IMPORTANT CASES DECIDED BY THE SUPREME COURT (APRIL 2009 - MARCH 2010)

10. IMPORTANT JUDGMENTS OF THE SUPREME COURT RENDERED DURING 24th MARCH, 2009 TO 31ST MARCH, 2010.

10.1 Sindh High Court Bar Association Vs. Federation of Pakistan (PLD 2009 SC 879) – [Proclamation of Emergency of 3rd November, 2007]

On November 3, 2007 General Pervez Musharraf, Chief of Army Staff and also the President of the country declared a state of emergency by means of the Proclamation of Emergency of that date. Simultaneously, he promulgated Provisional Constitution Order 2007 (PCO) and the Oath of Office (Judges) Order 2007, which purported to provide that only those Judges of the Supreme Court and High Courts would continue to hold office who would make oath under the PCO and the Oath Order. The same evening, the Hon'ble Chief Justice of Pakistan, Justice Iftikhar Muhammad Chaudhry constituted a seven-member Bench of the Supreme Court, which issued an interim restraint order directing, inter alia, that no Judge of the Supreme Court or a High Court would make oath under any extra-constitutional measure imposed by General Pervez Musharraf. However, in utter violation of the seven-member Bench order of the Supreme Court, the Chief Justice of Pakistan and a large number of Judges including those of High Courts, who did not make oath under the PCO and the Oath Order, were prevented from performing their constitutional functions and some of them were placed under house Abdul Hameed Dogar made oath under Justice instruments/measures of General Pervez Musharraf and was installed in the office of Chief Justice of Pakistan. With him, four other Judges of the Supreme Court also made oath and occupied the office of the Judges of the Supreme Court.

One Tikka Iqbal Muhammad Khan and Watan Party through its President challenged the validity of the aforesaid actions of General Pervez Musharraf by means of constitutional petitions filed in the Supreme Court under Article 184(3) of the Constitution. Justice Abdul Hameed Dogar and such other Judges, in the cases of Tikka Iqbal Muhammad Khan, reported as PLD 2008 SC 6 and PLD 2008 SC 178) and the Review Petition reported as PLD 2008 SC 615 validated on the touchstone of the law of necessity and the principle of *salus populi suprema est* lex (welfare of the people was the supreme law) the Proclamation of Emergency as well as other unconstitutional instruments of the 3rd November, 2007 and the actions taken thereunder including amendments made in the Constitution and insertion of Article 270AAA whereby validation was purported to be given to all such acts of the General.

The judicial crises, which had erupted with the actions of November 3, 2007 continued to deepen with every passing moment. General Pervez Musharraf relinquished the office of Chief of Army Staff and assumed the office of President for another term of five years after Justice Abdul Hameed Dogar and other Judges declared him qualified to contest the Presidential election. General elections were held in the country on February 18, 2008 as a result whereof the Parliament and Provincial Assemblies came into existence and Governments at the Federal and Provincial levels were formed. Later,

General Pervez Musharraf resigned from the office of President, too. Ultimately, the Chief Justice of Pakistan and other deposed Judges were restored in the month of March 2009 to the position they were holding prior to November 3, 2007.

The present case, instituted in 2009 under Article 184 of the Constitution, challenged the validity of the Proclamation of Emergency, Provisional Constitution Order No.01 of 2007, the Oath of Office (Judges) Order, 2007, the Provisional Constitutional (Amendment) Order 2007, the Constitution (Amendment) Order 05 of 2007, the Constitution (Second Amendment) Order 6 of 2007, the Islamabad High Court (Establishment) Order 7 of 2007, the High Court Judges (Pensionary Benefits) Order 8 of 2007, the Supreme Court (Number of Judges) Act (No. XXXIII) 1997 and the judgments and orders passed by Justice Abdul Hameed Dogar and other Judges during the interregnum validating the actions of General Pervez Musharraf.

