

IN THE SUPREME COURT OF PAKISTAN

(ORIGINAL JURISDICTION)

PRESENT:

Mr.Justice Sh.Riaz Ahmed, HCJ

Mr.Justice Munir A.Sheikh

Mr.Justice Iftikhar Muhammad Chaudhry

Mr.Justice Qazi Muhammad Farooq

Mr.Justice Mian Muhammad Ajmal

Mr.Justice Syed Deedar Hussain Shah

Mr.Justice Hamid Ali Mirza

Mr.Justice Abdul Hameed Dogar

Mr.Justice Muhammad Nawaz Abbasi

**CONSTITUTION PETITION NO.15 OF 2002**

Qazi Hussain Ahmed, Ameer Jamaat-e-Islami Pakistan

Mansoor, Multan Road, Lahore

... PETITIONER

VERSUS

General Pervez Musharraf,

Chief Executive & another

... RESPONDENTS

**CONSTITUTION PETITION NO.17 OF 2002**

High Court Bar Association Rawalpindi ... PETITIONER

VERSUS

General Pervez Musharraf,

Chief Executive & others ... RESPONDENTS

**CONSTITUTION PETITION NO.18 OF 2002**

Supreme Court Bar Association of Pakistan

... PETITIONER

VERSUS

General Pervez Musharraf,

Chief of the Army Staff &

Chief Executive & others ... RESPONDENTS

**CONSTITUTION PETITION NO.19 OF 2002**

Nawabzada Nasrullah Khan,

President, Alliance for Restoration of Democracy

... PETITIONER

VERSUS

The Federation of Pakistan through  
Secretary to the Government of Pakistan  
Establishment Division, Islamabad & others

... RESPONDENTS

**CONSTITUTION PETITION NO.20 OF 2002**

Shahid Orakzai ... PETITIONER

VERSUS

General Pervez Musharraf,  
President of Pakistan & others ... RESPONDENTS

**CONSTITUTION PETITION NO.21 OF 2002**

Adal Trust through its Managing Trustee  
Shaikh Mushtaq Ali, Advocate & another  
... PETITIONERS

VERSUS

General Pervez Musharraf,  
Chief Executive of Pakistan  
& others ... RESPONDENTS

**CONSTITUTION PETITION NO.22 OF 2002**

Syed Zafar Ali Shah ... PETITIONER

VERSUS

General Pervez Musharraf,

Chief Executive & others ... RESPONDENTS

**CONSTITUTION PETITION NO.23 OF 2002**

Engr. Muhammad Saleem Ullah Khan

President, Jamiat Ulema-e-Pakistan

(Nifaze Shariat) Lahore. ... PETITIONER

VERSUS

Federation of Pakistan through Secretary

Establishment Division, Islamabad

& others ... RESPONDENTS

**CONSTITUTION PETITION NO.24 OF 2002**

Wasim Rehan ... PETITIONER

VERSUS

General Pervez Musharraf,

Chief Executive of Pakistan ... RESPONDENT

**CIVIL PETITION NO.512 OF 2002**

Awami Himayat Tehrik (Pakistan)

Through its Founder Chairman

Moulvie Syed Iqbal Haider

... PETITIONER

VERSUS

Federation of Pakistan through Secretary

Ministry of Law, Justice and H.R. Division

Govt. of Pakistan, Islamabad

... RESPONDENT

For the petitioner : Dr.Farooq Hasan, Sr.ASC  
(CP 15/2002) Rai Muhammad Nawaz Kharal, ASC  
Mr.Ejaz Muhammad Khan, AOR

For the petitioner : Mr.Muhammad Ikram Ch., ASC  
(CP 17/2002) Ch.Muhammad Akram, AOR

For the petitioner : Mr.Hamid Khan, ASC  
(CP 18/2002) Mr.Ejaz Ahmed Khan, AOR (absent)

For the petitioner : Syed Sharif Hussain Bokhari, ASC  
(CP 19/2002) Syed Abul Aasim Jafri, AOR (absent)

For the petitioner : In person  
(CP 20/2002)

For the petitioner : In person  
(CP 21/2002)

For the petitioner : Mr.A.K.Dogar, ASC  
(CP 22/2002) Mr.Ejaz Muhammad Khan, AOR

For the petitioner : Mr.Hashmat Ali Habib, ASC  
(CP 23/2002) Mr.M.S.Khattak, AOR

For the petitioner : In person  
(CP 24/2002)

For the petitioner : In person  
(CP 512/02)

On Court notice : Mr.Makhdoom Ali Khan,  
Attorney General for Pakistan  
Mr.Amir Hani Muslim, DAG  
Mr.Muhammad Ashraf Tanoli, Advocate General, Balochistan

For respondents/  
Federation : Syed Sharifuddin Pirzada, Sr.ASC  
Mr.Maqbool Ellahi Malik, Sr.ASC  
(In CP 15/02) Ch.Naseer Ahmed, ASC  
Rana Waqar Ahmed, Advocate with  
Mr.Mehr Khan Malik, AOR

For respondents/  
Federation : Mr.Maqbool Ellahi Malik, Sr.ASC  
Mr.Mehr Khan Malik, AOR  
(In CP 17, 21, 23  
24 & 512/02)

For respondents/

Syed Iftikhar Hussain Gillani, ASC

Federation

assisted by Mr.Muneeb Zia, Adv.

(In CP 18/02)

Mr.Mehr Khan Malik, AOR

For respondents/ Mr.Abdul Hafeez Pirzada, Sr.ASC

Federation assisted by

(In CP 19 & 22/02) M/S Miangul Hassan Aurangzeb,

Mian Feroze Jamal Shah Kakakhell &  
Sardar Qasim Ahmad Ali  
Advocates High Court &  
Mr.Mehr Khan Malik, AOR

For respondents/ Mr.Mehr Khan Malik, AOR

Federation

(In CP 20/02)

Date of hearing : 22-4-2002 to 27-4-2002

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## JUDGMENT

SH. RIAZ AHMED, C. J. - The above petitions were disposed of on 27<sup>th</sup> April, 2002 through a Short Order. The concluding portion of the Short Order is worded thus: -

“8. The above Constitution Petitions have been filed in this Court under Article 184 (3) of the Constitution challenging the legality and *vires* of the Referendum Order on the constitutional plane as well as on the touchstone of the verdict of this Court in Syed Zafar Ali Shah's case. Dr. Farooq Hasan, learned ASC appearing in support of Constitution Petition No. 15/2002 vehemently contended that despite the validation of the Proclamation of Emergency and the Provisional Constitution Order No. 1 of 1999, the 1973 Constitution still remains the supreme law of the land as laid down in Syed Zafar Ali Shah's case and the powers of the present government are strictly circumscribed in the aforesaid case. According to the learned counsel, at present the grund norm of the country being the 1973 Constitution and the judgment of this Court in Syed Zafar Ali Shah's case, the *vires* of the Referendum Order have to be examined on the touchstone of the relevant provisions of the Constitution as well as the law laid down in Syed Zafar Ali Shah's case. In all these petitions, a common prayer has been made that the Referendum Order be declared illegal, *ultra vires* the Constitution and violative of the law laid down in Syed Zafar Ali Shah's case.

9. In Constitution Petition No. 15/2002 filed by Qazi Hussain Ahmed, Amir Jamaat-i-Islami and Constitution Petition No. 22/2002 filed by Syed Zafar Ali Shah, a composite declaration has been sought to the effect: -

That the Chief Executive has unlawfully occupied and taken over the position of the President of the Islamic Republic of Pakistan in violation of the judgment of this Court in Syed Zafar Ali Shah's case;

That Mr. Muhammad Rafiq Tarar still continues to be the President notwithstanding the Chief Executive's Order 3 of 2001;

That writ in the nature of *quo warranto* be issued against the Chief Executive; and

That the holding of referendum for election to the office of the President be declared illegal, unconstitutional and violative of the judgment of this Court in Syed Zafar Ali Shah's case.

10. Syed Sharifuddin Pirzada, Sr. ASC, Mr. Abdul Hafeez Pirzada, Sr. ASC and Syed Iftikhar Hussain Gillani, ASC, learned counsel appearing on behalf of the Federation and Mr. Makhdoom Ali Khan, learned Attorney General for Pakistan appearing on Court's notice, have urged the following points: -

(i) The controversy raised in these petitions has to be looked into with reference to a long history of the constitutional crises Pakistan has been going through ever since its coming into existence and the ground realities prevailing in the country particularly in the aftermath of the events of 12th October 1999, as recognized and validated by this Court in Syed Zafar Ali Shah's case;

(ii) General Pervez Musharraf is firmly committed to and bound by the direction of this Court given in Syed Zafar Ali Shah's case regarding holding of elections in October 2002, which is clearly established not only from his statements within and outside the country, but also from the provisions of Article 4 (2) of the Referendum Order;

(iii) The holding of elections in October 2002 as promised and reiterated before this Court by the learned counsel for the Federation and the learned Attorney General for Pakistan is a step in aid of the transition or the

transformation as it would lead to the road towards democracy and rebuilding the institutions of the State, which is a great need of the hour;

(iv) Transition and transformation of an extra-constitutional set up into a democratic dispensation is the most troubled path and the gap cannot just be covered with one jump;

(v) General Pervez Musharraf, ever since the assumption of power, has been performing his functions and duties in accordance with the mandate given to him by this Court in Syed Zafar Ali Shah's case and has been striving to transform the Army rule into a democratic set up as envisaged in the aforesaid case;

(vi) It has been explicitly stated in the Preamble to the Referendum Order that it has been made and promulgated in pursuance of the Proclamation of Emergency of the 14th day of October 1999 and the PCO No. 1 of 1999 and in exercise of all other powers enabling the Chief Executive and President of the Islamic Republic of Pakistan in that behalf.;

(vii) In the peculiar constitutional history of Pakistan, referendum is a valid means of election to the office of President in Pakistan. It has also been resorted to in various other countries for the purpose. Referendum is nothing but an appeal to the people of Pakistan, who are the political sovereign of the country;

(viii) Nexus between the law, i.e. the Referendum Order and the objects intended to be achieved through it, i.e. the declared objectives of the Chief Executives and transition and transformation to the democratic set up is clearly established in the present case. The Preamble to the Referendum Order, *inter alia*, provides as under: -

AND WHEREAS, since at that juncture the institutions of State stood seriously weakened and the democratic and moral authority of the government of the day stood gravely eroded, the Chief Executive of Pakistan announced a 7 - Point Agenda on 17th October 1999, stating his objectives to rebuild national confidence and morale; strengthen the Federation, remove inter-provincial disharmony and restore national cohesion; revive the economy and restore investor confidence; ensure law and order and dispense speedy justice;

depoliticize state institution;  
devolution of power to the  
grass roots level; and ensure  
swift and across the board  
accountability;

AND WHEREAS the Chief  
Executive of Pakistan has  
emphasised that, inter alia,  
appropriate measures will be  
taken for good governance,  
economic revival, poverty  
alleviation and political  
restructuring;

AND WHEREAS it is  
imperative to consolidate the  
measures taken by the Chief  
Executive of Pakistan for the  
reconstruction of the  
institution of state for  
establishing genuine and  
sustainable democracy to  
ensure good governance for  
an irreversible transfer of  
power to the people of  
Pakistan;

AND WHEREAS it is  
essential to combat  
extremism and sectarianism  
for the security of the State  
and tranquillity of society;

AND WHEREAS it is in the  
supreme national interest to  
obtain a democratic mandate  
from the people of Pakistan  
through referendum for  
General Pervez Musharraf to  
continue to be the President  
of Pakistan.”

(ix) The reform agenda launched by the Chief Executive, being in the interest, welfare and prosperity of the people of Pakistan, its achievement and continuity are essential for the public good.

(x) The Referendum Order does not, in any manner, derogate from the parameters of the extra-constitutional measure validated by this Court in Syed Zafar Ali Shah's case nor is it tantamount to converting the parliamentary system envisaged by the Constitution into presidential form of government in view of the fact that elections to the National and Provincial Assemblies and the Senate of Pakistan would be held in October 2002 in accordance with the constitutional scheme and governments at the federal and provincial levels would be formed accordingly. The Referendum Order is *intra vires* the powers given to the Chief Executive by means of the judgment of this Court in Syed Zafar Ali Shah's case;

(xi) The Referendum Order has not the effect of amending the 1973 Constitution, therefore, its legality and vires cannot be examined on the touchstone of the verdict of this Court in Syed Zafar Ali Shah's case and the

constitutional provisions  
relating to holding of  
referendum;

(xii) Mr. Muhammad Rafiq Tarar cannot be deemed to be continuing to hold the office of the President of the Islamic Republic of Pakistan and the relief in the nature of issuance of writ of *quo warranto* prayed for in Constitution Petitions No. 15 and 22 of 2002 and against the assumption of office of President by General Pervez Musharraf under Chief Executive's Order No. 3 of 2001, cannot be granted in these proceedings for the following reasons: -

The outgoing President continued in office under the PCO 1 of 1999 and was part of the present government for nearly less than two years;

He had been performing the functions and duties of the office of President on and in accordance with the advice of the Chief Executive of Pakistan under the new dispensation and

was a party to various legislative and executive actions of the present government;

He did not launch any protest when he ceased to hold office;

After he ceased to hold the office of President, he accepted the retirement benefits of that office and thus acquiesced in his ceasing to hold the office;

The petition suffers from *laches* inasmuch as the former President left the office on 20th June 2001 whereas Qazi Hussain Ahmed filed Constitution Petition No. 15/2002 in this Court on 2nd April 2002, i.e. after a lapse of about 10 months;

The issuance of writ of *quo warranto* is discretionary in nature and as held in *Sabir Ali Shah's case* (PLD 1994 SC 738), such a writ cannot be issued in collateral

proceedings.

11. We have heard the learned counsel for the parties at great length. In view of the peculiar facts and circumstances of the present case, we are not persuaded to hold that a case for issuing the writ of *quo warranto* prayed for in Constitution Petitions No. 15 and 22 of 2002 has been made out. We, therefore, hold that the Chief Executive's Orders No. 2 and 3 of 2001 have been validly issued by the Chief Executive of Pakistan in exercise of his powers under the Proclamation of Emergency of the 14th day of October 1999 and the Provisional Constitution Order No. 1 of 1999 as validated by this Court in Syed Zafar Ali Shah's case. Consequently, these petitions *qua* the issuance of writ of *quo warranto* are dismissed.

12. As far as the legal status of the Referendum Order is concerned, suffice it to say that it has been issued by the Chief Executive and the President of the Islamic Republic of Pakistan in exercise of the powers conferred upon him by this Court in Syed Zafar Ali Shah's case while validating the Proclamation of Emergency of the 14th day of October 1999 and the Provisional Constitution Order No. 1 of 1999 and it has rightly been conceded by the learned counsel for the respondents that the said Order does not have the effect of amending the Constitution of Pakistan.

13. As regards the grounds of challenge to the consequences flowing from the holding of referendum under the Referendum Order, apparently these questions are purely academic, hypothetical and presumptive in nature and are not capable of being determined at this juncture. Accordingly, we would not like to go into these questions at this stage and leave the same to be determined at a proper forum at the appropriate time. Since no relief can be granted in these proceedings at this stage, the Constitution Petitions are disposed of being premature.

14. In view of our findings in the above petitions, no order is required to be passed in Civil Petition for Leave to Appeal No. 512/2002, which is disposed of accordingly.”

We now propose to give hereinafter detailed reasons for the above order.

2. Through these Constitution Petitions jurisdiction of this Court has been invoked under Article 184(3) of the Constitution in the post-October 1999 scenario. The petitions are primarily directed against the Chief Executive's Order No. 12 of 2002 (hereinafter called the Referendum Order) under which the Chief Executive/President of Pakistan has decided to hold a referendum seeking people's democratic mandate to serve the nation as President of Pakistan for a period of five years to enable him, *inter alia*, to consolidate the reforms and the reconstruction of institutions of State for the establishment of genuine and sustainable democracy including the entrenchment of the local government system, to ensure continued good governance for the welfare of the people and to combat extremism and sectarianism for the security of the State and the tranquillity of society. The validity of the Chief Executive's Order No. 2 of 2001 and the Chief Executive's Order No. 3 of 2001 (hereinafter referred to as "the CE Order No. 2 of 2001" and "the CE Order No. 3 of 2001" respectively) has also been challenged in two petitions collaterally.

3. Before proceeding further, we are constrained to mention that in the year 2002, i.e. after 54 years of the creation of our country, we are again at the crossroads. In fact, we must observe that we have miserably failed to evolve a system of governance, transfer of power and to follow the constitutional path for achieving the welfare of the people and establishment of democratic institutions as envisaged by the Constitution. This is not a crisis but a dilemma, therefore, while deciding these petitions we have to recall the series of crises and turmoils which this Court had to deal with on all those occasions. Unfortunately, ever since the dissolution of the Constituent Assembly by Governor General Ghulam Muhammad in 1954 till the takeover of the government by General Pervez Musharraf in October, 1999 all political questions which should have been dealt with and resolved elsewhere, have been brought to this Court. However, this Court cannot shirk its responsibility as an institution and being the apex Court we proceed further to adjudicate the controversy arising in these petitions.

4. From 1947 till 1954 the Constituent Assembly, which was also the legislature of the country, failed to give a Constitution to the nation. Nothing was done beyond the passing of the Objectives Resolution by the said Constituent Assembly. Failure to give a Constitution to the nation coupled with palace intrigues and the musical chair game for power and with a view to having absolute powers Governor General Ghulam Muhammad dissolved the Constituent Assembly. This act of the Governor General was challenged by Moulvi Tamizuddin Khan, President of the Assembly, in the Chief Court of Sindh. The Sindh Chief Court allowed the petition and declared the dissolution of the Assembly as illegal. The judgment of the Sindh Chief Court was successfully challenged in the Federal Court and by virtue of the judgment reported as *Federation of Pakistan v. Moulvi Tamizudding Khan* (PLD 1955 FC 240), the Federal Court reversed the judgment of the Sindh Chief Court and held that assent of the Governor General was necessary to all the laws and the amendments made in the Government of India Act, 1935 which was the interim Constitution. According to the Court, section 223-A conferring power on the High Courts to issue writs had not received assent of the Governor General and the Chief Court could not have issued writ holding the act of the Governor General as invalid. Therefore, by means of the Emergency Powers Ordinance, 1955 (Ordinance No. IX of 1955) issued under section 42 of the Government of India Act, 1935 the Governor-General sought to validate such Acts by indicating his assent with retrospective operation. The Federal Court in *Usif Patel's case* (PLD 1955 FC 387), however, declared that the Acts mentioned in the Schedule to the aforesaid Ordinance could not be validated under section 42 of the Government of India Act, 1935, nor could retrospective effect be given to them. A noteworthy fact was that the Constituent Assembly had ceased to function, having been already dissolved by the Governor-General by a Proclamation on 24th October, 1954 and no Legislature competent to validate these Acts was in existence. The Governor-General made a Reference to the Federal Court under section 213 of the Government of India Act, 1935 asking for the Court's opinion on the question whether there was any provision in the Constitution or any rule of law applicable to the situation by which the Governor-

General could, by order or otherwise, declare that all orders made, decisions taken, and other acts done under those laws, should be valid and enforceable and those laws, which could not without danger to the State be removed from the existing legal system, should be treated as part of the law of the land until the question of their validation was determined by the new Constituent Convention. The answer returned by the Federal Court (by majority) to the *Reference by H. E. The Governor General* (PLD 1955 FC 435) was that in the situation presented by the Reference, the Governor-General has, during the interim period, the power under the common law of civil or state necessity of retrospectively validating the laws listed in the Schedule to the Emergency Powers Ordinance, 1955, and all those laws, until the question of their validation was decided upon by the Constituent Assembly, were, during the aforesaid period, valid and enforceable in the same way as if they had been valid from the date on which they purported to come into force.