The fourteen-member bench of the Supreme Court headed by the Chief Justice of Pakistan, vide judgment dated 31 July 2009 declared unconstitutional and void ab initio the Proclamation of Emergency and the other aforesaid instruments/measures promulgated by General Pervez Musharraf on 3rd Nov 2007 or thereafter in pursuance thereof. The Court held that the Constitution could not be suspended even for a single moment in a manner not authorized by the Constitution itself and declared General Pervez Musharraf as a usurper of power. The Court also declared all the amendments introduced in the Constitution and other statutes to be unconstitutional. It was observed that the unconstitutional acts of General Pervez Musharraf were never extended protection/validation by the Parliament through a constitutional amendment. That the said amendments were unconstitutionally and illegally validated by the so called judgments in Tikka Iqbal Muhammad Khan's case, therefore, all such instruments and measures including constitutional amendments and the judgments in cases titled as Tikka Iqbal Muhammad Khan v. General Pervez Musharraf (PLD 2008 SC 6 and PLD 2008 SC 178) and Review Petition titled Tikka Iqbal Muhammad Khan v. General Pervez Musharraf (PLD 2008 SC 615) were set aside, being per incuriam of the law laid down in Zafar Ali Shah's case (PLD 2000 SC 869).

The Court held that there were no such circumstances that could warrant the imposition of emergency in the country as described under Article 245 of the Constitution. Rather, it was found that the apparent reason leading to the actions of November 3, 2007, was to prevent the eleven-member Bench of the Supreme Court from hearing the case of Wajihuddin Ahmed v. Chief Election Commissioner of Pakistan, reported as PLD 2008 SC 25 wherein the qualification of General Pervez Musharraf to contest election of the President while holding the office of Chief of Army Staff was called in question. The material produced before the Court amply showed that the measures of November 3, 2007 were the result of apprehensions of General Pervez Musharraf of not getting a favourable verdict from the apex Court in the aforesaid case.

The appointment of Justice Abdul Hameed Dogar as Chief Justice of Pakistan was declared to be unconstitutional and void ab initio, to be deemed to have never existed in the eye of law. It was declared that the office of the Chief Justice of Pakistan never fell vacant. The increase in the number of Judges by means of the Finance Act, 2008 and the appointment of Judges in the Superior judiciary without the consultation of de *jure* Chief Justice were also declared unconstitutional and illegal. The appointments of all those Judges who were appointed in consultation with Justice Abdul Hameed Dogar were declared unconstitutional and void ab initio. The persons taken from the Bar were declared to have ceased to hold office while those taken from service were reverted to their respective courts. Those Judges who disobeyed the order of the seven member Bench were directed to be proceeded against in terms of Article 209 of the Constitution for violating the order of the Supreme Court.

However, the Supreme Court in the interest of justice gave protection to the judgments and orders which were rendered by Justice Abdul Hameed Dogar and such other Judges in the cases of the ordinary litigants. The establishment of the Islamabad High Court vide the Islamabad High Court (Establishment) Order 2007, was declared to be un-constitutional and of no legal effect. All the matters pending before the Islamabad High Court were directed to be transferred to the courts of competent jurisdiction. All the Ordinances promulgated by the President and the Governors before 03.11.2007 and from 03.11.2007 to 15-12-2007, which were given permanence by the PCO No 1 of 2007 and the judgments in the Tikka Iqbal's case were shorn off their purported permanence. All such Ordinances were directed to be placed before the Parliament and the respective Provincial Assemblies for their proper validation in accordance with Articles 89 and 128 of the Constitution.

The Supreme Court while acknowledging and respecting the mandate given by the sovereign authority i.e. electorate to the democratically elected government in the general election held on 18th February 2008, upheld the principle of trichotomy of powers as enshrined in the Constitution. The apex Court held that any declaration made in the judgment would not affect the election of the members of the Parliament and the Provincial Assemblies, the offices of President, Prime Minister, etc. The Court thus secured the sanctity of the Constitution as being the supreme law of the land.

10.2 Justice Khurshid Anwar Bhindar Vs. Federation of Pakistan (PLD 2010 SC 483) [Review of PCO Judges Case]

The instant Civil Review Petitions for the review of the judgment dated 31 July 2009 in the case titled Sindh High Court Bar Association v. Federation of Pakistan were filed by persons who were appointed as Judges of the High Courts between 4th November, 2007 and 23rd March, 2009 upon the recommendation of, and in consultation with Justice Abdul Hameed Dogar. In the course of hearing of the review petitions, contempt notices under Article 204 of the Constitution read with the Contempt of Court laws were issued to two categories of Judges i.e. the first comprising those who were Judges of the Supreme Court or of a High Court on 03.11.2007, and the second category was of those persons who were notified as

Judges of the Supreme Court or of High Courts during the period from 04.11.2007 and 23.03.2009 in violation of the order dated 3rd November, 2007 passed by the seven-member Bench of Supreme Court. In response to the notices, vast majority of the Judges tendered their unconditional apologies. The Judges (sitting as well as retired) who had expressed their regrets and repentances by tendering unconditional apologies and affirmed their remorse through withdrawal of the petitions and submission of resignations were discharged. Some of the judges contested the contempt notices and also pursued the Review Petitions. The Supreme Court observed that the appointment of judges in the superior judiciary could be made in consultation with the de jure Chief Justice and, as held in Al-Jehad Trust case (PLD 1996 SC 324), even an acting Chief justice could not be a consultee in terms of Article 193 of the Constitution. It was further held that all those persons who were notified as Judges of the Supreme Court or of High Courts between 04.11.2007 and 23.02.2009 on the basis of 'consultation' with Justice Abdul Hameed Dogar. were not Judges of the concerned Courts, regardless of the fact that they purported to occupy such office. It was declared that such persons had no locus standi to file Civil Miscellaneous Applications or Review petitions. That the removal of all such judges was in consequence of declaration of the actions of November 3, 2007 as unconstitutional and void ab initio.

The Supreme Court in the instant review petitions held that the judgments of the Court on questions of law were binding on all courts of the land and the ultimate responsibility of interpreting the law rested with the Court itself. It was observed that all the matters agitated in the review petitions had already been decided in accordance with the law in the case of Sindh High Court Bar Association v. Federation of Pakistan and needed no further consideration. The Court further observed that as the Provisional Constitution Order, 2007 and the Oath of Office (Judges) Order, 2007 were declared unconstitutional and void ab initio, therefore, any superstructure built on such orders passed in the garb of Proclamation of Emergency was bereft of any legal sanctity and that constitutional jurisdiction under Article 184(3) of the Constitution could not be invoked in aid of injustice.

It was reiterated that as all appointments made in the superior judiciary had been declared unconstitutional and void *ab initio* in the impugned judgment under Article 184(3) of the Constitution, therefore, the principle of natural justice was not applicable. That the Courts would refuse to intervene where the judicial consensus was that the grant of relief would amount to retention of ill-gotten gains or would lead to injustice or aiding the injustice.

The Supreme Court declared that the petitioners had neither any legitimacy nor had any legal right to hold the office of Judges of the Superior Courts when the judgment on the basis of which they were holding said offices had been set aside. That the presumption of knowledge of the said judgment could be validly drawn and the petitioners could not take the plea that they were unaware and should have been afforded proper opportunity of hearing. As to the maintainability of the

review petitions, the Supreme Court observed that no yardstick could be fixed as to who could file review petition against a judgment of the Court nor any embargo could be placed on the right of an ordinary litigant to file a review petition for the redress of his grievance, which would always be decided on the basis of the facts and circumstances of each case. It was observed that the powers as conferred upon Supreme Court under Article 188 of the Constitution, Order XXVI of the Supreme Court Rules, 1980 read with Order XLVIII, C.P.C. could be invoked in appropriate cases as Supreme Court had a prerogative and privilege to do so if found in the interest of justice, fair play and equity.

In consequence, all the review petitions filed against the judgment dated 31 July 2009 in case titled <u>Sindh High Court Bar Association v. Federation of Pakistan</u> were dismissed.