5. The Constituent Assembly, reconstituted as per the guidelines given by the Federal Court, with great efforts and pains, framed the 1956 Constitution wherein Pakistan was declared an Islamic Republic. Unfortunately, the political stability could not be achieved and frequent changes of the government, apathy on the part of the legislators to the problems of the country, killing of the Deputy Speaker of the East Pakistan Assembly, beating up of the Speaker and desecration of national flag in Dacca led to the abrogation of the 1956 Constitution and imposition of first Martial Law in the country in October, 1958. The central and provincial governments were dismissed, the national and provincial assemblies were dissolved, the political parties were abolished and General Muhammad Ayub Khan, the Commander-in-Chief of the Army, was appointed as the Chief Martial Law Administrator, who later became the Field Marshal. It was declared that a Constitution more suitable to the genius of the Muslim people would be devised.

6. On 10th October, 1958, the President promulgated the Laws (Continuance in Force) Order, 1958 wherein it was, inter alia, provided that notwithstanding the abrogation of the Constitution, Pakistan shall be governed, as nearly as may be, in accordance with the 1956 Constitution, all Courts in existence immediately before the Proclamation shall continue in being, the law declared by the Supreme Court shall be binding on all Courts in Pakistan, the Supreme Court and the High Courts shall have power to issue the writs of *habeas corpus*, *mandamus*, *prohibition*, *quo warranto* and *certiorari*, etc.

7. Under Clause (7) of Article 2 of the Laws (Continuance in Force) Order, 1958, all writ petitions pending in the High Courts seeking enforcement of Fundamental Rights stood abated. Interpretation of clause (7) of Article 2 was debated in the Supreme Court and in the famous case reported as *State v. Dosso* (PLD 1958 SC 533), the Supreme Court held that if the Constitution was destroyed by a successful revolution, the validity of the prevalent laws depended upon the will of the new law-creating organ. Therefore, if the new legal order preserved any one or more laws of the old legal order, then a writ would lie for violation of the same. As regards pending applications for writs or writs already issued but which were either *sub judice* before the Supreme Court or required enforcement, the Court in the light of the Laws (Continuance in Force) Order, 1958 held that excepting the writs issued by the Supreme Court after the Proclamation and before the Promulgation of the Order, no writ or order for a writ issued or made after the Proclamation shall have any legal effect unless the writ was issued on the ground that any one or more of the laws mentioned in Article 4 or any other right kept alive by the new order had been contravened. To sum up, the Supreme Court, on the basis of the theory propounded by Hans Kelsen, accorded legitimacy to the assumption of power by General Muhammad Ayub Khan holding that *coup d'etat* was a legitimate means to bring about change in the government and particularly so when the new order brought about by the change was accepted by the people.

8. In 1959 the Basic Democracies Order was promulgated and 40,000 basic democrats from each province, i.e. the West Pakistan and the East Pakistan were elected, who formed the electoral college for election to the office of the President. General Muhammad Ayub Khan sought referendum and more

than 94-95 percent of the basic democrats voted in his favour and thus he assumed the office of the President of Pakistan. The basic democrats were then entrusted with the task of electing national and provincial assemblies ultimately leading to the framing and promulgation of the 1962 Constitution.

9. War between India and Pakistan in 1965, the Tashkent Declaration of 1966, dissatisfaction over the tremendous Presidential powers as against the helplessness of the National Assembly and a clamour for restoration of the Parliamentary system in which the Government was controlled by the Legislature and answerable to it, gave rise to agitations by the political leaders in both wings of the country. Resultantly, Field Marshal Ayub Khan had to descend from power. However, instead of transferring power to the Speaker of the National Assembly in accordance with the 1962 Constitution, he called upon General Agha Muhammad Yahya Khan to take control of the affairs of the country, who proclaimed Martial Law, abrogated the

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1962 Constitution and promulgated Provisional Constitution Order, 1969 on 25<sup>th</sup> March, 1969. This was followed by the Legal Framework Order, 1970 under which general election was held in both the wings of the country on the basis of adult franchise.

10. As a result of the general election, Awami League led by Sh. Mujeebur Rehman swept polls in the East Pakistan while in two provinces, namely, Sindh and Punjab, Pakistan Peoples Party won majority of the seats but in the other two provinces, namely, NWFP and Balochistan, Peoples Party could not secure majority seats. Though it is not the subject of this judgment, yet to complete the narration of the events, the transfer of power to the elected representatives did not take place and session of the Assembly summoned for 3rd of March, 1971 at Dacca was adjourned, which led to violent agitation in the East Pakistan. With a view to controlling the situation, the Armed Forces were deployed in the East Pakistan. The Government of India, taking advantage of the fragile situation in the East Pakistan, invaded Pakistan, which led to the fall of Dacca on 16th December 1971 and consequently the East Pakistan became Bangladesh.

11. It may be mentioned here that the imposition of Martial Law by General Yahya Khan and assumption of the office of Chief Martial Law Administrator by him was challenged in *Asma Jilani's case* (PLD 1972 SC 139) wherein this Court held that the *doctrine of legal positivism* founded on Hans Kelsen's theory and recognized in *Dosso's case* was inapplicable, General Yahya Khan was termed as a usurper and all actions taken by him except those in the welfare of the people were declared to be illegal.

12. In December 1971, Yahya Khan resigned and handed over the Government to Mr. Z. A. Bhutto Chairman, Pakistan Peoples Party, who had won majority seats in two provinces. He assumed power as the first civilian Chief Martial Law Administrator, which was necessitated for transfer of power from the military commander. On 14th April, 1972, Interim Constitution was passed by the National Assembly and Martial Law was lifted. The National Assembly after painstaking efforts framed the 1973 Constitution, which was promulgated on 14th August, 1973.

13. In 1976 Mr. Zulfikar Ali Bhutto announced general election in the country and after the polls were held in 1977 an agitation started alleging that the election had been rigged. There were large-scale demonstrations, law and order became worse and there was arson, loot and plunder. The parleys between the ruling party and the opposition failed although it was said that an understanding had been reached. At that juncture, Article 96-A was inserted in the Constitution to provide for a referendum for a vote of confidence in the Prime Minister. It may be advantageous to reproduce the said provision, which read as follows:-

“96-A. *Referendum as to confidence in Prime Minister.*- (1) If at any time the Prime Minister considers it necessary to obtain a vote of confidence of the people of Pakistan through a referendum, he may advise the President to cause the matter to be referred to a referendum in accordance with law made by Parliament.

(2) The law referred to in clause (1) shall provide for the constitution of a Referendum Commission and the manner and mode of holding a

referendum.

(3) On receipt of the advice of the Prime Minister under clause (1), the President shall call upon the Referendum Commission to conduct a referendum amongst the persons whose names appear on the electoral rolls for the immediately preceding general election to the National Assembly as revised up-to-date

(4) Any dispute arising in connection with the counting of votes at a referendum shall be finally determined by the Referendum Commission or a member thereof authorised by it and, save as aforesaid, no dispute arising in connection with a referendum or the result thereof shall be raised or permitted to be raised before any Court or other authority whatsoever.

(5) If, on the final count of the votes cast at the referendum, the Prime Minister fails to secure majority of the total votes cast in the matter of the confidence of the people of Pakistan, he shall be deemed to have tendered his resignation within the meaning of Article 94.”

However, no referendum could take place because of the volatile situation in the country and this provision being time-specific ceased to be part of the Constitution in September, 1977.

14. Nevertheless, in the absence of agreement between the government and the opposition parties, General Ziaul Haq, the then Chief of Army Staff, on 5th July 1977 imposed Martial Law and held the 1973 Constitution in abeyance.

15. The imposition of the third Martial Law was challenged in *Nusrat Bhutto's case* (PLD 1977 SC 657) wherein, keeping in view the ground realities and the objective conditions, this Court declared the imposition of Martial Law as valid on the *doctrine of State necessity*, but this Court observed that the power of judicial review was available to it to examine the legality or otherwise of the actions of the government and particularly the Court would also see whether the necessity continued to exist or not. Notwithstanding the judgment of this Court in *Begum Nusrat Bhutto's case*,

Provisional Constitution Order, 1981 was promulgated ousting the power and jurisdiction of the Superior Courts to judicially review actions of the Martial Law regime.

16. The country continued to remain under Martial Law and in 1984 in pursuance of the Referendum Order, 1984 (P.O. 11 of 1984), General Muhammad Ziaul Haq held referendum where the question posed was, 'Whether the people of Pakistan endorse the process initiated by General Muhammad Ziaul Haq, the President of Pakistan, for bringing the laws of Pakistan in conformity with the injunctions of Islam as laid down in the Holy Qur'an and Sunnah of the Holy Prophet (Peace be upon him) and for the preservation of the Ideology of Pakistan, for the continuation and consolidation of that process and for the smooth and orderly transfer of power to the elected representatives of the people', and in case of answer "Yes", General Muhammad Ziaul Haq shall be deemed to have been duly elected President of Pakistan for a term of five years from the day of the first meeting of the Houses of Parliament in joint sitting.

17. In 1985 elections to the National Assembly, Provincial Assemblies and Senate were held and the late Mr. Muhammad Khan Junejo was invited by the President to assume the office of Prime Minister. The Constitution (Eighth Amendment) Act, 1985 was passed whereby the 1973 Constitution was revived and the Martial Law was lifted. Clause (3) of Article 41 of the Constitution was substituted whereby Provincial Assemblies became part of the electoral college for election to the office of the President. Under Article 58(2)(b) the President was empowered to dissolve the National Assembly in his discretion where, in his opinion, a situation had arisen in which the Government of the Federation cannot be carried on in accordance with the provisions of the Constitution and an appeal to the electorate was necessary. It may also be advantageous to refer to Article 270A of the Constitution, which was inserted into the Constitution by means of P.O. 14 of 1985 to facilitate transition of power from military to the civilian authorities. Article 270A reads as under: -

“[[**270A.**- (1) The Proclamation of the fifth day of July, 1977, all President's Orders, Ordinances, Martial Law Regulations, Martial Law Orders, including the Referendum Order, 1984 (P.O. No.11 of 1984), under which, in consequence of the result of the referendum held on the nineteenth day of December, 1984, General Mohammad Ziaul-Haq became the President of Pakistan on the day of the first meeting of the Majlis-e-Shoora (Parliament) in joint sitting for the term specified in clause (7) of Article 41, the Revisal of the Constitution of 1973 Order, 1985 (P.O.No.14 of 1985), the Constitution (Second Amendment) Order, 1985 (P.O. No.20 of 1985), the Constitution (Third Amendment) Order, 1985 (P.O. No.24 of 1985), and all other laws made between the fifth day of July, 1977, and the date on which this Article comes into force are hereby affirmed, adopted and declared, notwithstanding any judgment of any court, to have been validly made by competent authority and, notwithstanding any thing contained in the Constitution, shall not be called in question in any court on any ground whatsoever:

Provided that a President's Order, Martial Law Regulations or Martial Law Order made after the thirtieth day of September, 1985, shall be confined only to making such provisions as facilitate, or are incidental to, the revocation of the Proclamation of the fifth day of July, 1977.

(2) All orders made, proceedings taken and acts done by authority or by any person, which were made, taken or done, or purported to have been made, taken or done, between the fifth day of 1977, and the date on which this Article comes into force, in exercise of the powers derived from any Proclamation, President's Orders, Ordinances, Martial Law Regulations, Martial Law Orders, enactments, notifications, rules, orders or bye-laws, or in execution of or in compliance with any order made or sentence passed by any authority in the exercise or purported exercise of powers as aforesaid, shall, notwithstanding any judgment of any court, be deemed to be and always to have been validly made, taken or done and shall not be called in question in any court on any ground whatsoever.

(3) All President's Orders, Ordinances, Martial Law Regulations, Martial Law Orders, enactments, notifications, rules, orders or bye-laws in force immediately before the date on which this Article comes into force shall continue to force until altered, repealed or amended by competent authority.

*Explanation.-* In this clause, "competent authority" means,-

(a) in respect  
of  
President's  
Orders,  
Ordinances,  
Martial Law

Regulations,  
Martial Law  
Orders and  
enactments,  
the  
appropriate  
Legislature;  
and

(b) in  
respect of  
notifications,  
rules, orders  
and bye-  
laws, the  
authority in  
which the  
power to  
make, alter,  
repeal or  
amend the  
same vests  
under the  
law.

(4) No suit, prosecution or other legal proceedings shall lie in any court against any authority or any person, for or on account of or in respect of any order made, proceedings taken or act done whether in the exercise or purported exercise of the powers referred to in clause (2) or in execution of or in compliance with orders made or sentences passed in exercise or purported exercise of such powers.

(5) For the purposes of clauses (1), (2) and (4), all orders made, proceedings taken, or purporting to be made, taken or done by any authority or person shall be deemed to have been made, taken or done in good faith and for the purpose intended to be served thereby.

(6) Such of the President's Orders and Ordinances referred to in clause (1) as are specified in the Seventh Schedule may be amended in the manner provided for amendment of the Constitution, and all other laws referred to in the said clause may be amended by the appropriate Legislature in the manner provided for amendment of such laws.

*Explanation.-* In this Article "President's Orders" includes "President and Chief Martial Law Administrator's Orders and "Chief Martial Law Administrator's Orders."]

18. Ms Benazir Bhutto filed a petition under Article 184(3) of the Constitution in this Court challenging the *vires* of the amendments made in the Political parties Act, 1962 as violative of Articles 17 and 25 of the Constitution, the *vires* of the Freedom of Association Order, 1978 and the constitutionality of Article 270A in so far as it curtailed the power to judicially review its content or restricted the jurisdiction of the Superior Courts to protect Fundamental Rights of the citizens including the right to form or be a member of a political party under the Constitution as it existed before the 5th of July, 1977. The Supreme Court in the judgment reported as *Benazir Bhutto v. Federation of Pakistan* (PLD 1988 SC 416) held that the Constitution of Pakistan envisages parliamentary democracy with a cabinet system based on party system as essentially it is composed of the representatives of a party, which is in majority and therefore the future election would be held on party basis.

19. On 29th May 1988, General Muhammad Ziaul Haq dissolved the National Assembly and dismissed the government of Mr. Muhammad Khan Junejo under Article 58(2)(b) of the Constitution. The dissolution of the National Assembly was challenged in the Lahore High Court under its constitutional jurisdiction and through the judgment reported as *Kh. Muhammad Sharif v. Federation of Pakistan* (PLD 1988 Lahore 725), the dissolution of the Assembly was declared illegal and the matter then came to this Court in appeal. On 17th August 1988, General Muhammad Ziaul Haq died in an air crash and Ghulam Ishaq Khan, the then Chairman of the Senate assumed the office of the President of Pakistan. This Court vide judgment reported as *Federation of Pakistan v. Haji Saifullah Khan* (PLD 1989 SC 166), which was delivered on 5th October, 1988, upheld the judgment of the Lahore High Court but declined to grant the relief of restoration of the Assembly on the ground that the whole nation had been geared up for election scheduled for 16th and 19th November, 1988.

20. As a result of the 1988 election, Pakistan Peoples Party led by Mohtarma Benazir Bhutto formed government at the centre while Islami Jamhuri Ittehad (IJI) with Pakistan Muslim League being its major component, led by Mian Muhammad Nawaz Sharif formed government in the Province of Punjab. Since the two leaders did not see eye to eye with each other, a state of constant confrontation existed. The two of them were not even ready to meet each other, what to talk of negotiating or settling issues and having consensus on questions of national importance.

21. On 6th August, 1990, Mr. Ghulam Ishaq Khan, the then President of Pakistan, levelled various

charges including corruption and mal-administration, violations of the Constitution, etc., dissolved the National Assembly, dismissed the government of Mohtarma Benazir Bhutto under Article 58(2)(b) of the Constitution and ordered fresh election. The order of dissolution was challenged before all the four High Courts. However, the cases from Balochistan and Sindh were consolidated and heard by the High Court of Sindh. Likewise, the cases from NWFP and Lahore were consolidated and heard by the Lahore High Court. Both the High Courts in their separate judgments, distinguished *Haji Saifullah Khan's case* and upheld the order of dissolution of assemblies and observed that the President was justified in forming the opinion that the government of the Federation was not being carried on in accordance with the Constitution. The matter came to this Court in appeal in the case reported as *Kh. Ahmed Tariq Rahim v. Federation of Pakistan* (PLD 1992 SC 646) but the Court refused to grant leave to appeal against the judgments of the High Courts and consequently the dissolution order was maintained.

22. The general election held in 1990 returned Mian Muhammad Nawaz Sharif to power with Mohtarama Benazir Bhutto sitting on the opposition benches. The two of them continued indulging in confrontation. Differences arose between Mian Muhammad Nawaz Sharif and Mr. Ghulam Ishaq Khan, the then President of Pakistan. On 18th April, 1993 the then President dissolved the National Assembly and dismissed the government of Mian Muhammad Nawaz Sharif under Article 58(2)(b) of the Constitution. The matter came before this Court in the case reported as *Mian Muhammad Nawaz Sharif v. President of Pakistan* (PLD 1993 SC 473) and by majority of 10 to 1, this Court held that the order of dissolution did not fall within the ambit of the powers conferred on the President under Article 58(2)(b) of the Constitution and other enabling powers available to him in that behalf and in consequence the National Assembly, Prime Minister and the Cabinet were restored. However, in the peculiar situation then obtaining, Mian Muhammad Nawaz Sharif advised the then President to dissolve the assemblies on 18th July, 1993.

23. In the election held in October 1993, Mohtarama Benazir Bhutto with the help of allied parties again came to power and Mr. Farooq Ahmed Khan Leghari was elected as President of Pakistan while Mian Muhammad Nawaz Sharif formed the opposition. The degree of tension between the two old rivals rather increased. On 5th November, 1996, President Farooq Ahmed Khan Leghari dissolved the National Assembly and dismissed the government of Mohtarama Benazir Bhutto under Article 58(2)(b) of the Constitution. This dissolution was also challenged in this Court in the case reported as *Mohtarama Benazir Bhutto v. President of Pakistan* (PLD 1998 SC 388), but it was held that the action of the President was legal and constitutional.

24. In the election held in February 1997, Mian Muhammad Nawaz Sharif returned to power with a thumping majority in the Assemblies with Mohtarama Benazir Bhutto as the opposition leader. Mian Muhammad Nawaz Sharif continued his policies of confrontation not only with the opposition but also with other institutions of the State including judiciary and the armed forces. The former Chief of Army Staff, General Jehangir Karamat suggested the formation of National Security Council, which was not taken in good taste by the Prime Minister and resultantly the then Chief of Army Staff had to quit. With the Constitution (Thirteenth Amendment) Act, 1997, Article 58(2)(b) was repealed and the power to appoint Services Chiefs vested with the Prime Minister and thus Mian Muhammad Nawaz Sharif, after the resignation of General Jehangir Karamat, appointed General Pervez Musharraf as the Chief of Army Staff.

25. Differences between the Prime Minister and the Chief of Army Staff General Pervez Musharraf arose on the Kargil issue. At one point of time, it seemed that the tension has come to an end when General Pervez Musharraf was appointed as Chairman, Joint Chiefs of Staff Committee. However, a few days later, the Prime Minister issued order of removal of General Pervez Musharraf when the latter was returning from an official tour to Sri Lanka and appointed Lt. General Ziauddin Butt as the

Chief of Army Staff. This act of the Prime Minister was resented by the Pakistan Army and was construed as interference in the Army affairs and an attempt to politicize and destabilize it. The then Prime Minister had directed that the plane carrying General Pervez Musharraf to Pakistan be not allowed to land at the Karachi Airport, but due to the prompt action of the Pakistan Army, the Prime Minister could not achieve his objective. Consequently, the Pakistan Army took exception to the action of the Prime Minister and Mian Muhammad Nawaz Sharif was removed and General Pervez Musharraf, Chief of Army Staff took control of the affairs of the country.