10.3 Justice Iftikhar Muhammad Chaudhry, Chief Justice of Pakistan Vs. President of Pakistan

(PLD 2010 SC 61) - [Restoration of Chief Justice Case]

The instant Constitution Petition under Article 184(3) of the Constitution was filed by the Chief Justice of Pakistan, after a reference was filed against him by General Pervez Musharraf, Chief of Army Staff/President of Pakistan on March 9, 2007 and restrained him from performing the functions of his office and appointed an Acting Chief Justice in his place. The Chief Justice, through the instant petition impugned the validity of the various actions of General Pervez Musharraf including, such as the filing of the Reference by the President under Article 209(5) of the Constitution calling upon the Supreme Judicial Council to inquire into the allegations of misconduct against the Chief Justice of Pakistan; the composition of the Supreme Judicial Council and its competence to inquire into the conduct of the Chief Justice of Pakistan; the validity of the order denuding the Chief Justice of Pakistan of the powers conferred on him by the Constitution; and the manner in which the Supreme Judicial Council was proceeding with the same.

The petition was heard by a thirteen-member Bench, which unanimously declared the petition to be maintainable under Article 184(3) of the Constitution. The direction (Reference) made by the President under Article 209(5) of the Constitution was set aside by a majority of 10 to 3. The Judges (Compulsory Leave) Order, 1970 and the order passed by the President directing that the Chief Justice of Pakistan shall be on leave were unanimously declared to have been passed without lawful authority. The Court unanimously set aside the orders of the President and that of the Supreme Judicial Council restraining the Chief Justice of Pakistan from acting as such.

Appointments of the Acting Chief Justices of Pakistan in view of the annulment of the two restraining orders (by the President and the Supreme Judicial Council) and the compulsory leave order in respect of Chief Justice of Pakistan were unanimously declared to have been made without lawful authority. The Court, however, observed that such invalidity would not affect the ordinary working of the

Supreme Court or the discharge of any other constitutional and legal obligations by the Acting Chief Justices of Pakistan during the period in question and such declaration was so made by applying the *de facto* doctrine.

The Court also discussed the impact of incorporation of ouster of jurisdiction clauses in the Constitution or in any other law and held that mere incorporation of such clauses did not by itself preclude a court from entering into the arena sought to be protected from the exercise of power of judicial review. It was observed that it was not the privilege but in fact the obligation of the Court to examine the ouster clauses and to determine the extent of the immunity claimed in the matter. It was held that no amount of immunity would ever be sufficient to protect acts which had been taken mala fide or which had been taken without jurisdiction or which were coram non judice.

The maintainability of constitutional petition was discussed in the light of the provisions of Article 199(5) of the Constitution. The judgment postulated that Article 199 (5) allowed issuance of writ, inter alia, to all courts and to tribunals of all kinds, however, it kept certain courts and tribunals outside the said purview and commanded that no writ could be issued to the Supreme Court of Pakistan, to a High Court and to a court or a tribunal established under any law relating to the Armed Forces. It was observed that the Writ should not be issued from one High Court to another High Court or from one Bench of a High Court to another Bench of the same High Court because that could seriously undermine and prejudice the smooth and harmonious working of the superior courts, however, this should never be understood to mean that no writ could ever be issued to a Judge in his personal capacity or where a Judge was working as persona designata.

Explaining the status of the Supreme Judicial Council, the court observed that the Council comprising of the Chief Justice of Pakistan (except when the reference be against him) and two most senior Judges of Supreme Court and two most senior Chief Justices of the High Courts, is a forum entitled to the highest respect, however, it could not be accorded the status of a court. That in situation of extraordinary nature, the Supreme Judicial Council would be amenable to the jurisdiction of Supreme Court under Article 184 of the Constitution. Principle of comity among Judges of the superior courts is only a rule of propriety and could never be considered an impediment in the way of providing justice to an aggrieved person.

The Supreme Court held that even a temporary interference with the office of the Chief Justice or a Judge, even when he has not been suspended but in fact appointed to another judicial office, amounted to his removal from office. It was observed that no constitutional, legal or legislative framework of Pakistan recognized any inherent, ancillary or incidental powers with the President of Pakistan to suspend or to restrain from working Chief Justice of Pakistan whose tenure in office stood guaranteed by the Constitution. That any restraint on the exercise of judicial powers by a Judge or any restraint on him to act as a Judge during the pendency of the

proceedings envisaged by Article 209 of the Constitution was not allowed by the Constitution. That the Constitution conferred no power on anyone, including the President, to suspend a Judge of a Superior Court or to restrain him from acting as such. The August Court set aside the order of the President of Pakistan commanding the Chief Justice of Pakistan to be on compulsory leave till submission of the report of the Supreme Judicial Council and the Chief Justice of Pakistan was restored to his office.

10.4 Dr. Mobashir Hassan Vs. Federation of Pakistan [PLD 2010 SC 265]

Succinct facts leading to the instant case were that on 5th October, 2007, the then President of Pakistan General Pervez Musharraf, in purported exercise of powers conferred by clause (1) of Article 89 of the Constitution, issued the National Reconciliation Ordinance, 2007 (NRO) whereby, certain amendments were made in the Criminal Procedure Code, 1898, the Representation of the People Act, 1976 and the National Accountability Ordinance, 1999. The NRO came under challenge before the Supreme Court, through these petitions. Pending decision of these petitions, on 3rd November, 2007, emergency was proclaimed in the country by the then President of Pakistan and also the Chief of Army Staff. Under the garb of Provisional Constitution Order, 2007, Provisional Constitution (Amendment) Order, 2007 was issued, whereby, Article 270AAA was inserted in the Constitution, which provided protection to all the laws including the Ordinances in force on the day on which the Proclamation of Emergency of 3rd November 2007 was revoked. As a result of above constitutional amendment, the NRO was given to have attained permanence and thus not required to be placed before the Parliament.

The Supreme Court, vide its judgment dated 31st July 2009, in the case of Sindh High Court Bar Association v. Federation of Pakistan (PLD 2009 SC 879) declared the Proclamation of Emergency of 3rd November, 2007, the Provisional Constitution Order, 2007, Provisional Constitution (Amendment) Order, 2007, the Oath of Office (Judges) Order, 2007 and the President's Order No.5 of 2007, to be unconstitutional, illegal and void ab initio, as a result whereof Article 270AAA stood deleted from the Constitution. Consequently, the NRO, as well as 37 other Ordinances, were shorn off the permanency purportedly provided under Article 270AAA of the Constitution and sanctified by the judgment passed in Tikka Iqbal Muhammad Khan's case. However, through the same judgment, this Court, while supporting the doctrine of trichotomy of powers, enabled the Parliament to reconsider and, if thought fit, to enact, all the 37 Ordinances including the NRO, as Acts of Parliament. In pursuance of above judgment, the NRO was placed before the Standing Committee of the National Assembly on Law & Justice, however, despite finalization of the report of the Standing Committee on NRO and before its approval by the Chairperson of the Committee, the Minister concerned withdrew the Bill under Rule 139 of the Procedure & Conduct of Business in the National Assembly, 2007. As a result, the NRO could not be passed by the Parliament, within its extended life, therefore, it lapsed.

The Supreme Court held that the NRO was promulgated as a result of deal between two individuals for their personal objectives and was designed to benefit certain classes of individuals against whom cases were registered between 01.01.1986 and 12.10.1999. That the NRO was not promulgated for "national reconciliation" but for achieving the objectives which absolutely had no nexus with the "national reconciliation" because the nation of Pakistan, as a whole, had not derived any benefit from the same; contrary to it, it had been promulgated for achieving the individuals' reconciliation, according to admitted evidence on record.