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26. After takeover of the government by General Pervez Musharraf, on 14<sup>th</sup> October 1999, a Proclamation of Emergency was issued in pursuance of the deliberations and decisions of the Chiefs of Staff of the Armed Forces and the Corps Commanders of the Pakistan Army. The Proclamation of Emergency of the 14th day of October, 1999 (hereinafter referred to as “the Proclamation of Emergency”) reads as under: -

### THE PROCLAMATION OF EMERGENCY

“In pursuance of deliberations and decisions of Chiefs of Staff of the Armed Forces and Corps Commanders of Pakistan Army, I, General Pervez Musharraf, Chairman, Joint Chiefs of Staff Committee and Chief of Army Staff proclaim Emergency throughout Pakistan and assume the office of the Chief Executive of the Islamic Republic of Pakistan.

“I hereby order and proclaim as follows:

The Constitution of the Islamic Republic of Pakistan shall remain in abeyance;

The President of Pakistan shall continue in office;

The National Assembly, the Provincial Assemblies and Senate shall stand suspended;

The Chairman and Deputy Chairman of the Senate the Speaker and Deputy Speaker of the National Assembly and the Provincial Assemblies shall stand suspended;

The Prime Minister, the Federal Ministers, Ministers of State, Advisors to the Prime Minister, Parliamentary Secretaries, the Provincial Governors, the Provincial Chief Ministers, the Provincial Ministers and the Advisors to the Chief Ministers shall cease to hold office;

The whole of Pakistan will come under the control of the Armed Forces of Pakistan.

This Proclamation shall come into force at once and be deemed to have taken effect on and 12th day of October, 1999.”

On the same day, i.e. 14th of October 1999, the Provisional Constitution Order No. 1 of 1999 (hereinafter referred to as “the PCO No. 1 of 1999”) was issued, which reads as follows: -

#### THE PCO NO. 1 OF 1999

“In pursuance of Proclamation of the 14th day of October, 1999, and in exercise of all powers enabling him in that behalf, the Chairman Joint Chiefs of Staff Committee and Chief of Army Staff and Chief Executive of the Islamic Republic of Pakistan under the Proclamation of Emergency of 14th October 1999 (hereinafter referred to as the Chief Executive) is pleased to make and promulgate the following Order-

(1) This Order may be called Provisional Constitution Order No. 1 of 1999.

(2) It extends to the whole of Pakistan.

(3) It shall come into force at once.

(1) Notwithstanding the abeyance of the provisions of the Constitution of the Islamic Republic of Pakistan, hereinafter referred to as the Constitution, Pakistan shall, subject to this Order and any other Orders made by the Chief Executive, be governed, as nearly as may be, in accordance with the Constitution.

(2) Subject as aforesaid, all courts in existence immediately before the Commencement of this Order shall continue to function and to exercise their respective powers and jurisdiction:

Provided that the Supreme Court or High Courts and any other court shall not have the powers to make any order against the Chief Executive or any person exercising powers or jurisdiction under his authority.

(3) The Fundamental rights conferred by Chapter 1 of Part II of the Constitution, not in conflict with the Proclamation of Emergency or any Order made thereunder from time to time shall continue to be in force.

3. (1) The President shall act on, and in accordance, with the advice of the Chief Executive.

(2) The Governor of a Province shall act on,

and in accordance with the instructions of the Chief Executive.

4. (1) No Court, tribunal or other authority shall call or permit to be called in question the Proclamation of Emergency of 14th day of October, 1999 or any Order made in pursuance thereof.

(2) No judgement, decree, writ, order or process whatsoever shall be made or issued by any court or tribunal against the Chief Executive or any authority designated by the Chief Executive.

5. (1) Notwithstanding the abeyance of the provisions of the Constitution, but subject to the Orders of the Chief Executive all laws other than the Constitution, all Ordinances, Orders, Rules, Bye laws, Regulations, Notifications and other legal instruments in force in any part of Pakistan whether made by the President or the Governor of a Province, shall be inserted and shall be deemed to have always been so inserted, shall continue in force until altered, amended or repealed by the Chief Executive or any authority designated by him.

(2) In all laws including all Acts, Ordinances, Orders, Rules, Bye-laws, Regulations, Notifications and all other legal instruments in force in any part of Pakistan, whether made by the President or the Governor of a Province, the words, "Prime Minister", and the words, "Chief Minister", wherever occurring, shall be deemed substituted by the words, "Chief Executive of the Islamic Republic of Pakistan", and "Governor" respectively.

5A. (1) An Ordinance promulgated by the President or by the Governor of a Province shall not be subject to the limitation as to its duration prescribed in the Constitution.

(2) The provisions of Clause (1) shall also apply to an Ordinance issued by the President or by the Governor, which was in force immediately before the commencement of the proclamation Order of Chief Executive of the Fourteenth day of October 1999.

Subject to the Proclamation Order of the Chief Executive of the Fourteenth day of October, 1999 and the provisions of the Provisional Constitution Order No. 1 of 1999 as amended, the President of the Islamic Republic of Pakistan on the advice of the Chief Executive, and the Governor of the Province on instructions of the Chief Executive, may issue and promulgate Ordinances which shall not be subject to the limitation as to their duration prescribed in the Constitution.

6. The Proclamation of Emergency issued on 28th day of May 1998, shall continue but subject to the provisions of Proclamation of Emergency dated 14th day of October 1999 and this Provisional Constitution Order and any other Order made thereunder.

7. All persons who, immediately before the commencement of this Order, were in the service of Pakistan as defined in Article 260 of the Constitution and those persons who immediately before such commencement were in office as Judge of the Supreme Court, the Federal Shariat Court or a High Court or Auditor-General or Ombudsman and Chief Ehtesab Commissioner, shall

continue in the said service on the same terms and conditions and shall enjoy the same privileges, if any.”

The takeover by the Army was challenged in this Court through several Constitution Petitions and the same were disposed of with certain guidelines through a unanimous judgment authored by Irshad Hasan Khan, C.J. (as he then was) in Syed Zafar Ali Shah and others v. General Pervez Musharraf, Chief Executive of Pakistan and others (PLD 2000 SC 869). However, before dealing with the said judgment, it is pertinent to mention that the former President Mr. Muhammad Rafiq Tarar continued in office under the Proclamation of Emergency and the PCO No. 1 of 1999. On 20th June, 2001 the Chief Executive issued the CE Order No. 2 of 2001 in pursuance of the Proclamation of Emergency (Amendment) Order, 2001. It came into force at once. It substituted clause (b) of para 2 of the Proclamation of Emergency. Clause (b) reads as follows: -

“(b) The person holding the office of the President of the Islamic Republic of Pakistan immediately before the commencement of the Proclamation of Emergency (Amendment) Order, 2001, shall cease to hold the office with immediate effect.”

Under the same Order, in clause (c) of para 2 *ibid*, the word ‘suspended’ was substituted with the words ‘dissolved with immediate effect’. Clause (d) of para 2 *ibid*. was substituted as under: -

“(d) The Chairman and Deputy Chairman of the Senate have already ceased to hold office; the Speaker and Deputy Speaker of the National Assembly and the Provincial Assemblies shall also cease to hold office with immediate effect.”

On the same day, i.e. the 20th of June, 2001, the Chief Executive issued the CE Order No. 3 of 2001. The Preamble to the said Order reads as under: -

“Whereas it is expedient to provide for succession to the office of the President of the Islamic Republic of Pakistan and for matters connected therewith or ancillary thereto; Now, therefore, in pursuance of the Proclamation of Emergency of the fourteenth day of October 1999 and the

Provisional Constitution Order 1 of 1999 and in exercise of all powers enabling him in that behalf, the Chief Executive of the Islamic Republic of Pakistan is pleased to make and promulgate the following Order.”

The CE Order No. 3 of 2001 provided that it shall have effect notwithstanding anything contained in the Constitution or any other law. Under para 3(1), it was provided that upon the office of the President becoming vacant for any reason whatsoever, the Chief Executive of the Islamic Republic of Pakistan shall be the President of the Islamic Republic of Pakistan and shall perform all functions assigned to the President by or under the Constitution or by or under any law. It was further provided that the Chief Executive shall hold office as President until his successor enters upon his office.

27. Reverting to *Syed Zafar Ali Shah's case* we would like to reproduce the Short Order dated 12th May, 2000 by which the Constitution Petitions challenging the taking over of the government by General Pervez Musharraf, the Proclamation of Emergency and the PCO No. 1 of 1999, as amended, were disposed of after hearing the learned counsel for the parties and the learned *amicus curiae*. It reads as follows: -

#### **“SHORT ORDER**

For detailed reasons to be recorded later, we intend to dispose of the above petitions under Article 184(3) of the Constitution, directed against the Army take over of 12th October, 1999, the Proclamation of Emergency dated 14th October, 1999, the Provisional Constitution Order No. 1 of 1999 and the Oath Of Office (Judges) Order No. 1 of 2000, in the following terms: -

#### **INDEPENDENCE OF JUDICIARY**

Stability in the system, success of the Government, democracy, good governance, economic stability, prosperity of the people, tranquillity, peace and maintenance of law and order depend to a considerable degree on the interpretation of Constitution and legislative instruments by the Superior

Courts. It is, therefore, of utmost importance that the *Judiciary* is independent and no restraints are placed on its performance and operation. It claims and has always claimed that it has the right to interpret the Constitution or any legislative instrument and to say as to what a particular provision of the Constitution or a legislative instrument means or does not mean, even if that particular provision is a provision seeking to oust the jurisdiction of this Court. Under the mandate of the Constitution, the Courts exercise their jurisdiction as conferred upon them by the Constitution or the law. Therefore, so long as the Superior Courts exist, they shall continue to exercise powers and functions within the domain of their jurisdiction and shall also continue to exercise power of judicial review in respect of any law or provision of law, which comes for examination before the superior Courts to ensure that all persons are able to live securely under the rule of law; to promote, within the proper limits of judicial functions, the observance and the attainment of human and Fundamental Rights; and to administer justice impartially among persons and between the persons and the State, which is a *sine qua non* for the maintenance of independence of *Judiciary* and encouragement of public confidence in the judicial system.

**TAKING OF OATH UNDER PCO NO.  
1 OF 1999**

Fresh oath under Oath of Office (Judges) Order No. 1 of 2000, does not in any way preclude the Judges of this Court from examining the questions raised in the above petitions, which have to be decided in accordance with their conscience and law so as to resolve the grave crises and avoid disaster by preventing imposition of Martial Law for which the Constitution does not

provide any remedy.

New oath of office was taken by the Judges of this Court under PCO No. 1 of 1999 read with Oath of Office (Judges) Order No. 1 of 2000 with a view to reiterating the well established principle that the first and the foremost duty of the Judges of the Superior Courts is to save the judicial organ of the State. This was exactly what was done. By virtue of PCO No. 1 of 1999, the Constitution has not lost its effect in its entirety although its observance as a whole has been interrupted for a transitional period. The activity launched by the Armed Forces through an extra constitutional measure, involves the violation of “some of the rights” protected by the Constitution, which still holds the field but some of its provisions have been held in abeyance. A duty is cast upon the Superior Judiciary to offer some recompense for those rights which were purportedly violated in view of the promulgation of PCO No. 1 of 1999. This could be achieved only by taking the Oath and not by declining to do so and thereby becoming a party to the closure of the Courts, which would not have solved any problem whatsoever but would have resulted in chaos, anarchy and disruption of peaceful life. Independence of *Judiciary* does not mean that Judges should quit their jobs and become instrumental in the closure of the Courts. Indeed, the latter course would have been the most detestable thing to happen. Independence of *Judiciary* means that the contentious matters, of whatever magnitude they may be, should be decided/resolved by the Judges of the Superior Courts according to their conscience. This Court, while performing its role as “the beneficial expression of a laudable political realism”, had three options open to it in relation to the situation arising out of the military take-over on Twelfth day of October, 1999: *firstly*, it could tender resignation *en bloc*, which most certainly could be equated with sanctifying (a) chaos/anarchy and (b) denial of access to justice to every citizen of Pakistan wherever he may be; *secondly*, a

complete surrender to the present regime by dismissing these petitions for lack of jurisdiction in view of the purported ouster of its jurisdiction under PCO No. 1 of 1999 and *thirdly*, acceptance of the situation as it is, in an attempt to save what “institutional values remained to be saved”. This Court, after conscious deliberations and in an endeavour to defend and preserve the national independence, the security and stability of Pakistan, sovereignty and honour of the country and to safeguard the interest of the community as a whole, decided to maintain and uphold the independence of *Judiciary*, which, in its turn, would protect the State fabric and guarantee human rights/Fundamental Rights. It took the Oath under PCO No. 1 of 1999 so as to secure the enforcement of law, extend help to the law enforcing agencies for maintenance of public order and with a view to restoring democratic institutions, achieving their stability and guaranteeing constitutional rights to the people of Pakistan.

Oath of Office prescribed under Articles 178 and 194 of the Constitution for the Judges of the Superior Courts contains a specific provision that a Judge shall abide by the Code of Conduct issued by the Supreme Judicial Council. Same is the position with regard to the provisions regarding Oath of Office (Judges) Order No. 1 of 2000. The precise provisions in the Oath of Office (Judges) Order, 2000 are that a Judge, to whom oath is administered, shall abide by the provisions of Proclamation of Emergency of Fourteenth day of October, 1999, PCO No. 1 of 1999, as amended, and the Code of Conduct issued by the Supreme Judicial Council. But there is specific omission of words, “to preserve and defend the Constitution”. Adherence to the Code of Conduct has not been subjected to any pre-conditions and there can be no deviation from it by a Judge who takes oath either under the Constitution or PCO No. 1 of 1999 or Oath of Office (Judges) Order No.

1 of 2000. One of the requirements of the Code of Conduct is that the oath of a Judge implies complete submission to the Constitution, and under the Constitution to the law. Subject to these governing obligations, his function of interpretation and application of the Constitution and the law is to be discharged for the maintenance of the Rule of Law over the whole range of human activities within the nation. Thus the new Oath merely indicates that the Superior Judiciary, like the rest of the country had accepted the fact that on 12th October, 1999, a radical transformation took place.

### MAINTAINABILITY OF PETITIONS

Notwithstanding anything contained in the Proclamation of Emergency of the Fourteenth day of October, 1999, the Provisional Constitution Order No. 1 of 1999, as amended and the Oath of Office (Judges) Order No. 1 of 2000, all of which purportedly restrained this Court from calling in question or permitting to call in question the validity of any of the provisions thereof, this Court, in the exercise of its inherent powers of judicial review has the right to examine the validity of the aforesaid instruments. Additionally, submission of the Federation in response to the Court's notice concerning its own legitimacy also suggests that this Court has an inherent authority, arising from the submission of both the parties to its jurisdiction, notwithstanding the preliminary objection raised in the written statement as to the maintainability of the above petitions. In the exercise of its right to interpret the law, this Court has to decide the precise nature of the ouster clause in the above instruments and the extent to which the jurisdiction of the Courts has been ousted, in conformity with the well-established principles that the provisions seeking to oust the jurisdiction of the

Superior Courts are to be construed strictly with a pronounced leaning against ouster. The Constitution Petitions filed by the petitioners under Article 184(3) of the Constitution are, therefore, maintainable.

### INTERVENTION BY ARMED FORCES

National Assembly is the highest representative body, which reflects the will and aspirations of the people of Pakistan. Similar is the status of a Provincial Assembly in a Province. Senate, being a symbol of unity of the federating units has its own utility for the country as a whole. It is, therefore, of utmost importance that the impugned suspension of the above democratic institutions is examined with great care and caution, otherwise it would adversely affect the democratic processes in the country, which may cause instability, impair the economic growth and resultantly prove detrimental to the general well-being of the people. However, where the representatives of the people, who are responsible for running the affairs of the State are themselves accused of massive corruption and corrupt practices and in the public as well as private sectors are benefiting therefrom and resist establishing good governance; where a large number of references have been filed against the former Prime Minister, Ministers, Parliamentarians and members of the Provincial Assemblies for their disqualification on account of corruption and corrupt practices; where there is a general perception that corruption is being practised by diversified strata including politicians, parliamentarians, public officials and ordinary citizens and that a number of Parliamentarians and members of the Provincial Assemblies mis-declared their assets before Election Commission

and Tax Authorities; where there was no political and economic stability and bank loan defaults were rampant and that as per report of Governor, State Bank of Pakistan Rs. 356 billion are payable by the bank defaulters up to 12.10.1999, having no accountability and transparency; where economic stability in Pakistan was highly precarious and there was an overall economic slowdown as GDP growth during the past three years had hardly kept pace with the growth of population; where Pakistan has a debt burden, which equals the country's entire national income; where all the institutions of the State were being systematically destroyed and the economy was in a state of collapse due to self serving policies of the previous government, which had threatened the existence, security, economic life, financial stability and credit of Pakistan; where a situation had arisen under which the democratic institutions were not functioning in accordance with the provisions of the Constitution, inasmuch as, the Senate and the National and Provincial Assemblies were closely associated with the former Prime Minister and there was no real democracy because the country was, by and large, under one man rule; where an attempt was made to politicize the Army, destabilize it and create dissension within its ranks and where the *Judiciary* was ridiculed, leaving no stone unturned to disparage and malign it by making derogatory and contemptuous speeches by some of the members of the previous ruling party inside and outside the Parliament and no Reference was made to the Chief Election Commissioner for their disqualification as members of the Parliament under Article 63 (2) of the Constitution; where the disparaging remarks against the *Judiciary* crossed all limits with the rendering of judgment by this Court in the case of Sh. Liaquat Hussain v. Federation of Pakistan (PLD 1999 SC 504), declaring the establishment of Military Courts as *ultra vires* the Constitution, which resulted into a slanderous campaign against the *Judiciary* launched by the former Prime Minister registering his helplessness in the face of the *Judiciary* not allowing him the

establishment of Military Courts as a mode of speedy justice; where the image of the *Judiciary* was tarnished under a well conceived design; where the telephones of the Judges of the Superior Courts and other personalities were tapped in spite of the law laid down by this Court in the case of *Mohtarma Benazir Bhutto v. President of Pakistan* (PLD 1998 SC 388), that tapping of telephones and eavesdropping was immoral, illegal and unconstitutional; where storming of the Supreme Court was resorted to allegedly by some of the leaders and activists of the Pakistan Muslim League which ultimately led to the issuance of contempt notices against them/contemners by the Full Bench of this Court in a pending appeal; where Mian Nawaz Sharif's constitutional and moral authority stood completely eroded and where situation was somewhat similar and analogous to the situation that was prevalent in July, 1977, the extra constitutional step of taking over the affairs of the country by the Armed Forces for a transitional period to prevent any further destabilization, to create corruption free atmosphere at national level through transparent accountability and revive the economy before restoration of democratic institutions under the Constitution, is validated, in that Constitution offered no solution to the present crisis.

In the Commonwealth Finance Ministers Meeting, held on 21-23 September, 1999, commenting on the Framework for Commonwealth Principles on Promoting Good Governance and Combating Corruption, it was, *inter alia*, observed that; "Good governance is not a luxury but a basic requirement for development. Corruption, which undermines development, is generally an outcome and a symptom of poor governance. It has reached global proportions and needs to be attacked directly and explicitly."....."The Commonwealth should firmly commit itself to the policy of "zero tolerance" of all types of corruption.