It was observed by the apex Court that the provisions of Sections 2 & 7 of the NRO clearly extended benefit only to the criminals, involved in minor or heinous crimes and certain holders of public office involved in corruption and corrupt practices, as such, the NRO could not be considered to be a legislation aimed at achieving the object of national reconciliation. The NRO was declared to be an instrument *void ab initio* being *ultra vires* and violative of various constitutional provisions including Article Nos. 4, 8, 25, 62(f), 63(i)(p), 89, 175 and 227 of the Constitution. All steps taken, actions suffered, and all orders passed by whatever authority, any orders passed by the courts of law including the orders of discharge and acquittals recorded in favour of the accused persons, were also declared never to have existed in the eyes of law and resultantly of no legal effect. All cases in which the accused persons were either discharged or acquitted under Section 2 of the NRO or where proceedings pending against the holders of public office were got terminated in view of Section 7 thereof, were declared to have revived and relegated to the status of pre October 5, 2007 position, i.e. the promulgation of the NRO.

The Supreme Court directed all the concerned courts including the trial, the appellate and the revisional courts to summon the persons accused in such cases and then to proceed in the respective matters in accordance with law from the stage from where such proceedings had been brought to an end in pursuance of NRO. All cases which were under investigation or pending enquiries and which had either been withdrawn or where the investigations or enquiries had been terminated on account of the NRO were declared to have revived and the relevant and competent authorities were directed to proceed in the said matters in accordance with law. Any benefit derived by any person in pursuance of Section 6 of the NRO was also declared never to have legally accrued to any such person.

The Court took serious notice of the conduct of the then Attorney General for Pakistan by observing that in view of the provisions of Article 100(3) of the Constitution, the Attorney General for Pakistan could not have suffered any act not assigned to him by the Federal Government or not authorized by that Government, therefore, such communications addressed by him withdrawing the requests for Mutual Legal Assistance or abandoning the status of a Civil Party in such proceedings abroad or which had culminated in the termination of proceedings before the competent fora in Switzerland or other countries or in abandonment of the claim

of the Government of Pakistan to huge amounts of allegedly laundered moneys were unauthorized, unconstitutional and illegal acts. The Federal Government and other concerned authorities were ordered to take immediate steps to seek revival of the said requests, claims and civil party to proceedings status, etc.

The Court also directed the establishment of a Monitoring Cell in the Supreme Court of Pakistan comprising the Chief Justice of Pakistan or a Judge of the Supreme Court to be nominated by him to monitor the progress and the proceedings in the cases under the NAB Ordinance. Likewise, similar Monitoring Cells were directed to be set up in the High Courts of all the Provinces comprising the Chief Justice of the respective Province or Judges of the concerned High Courts to be nominated by them to monitor the progress and the proceedings in cases in which the accused persons had been acquitted or discharged under Section 2 of the NRO.

The Court declared the National Reconciliation Ordinance, 2007 as a whole, particularly its Ss. 2, 6 and 7 as void *ab initio*, being ultra vires and violative of Arts. 4, 8, 12, 13, 25, 62(f), 63(1)(h), 63(1)(p), 89, 175 and 227 of the Constitution

10.5 Commissioner of Income Tax Vs. Eli Lilly Pakistan (2009 SCMR 1279)

In the instant case the Supreme Court discussed the question of retrospective application of subsection (5A) of section 122 of the Income Tax Ordinance, 2001. The main appeals arose out of a judgment of the Sindh High Court passed in Constitutional Petitions Nos. D-643 to D-646 of 2004 filed by the respondent Messrs Honda Shahra-e-Faisal (Ltd.). The assessments in respect of the aforesaid respondents pertaining to the assessment year 2002-2003 were finalized on 20.05.2003 under section 59(1) of the Income Tax Ordinance, 1979 (repealed), but the Income Tax authorities initiated proceedings under section 122 (5A) of the Ordinance calling upon the respondents to show cause as to why the above finalized assessments be not amended. Aggrieved thereof, the respondents filed Constitution Petitions before the High Court of Sindh taking the plea that since subsection (5A) of section 122 was inserted by the Finance Act, 2003 dated 17.06.2003, effective from 01.07.2003, therefore, the same could not be given retrospective effect and consequently it would not be applicable to the assessments finalized before 01.07.2003. The High Court, vide its judgment dated 02.03.2005, allowed the petitions and held that the provision contained in subsection (5A) of section 122 of the Ordinance, inserted with effect from 01.07.2003 was not retrospective in operation and the assessments finalized before the said date could not be reopened/revised/amended in exercise of the jurisdiction conferred upon the income tax authorities under the above provision. Other appeals arose out of the judgments of High Court of Sindh, Lahore and Islamabad, passed in Writ Petitions filed against issuance of show cause notices as well as upon Tax References, all decided on the basis of Honda Shahra-e-Faisal's case.

The moot point in the appeals was the retrospective application or otherwise of the provisions of section 122(1), (5) & (5A) of the Ordinance. The Supreme Court held that in the course of interpretation of statutes, the Court while ascertaining the manifest, undoubted and true will and intent of the legislation, was fully competent and empowered not only to fill the lacuna or supply the omissions, but also to point to the deficiencies or the excesses that had crept into the legislation due to the un-skillfulness of the draftsman against the legislative will. It was observed that the tendency to bypass the remedy provided in the relevant statute and to press into service constitutional jurisdiction of the High Court was to be discouraged, though in certain cases invoking of such jurisdiction instead of availing the statutory remedy would be justified e.g. when the impugned order/action was palpably without jurisdiction or *mala fide*.

It was observed that the provisions of section 122 of the Ordinance were prospective in their application and did not apply to the assessment of a year ending on or before 30.06.2002. That Section 65 of the repealed Ordinance provided a period of five years for additional assessment and such assessments were to be dealt with under the said provision in accordance with original section 239(1) of the Ordinance. That the assessments completed under the repealed Ordinance would be subject to the provisions of the said Ordinance, as originally provided in the un-amended section 239(1), but not clearly and properly provided in the Ordinance at the amendment stage. To fill in this lacuna in the impugned judgments, the Supreme Court directed that the assessment of any year ending on or before 30th June, 2002 would be governed by the repealed Ordinance and would be dealt with as if the Ordinance had not come into force.

10.6 Abdul Wahab Vs. Secretary, Government of Balochistan (2009 SCMR 1354)

The petitioners in this case were performing their duties in the office of Director-General Planning and Design Circle, Public Health Engineering Department, Government of Baluchistan, Quetta as Senior Clerk and Peon respectively. Their services were dispensed with as a result of conversion of 93 out of 140 posts into non-development budget from the development budget. Being aggrieved the petitioners preferred Departmental Representation which was decided on the intervention of the Provincial Ombudsman and was rejected. Being aggrieved the appeals were preferred before the Federal Service Tribunal which were dismissed *vide* judgment impugned, hence, the present petitions were filed before the Supreme Court.

The Court observed that no one could be allowed to act in an arbitrary, fanciful and whimsical manner and one had to be judicious, fair and just in taking such decision. That the discretionary power conferred on government should be exercised reasonably and subject to existence of essential conditions, required for exercise of such powers within the scope of law. That all judicial, quasi judicial and administrative authorities while exercising mandatory or discretionary jurisdiction must follow the rule of fair exercise of power in a reasonable manner and must ensure dispensation of justice in the spirit of law. That the seven instruments that were most useful in structuring of

discretionary power were open plans, open policy statement, open rules, open findings, open reason, open precedents and fair informal procedure. It was further observed that the power to exercise discretion did not authorize the authorities to act arbitrarily, discriminately and with *mala fides*; rather they had to act without any ulterior motive; and where the President of Pakistan's exercise of discretionary powers under Article 58(2)(b) of the Constitution were found to be violative of terms and spirit of that Article, the orders were liable to be struck down.

Resultantly, the petitions were converted into appeals and allowed and the appellants were reinstated in service with immediate effect.