This policy must permeate national political cultures, governance, legal systems and administration. Where corruption is ingrained and pervasive, especially at the highest political levels, its eradication may require a sustained effort over a protracted period of time. However, the policy of “zero tolerance” should be adopted from the outset, demonstrating a serious commitment to pursue the fight against corruption. The Commonwealth should remain firm in its determination that the high standards and goals enunciated in the 1991 Harare Declaration are upheld and enhanced. Creating an environment, which is corruption-free will require vigorous actions at the national and international levels, and within the Commonwealth itself. These actions should encompass the prevention of corruption, the enforcement of laws against it and the mobilization of public support for anti-corruption strategies.”

Probably, the situation could have been avoided if Article 58(2)(b) of the Constitution had been in the field, which maintained parliamentary form of government and had provided checks and balances between the powers of the President and the Prime Minister to let the system run without any let or hindrance to forestall the situation in which Martial Law can be imposed. With the repeal of Article 58(2)(b) of the Constitution, there was no remedy provided in the Constitution to meet the situation like the present one with which the country was confronted, therefore, constitutional deviation made by the Chief of the Army Staff, General Pervez Musharraf for the welfare of the people rather than abrogating the Constitution or imposing Martial Law by means of an extra constitutional measure is validated for a transitional period on ground of State necessity and on the principle that it is in public interest to accord legal recognition to the present regime with a view to achieving his declared objectives and that it is in the interest of the community that order be preserved. Legal recognition/legitimacy can be accorded to the present regime also on the principle that the government should be by the consent of the governed, whether voters or not. Here there is an implied consent of the governed i.e. the people of Pakistan in general including politicians/parliamentarians, etc. to the army take-over, in that no protests worth the name or agitations have been launched against the army take-over and/or its continuance. The Court can take judicial notice of the fact that the people of Pakistan have generally welcomed the army take-over due to

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their avowed intention to initiate the process of across the board and transparent accountability against those, alleged of corruption in every walk of life, of abuse of national wealth and of not taking appropriate measures for stabilizing the economy and democratic institutions. Another principle, which is attracted is that since an extra-constitutional action has been taken by General Pervez Musharraf wielding effective political power, it is open to the Court to steer a middle course so as to ensure that the framework of the pre-existing Order survives but the constitutional deviation therefrom be justified on the principle of necessity, rendering lawful what would otherwise be unlawful. However, prolonged involvement of the Army in civil affairs runs a grave risk of politicizing it, which would not be in national interest, therefore, civilian rule in the country must be restored within the shortest possible time after achieving the declared objectives, which necessitated the military take over and Proclamation of Emergency as spelt out from the speeches of the Chief Executive dated 13<sup>th</sup> and 17th October, 1999. The acceptance of the above principles does not imply abdication from judicial review in the transient suspension of the previous legal order.

We accordingly hold as under:-

1. On 12th October, 1999 a situation arose for which the Constitution provided no solution and the intervention by the Armed Forces through an extra constitutional measure became inevitable, which is hereby validated on the basis of the

doctrine of State necessity and the principle of *salus populi suprema lex* as embodied in *Begum Nusrat Bhutto's* case. The doctrine of State necessity is recognized not only in Islam and other religions of the world but also accepted by the eminent international jurists including *Hugo Grotius, Chitty and De Smith* and some Superior Courts from foreign jurisdiction to fill a political vacuum and bridge the gap.

2. Sufficient corroborative and confirmatory material has been produced by the Federal Government in support of the intervention by the Armed Forces through extra constitutional measure. The material consisting of newspaper clippings, writings, etc. in support of the impugned intervention is relevant and has been taken into consideration as admissible material on the basis of which a person of ordinary prudence would conclude that the matters and events

narrated therein did occur. The findings recorded herein are confined to the controversies involved in these cases alone.

3. All past and closed transactions, as well as such executive actions as were required for the orderly running of the State and all acts, which tended to advance or promote the good of the people, are also validated.

4. That the 1973 Constitution still remains the supreme law of the land subject to the condition that certain parts thereof have been held in abeyance on account of State necessity;

5. That the Superior Courts continue to function under the Constitution. The mere fact that the Judges of the Superior Courts have taken a new oath under the Oath of Office (Judges) Order No. 1 of 2000, does not in any

manner derogate from this position, as the Courts had been originally established under the 1973 Constitution, and have continued in their functions in spite of the Proclamation of Emergency and PCO No. 1 of 1999 and other legislative instruments issued by the Chief Executive from time to time;

6.(i) That General Pervez Musharraf, Chairman, Joint Chiefs of Staff Committee and Chief of Army Staff through Proclamation of Emergency dated the 14th October, 1999, followed by PCO 1 of 1999, whereby he has been described as Chief Executive, having validly assumed power by means of an extra-Constitutional step, in the interest of the State and for the welfare of the people, is entitled to perform all such acts and promulgate all legislative measures as enumerated hereinafter, namely:-

All acts or legislative measures which are in accordance with, or could have been made under the 1973 Constitution, including the power to amend it;

All acts which tend to advance or promote the good of the people;

All acts required to be done for the ordinary orderly running of the State; and

All such measures as would establish or lead to the establishment of the declared objectives of the Chief Executive.

(ii) That constitutional amendments by the Chief Executive can be resorted to only if the Constitution fails to provide a solution for attainment of his declared objectives and further that the power to amend the Constitution by virtue of clause 6 sub-clause (i) (a) *ibid* is controlled by sub-clauses (b)(c) and (d) in the same clause.

(iii) That no amendment shall be made in the salient features of the Constitution i.e. independence of *Judiciary*, federalism, parliamentary form

of government  
blended with Islamic  
provisions.

(iv) That  
Fundamental Rights  
provided in Part II,  
Chapter I of the  
Constitution shall  
continue to hold the  
field but the State  
will be authorized to  
make any law or take  
any executive action  
in deviation of  
Articles 15, 16, 17,  
18, 19 and 24 as  
contemplated by  
Article 233 (1) of the  
Constitution, keeping  
in view the language  
of Articles 10, 23  
and 25 thereof.

(v) That these acts,  
or any of them, may  
be performed or  
carried out by means  
of orders issued by  
the Chief Executive  
or through  
Ordinances on his  
advice;

(vi) That the  
Superior Courts  
continue to have the  
power of judicial  
review to judge the  
validity of any act or  
action of the Armed  
Forces, if challenged,  
in the light of the  
principles underlying

the law of State necessity as stated above. Their powers under Article 199 of the Constitution thus remain available to their full extent, and may be exercised as heretofore, notwithstanding anything to the contrary contained in any legislative instrument enacted by the Chief Executive and/or any order issued by the Chief Executive or by any person or authority acting on his behalf.

(vii) That the courts are not merely to determine whether there exists any nexus between the orders made, proceedings taken and acts done by the Chief Executive or by any authority or person acting on his behalf, and his declared objectives as spelt out from his speeches dated 13th and 17th October, 1999, on the touchstone of State necessity but such orders made, proceedings taken and acts done including the legislative measures, shall also be subject to judicial review by the superior courts.

6. That the previous Proclamation of Emergency of 28th May, 1998 was issued under Article 232(1) of the Constitution whereas the present Emergency of 14th October, 1999 was proclaimed by way of an extra-Constitutional step as a follow up of the Army take-over which also stands validated notwithstanding the continuance of the previous Emergency which still holds the field.

7. That the validity of the National Accountability Bureau Ordinance, 1999 will be examined separately in appropriate proceedings at appropriate stage.

8. That the cases of learned former Chief Justice and Judges of the Supreme Court, who had not taken oath under the Oath of Office (Judges) Order, 2000 (Order 1 of 2000), and those Judges of the Lahore High Court, High Court of Sindh and Peshawar High

Court, who were not given oath, cannot be re-opened being hit by the doctrine of past and closed transaction.

9. That the Government shall accelerate the process of accountability in a coherent and transparent manner justly, fairly, equitably and in accordance with law.

10. That the Judges of the superior Courts are also subject to accountability in accordance with the methodology laid down in Article 209 of the Constitution.

11. General Pervez Musharraf, Chief of the Army Staff and Chairman Joint Chiefs of Staff Committee is a holder of Constitutional post. His purported arbitrary removal in violation of the principle of *audi alteram partem* was ab initio void and of no legal effect.

12. That this order will not affect the trials conducted and

convictions recorded including proceedings for accountability pursuant to various orders made and Orders/laws promulgated by the Chief Executive or any person exercising powers or jurisdiction under his authority and the pending trials/proceedings may continue subject to this order.

13. This is not a case where old legal order has been completely suppressed or destroyed, but merely a case of constitutional deviation for a transitional period so as to enable the Chief Executive to achieve his declared objectives.

14. That the current electoral rolls are out-dated. Fresh election cannot be held without updating the electoral rolls. The learned Attorney General states that as per report of the Chief Election Commissioner this process will take two years. Obviously,

after preparation of the electoral rolls some time is required for delimitation of constituencies and disposal of objections, etc.

15. That we take judicial notice of the fact that ex-Senator Mr. Sartaj Aziz moved a Constitution Petition No. 15 of 1996, seeking a *mandamus* to the concerned authorities for preparation of fresh electoral rolls as, according to Mr. Khalid Anwar, through whom, the above petition was filed, the position to the contrary was tantamount to perpetuating disenfranchisement of millions of people of Pakistan in violation of Articles 17 and 19 of the Constitution. Even MQM also resorted to a similar Constitution Petition bearing No. 53 of 1996 seeking the same relief. However, for reasons best known to the petitioners in both the petitions, the same were not pursued any further.

16. That having

regard to all the relevant factors involved in the case including the one detailed in paragraphs 14 and 15 above three years period is allowed to the Chief Executive with effect from the date of the Army take-over i.e. 12th October, 1999 for achieving his declared objectives.

17. That the Chief Executive shall appoint a date, not later than 90-days before the expiry of the aforesaid period of three years, for holding of a general election to the National Assembly and the Provincial Assemblies and the Senate of Pakistan.

18. That this Court has jurisdiction to review/re-examine the continuation of the Proclamation of Emergency dated 12th October, 1999 at any stage if the circumstances so warrant as held by this Court in the case of *Farooq Ahmed Khan Leghari v. Federation of Pakistan* (PLD 1999 SC 57).”

28. In the backdrop of above circumstances and in pursuance of the Proclamation of Emergency and the PCO No. 1 of 1999 and in exercise of all other powers enabling him in that behalf, the Chief Executive and President of Pakistan on 9th April 2002 promulgated the Referendum Order, which is worded thus: -

“CHIEF EXECUTIVE’S ORDER NO.12 OF 2002

AN

ORDER

To provide for holding referendum

WHEREAS on 12TH October 1999 a situation had arisen due to steps taken by the then Prime Minister undermining the discipline and integrity of the armed forces of Pakistan and thereby potentially jeopardizing the security of Pakistan;

AND WHEREAS in pursuance of the deliberations and decisions of the Chiefs of Staff of the Armed Forces and Corps Commanders of Pakistan Army, General Pervez Musharraf, Chairman Joint Chiefs of Staff Committee and Chief of Army Staff proclaimed Emergency throughout Pakistan and assumed the office of Chief Executive of Pakistan;

AND WHEREAS the Constitution was placed in abeyance and Provisional Constitution Order No.1 dated 14th October 1999 was promulgated to provide a framework for governance under law, as nearly as may be in accordance with the Constitution;

AND WHEREAS all laws as specified in Article 5 of the Provisional Constitution Order No.1 of 1999 continue to be in force subject to orders of the Chief Executive.

AND WHEREAS, since at that juncture the institutions of State stood seriously weakened and the democratic and moral authority of the government of the day stood gravely eroded,

the Chief Executive of Pakistan announced a 7 - Point Agenda on 17th October 1999, stating his objectives to rebuild national confidence and morale; strengthen the Federation, remove inter-provincial disharmony and restore national cohesion; revive the economy and restore investor confidence; ensure law and order and dispense speedy justice; depoliticize state institution; devolution of power to the grass roots level; and ensure swift and across the board accountability;

AND WHEREAS the Chief Executive of Pakistan has emphasised that, inter alia, appropriate measures will be taken for good governance, economic revival, poverty alleviation and political restructuring;

AND WHEREAS it is imperative to consolidate the measures taken by the Chief Executive of Pakistan for the reconstruction of the institution of state for establishing genuine and sustainable democracy to ensure good governance for an irreversible transfer of power to the people of Pakistan;

AND WHEREAS it is essential to combat extremism and sectarianism for the security of the State and tranquillity of society;

AND WHEREAS it is in the supreme national interest to obtain a democratic mandate from the people of Pakistan through referendum for General Pervez Musharraf to continue to be the President of Pakistan;

NOW, THEREFORE, in pursuance of the Proclamation of Emergency of 14th October, 1999, and Provisional Constitution Order No.1 of 1999, and in exercise of all other powers enabling him in that behalf, the Chief Executive and President of the Islamic Republic of Pakistan is pleased to make and promulgate the following Order:-

1. Short title, extent and commencement. - (1)  
This Order may be called the Referendum Order, 2002.

2. It extends to the whole of Pakistan.

3. It shall come into force at once.

2. Definitions: In this Order, unless there is anything repugnant in the subject or context, -

“Commissioner”  
means the Chief  
Election  
Commissioner  
appointed under the  
Election Commission  
Order, 2002 (Chief  
Executive Order  
No.1 of 2002) and  
the “Commission”  
means the Election  
Commission  
constituted under the  
said Order;

“question”, being a  
matter of national  
importance, means  
the question to be  
asked at the  
referendum under  
this Order;

“Schedule” means a  
Schedule to the  
Order; and

“Returning Officer”  
means a Returning  
Officer, Additional  
Returning Officer,  
Assistant Returning  
Officer.

3. Referendum.- (1) There shall be a referendum on the 30th day of April 2002, in which every citizen of Pakistan who has attained the age of eighteen years on the date of referendum and possess a National Identity Card issued under the National Database and Registration Authority Ordinance, 2000 (VIII of 2000), shall be eligible to vote at the referendum:

Provided that where a National Identity Card under the National Database and Registration Authority Ordinance, 2000(VIII of 2000) has not been issued, but he is in possession of an identity card validly issued under section 5 of the National Registration Act, 1973 (LVI of 1973), (since repealed), he shall be eligible to cast his vote on the basis of such identity card.

(2) For the purpose of this referendum, the whole of Pakistan shall be a single constituency and every voter shall be entitled to vote at a polling station of his choice regardless of his place of residence.

(3) The question for referendum shall be as set out in the First Schedule on the ballot paper in Urdu;

Provided that in the Province of Sindh, the Commission shall provide a ballot paper printed in Sindhi or in Urdu as demanded by the voter.

(3) The question shall be answered in either "yes" or no" by affixing the stamp provided by the Commission approximately in the appropriate circle printed on the ballot paper.

(4) The procedure for holding the referendum shall be as provided in the Second Schedule.

4. Consequence of the result of referendum.-  
(1) Notwithstanding anything contained in the Constitution or any law for the time being in force, if the majority of the votes cast in the referendum are in the affirmative, the people of Pakistan shall be deemed to have given the democratic mandate to General Pervez Musharraf to serve the nation as President of Pakistan for a period of five years to enable him, inter alia, to consolidate the reforms and the reconstruction of institutions of State for the establishment of genuine and sustainable democracy, including the entrenchment of the local government system, to ensure continued good governance for the welfare of the people, and to combat extremism and sectarianism for the security of the State and the tranquillity of society.

(2) The period of five years referred in clause (1) shall be computed from the first meeting of the Majlis-e-Shoora (Parliament) to be elected as a result of the forthcoming general election to be held in October, 2002, in accordance with the Judgment of the Supreme Court.

5. Bar of Jurisdiction. (1) Subject to clause (2), no court, tribunal or other authority shall call in question, or permit to be called in question, the validity of any provision of this Order or of anything done or action taken, or purporting to be done or taken, thereunder on any grounds whatsoever or grant an injunction make any order or entertain any proceedings in respect of any matter provided for in this Order or arising therefrom.

(2) All disputes as to the result of the referendum shall be finally decided by the Commission and no court or other authority shall have any jurisdiction to entertain any proceedings relating thereto.

6. Order to override other laws. The provision of this order shall have effect notwithstanding anything contained in the Constitution or any other law for the time being in force.

7. Removal of difficulty. If any difficulty arises in giving effect to any of the provisions of this Order, the President may make such order for the removal of the difficulty as he may deem fit.

### **FIRST SCHEDULE**

(see Article 3 (3))

Ballot Paper

Ballot Paper Referendum 2002

## **SECOND SCHEDULE**

[See Article 3 (4)]

1. Poll for the purpose of the referendum shall be held on the 30th day of April 2002, from 09.00 a.m. to 07.00 p.m.

2. Polling under this Order shall be by secret ballot and every voter shall cast his vote on the ballot paper specified in the First Schedule.

3. (1) Where a voter presents himself for casting his vote, the President Officer shall issue a ballot paper to him after satisfying himself about his identity and shall, for that purpose, require the voter to produce the identity card issued to him.

(2) Before a ballot paper is issued to a voter,-

(a) his name and identity card number shall be entered on the counterfoil of the ballot paper;

(b) the ballot paper shall on its back be stamped with the official mark and initialed by the Presiding Officer;

(c) the voter shall put his signature or thumb impression on the counterfoil; and

(d) the Presiding Officer shall put a mark on the right hand thumb of the voter with indelible ink:

Provided that where the right hand thumb of a

person is missing such mark shall be made on the left hand thumb of such person.

(3) The voter on receiving a ballot paper shall-

(a) forthwith proceed to the place reserved for marking of ballot papers;

(b) secretly affix on the ballot paper the stamp provided to him by the Presiding Officer to indicate his answer to the question; and

(c) after he has affixed the prescribed stamp, fold the ballot paper and insert it in the ballot box.

(4) Where a voter is blind or otherwise so incapacitated that he cannot vote without the assistance of a companion, the Presiding Officer shall allow him such assistance, and thereupon such voter may cast his vote as provided in sub-paragraph (3).

(5) No voter shall vote at the referendum-

(a) more than once at the same polling station;  
or

(b) at more than one polling station.

(6) All votes cast in contravention of sub-

paragraph (5) shall be void.

4. A Presiding Officer may refuse to deliver a ballot paper to person if he has reason to believe that such person has already cast his vote at the referendum at the same polling station or at any other polling station, or is not the person whose identity card has been produced by such person.

5. (1) The following persons may cast votes by postal ballot in such manner as the commission may specific:-

(a) a person who is a public servant within the meaning of section 21 of the Pakistan Penal code (Act XLV of 1860), including members of armed forced of Pakistan and persons attached with such forces;

(b) persons employed by statutory corporations;

(c) persons employed by companies and corporations set up, established or controlled by the Federal Government or a Provincial Government;

(d) citizens of Pakistan residing abroad;

(e) wives and children of persons referred to in clauses (a), (b), (c) and (d); and

(f) a person who is detained in prison or held

on custody;

(2) A voter eligible to cast vote by postal ballot shall apply to the Returning Officer along with a copy

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of his National Identity Card for a ballot paper for voting by postal ballot at least one week before the date of polling.

(3) The Returning Officer shall immediately upon the receipt of an application by a voter under sub-paragraph (2) send by post to such voter a ballot paper and an envelope bearing on its face a form of certificate of posting, showing the date thereof, to be filled in by the proper official of the Post Office at the time of despatch by the voter or, where a specific request has been made, deliver the ballot paper to such person directly or through an authorised messenger to avoid any delay.

(4) A voter, on receiving his ballot paper for voting by post shall record his vote in the manner specified by the Commission and send the ballot paper to the Returning Officer in the envelop sent to him under sub-paragraph (3), by post or through an authorised messenger, so as to reach the Returning Officer before the consolidation of results by him.

(5) The Commission may make arrangements for provision and collection of ballot papers of the persons referred to in sub-paragraph (1) collectively, without compromising the secrecy of the ballot.

6. A person referred to in clauses (a), (b), (c), (d) and (e) of sub-paragraph (1) of paragraph 5 who is eligible to cast vote by postal ballot may, instead of voting through postal ballot, appear before a Presiding Officer along with his National Identity Card cast his vote in person at any polling station and the Presiding Officer shall, after identification, allow him to cast his vote.

7. (1) Immediately after the close of the poll, the Presiding Officer shall-

(a) in the presence of such persons as may be specified by the Commission, open the ballot box, or ballot boxes, and count the ballot papers taken out therefrom; and

(b) count in such a manner as may be prescribed, the votes cast in favour of each answer to the question after rejecting the invalid ballot papers, that is, the ballot papers which have-

(i) no official mark or initials of the Presiding officer,

(ii) any mark by which the voter can be identified;

(iii) no mark to indicate the answer to the question; and

(c) prepare a statement of the result of the count and such other statements and packets in such manner as the Commission may direct.

(2) The Presiding Officer shall, immediately after the count under sub-paragraph (1) prepare a ballot paper account showing-

(a) the number of ballot papers entrusted to him;

(b) the number of ballot papers taken out of the ballot boxes and counted; and

(c) the number of un-issued ballot papers and spoilt and invalid ballot papers.

(3) The Presiding Officer shall, immediately after the close of the proceedings under sub-paragraphs (1) and (2), cause the statements, packets and account prepared by him to be sent to the Returning Officer together with such other records as the Returning Officer may direct.

8. (1) The Returning Officer shall, on receipt of the statements of the results of the count from the Presiding Officer, consolidate in the prescribed manner the results of the count by the Presiding Officers in respect each answer to the question, including therein the postal ballot received by him until then.

(2) The Returning Officer shall, after obtaining the result of the count, forthwith submit a return of the referendum to the

Commission.

(3) The Commission shall announce the result of the referendum showing the total number of votes cast in favour of each answer and shall also publish the same in the official Gazette.

9. (1) Save or otherwise provided, the Commission shall make all arrangement necessary for holding of the referendum, including the appointment of Returning Officers, make provision of polling stations and may issue and prescribe such order, directions and instructions, and exercise such powers as may be necessary for the performance of its functions for ensuring that the referendum is conducted justly and fairly in accordance with the provisions of this Order.

(2) The Commissioner may authorise any member of the Commission, an authority or officer to exercise any of its powers and functions under this Order.

(3) The Commissioner shall have the same powers as a Judge of the Supreme Court to punish any person for contempt of court as provided under the Contempt of Court Act, 1976 (XLIV of 1976).

(4) All executive authorities in the Federation and in the Provinces shall render such assistance to the Commissioner and the Members of the Commission in discharge of his or their functions as may be required by them by the Commissioner and the Members of the Commission.

GENERAL

PERVEZ MUSHARRAF

*Chief Executive and*

*President of the Islamic Republic of Pakistan*

*And Chief of Army Staff*

MR.JUSTICE

MANSOOR AHMED

SECRETARY”

29. As mentioned earlier, the validity of the Referendum Order, the CE Order No. 2 of 2001 and the CE Order No. 3 of 2001 has been challenged in these petitions. Dr. Farooq Hasan, learned counsel for the petitioner in Constitution Petition No. 15 of 2002, formulated his submissions as under: -

The Constitution remains the supreme law of the land and the position now being taken by General Pervez Musharraf, although lawfully holding the portfolio of Chief Executive as allowed by this Court, is in total disregard of the above concept to which he had subscribed personally and through his lawyers in Syed Zafar Ali Shah's case;

The Constitution is the vehicle of a nation's movement towards advancement and democracy. The freedoms envisaged by it generate the energy, which provide velocity and dynamics to the nation's life. The respondents, in contravention of their duties as outlined by this Court, are relentlessly stifling even the most elementary freedoms in Pakistan;

The mechanism of referendum contained in the Constitution is wholly and utterly inapplicable for the election of President of the Islamic Republic of Pakistan and as such all steps taken in that behalf including the Referendum Order are utterly *void* and *ultra vires* the Constitution and the law declared by this Court in Syed Zafar Ali Shah's case;

It is impermissible under the Constitution and the law declared by this Court to politicize the Army. Respondent No.1 is directly doing that, which is prohibited by this Court;

It is unlawful and shocking to conscience that respondents No.1 and 2 in connivance with each other are openly using the resources of the State of Pakistan for the political ambitions of respondent No.1;

Under the judgment of this Court in Syed Zafar Ali Shah's case, the present government is expressly described to be 'transient' in nature. It is for a temporary period with definite and clear-cut duties and purposes. Its actions, whether executive or legislative, are always capable of being tested *qua* or *de hors* the Constitution. In a nut shell, the present government has a fiduciary relationship in the discharge of functions of the State and no Court of equity or of law can allow a trustee to gobble up

the property of the trust and use it for his own benefit on fake and flimsy pretexts;

In view of the direction of this Court to hold elections to all the democratic institutions of the country by 12<sup>th</sup> October 2002, it is manifest and self-evident that allowing political activity towards election is the obligation of the respondents, which they are defeating on flimsy grounds of administrative necessity and convenience.

Elaborating his formulations the learned counsel submitted that the present government has transient authority and it has been given *ad interim* charge in the nature of a caretaker administration with a specific mandate, a specific time-table and a specific list of duties spelt out in *Syed Zafar Ali Shah's case*. It is not a supra-constitutional authority, but one functioning under the Constitution. However, in the discharge of their duties the respondents are continuously violating their mandate and have in fact devised legal stratagems aimed at getting out of the limitations set for them. They have forgotten that the declared objectives are to be achieved and election is to be held within a period of three years, the power to amend the Constitution is subject to as many as seven riders and this Court continues to have its power of judicial review. Respondents No.1 is holding rallies at the expense of public exchequer using the electronic media for his personal gain and is not allowing his opponents even to have right of audience to the people of Pakistan in exercise of their fundamental rights of freedom of expression and freedom of assembly. In this context he referred to the restrictions imposed on the movement of petitioner Qazi Hussain Ahmed. According to the learned counsel respondent No. 1 was acting in a despotic manner and the statements made by him in his speech of 5th April, 2002 in regard to the powers to be exercised in future by the President, the Prime Minister and the Chief of Army Staff defy the constitutional scheme of things because the Chief of Army Staff does not figure in the Constitution as a centre of power. He further contended that President Mr. Muhammad Rafiq Tarar continued in office after the promulgation of the Proclamation of Emergency and the PCO No. 1 of 1999 which stand validated by this Court in *Syed Zafar Ali Shah's case* and would continue as such till 28th December, 2002 to be replaced by an incumbent elected under the new set up. He had not tendered resignation from his office and was removed arbitrarily and unceremoniously by promulgating the CE Orders No.2 and 3 of 2001 which are *ultra vires* the Constitution and have changed the system to the Presidential form of Government. It is well settled that the lawmaker cannot make laws for his personal benefit. Both the orders being a device for self-aggrandizement of respondent No.1 who has destroyed even the semblance of the parliamentary system of government by removing the elected President, is *ex facie mala fide*. Respondent No. 1 continues to be in the service of Pakistan whereas no person in the service of Pakistan can even be a candidate for President. He is hit by Article 41(1), Article 62 and Article 63(i)(d) read with Article 260 of the Constitution. Besides, even in the interregnum respondent No.1 is not allowed to defeat the parliamentary system by amalgamating two distinct functionaries, viz., the President and the Prime Minister into one person. The Constitution does not allow holding of referendum for election of the President. The device of referendum on the part of respondent No.1 for the above purpose, is a direct affront to the judgments of this Court in *Syed Zafar Ali Shah's case* and *Wasim Sajjad's case*. Electoral process in relation to the election of the office of President is dealt with in Article 41 of the Constitution which would be available after the election is held in October, 2002.

30. He further submitted that under Article 48 the President, in the exercise of his functions, has to act in accordance with the advice of the Cabinet or the Prime Minister. This is again foundation of the parliamentary system as it envisages a safeguard against arbitrary exercise of power by empowering the President to require the Cabinet or the Prime Minister, as the case may be, to reconsider the advice. There are only few matters where the President is empowered to act in his discretion. In all other matters, he has to act in accordance with the advice of the Cabinet or the Prime Minister, as the

case may be. Thus, the Chief Executive's Orders No. 2 and 3 of 2001 have rendered this provision meaningless and ineffective.

31. He next contended that Article 48(6) of the Constitution does not spell out the consequences of the referendum. However, once referendum is held under the Referendum Order, respondent No. 1 would become President as laid down therein, which is against the Constitution as well as the judgment of this Court in *Syed Zafar Ali Shah's case*. The *non obstante* clause in the Referendum Order is meaningless in view of the law laid down by this Court. The learned counsel read out excerpts from several books and treatises to show that in the United States referendum is resorted to in Municipal matters and in the European context it is basically used to ask for the people's vote on any policy matter.

32. Mr. Hamid Khan, Sr. ASC, appearing in Constitution Petition No. 18 of 2002 filed by the Supreme Court Bar Association raised the following contentions:-

(1) Article 48 (6) & (7) of the Constitution pertaining to referendum do not envisage referendum as a means for election to the constitutional offices. It is meant for soliciting opinion of the people on issues of national importance;

(2) Even if, for the sake of argument, it is accepted that referendum can be held to elect a President, then the consequences would be that Article 41 clauses (2), (3), (4), (5) & (6) and Second Schedule to the Constitution would become redundant and nugatory and under the established principles of interpretation of a Constitution or any constitutional provision, only that interpretation is to be made, which does not render a provision of the Constitution redundant, meaningless or nugatory;

(3) The Referendum Order is not in accordance with the Constitution. It is rather inconsistent with the Constitution being repugnant to Articles 41 and 48 of the Constitution and the Second Schedule to the Constitution specifically and, therefore, is liable to be declared *ultra vires* the Constitution. Any action taken thereunder would also be *ultra vires* the Constitution;

(4) Only once in the history of Pakistan, a constitutional provision was made vide Article 96-A of the Constitution (inserted through the Constitution [Seventh Amendment]

Act, 1977) for holding referendum as a means of conferring vote of confidence in favour of the holder of a constitutional office (the then Prime Minister of Pakistan). This provision was made for a specific period and under certain circumstances. Under section 1(2) it came into force on 16th May 1977 and under section 1(3) it ceased to be in force on the thirteenth day of September, 1977;

(5) Even under the Constitution (Seventh Amendment) Act, 1977, no referendum took place because this was an aberration in the constitutional document. Such referendums are not provided. It had a special background. There was a strong PNA movement going on against Mr. Zulfikar Ali Bhutto, the then Prime Minister of Pakistan agitating that the elections to the National and Provincial Assemblies held in March, 1977 were not fair, impartial and just. The opposition neither recognized the assembly nor accepted this amendment. Negotiations between the ruling party and the opposition started in the month of June, 1977 and ultimately the government gave the idea of holding referendum under this provision;

(6) The Referendum Order is violative of the judgment of this Court in Syed Zafar Ali Shah's case, inasmuch as -

The judgment only permits those legislative measures which are in accordance with the 1973 Constitution;

(ii) The judgment requires that only such legislative and other acts can be performed, which are

meant for ordinary and orderly functioning of the State. In other words, it means that the government can only pass such legislation, which is essential for day-to-day functioning of the government. The authority of the government is restricted. The Referendum Order has got nothing to do with the day-to-day functioning of the State. This is totally outside the ambit of the powers of the government;

It has been clearly laid down in prohibitory language that no amendment in the Constitution can be made, which is against the basic features of the Constitution and in particular reference has

been made to  
the  
parliamentary  
form of  
government.  
The  
Referendum  
Order is  
against the  
basic features  
of the  
Constitution  
because it is  
violative of  
parliamentary  
form of  
government.  
It seeks to  
establish  
Presidential  
form of  
government.  
Respondent  
No.1 has  
clearly stated  
in his speech  
of 5th April,  
2002 that  
under the  
new  
constitutional  
dispensation,  
the President  
will be more  
powerful than  
the Prime  
Minister and  
the  
Parliament;

Under the  
scheme of the  
Constitution,  
there is a  
clear  
succession of  
events. In the  
first place,  
election to  
the national  
and  
provincial  
assemblies is  
to take place.  
In the second

place,  
election to  
the senate is  
to take place.  
In the third  
place,  
election to  
the office of  
the President  
takes place  
after  
completion of  
the first two  
stages. By  
holding the  
referendum  
for election to  
the office of  
the President  
to be  
effective  
from the date  
the  
assemblies  
meet, it  
nullifies the  
scheme and  
precludes the  
election to  
the office of  
the President  
by the  
electoral  
college  
provided in  
the  
Constitution;

It has been  
held in the  
judgment that  
there is no  
destruction of  
the old order  
and  
constitutional  
deviation for  
a transitional  
period has  
been allowed.  
By  
introducing  
Referendum  
Order and  
holding

referendum  
for conferring  
five years  
term on  
respondent  
No.1, this  
finding has  
been  
completely  
violated  
because the  
effect of the  
same will go  
beyond the  
transitional  
period of  
three years. It  
is extending  
transitional  
period from 3  
years to 8  
years;

(7) The respondent No.1 is holding Presidential election in the garb of referendum as being in the service of Pakistan he is disqualified under Articles 41 and 63 (k) to contest the Presidential election;

(8) By holding the referendum respondent No.1 is violating his oath of office as a member of Armed Forces under which he cannot engage himself in any political activity;

(9) The referendum being held on 30th April, 2002 deprives the people of Pakistan to elect their President through their chosen representatives in the Parliament and the provincial assemblies as envisaged under Article 2A of the Constitution;

(10) There is a consistent practice of military rulers in Pakistan of

attempting to obtain legitimacy to their dictatorial rule by holding referendums, which are generally fake and false. The forthcoming referendum will be held without electoral rolls. An election without electoral rolls cannot be fair, impartial and transparent;

(11) The functions of the Election Commission have been spelt out in Article 218 of the Constitution and obviously referendum does not fall within those functions;

(12) The proposed referendum is constitutionally a futile and harmful exercise because it will have no validity unless ratified and indemnified by the Parliament. On the one hand, it will be invalid without ratification and on the other, it will obviously lead to confrontation between the President and the Parliament inasmuch as the latter will be compelled to ratify it as was done by General Ziaul Haq by insertion of Articles 41(7) and 270A(1) of the Constitution; and

(13) From 1944 to 1996, in all 100 referendums have been held in the world, but none of them was held for election to a public office. Referendums are held to ascertain the public opinion on policy matters. In USA, no referendum has been held at the federal level. In UK, the only referendum has been held in 1975 on the question whether or not to stay in the European Economic Community. Dr. Maija Setala, a constitutional writer, in her book titled, 'Referendums and Democratic Governments' has said that referendum is only used by dictatorial regimes.

33. Mr. Muhammad Ikram Chaudhry, learned counsel for the petitioner in Constitution Petition No. 17/2002 adopted the arguments of Mr. Hamid Khan and submitted that the preliminary objections taken by the Federation in the written statement had no legal basis and were not tenable.

34. He further submitted that the referendum is not only violative of the mandate of this Court in *Syed Zafar Ali Shah's case* regarding restoration of democratic institutions within a limited period of three years but also involved violation of oath which General Pervez Musharraf had taken as an Army Officer to uphold

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the Constitution. The holding of referendum has the effect of politicizing the Armed Forces therefore, the Referendum Order is against the declared objectives of the Chief Executive.

35. Syed Sharif Hussain Bokhari, learned counsel for the petitioner in Constitution Petition No 19/2002 also adopted the arguments addressed by Mr. Hamid Khan and added that the preliminary objection regarding *locus standi* of the petitioner in the concise statement of the respondents was devoid of substance as the petitioner is a juristic person and represents major political parties which in turn represent a large number of people belonging to different strata of society whose fundamental rights have been infringed by the Referendum Order. Similarly the objection with regard to maintainability of petition against the President of Pakistan on the touchstone of the prohibition contained in Article 248 of the Constitution had no substance because the petitioner had not impleaded the President of Pakistan as a respondent but General Pervez Musharraf in his capacity as the Chief Executive of Pakistan who is not one of the persons exempted from the legal process under Article 248. The legal provisions regarding exemptions and immunities from the legal process are to be strictly construed because such exemptions are not applicable unless expressly provided by law. In any case even the protection granted to the functionaries of the State under Article 248 of the Constitution does not cover illegal and *mala fide* acts because such acts cannot be deemed to be in pursuance of the law or in discharge of the official functions. Reliance was placed on Zahoor Elahi v. Zulfiqar Ali Bhutto (PLD 1975 SC 383), Sadiq Hussain Qureshi v Federation of Pakistan (PLD 1979 Lahore 1) and Muhammad Anwar Durrani v. Province of Balochistan (PLD 1989 Quetta 25).

36. He further submitted that the Referendum Order is tainted with *mala fide* and not an honest legislation. The legislation through which Article 96-A was inserted in the Constitution was an honest legislation inasmuch as it clearly provided that the Prime Minister would be deemed to have tendered resignation in case of negative vote.

37. He next submitted that the Referendum Order offends the principle of trichotomy of powers among the three organs of the State because in consequence thereof General Parvez Musharraf would continue to be the President, the Chief Executive and the Chief of Army Staff.

38. Sheikh Mushtaq Ali, ASC, petitioner in C.P. No. 21 of 2002 contended that the respondent had politicized the Army, assumption of the office of President by the respondent was illegal, the referendum had no nexus either with the declared objectives or the judgment of this Court in Zafar Ali Shah's case, the Election Commission was not possessed of authority to hold the referendum just and fair referendum was not possible under the Referendum Order, there were in-built provisions of the Referendum Order to facilitate rigging and the exercise being tainted with *mala fide* must be stopped.

39. Mr. A.K. Dogar, ASC, while appearing in support of Constitution Petition No. 22 of 2002 filed by Syed Zafar Ali Shah criticized the campaign and public meetings being held in connection with referendum and contended that referendum is being held by General Parvez Musharraf for his personal gain and not for the benefit of the nation and it is in fact a device through which he wants to break the shackles put around him by this Court in Zafar Ali Shah's case. It is an extra-constitutional step which does not appear in the roadmap mentioned in the said case.

40. He further contended that the respondent has been given power to amend the Constitution only to the extent that the Parliament could have amended it and this power could be exercised only if the Constitution fails to provide a solution for the attainment of his declared objectives. To remain personally in power is not one of the declared objectives. The Referendum Order is not only in conflict with the judgment of this Court in Zafar Ali Shah's case but also the Constitution.

41. He next submitted that referendum amounts to election of the President whereas the President cannot be elected before the election of the National Assembly, Senate and the Provincial Assemblies, which is the electoral college because that is the scheme of the Constitution. The electoral college has to be there first and then there would be President. Moreover the system of referendum is a disenfranchisement of all eligible persons who are qualified to become President. The respondent is not eligible to be elected as President because he is disqualified for various reasons and one of the reasons is that he is in the service of Pakistan (Articles 43 and 63(1)(k) of the Constitution). Another significant reason is that he has violated the oath taken as an Army Officer. He lastly contended that the doctrine of necessity cannot be pressed into service to defend referendum and the respondent by removing Muhammad Rafiq Tarar through the methodology of the CE Orders No.2 and 3 of 2001 had violated the provisions of Article 47(1) of the Constitution.

42. Mr. Hashmat Ali Habib, learned counsel for the petitioner in Constitution Petition No. 23 of 2002, reiterated the contentions urged by the learned counsel for the other petitioners and added that referendum is not only aimed at altering the parliamentary system but also a device for perpetuation of the dictatorial regime, the referendum order extends the declared objectives from seven to sixteen, the question asked in the referendum is a compendium of six questions and a case for grant of interim relief of stay of proceedings was made out as billions of rupees were being spent on the referendum campaign.

43. Mr. Wasim Rehan, petitioner in C.P. No. 24 of 2002 criticized the referendum order without raising any noticeable point.

44. Mr. Iqbal Haider submitted in support of CPLA NO. 512/2002 against the order of the High Court of Sindh that the referendum being held under the Referendum Order is covered by the Constitution as was the case with the referendums held by Field Marshal Ayub Khan and General Ziaul Haq. The two referendums held earlier were accepted by the political parties, inasmuch as while passing the Constitution (Thirteenth Amendment) Act, 1997, although Article 58(2)(b) was deleted but the provisions regarding referendum were not touched.

45. Syed Iftikhar Hussain Gillani, learned counsel for the Federation, contended that law is not an abstract thing and while interpreting the same this Court being the protector of the Constitution must attempt to reduce the gap between the ideals of justice and the supreme interest of the people of Pakistan particularly in a situation that is legalistically not ideal. In *Haji Saifullah Khan's case* which had arisen when the Constitution was in full operation, relief of restoration was refused by this Court on the ground that a call had been given to the supreme political sovereign. He next submitted that prior to 12<sup>th</sup> October, 1999 the Constitution was the only organic and supreme law of the land without any clog on it but after 12th May, 2000 when the Short Order was announced by this Court in *Syed Zafar Ali Shah's case*, the Constitution of Pakistan is to be read with the Proclamation of Emergency and the PCO No. 1 of 1999. The present controversy has to be looked at in the light of these three documents.

46. He further contended that in view of the observations in para 6(i) of the judgment of this Court in *Syed Zafar Ali Shah's case* the present government has much wider powers than an elected government. If respondent No.1 feels that there is an impediment in his way on account of certain constitutional provisions or a constitutional provision needs to be inserted for achievement of his declared objectives he can make the necessary amendments in the Constitution. The Proclamation of Emergency lays down that the Constitution is in abeyance and the PCO No. 1 of 1999 envisages that Pakistan would be governed, as nearly as may be, in accordance with the Constitution.

47. He went on to argue that assumption of office of President by respondent No.1 cannot be challenged in collateral proceedings in the light of the law laid down in *Abdul Mujeeb Pirzada v Federation of Islamic Republic of Pakistan* (PLD 1990 Karachi 9), *Ghulam Jilani v. Province of Punjab* (PLD 1979 Lahore 564), *Pir Sabir Shah v. Federation of Pakistan* (PLD 1994 SC 738) and *Farzand Ali v. Province of West Pakistan* (PLD 1970 SC 98). Respondent No. 1 became President through a valid legal instrument promulgated on 20th June, 2001. It has been acted upon and widely accepted. The Chief Justice of Pakistan has been acting as President of Pakistan by virtue of the Chief Executive's Order No. 3 of 2001. The continuance in office of Mr. Muhammad Rafiq Tarar was dependent on the Proclamation of Emergency.

48. The next submission made by him was that the Referendum Order has to be read with Articles 48(6) & (7) of the Constitution. After the lapse of Article 96-A of the Constitution there was no provision akin to the holding of referendum under the Constitution. That was the reason that clauses (6) & (7) of Article 48 were introduced in 1985. It was felt that there was no provision for holding a referendum which is envisaged by the Referendum Order. Promulgation of the Referendum Order was necessary because clause (7) of Article 48 enjoins that the Parliament may lay down the procedure for the conduct of referendum. The present referendum is not being held exclusively under Article 48(6) of the Constitution. It is directly relatable to the dictum laid down in *Syed Zafar Ali Shah's case* whereunder the Chief Executive has been authorized to promulgate all such measures as would establish or lead to the establishment of his declared objectives. The ultimate objective is the holding of election which is an unwavering commitment of the respondent.

49. He lastly contended that referendum being merely an appeal to the political sovereign cannot be equated with election and the Referendum Order cannot be challenged even on moral grounds. The statements made by the political leaders including Mohtarama Benazir Bhutto and Qazi Hussain Ahmed immediately after the Army takeover are part of the record. Their present stance needs to be examined in juxtaposition with their previous conduct.

50. Mr. Maqbool Elahi Malik, Sr. ASC, learned counsel for the Federation appeared on behalf of the respondents and submitted that the Referendum Order was in line with the judgment of this Court in *Syed Zafar Ali Shah's case* and if referendum is not allowed to be held the entire exercise done in that case would go waste, the Election Commission had made all necessary arrangements to guard against malpractices, the Pakistan Council of Scientific and Industrial Research Laboratories Complex, Karachi had issued a certificate to the effect that indelible ink to be used on the thumb of the voters will last for a week and the referendum is being held by the respondent not for his personal benefit but for taking the process of restoration of democracy initiated by him to its logical conclusion.

51. Mr. Abdul Hafeez Pirzada, Sr. ASC, appearing on behalf of the Federation traced the history of evolution of the Constitution and made the following submissions in support of the Referendum Order:-

(1) There are certain misconceptions about the Constitution, which must be cleared. The 1973 Constitution, which is in abeyance, is the supreme law of the land. It is the organic law and is indestructible. It has shown resilience, tenacity and poignancy and notwithstanding 11 years rule of General Ziaul Haq it has survived and it will survive as long as the power of

judicial review is exercised by this Court. The position of the Chief Executive and the Federation is very clear. For the first time under an extra-constitutional rule, the supremacy of the judicial power and judicial review has been accepted.

(2) The Referendum Order is a valid piece of legislation. It is hit neither by the constitutional *ultra vires* nor by the doctrine of substantive *ultra vires*.

(3) The validity of the Referendum Order is to be tested not on the touchstone of the Constitution but on the touchstone of the extra-constitutional legal order upheld by this Court in Syed Zafar Ali Shah's case. The legal order which will determine the validity of the Referendum Order is the Proclamation of Emergency read with the PCO No. 1 of 1999, which have been validated *in toto* by this Court and are in the nature of *quasi-organic* law of the country during the constitutional deviation.

(4) This Court in Syed Zafar Ali Shah's case has identified the basic structure of the country as consisting of four characteristics; firstly, a parliamentary system of democracy; secondly, the federal structure of the State; thirdly, under the trichotomy of powers complete independence of the judiciary and its power of judicial review, and fourthly, irrepressibility of certain fundamental rights. It has been held in the judgment that while exercising the power of amendment of the Constitution during the interregnum or the constitutional deviation, these four characteristics cannot be interfered with.

(5) The constitutional provisions with regard to parliamentary system of democracy are in abeyance. There are no assemblies, senate, etc.

(6) The most important characteristic is the federal structure of the government which stands suspended by virtue of the Proclamation of Emergency and the PCO No. 1 of 1999. There are no provincial assemblies or provincial executives and the Governors in the provinces have to act under the instructions of the Chief Executive while performing legislative and

executive functions in relation to the affairs of the province as laid down in Article 3(2) of the PCO No. 1 of 1999.

(7) The fundamental rights with few exceptions are not in suspension and the provisions of the Constitution in that behalf are in force.

(8) The power to amend the Constitution given to the Chief Executive is relatable to the future to facilitate transition because otherwise transformation and transition cannot take place, which is established from the provisions of Articles 269, 270 and 270A of the Constitution. Currently the basic structure consists of the independence of the judiciary as the remaining two organs of the State under the trichotomy of powers are under suspension.

(9) The validity of the Referendum Order is to be examined in the context of the present circumstances and factual position on the ground. This Court cannot enter into academic, hypothetical or presumptive exercise. In *Asad Ali's case* and the *Review Petition of Justice Sajjad Ali Shah* (1999 SCMR 640), the question, which concerned the independence of judiciary, was as to whether an Advocate of the Supreme Court could be appointed as Chief Justice of Pakistan. The Court held that the issue was not before it.

(10) The Referendum Order does not in any manner amend or claim to amend the Constitution. Therefore, the question of testing the legality of Referendum Order and the legal consequences flowing therefrom on the touchstone of the Constitution does not arise at this stage, being abstract, hypothetical, presumptive and academic, which might be decided by proper forum at proper time.

(11) The power of amendment given to the Chief Executive, as rightly stated by Syed Sharifuddin Pirzada in *Syed Zafar Ali Shah's case*, is subject to certain limitations. The amendments when introduced will come up before the appropriate forum.

(12) This Court should trace firstly the history of evolution of the Constitution as the organic and

supreme law of the land making distinction between the two periods of history, viz. (i) the periods of abrogations and (ii) the periods of constitutional abeyance and deviations. On a less onerous side, this Court should examine the similarities, legal and constitutional, between the 1977 takeover and the present takeover and the factual dissimilarities.

(13) Under the first referendum, Field Marshal Muhammad Ayub Khan got the mandate for framing Constitution and to be President for the first term under that Constitution. Transition is the most important aspect particularly when it is from an extra-constitutional or supra-constitutional Order to a constitutional Order which is to be seen in the light of the doctrine of eclipse. The 1973 Constitution itself provided 15 years for transition, therefore, the transition is a very delicate and sensitive process.

(14) The effect of the judgment of this Court in *Mahmood Khan Achazai's case* (PLD 1997 SC 426) whereby revival of Article 58(2)(b) of the Constitution was adopted needs to be examined. Jurisdiction of this Court under Article 184(3) of the Constitution is an equitable jurisdiction, which is to be exercised *ex debito justitiae* and the conduct of the parties. This Court upheld the Constitution (Eighth Amendment) Act, 1985 on two grounds, namely, (i) Parliament had approved it, and (ii) three successive Parliaments did not undo it and, therefore, by necessary implication they accepted it. Acquiescence on the part of the parties has to be taken into consideration by the Court.

(15) Article 277 of the Interim Constitution of 1972 provided for a referendum but the same was not incorporated in the permanent Constitution. Mr. Mehmud Ali Qasuri, Chairman of the Committee which prepared the draft constitution, in his note of dissent at page 197 of the book titled "Constitution making in Pakistan" published by the National Assembly of Pakistan had supported this provision. At page 200 of the said book it is mentioned, "A referendum would be useful in circumstances where it becomes necessary, in mid term, to elicit the views of the electorate on matters of major

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importance. Referendum can in some circumstances be a substitute for dissolution of legislature.”

(16) In *Mahmood Khan Achakzai's case*, it was categorically held that with the removal of Article 58(2)(b), Martial law would be invited. The 13<sup>th</sup> and 14<sup>th</sup> Amendments should be viewed in this background. It was the rigidity of the Constitution that brought about the 1977 Martial law. The Constitution does not provide solution to all political problems. It is the ground realities that are to be taken into consideration.

(17) The supremacy of the Constitution has progressed from 1977 to 1999. The validation accorded to General Ziaul Haq was no different than the one in *Syed Zafar Ali Shah's case*. In *Begum Nusrat Bhutto's case* identical power was granted to General Ziaul Haq as has been granted to General Pervez Musharraf. Constitutionally and legally, there is no difference at all except that General Ziaul Haq had assumed power by the Proclamation of Martial Law and the Laws (Continuance in Force) Order, 1977 and General Pervez Musharraf assumed power under the Proclamation of Emergency and the PCO No. 1 of 1999.

Transition in 1984-85 lasted for more than a year. The Assembly started functioning in March 1985, but Martial law was lifted in December, 1985. It is the concern of the Federal Government that the transition from the extra-constitutional Order takes place to the constitutional Order. It is absolutely committed. However, there should be some sort of checks and balances so that the institutions and offices of the State act in equilibrium otherwise change of musical chairs will go on and on. The election is going to be held in October, 2002. It is in accordance with the judgment of this Court in *Syed Zafar Ali Shah's case*.

with the comment that Mr. Abdul Hafeez Pirzada had adopted a very clear line of reasoning and he would make submissions in the alternative. The learned counsel submitted that Mr Muhammad Rafiq Tarar was elected as President of Pakistan by the National Assembly, Senate and the Provincial Assemblies on 29th December, 1998. That was the position till 13th October 1999 whereafter he continued under the Proclamation of Emergency and the PCO No. 1 of 1999. In *Syed Zafar Ali Shah's case*, this Court upheld the validity of the Proclamation of Emergency and the PCO No. 1 of 1999 and then gave power to do certain things on the lines of *Begun Nusrat Bhutto's case* including the power to amend the Constitution. General Pervez Musharraf in exercise of the powers enabling him issued the CE Order No. 2 of 2001 whereby the National Assembly, the Senate and the Provincial Assemblies were dissolved with immediate effect. Thus, the electoral college, which had elected President Muhammad Rafiq Tarar was no more available and the person elected by that electoral college ceased to hold office. He had been allowed to continue under the Proclamation of Emergency and the PCO No. 1 of 1999 and perform the functions which the Chief Executive, either by order or acts, asked him to issue and he issued such orders. So, there was a void and therefore the CE Order No. 3 of 2001 was issued on the same day, which enabled General Pervez Musharraf to assume the office of President. By way of abundant caution, it was provided that this Order shall take effect notwithstanding anything contained in the Constitution or the law. The CE Orders No. 2 and 3 of 2001 are therefore, in consonance with the judgment of this Court in *Syed Zafar Ali Shah's case*. He further submitted that these Orders were also in line with the series of precedents and past practice, which has become a convention, upheld by this Court. In this context he referred to the circumstances in which various Constitutions were framed and abrogated or held in abeyance and Martial Law was imposed thrice. General Ayub Khan was appointed Chief Martial Law Administrator and thereafter he assumed the office of President, Mr. Zulfikar Ali Bhutto had become civilian Chief Martial Law Administrator and the President's Successions Order, 1978 was promulgated whereby General Zia-ul-Haq had assumed the office of the President. The assumption of office of President by General Zia-ul-Haq was challenged first by Lt. General (Retired) Nasirullah Khan Babar and then by Mr. Ghulam Jilani but the petitions were dismissed as per the judgments reported as *Nasirullah Khan Babar v. Chief of Army Staff* (PLD 1979 Peshawar 23) and *Malik Ghulam Jilani v. Province of Punjab and others* (PLD 1979 Lahore 564). The assumption of the office of President by General Parvez Musharraf was thus valid and not *mala fide*.

53. He next contended that the present government was *sui generis* and not a caretaker government. It was not open to question having regard to the functions to be performed by it under the powers given by this Court in *Syed Zafar Ali Shah's case*. Adverting to the Referendum Order he submitted that there are two kinds of referendums, viz. (i) referendums in general and (ii) referendums in Pakistan. The book titled "Referendums and Democratic Governments" by Maija Setala, cited by Mr. Hamid Khan is a restricted study as it covers only 26 countries. In England, where the parliamentary system is founded and recognized, Dicey had suggested referendum. In France, General de Gaulle had used referendum for a vote of confidence. Referendums were held in several countries of the world including Greece, Italy, Luxembourg, Norway, Romania, Russia, Egypt, Iraq, Maldives, Philippines, Turkey, and Bangladesh. In the United Kingdom referendum was held in 1975 on the question whether or not to stay in the European Economic Community.

54. In Pakistan, the very birth of Pakistan partly is the result of referendum held in NWFP, Balochistan and Sylhet. President's Order No. 3 of 1960 was issued on 13th January, 1960 by Ayub Khan for seeking mandate from the local councils. It was mentioned in the Order itself that object of the mandate was to frame the Constitution and become President for the first term under that Constitution. Article 24 of the 1962 Constitution provided for referendum in case of

conflict between the President and the National Assembly. Justice Monir has said that the provision was superfluous. The canons of construction speak otherwise. In 1964 the Referendum Act was passed. It was repealed in 1970. Article 277 of the Interim Constitution provided that the President could refer any particular matter to a referendum but this provision was not included in the 1973 Constitution. In March 1977 the National Assembly election took place. The Pakistan National Alliance (PNA) refused to accept the results for alleged massive rigging. On 13th May, 1977, Mr. Zulfikar Ali Bhutto brought the 7th Amendment inserting Article 96-A in the Constitution seeking vote of confidence and in case the result was against him, he would be deemed to have resigned. The referendum did not take place in view of the boycott and then the military intervention took place, which was justified in *Begum Nusrat Bhutto's case*. On 1st December, 1984 General Ziaul Haq promulgated President's Order No. 11 of 1984 for holding a referendum on the continuance of his policies and in consequence giving him a term of five years. The election was held on 23rd March, 1985. On 2nd March, 1985, Revival of the Constitution of 1973 Order, 1985 (P.O. No. 14 of 1985) was made. Article 48 of the Constitution was amended and sub-Articles (6) & (7) were added. In the original Constitution there was no provision for referendum. In exercise of the extra-constitutional powers, General Ziaul Haq promulgated P.O. No. 11 of 1984 whereby he was deemed to have been elected as President for five years. It was vehemently argued that referendum can be held on matters of national importance but one Prime Minister chose to seek vote of confidence and General Ziaul Haq became President through referendum and was so recognized by Article 41(7) of the Constitution.

55. Mr. Makhdoom Ali Khan, learned Attorney General for Pakistan submitted that the main challenge in the petitions has been made to the Referendum Order and in some of the petitions particularly Constitution Petition No. 15/2002 the CE Orders No. 2 and 3 of 2001 have been challenged. The latter challenge is not only hit by the doctrine of *laches* but also by the principle laid down in *Pir Sabir Shah's case* (PLD 1994 SC 738) that such a challenge cannot be made in collateral proceedings. So far as *laches* is concerned, though generally a plea of *laches* is not allowed to defeat the writ of *quo warranto* but in some of the cases it has been held that it will reflect on the *bona fides* of the petitioner. Reliance was placed on *Ali Raza Asad Abdi v. Mr Ghulam Ishaq Khan* (PLD 1991 Lahore 420). In that case, election of President Ghulam Ishaq Khan was challenged after two and a half years. Reference was also made to *Mahmood Khar Achakzai's case* (PLD 1997 SC 426), wherein it was observed that the delay alone is not enough but other circumstances are to be looked into by this Court. He further submitted that absence of *non obstante* clause in the CE Order No.2 of 2001 was immaterial as being merely an amending order, it amended the Proclamation of Emergency, which has a *non obstante* clause. He pointed out that after 14th October, 1999, the continuation in office of Mr. Muhammad Rafiq Tarar was not by virtue of his election but by virtue of the Proclamation of Emergency and the PCO No. 1 of 1999 which was accepted and acted upon by him. He could have been removed and he therefore, lawfully ceased to hold office.

56. He also submitted that the CE Orders No. 2 and 3 of 2001 do not derive their validity from the Constitution, but from the Proclamation of Emergency and the PCO No. 1 of 1999 and thus the same have to be examined on the touchstone of these two documents. As to the objection that under Article 43 read with Article 260 of the Constitution General Pervez Musharraf cannot hold two offices, he submitted that it cannot be denied that this is a transitional period and the source of validity is different. In *Zulfikar Ali Bhutto v. State* (PLD 1978 SC 40), the appointment of Mr. Justice Mushtaq Hussain, Acting Chief Justice of the Lahore High Court as Chief Election Commissioner was questioned on the ground that he could not hold those two offices. The appointment was upheld. Other relevant cases were reported as PLD 1978 Karachi 736 PLD 1979 Peshawar 23 and PLD 1979 Lahore 564.

57. The learned Attorney General further submitted with the support of case law that in a time of extra-constitutional transition the power of judicial review is to be exercised within certain parameters and with caution.

58. He next submitted that the Referendum Order has been promulgated in pursuance of the Proclamation of Emergency and the PCO No. 1 of 1999 upheld by this Court in Syed Zafar Ali Shah's case, therefore, at the present point of time its validity cannot be questioned. In a time of extra-constitutional deviation where the constitutional provisions are in abeyance the validity of the legislative measures cannot be examined on the touchstone of constitutional provisions. The consequences of the referendum are not to take effect immediately and the contentions raised by the petitioners are academic, presumptive and hypothetical. Even looking at the constitutional provisions, the Referendum Order falls within the scope of Article 48(7) of the Constitution and is within the nature of the law made by the competent authority at a time when the legislature is not in existence. The referendum held by General Ayub Khan received judicial recognition in Asma Jillani's case.

59. The learned Attorney General referred to a number of referendums held in various countries of the world and submitted that appeal to the political sovereign i.e. people of the country can never be regarded as either undemocratic or being against the letter and spirit of the Constitution. He lastly submitted that as pointed out earlier by Syed Sharifuddin Pirzada the verdict in Syed Zafar Ali Shah's case was analogous and similar to that in Begum Nusra Bhutto's case.

60. In rebuttal, Dr. Farooq Hasan submitted that; (1) the challenge to Presidency cannot be termed collateral as in the petition relief of *quo warranto* has been prayed first; (2) the learned counsel for the respondents have raised certain contentions which travel beyond the pleadings (3) Army takeover was welcomed initially but now the motivations have changed; (4) there is no proposition of law that a transient government has extraordinary and unbridled powers; (5) it has been held in Syed Zafar Ali Shah's case that Constitution still remains supreme law of the land and constitutional amendments can be resorted to only if the Constitution does not provide any solution; (6) the Proclamation of emergency and PCO No.1 of 1999 cannot override the Constitution and (7) with the promulgation of the Referendum Order the image of the country has been tarnished.

61. It may be pointed out at the outset that insofar as the legal status of the Referendum Order is concerned, it is unquestionable inasmuch as it has been promulgated in pursuance of the Proclamation of Emergency and the PCO No. 1 of 1999, which have been validated by this Court. In this behalf, it may be mentioned here that the verdict given by this Court in Syed Zafar Ali Shah's case, which holds the field, manifestly shows that the Chief Executive/President of Pakistan has not only been empowered to run the affairs of the Government for a period of three years to achieve his declared objectives and directed to hold the election on a date not later than 90 days before October 12, 2002, but also given power to amend the Constitution and make necessary legislation for the purpose of implementing his declared objectives and for running day-to-day affairs of the government. The Referendum Order was promulgated notwithstanding the provisions of Clause (6) of Article 48 of the Constitution under which a referendum can be held if the President, in his discretion or on the advice of the Prime Minister, considers that it is desirable that any matter of national importance should be referred to a referendum. In the said event, the President can cause the matter to be referred to a referendum in the form of a question which is capable of being answered either by "Yes" or "No". It was strenuously argued that Article 48(6) of the Constitution having not been held in abeyance, the holding of referendum was illegal and unconstitutional particularly when General Pervez Musharraf being not ar

elected President under the Constitution had no authority to hold such referendum. It was contended that the President, who is also the Chief Executive and the Chief of Army Staff, has no authority to act under Article 48(6) of the Constitution. The searching question for ascertaining answer to this argument is under what powers the Chief Executive/President has decided to hold the referendum. The answer lies in the Referendum Order itself the preamble whereof makes it manifest that the Chief Executive/President did not act under Article 48(6) of the Constitution for holding a referendum but promulgated the Referendum Order in pursuance of the Proclamation of Emergency and the PCO No. 1 of 1999 and in exercise of all other powers enabling him in that behalf. As already observed, General Pervez Musharraf had taken over the affairs of the country in extraordinary circumstances and in the light of the judgment of this Court in Syed Zafar Ali Shah' case the Chief Executive/President was fully competent to issue the Referendum Order and thus no objection could be taken because he had the power and authority to do so. We may reiterate here the *ratio* of Syed Zafar Ali Shah's case, which allowed a period of three years to General Pervez Musharraf to hold the reins of government in his capacity as the Chief Executive. It is further pertinent to mention here that the country is being steered towards the path of democracy and this is a transitional or transformation period and in the present scenario the Referendum Order has turned out to be a springboard for reiteration of the commitment of the Chief Executive to hold the general election in October, 2002. It will not be out of place to mention that after the resignation of General Agha Muhammad Yahya Khan Mr. Zulfiqar Ali Bhutto was appointed as the Civilian Chief Martial Law Administrator. The question is could a civilian be appointed as the Chief Martial Law Administrator? In ordinary circumstances the answer would be 'No'. But for transitional period and with a view to effecting peaceful transfer of power it was thought desirable and expedient to hand over power to Mr. Zulfiqar Ali Bhutto as the Chief Martial Law Administrator. We have already held in Syed Zafar Ali Shah's case that the Chief Executive does not have the power to alter the basic structure of the Constitution and the parliamentary form of government is one of the fundamentals of the 1973 Constitution. It may be observed here that General Pervez Musharraf has time and again made statements both within and outside the country that he is committed to hold election in October, 2002 in accordance with the direction given by this Court in Syed Zafar Ali Shah's case.

62. It was also urged before us that in an indirect method General Pervez Musharraf is seeking his election to the office of President through referendum and be it Article 48(6) of the Constitution or the Referendum Order this method cannot be adopted to get oneself elected as President. The argument ignores the fact that in the past on two occasions such a referendum was held, one by Field Martial Ayub Khan and the other by General Ziaul Haq with a view to effecting transfer of power from military to civilian authorities. We have already taken note of the provisions of Article 96-A of the Constitution, which was inserted into the Constitution by Mr. Zulfiqar Ali Bhutto for holding a referendum in order to ascertain whether the nation in the midst of agitations against him wanted to retain him as the Prime Minister or not.

63. This brings us to the nature, definition, concept and meaning of referendum. According to the Oxford English Dictionary,

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Volume XI, Second Edition, 1989, the word 'referendum' is of Latin origin which means 'things to be referred'. It is derived from the French term 'referer' or from the Latin term 'referre' and a compound verb formed from the prefix 're', meaning, 'back' and 'ferre' meaning 'carry' and referendum is an adoption of 'neture gerundive of referre'. The terms 'plebiscite' and 'referendum' are interchangeable. According to the Oxford English Dictionary, Volume XI, Second Edition, 1989, the word 'plebiscite', which is also of Latin origin, is made of two words 'plebis' and 'citus', which mean 'referring to the people'. The word 'plebiscite' is said to be derived from 'plebeian' and etymologically is a decree approved by the common people. In modern politics, plebiscite is a direct vote of the whole of the electors of a State to decide a question of public importance. Direct democracy elections or plebiscite are nearly as old as the idea of democracy. The notion of plebiscite goes back at least to the ancient Rome. A plebiscite is a direct vote by which voters are invited to accept or refuse the measure, program or the government of a person or a party, and is a consultation whereby citizens exercise the right of national self-determination. According to the book 'Direct Democracy' by Thomas E. Cronin, Harvard University Press, the Swiss Constitution of 1848 provided for a popular constitutional initiative. The Swiss have held more than 300 referendums and launched 135 initiatives since 1800s. Similarly, Australia, Italy, the Scandinavian nations, Canada, Ghana and the Philippines have also used referendums. Although the United States is one of the few democracies without a nationwide initiative or referendum, the State Department has some times recommended its use to settle political questions in other nations. In 1978, the US mediators urged President Anastasio Somoza to allow Nicaraguans to vote on the question whether he should remain in office or not.

64. The jurists have divided the subject matter of referendum into four broad categories: -

Constitutional issues: After a revolution or territorial break up, a country needs to give legitimacy to fresh arrangements and to the rules under which it is to operate in the future. A popular vote of endorsement is an excellent way of giving democratic authority to the new regime;

Territorial issues: After 1918 President Woodrow Wilson's principle of self-determination led to the settlement of several border disputes;

Moral issues: Some questions cut across party line and cause deep divisions among politicians, who are normally allied in office or in opposition. Alcoholic beverage prohibition, divorce and abortion are examples of contentions that several countries have sought to settle through referendum;

Other issues: In certain countries the citizens have the right to insist that certain matters be put to a popular vote. In Switzerland, Italy and in a number of States in the United States of America, a vast diversity of questions has been referred to the electorate. See 'Referendums Around the World' by David Butler and Austin Ranney, page 2.

It is not our country alone in which referendum is being held under the Referendum Order. Referendums have been held in many countries of the world on several issues. President Hosni Mobarek of Egypt got elected as President in 1999 for a six-year term through referendum. In January 2002, referendum in Uzbekistan took place as a result of which President Islam Krimov got elected for seven years. See 'Referendums Around the World' by David Butler and Austin Ranney. The book titled 'Referendums in Democratic Governments' by Maija Setala, cited by Mr. Hamid Khan, Sr. ASC, learned counsel for one of the petitioners is comparatively selective

in character inasmuch as it has dealt with only 28 countries. In this very book at page 88, it is mentioned that sometimes referendum is used to achieve symbolic legitimization of the position of the government or its policies. Syed Sharifuddin Pirzada, Sr. ASC, learned counsel for the Federation, who has very ably argued this case, drew our attention to the book titled "Referendums around the World - The Growing Use of Direct Democracy" edited by David Butler and Austin Ranney. In Appendix A to this book under the heading "Nationwide Referendums, 1793-1993" a list of all nationwide referendums in independent countries except for Australia and Switzerland, which have had more referendums than all other countries put together, has been given according to which more than 300 referendums have been held so far in those countries of the world on various subjects.

65. As regards the referendums in Pakistan, it may be observed that the very birth of Pakistan is associated with referendums held in the NWFP, Balochistan and Sylhet. The Frontier Congress suggested that the decision about accession to Pakistan be taken by the Provincial Assembly. Since election to the Assembly was held under the Congress Ministry, the Quaid-e-Azam suggested dismissal of the Congress Ministry and holding of fresh election to the Assembly. This proposal was not acceptable to the Congress and Lord Mount Batten. The Quaid-e-Azam then suggested for holding a referendum in the Frontier Province. The Congress Ministry contended that the referendum was illegal and advised to take the matter to the Court. However, the referendum did take place and although it was boycotted by the Congress, the people with heavy majority voted in favour of Pakistan on the appeal of the Quaid-e-Azam.

66. On 13<sup>th</sup> January 1960 President's Order 3 of 1960 was issued, which provided that elected members of the local councils shall be called upon by the Election Commission to declare by a vote in secret ballot whether or not they have confidence in President Muhammad Ayub Khan. The majority of the votes cast declared confidence in the President and thus he was deemed to have been elected as President for the first term under the Constitution. Article 24 of the 1962 Constitution provided for a referendum whereas Article 153 provided that the Election Commission would be constituted for (a) election to the office of President, (b) general election and (c) referendum. However, the Referendums Act, 1964 was repealed in 1970.

67. Article 277 of the Interim Constitution of 1972 provided that the President could refer any particular matter of public importance to a referendum. This Article was deleted from the draft 1973 Constitution and no provision as to referendum was made in the 1973 Constitution as originally framed. In 1977, the PNA refused to accept the results of the general election alleging massive rigging. At that juncture, Mr. Zulfikar Ali Bhutto got inserted Article 96-A into the Constitution by means of the Constitution (Seventh Amendment) Act, 1977, which provided for obtaining a vote of confidence of the people through referendum. However, no referendum took place under this Article in view of the boycott of the opposition and the Amendment Act lapsed on 13th September, 1977 in view of the provisions of section 1(3) of the said Act.

68. On 1st December 1984, President General Ziaul Haq promulgated President's Order 11 of 1984, which provided for holding a referendum. As a result of the referendum held on 19th December 1984, General Ziaul Haq was deemed to have been duly elected as President for a term of five years. Election to the National and Provincial Assemblies and the Senate was held on 23rd March 1985 and by means of the Revival of the Constitution Order (President's Order No. 14 of 1985), Article 48 was amended and clauses (6) & (7) were added regarding referendum.

69. As already discussed, the Government of Mian Muhammad Nawaz Sharif came to an end on

12th October, 1999 when General Pervez Musharraf took over the affairs of the country in pursuance of the Proclamation of Emergency and the PCO No. 1 of 1999, which were validated by this Court in *Syed Zafar Ali Shah's case*. On 20th June 2001, General Pervez Musharraf assumed the office of President by means of the CE Orders No. 2 and 3 of 2001 and on 9th April 2002 issued the Referendum Order which has been challenged in these proceedings.

70. We have already held that the legal status of the Referendum Order is unquestionable. We would reiterate that the Referendum Order has been validly promulgated and further add that a case for interrupting the process is not made out as the stage is set for holding the referendum on 30th April, 2002. As regards the consequences of the result of referendum spelt out by Article 4 of the Referendum Order, suffice it to say that in the Short Order we have already held as follows: -

“13. As regards the grounds of challenge to the consequences flowing from the holding of referendum under the Referendum Order, apparently these questions are purely academic, hypothetical and presumptive in nature and are not capable of being determined at this juncture. Accordingly, we would not like to go into these questions at this stage and leave the same to be determined at a proper forum at the appropriate time. Since no relief can be granted in these proceedings at this stage, the Constitution Petitions are disposed of being premature.”

71. We would now advert to the CE Orders No. 2 of 2001 and CE Order No. 3 of 2001 against which scathing criticism was made and it was attempted to argue that the former President Mr. Muhammad Rafiq Tarar still continued to hold the office of President and General Pervez Musharraf had illegally assumed unto himself the office of the President. The argument is untenable because in our considered view the CE Orders No. 2 and 3 of 2001 have been validly promulgated by the Chief Executive/President in exercise of the powers conferred on him by virtue of the Proclamation of Emergency and PCO No.1 of 1999, which have been validated by this Court in *Syed Zafar Ali Shah's case*. Accordingly, we hold that Mr. Muhammad Rafiq Tarar has ceased to hold office by virtue of CE Orders No. 2 and 3 of 2001.

72. We may further add here that the CE Order No. 2 of 2001 was promulgated on 20th June, 2001 amending the Proclamation of Emergency and as a result thereof Mr. Muhammad Rafiq Tarar, the then President of Pakistan, ceased to hold office with immediate effect, the National Assembly, the Provincial Assemblies and the Senate of Pakistan suspended by the Proclamation of Emergency were dissolved, the Chairman and Deputy Chairman of Senate and Speakers and Deputy Speakers of the National and the Provincial Assemblies also ceased to hold their respective offices. The CE Order No. 3 of 2001 which was also issued on the same day provided that upon the office of the President becoming vacant, the Chief Executive shall be the President of the Islamic Republic of Pakistan and shall perform all functions assigned to the President by or under the Constitution or by or under any law. It was further provided that if the President is unable to perform his functions either by his absence from the country or for any other reason,

the Chief Justice of Pakistan shall act as President and in case the Chief Justice is unable to act as President the most senior Judge of the Supreme Court shall act as President of Pakistan till the President returns to Pakistan and assumes his functions, as the case may be.

73. On 20th June 2001, General Pervez Musharraf entered upon the office of the President and was administered oath of office provided in the Schedule to the CE Order No. 3 of 2001 by the then Chief Justice of Pakistan. Thereafter, General Pervez Musharraf has been performing the functions of the President. He has sworn in two Chief Justices of Pakistan. He has met foreign heads of the States as well as local politicians including many of the petitioners in his capacity as President of Pakistan. No challenge muchless effective was thrown to the assumption of office of President by him and even in these petitions the challenge has been made only peripherally and collaterally while challenging the Referendum Order. It is well settled that a writ of *quo warranto* cannot be brought through collateral attack. Such a relief has to be claimed directly. We are fortified in this behalf by the judgment of this Court in *Pir Sabir Shah's case* (PLD 1994 SC 738). Not only in this case but also in other cases it was held that for orderly and good governance validity of the appointment of incumbent of public office cannot be impugned through collateral proceedings. Although strictly speaking the principle of *laches* does not apply to the writ of *quo warranto* but the Court cannot close its eyes as regards the conduct of the petitioners appearing before it, which militates against the *bona fides* of the petitions. We are fortified by the judgment of the Lahore High Court in the case reported as *Ali Raza Asad Abdi v Mr. Ghulam Ishaq Khan* (PLD 1991 Lahore 420). One of the petitioners through Dr. Farooq Hasan had also challenged the election of Mr. Ghulam Ishaq Khan as President of Pakistan in the Lahore High Court. That election was held on 12th December 1988 and Mr. Ghulam Ishaq Khan was elected as President of Pakistan and he took oath of office on 13th December 1988 but the petition was filed in 1991. The principle of *laches* was applied by the Lahore High Court while dismissing the said petition. The Lahore High Court held as under: -

“.... the attempt of the petitioner at such a belated stage to call in question the validity of the said election and as a consequence the validity of the acts of the President..... is bound to create confusion and chaos which in national affairs must be avoided as far as possible.....the circumstances which floated manifestly on the service warranted an explanation from the petitioner about the delay in filing this petition. Nothing at all has been urged today to explain the inordinate delay of 2 - ½ years from the date of the election of the President and more than one year passed from 20-3-1990, in filing this petition. This is yet another valid basis for refusing to entertain this petition.”

Similarly, in the case of *Mahmood Khan Achakzai v. Federation of Pakistan* (PLD 1997 SC 426), this Court observed as under:-

“.....delay per se may not be the only ground

to refuse the relief where question of Constitutional importance is involved. Nevertheless, the delay and laches shall have to be considered along with other grounds in refusing to give the relief.”

In the case before us, the petitioners also rose from slumber when the Referendum Order was promulgated in April 2002 although the CE Orders No. 2 and 3 of 2001 were issued in June 2001 and while challenging the Referendum Order, the assumption of office by General Pervez Musharraf has been challenged collaterally. No explanation has been rendered by the petitioners for not filing the petitions after 20th June 2001 till the promulgation of the Referendum Order.

74. Dr. Farooq Hasan also submitted that the CE Order No. 2 of 2001 did not contain a *non obstante* clause and therefore it could not override the Constitution. The perusal of the Order No. 2 would show that it merely amended the Proclamation of Emergency and being an amending order is an integral part of the Proclamation of Emergency. The Proclamation of Emergency clearly provided in para 2(a) that the Constitution of the Islamic Republic of Pakistan shall remain in abeyance. It further provided in para 2(f) that the whole of Pakistan shall come under the control of the Armed Forces of Pakistan. Since the 1973 Constitution itself is in abeyance, it was not necessary to repeat in the CE Orders No. 2 and 3 of 2001 the language used in the Proclamation of Emergency and there was hardly any necessity to provide that the provisions of the Proclamation of Emergency will override the Constitution or shall have effect notwithstanding anything contained therein. The perusal of the CE Order No. 3 of 2001 would clearly reveal that it provides in Article 2 that it shall have effect notwithstanding anything contained in the Constitution or any other law. The CE Order No. 3 of 2001 has not been issued under the Constitution and it is like the earlier extra-constitutional measures, viz. the Proclamation of Emergency and the PCO No. 1 of 1999 and has been issued in extraordinary situation to promote the good of the people and good governance in the country. The CE Orders No. 2 and 3 of 2001 draw their validity from the Proclamation of Emergency and the PCO No. 1 of 1999 and have been issued in exercise of the powers enabling General Pervez Musharraf in that behalf as the Chief Executive of Pakistan. Needless to mention that this Court has validated the Proclamation of Emergency as well as the PCO No. 1 of 1999.

75. Mr. Muhammad Rafiq Tarar was elected as President on 29th December, 1997 and continued in office till 14th October, 1999, i.e. the date when Proclamation of Emergency was promulgated and given effect from 12th October 1999. It clearly provided in para 2 that the President shall continue in office. Thus, he continued as President under the Proclamation of Emergency and not under the 1973 Constitution and the fact that he was not given oath under the PCO No. 1 of 1999 is of no consequence.

76. We may observe that in *Syed Zafar Ali Shah's case* this Court empowered General Pervez Musharraf to perform all such acts and promulgate all legislative measures which are in accordance with and could have been made under the 1973 Constitution as well as acts and measures which promote good of the people or which are required to be done for ordinary orderly running of the affairs of the State or which lead to the establishment and attainment of declared objectives of the Chief Executive. The CE Orders No. 2 and 3 of 2001 were promulgated to promote the good of the people and thus in our view were necessary to establish the objectives of the Chief Executive for the orderly ordinary running of the State within the

scope of the judgment of this Court in *Syed Zafar Ali Shah's case*. These legislative measures have, therefore, been validly issued. The three Orders, i.e. the CE Orders No. 2 and 3 of 2001 and the Referendum Order read together are essential to provide for smooth and orderly transition to the democratic set up after the October 2002 election.

77. Mr. Abdul Hafeez Pirzada, learned Sr. ASC drew our attention to the circumstances in which after the fall of Dacca, General Agha Muhammad Yahya Khan handed over power to Mr. Zulfiqar Ali Bhutto who was declared first Civilian Chief Martial Law Administrator as well as President of Pakistan. Interim

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Constitution was given to the country and then long parleys were held. Tripartite agreements were entered into by the Pakistan People's Party with other political parties. On number of occasions, there was a deadlock on the framing of the 1973 Constitution but eventually the 1973 Constitution was passed by the National Assembly and promulgated on 14<sup>th</sup> August, 1973 and Mr. Zulfikar Ali Bhutto assumed the office of the Prime Minister of Pakistan. We need not go into the details of that history but the perusal thereof does show as to how delicate and difficult is the path for proceeding on the road to democracy and for the transfer of power to the civilian side. As already observed by us, we have no manner of doubt that the present referendum like the earlier referendums held in this country twice before, is a step towards restoration of democracy.

78. Syed Sharifuddin Pirzada also argued that there was similarity between the ratio of the judgments of this Court in Begum Nusrat Bhutto's case and Syed Zafar Ali Shah's case. In Begum Nusrat Bhutto's case, this Court laid down as under: -

“As a result, the true legal position which, therefore, emerges is: -

(i) That the 1973 Constitution still remains the supreme law of the land subject to the condition that certain parts thereof have been held in abeyance on account of State necessity;

(ii) That the President of Pakistan and the superior Courts continue to function under the Constitution. The mere fact that the Judges of the superior Courts have taken a new oath after the proclamation of Martial Law, does not in any manner derogate from this position, as the Courts had been originally established under the 1973 Constitution and have continued in their functions in spite of the proclamation of Martial Law;

(iii) That the Chief Martial Law Administrator, having validly assumed power by means of an extra-Constitutional step, in the interest of the State and for the welfare of the people, is entitled to perform all such acts and promulgate all legislative measures which have been consistently recognized by judicial authorities as falling within the scope of the law of necessity, namely: -

(a) All acts or legislative measures which are in accordance with, or could have been made under the 1973 Constitution, including the power to amend it;

(b) All acts which tend to advance or promote the good of the people;

(c) All such measures as would establish or lead to the establishment of the declared

objectives of the Proclamation of Martial Law, named restoration of law and order, and normally in the country, and the earliest possible holding of free and fair elections for the purpose of restoration of democratic institutions under the 1973 Constitution.

(iv) That these acts, or any of them, may be performed or carried out by means of Presidential Orders, Ordinances, Martial Law Regulations, or Orders, as the occasion may require; and

(v) That the superior Courts continue to have the power of judicial review to judge the validity of any act or action of the Martial Law Authorities, if challenged, in the light of the principles underlying the law of necessity as stated above. Their powers under Article 199 of the Constitution thus remain available to their full extent, and may be exercised as heretofore, notwithstanding anything to the contrary contained in any Martial Law Regulation or Order, Presidential Order or Ordinance.”

The legal and constitutional position as noted above is similar to that which prevails now. In Syed Zafar Ali Shah's case, this Court has held that the Chief Executive may perform acts referred to in the judgment by means of Orders issued by him or through Ordinances on his advice. He has the authority to issue legislative measures. The authority, as in Begum Nusrat Bhutto's case, is subject to certain qualifications. These measures are, however, subject to judicial review. This Court in both the cases has held that “this is not a case where the old legal order has been completely suppressed or destroyed but merely a case of constitutional deviation for a transitional period.” This extraordinary situation was dealt with by this Court in Syed

Zafar Ali Shah's case and it was held as under: -

“...the impugned action has not been taken under any constitutional provision, but it is the result of an extra-constitutional measure and, therefore, reference to the above constitutional provision is of no consequence.”

At another place in the aforesaid judgment, this Court held as under: -

“... action dated 12-10-1999 is in itself sufficient to be equated with something beyond the contemplation of the Constitution, and, therefore, no question regarding the same being attended to by the courts for resolution by treating it as having been taken under the Constitution arises.”

We may observe here that similar is the position of the Referendum Order, which has not been issued under the Constitution and therefore, reference to Articles 41, 42, 43 and 48 of the Constitution is absolutely irrelevant. The Referendum Order, which has been issued under the Proclamation of Emergency and the PCO No. 1 of 1999 cannot be challenged in any manner or the touchstone of the Constitution including any reference to the provisions, which lay down explicitly or implicitly that the offices of the President and the Prime Minister shall be held by two different persons or that the President cannot be the Chief Executive as well as the Chief of Army Staff at the same time. It was also urged that under Article 62 of the Constitution, which contains qualifications for being elected as a member of the National Assembly, which are also the qualifications for election to the office of the President, cannot be read into Article 41(2) of the Constitution. The said Article only provides that the President must be a person qualified to be elected as a member of the National Assembly. The disqualifications listed in Article 62 cannot be read into Article 41(2) in view of the judgement of this court in Aftab Shahbar Mirani v. President of Pakistan [1998 SCMR 1863] which upheld the judgement of the Lahore High Court in the case reported as Muhammad Rafiq Tarrar v. Justice Mukhtar Ahmad Junejo [PLD 1998 Lahore 414]. The same view was also expressed in Muhammad Shahbaz Sharif v Muhammad Iltaf Hussain [PLD 1995 Lahore 541].

79. As regards the provisions of Article 43 of the Constitution and the definition of ‘service of Pakistan’ given in Article 260 read with other provisions of the Constitution including the Second and Third Schedule thereto, all these provisions are in abeyance. Therefore, they have no relevance and the assumption of the office of the President by General Pervez Musharraf and the holding of referendum cannot be challenged on the strength of these provisions.

80. We may also mention here that after the decision in Begum Nusrat Bhutto's case, Mr Justice Maulvi Mushtaq Hussain, Acting Chief Justice of the Lahore High Court was also appointed as the Acting Chief Election Commissioner. The appointment was challenged and

this Court in *Zulfiqar Ali Bhutto v. State* [PLD 1978 SC 40] at pages 58-59 held that on the basis of doctrine of necessity, the holding of two offices by Mr. Justice Mushtaq Hussain was not at all illegal. The Court observed as follows:

“58. These categories of the various types of permissible actions were spelt out after a review of the leading authorities on the doctrine of necessity which purported to lay down that such actions would be construed or deemed to be necessary in the interest of the welfare of the people and the State. The reason underlying such a view obviously is that once an extra-Constitutional action or intervention is validated on the ground of State or civil necessity, then, as a logical corollary it follows that the new Regime or Administration must be permitted, in the public interest, not only to run the day-to-day affairs of the country, but also to work towards the achievement of the objectives on the basis of which its intervention has earned validation. In other words, if it can be shown that the impugned action reasonably falls within one or the other of the enumerated categories, then it must be construed as being necessary and thus held valid under the law of necessity. The word “necessity” has, therefore, come to be used in this context as a term of art, having a certain constitutional and legal connotation as distinct from its ordinary dictionary meaning.

“59. It seems to us, therefore, that it must be clearly understood that in judging whether an action taken by the President or the Chief Martial Law Administrator is valid under the law of necessity, the Court is not to sit in appeal over the executive or legislative authority concerned, nor substitute its own discretion for that of the competent authority. The responsibility for the relevant action, its methodology and procedural details, must rest on the authority. In exercising its power of judicial review the Court is concerned with examining whether the impugned action reasonably falls within any of the categories enumerated by this Court in Begum Nusrat Bhutto’s case, while spelling out the powers which may be exercised by the Chief Martial Law Administrator, or the President of Pakistan acting on his advice. As to what is

reasonable or not in this context must be judged by the standards of an ordinary, prudent and reasonable citizen, and will depend on the prevailing circumstances and the object with which the action has been taken. These observations are, of course, without derogation to the other accepted principles governing the exercise of powers conferred by Article 199 of the Constitution.”

This judgement was followed in *Rustam Ali v. Martial Law Administrator* [PLD 1978 Karachi 736] by a Division Bench of the High Court of Sindh at Karachi. In *Nasirullah Khan Babar v. Chief of the Army Staff* [PLD 1979 Peshawar 23], the issue under consideration was whether General Ziaul Haq could hold the offices of the Chief of Army Staff and the President of Pakistan simultaneously. A Division Bench of the Peshawar High Court at pages 27 and 28 paragraph 8 held as follows:

“It is true that by combining two offices, respondent No.1 was deviating from the provisions of Article 43 of the Constitution but the all important question that arises is as to whether respondent No.1 acted under the Constitution or that his or that of the former President’s action was an extra-Constitutional action. In this context it will be useful to refer to the President’s Succession Order, 1978, the Preamble whereof reads:-

“In pursuance of the Proclamation of fifth day of July, 1977, read with the Laws (Continuance in Force) Order, 1977 (C.M.L.A. Order No.1 of 1977) and in exercise of all powers enabling him in that behalf, the President is pleased to make the following Order.”

“It will be seen that this Presidential Order was not under the Constitution but was in pursuance of the proclamation of the 5th day of July, 1977, read with the Laws (Continuance in Force) Order, 1977. Now paragraph 2 (1) of the Laws Continuance in Force Order No.1 provides:-

Notwithstanding the abeyance of the provisions of the Constitution of the Islamic Republic of Pakistan, hereinafter referred to as the Constitution, Pakistan shall, subject to

this Order and any order made by the President and any Regulation made by the Chief Martial Law Administrator be governed as nearly as may be, in accordance with the Constitution.

So to speak this paragraph gives power to the President or to the Chief Martial Law Administrator to make Constitutional deviations or in the other words issue extra-Constitutional orders. On a second look at the Begum Nusrat Bhutto's case it will appear that this Laws Continuance in Force Order was declared as valid.

29: "If the holding of two posts by Mr. Justice Mushtaq Hussain simultaneously in pursuance of President Post-Proclamation Order could not be sifted at the touchstone of the Constitution, how could the President's Succession Order, 1978 be subjected to such an attack or sifting. Even though two opinions are possible, it cannot be reasonably argued that the combination of the two posts by respondent No.1 was in any way an act which would not tend to advance or promote the good of the people or an act which was not required for the ordinary orderly running of the State. Taking into consideration the requirements of the present situation it would rather appear that by combination of the two posts the respondent No.1 has not only done away with a cumbersome formality but has also assumed direct responsibility and incidental accountability for his actions as Chief Executive of Pakistan.

At page 31 in paragraph 14 the Court observed as follows:-

"14. It will follow, we cannot substitute our own discretion for that of a competent authority and we are clear in our mind that ultimate responsibility for an action taken, its methodology and procedural details must rest with respondent No.1 in all capacities, which he has assumed. The possibility of two opinions on certain points may be there but to say that it is the duty of this Court to judge in the exercise of its Constitutional jurisdiction, the political implications of this or that action will be an argument to which

we cannot subscribe subject to law, every party whether in minority or majority, is at liberty to question the wisdom of this or that decision of the Federal Government, as presently constituted, but all that we have to ensure is whether an impugned action reasonably falls within any of the categories enumerated in Begum Nusrat Bhutto's case on pages 5 to 7 of this order. This criterion in our judgment presents no serious challenge to the impugned actions.”

In *Malik Ghulam Jilani v. Province of Punjab* [PLD 1979 Lahore 564] the appointment of General Zia as President of Pakistan was called into question. It was held by the Lahore High Court that the appointment promoted the good of the people and being within the scope of the judgement in *Begum Nusrat Bhutto's case* was valid. At page 586 of the report it was held as follows:-

“The imposition of Martial Law, therefore, stands validated on the doctrine of necessity and the Chief Martial Law Administrator is entitled to perform all such acts and promulgate all legislative measures which have been consistently recognized by judicial authorities as falling within the scope of the law of necessity”. This principle would apply to the appointment of President also for which, in the present situation, there is no guidance in the Constitution. Resort to extra-constitutional measures is not only justified but is necessary. The President's Order 13 is, therefore, a valid legislation.”

81. A word may also be said about the definition of the term ‘abeyance’. This expression was interpreted by the Lahore High Court in *University of Punjab v. Rehmatullah* [PLD 1982 Lahore 729]. It was held that the word ‘abeyance’ means state of suspension or dormant condition. In a time of constitutional abeyance, therefore, the validity of the Orders issued by the Chief Executive insofar as these conform to the judgment of this Court in *Syed Zafar Ali Shah's case*, cannot be questioned on the basis of being at variance with the constitutional provisions and while examining such acts or measures this court would not sit in appeal on the political wisdom of such acts and measures. It will also not determine whether it was proper to do so. This Court while retaining the power of judicial review over the acts and orders and measures of the Chief Executive noted that the power of judicial review should be exercised with caution. We may also observe here that the power of judicial review has to remain strictly judicial and cannot be undertaken with a view to encroaching upon the domain of other branches of the government. In *Farooq Ahmed Khan Leghari v. Federation of Pakistan* [PLD 1999 SC 57] which was approved in *Syed Zafar Ali Shah's case*, this Court observed that only limited power of judicial review in such matters vested with the Court. It was held as under: -

“However, whether in a particular situation the extent of powers used is proper and

justifiable, is a question which would remain debatable and beyond judicially discoverable and manageable standards unless the exercise of the excessive power is so palpably irrational or *mala fide* as to invite judicial intervention. In fact, once the issuance of the Proclamation is held valid, the security of the kind and degree of power used under the Proclamation falls in a narrow compass. There is every risk and fear of the Court undertaking upon itself the task of evaluating with fine scales and through its own lenses the comparative merits of one rather than the other measure. The Court will, thus, travel unwittingly into the political arena and subject itself more readily to the charges of encroaching upon policy making. The 'political thicket' objection sticks more easily in such circumstances."

82. It was also argued that the essence of the Referendum Order was *mala fide*. As far as *mala fide* is concerned, this Court interpreted and defined the same in the case reported as Saeed Ahmed Khan v. Federation of Pakistan (PLD 1974 SC 151). It was observed as under: -

"*Mala fides* is one of the most difficult things to prove and the onus is entirely upon the person alleging *mala fides* to establish it, because, there is, to start with, a presumption of regularity with regard to all official acts, and until that presumption is rebutted, the action cannot be challenged merely upon a vague allegation of *mala fides*. As has been pointed out by this Court in the case of the Government of West Pakistan v. Begum Agha Abdul Karim Shorish Kashmiri (1), *mala fides* must be pleaded with particularity, and once one kind of *mala fides* is alleged, no one should be allowed to adduce proof of any other kind of *mala fides* nor should any enquiry be launched upon merely on the basis of vague and indefinite allegations, nor should the person alleging *mala fides* be allowed to a roving enquiry into the files of the Government for the purposes of fishing out some kind of a case.

"*Mala fides*" literally means "in bad faith". Action taken in bad faith is usually action taken maliciously in fact, that is to say, in which the person taking the action does so out of personal motives either to hurt the

person against whom the action is taken or to benefit oneself. Action taken in colourable exercise of powers, that is to say, for collateral purposes not authorized by the law under which the action is taken or action taken in fraud of the law are also *mala fide*. It is necessary, therefore, for a person alleging that an action has been taken *mala fide* to show that the person responsible for taking the action has been motivated by any one of the considerations mentioned above. A mere allegation that an action has been taken wrongly is not sufficient to establish a case of *mala fides*, nor can a case of *mala fides* be established on the basis of universal malice against a particular class or section of the people”

Similar view was expressed in Fauji Foundation v. Shamimur Rehman (PLD 1983 SC 457) and it was held that the exercise of legislative power either by the Assembly or by the President is not made dependent on any motive or wisdom and the legislation cannot be struck down on grounds of *mala fide* in view of these judgements.

83. It was argued that after holding of the referendum, General Pervez Musharraf and his regime have no intention to hold the election, the referendum would be unfair in the absence of the electoral rolls and such referendum would be a device to assume absolute powers. It was also urged before us that after the referendum General Pervez Musharraf will have to seek validity of the referendum from the Parliament and in consequence of the mandate obtained in the referendum he will seek enhancement of powers and thus the parliamentary system would come to an end and Presidential form of government will come into existence. All these apprehensions, in our view, are purely imaginary, academic, presumptive and hypothetical and in fact such questions have been raised premature. We cannot anticipate nor can the petitioners as to the course of future events. This Court has always declined to go into academic exercises in respect of unborn issues. In the case reported as Asma Jilani v Government of Punjab [PLD 1972 SC 139] this Court at page 166 observed as follows:-

“The Courts do not decide abstract, hypothetical or contingent questions or give mere declarations in the air. “The determination of an abstract question of constitutional law divorced from the concrete facts of a case”, as observed by the same learned Chief Justice, “floats in an atmosphere of unreality; it is a determination in vacuum and unless it amounts to a decision settling rights and obligations of the parties before the Court it is not an instance of the exercise of judicial power.

“There is no duty cast on the Courts to enter upon purely academic exercises or to

pronounce upon hypothetical questions. The court's judicial function is to adjudicate upon a real and present controversy which is formally raised before it by a litigant."

Reference may also be made to the cases reported as *Muhammad Saddiq Javaid Chaudhry v The Government of West Pakistan* [PLD 1974 SC 393], *Muhammad Hassan v. Government of Sindh and others* [1980 SCMR 400], *Asad Ali v Federation of Pakistan* [PLD 1998 SC 161] and *Sajjad Ali Shah v Asad Ali* [1999 SCMR 640].

84. It was also argued before us that the Chief Election Commissioner and the Election Commission of Pakistan had no authority to conduct the referendum in view of provisions of Articles 213(3), 218 and 219 of the Constitution. The argument is fallacious because it ignores the fact that the provisions of the Constitution are in abeyance. As mentioned earlier, the Referendum Order has been issued by the Chief Executive notwithstanding anything contained in the Constitution and under the Proclamation of Emergency and the PCO No. 1 of 1999 and all other powers enabling him in that behalf. Furthermore, the Chief Election Commissioner, in view of Article 213(3), has such powers and functions as are conferred on him by the Constitution and law. We have already held that the Referendum Order is a validly promulgated Order of the Chief Executive. The Referendum Order empowers the Chief Election Commissioner and the Election Commission of Pakistan to hold and conduct referendum and this is not open to challenge on any ground or criteria laid down in *Syed Zafar Ali Shah's case*. It was repeatedly argued that the provisions for referendum in the Constitution are general in nature while Article 41 specifically provides the mode for election to the office of the President through an electoral college of the National Assembly, the Provincial Assemblies and the Senate and Article 41 being the special provision would prevail over Article 48(6). Mr Syed Sharifuddin Pirzada urged that Article 41 and Article 48(6) of the Constitution, if read together and harmonized, provide plural remedies, courses and options. It may be observed that the principles for interpreting constitutional documents as laid down by this Court are that all provisions should be read together and harmonious construction should be placed on such provisions so that no provision is rendered nugatory. The learned counsel appearing for the respondents have rightly urged that appeal to the political and popular sovereign, i.e. the people of Pakistan cannot be termed as undemocratic and cannot be regarded as against the letter and spirit of the Constitution. As already observed, Articles 41, 43 and 48 and the definition of 'service of Pakistan' in Article 260 and Schedules to the Constitution are not at all relevant and have no bearing upon the issue involved in these proceedings.

85. Before parting with the judgment, we would like to record our deep appreciation of the valuable assistance rendered by the learned counsel for the parties and the learned Attorney General for Pakistan during the hearing of the case.

CHIEF JUSTICE

JUDGE

JUDGE

JUDGE

JUDGE

JUDGE

JUDGE

JUDGE

JUDGE

Islamabad

April 27, 2002

APPROVED FOR REPORTING

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