10.7 Ch. Muhammad Munir Vs. Election Tribunal, Mandi Bahauddin (2009 SCMR 1368)

In this case, the Supreme Court rendered its verdict as to the applicability of the principle of 'notorious disqualification' of a returned candidate. Succinct facts were that the petitioner and respondent No.4 contested the election in the year, 2005 for Nazim and Naib-Nazim respectively of Union Council No.112, Bhagnagar, Tehsil Sarai Alamgir, District Gujrat, whereas, respondents Nos.2 and 3 also contested the election of the office of Nazim and Naib-Nazim respectively of the said union council. The petitioner and respondent No.4 were declared and notified as returned candidates for the office of the Nazim and Naib-Nazim of the said Union Council respectively. Respondents Nos.2 and 3 feeling themselves dissatisfied with the election result of the petitioner and respondent No.4 challenged the same by filing Election Petition before the Election Tribunal, Mandi Bahauddin. The Election Tribunal accepted the Election Petition of respondents Nos.2 and 3, held the election of the petitioner and respondent No.4 as void and consequently declared the respondents Nos.2 and 3 as returned candidates for the seats of Nazim and Naib-Nazim of the said Union Council to have been duly elected within the purview of Rule 12(4), the Punjab Local Government Elections Rules, 2005. The petitioner feeling aggrieved from the judgment of the Election Tribunal filed writ petition before the Lahore High Court, Lahore challenging the judgment of the Election Tribunal, which was dismissed by the High Court.

The Supreme Court held that in a case of disqualification of a returned candidate having not been found to be not 'notorious' invariably fresh election on the vacant seats would be held though the disqualification may relate to the concealment of any fact required to be correctly and truly given in the prescribed declaration filed with the nomination paper by a candidate or affect his candidature as a validly nominated candidate or to his eligibility to contest the election, therefore, in absence of any mandate provided by the law or under the Punjab Local Government Elections Rules, 2005 it could not be claimed with inflexibility where the disqualification was not 'notorious' for any act or omission, the other candidates who contested the election having secured second highest votes to be declared as elected to the vacant seats without any exception, seemed to be not a just and correct approach to the issue without looking into the facts and circumstances of each case warranting otherwise.

It was held that the High Court failed to exercise its jurisdiction by not examining the question apparent on the face of the record that the disqualification of the petitioner and respondent No.4 Raja Muhammad Aslam was not 'notorious' and thus the phrase 'throwaway votes' was not applicable and as to whether respondents Nos.2 and 3 were entitled to have been declared as the candidates elected respectively on the seats which fell vacant on account of the disqualification of petitioner and respondent No.4.

Thus, the petitions were converted into appeals and allowed. The Election Commission of Pakistan was directed to take necessary steps to conduct fresh election of the vacant seats of Nazim and Naib-Nazim of both the Union Councils.

10.8 Saadia Usman Vs. Muhammad Usman Iqbal Jadoon (2009 SCMR 1458)

In this case the petitioner filed a suit for recovery of dower, dowry articles and maintenance allowance against her husband Usman Iqbal Jadoon before the Family Judge, Islamabad. The trial Court decreed the suit and held the appellant entitled to the recovery of dower amount of Rs.500,000. Further, the appellant and her minor daughter Minal Usman were allowed maintenance at Rs.7,000 per month each from the date of desertion, whereas, the suit of the respondent for restitution of conjugal rights was conditionally decreed in his favour subject to payment of dower, maintenance and making arrangements for the departure of the appellant along with her daughter to Australia where the respondent was then posted. In appeal filed by the appellant, the Additional District Judge, Islamabad enhanced the amount of maintenance to Rs.10,000/per month each for both the appellant and her daughter. By the same judgment, the appeals filed by the respondent were dismissed. Being aggrieved of the said judgment, the parties filed three writ petitions before the High Court, which were dismissed with the modification in the judgment of the Appellate Court that the decree for recovery of the dower in the sum of Rs.5, 00,000 would be recoverable subject to law at the time of dissolution of marriage by death or divorce.

The Supreme Court in its findings observed that the Qur'anic word "Nihla" signified the giving of something willingly, of one's own 'accord, without expecting a return for it; thus, dower was a gift given by the bridegroom to the bride; however, the Holy Qur'an was silent on the two types of dower, i.e. prompt and dower. It was further observed that as per the text of the book titled "Kitab-al-fiqh al-Madhahab-al-arba'a", the Hanfi jurists allowed both categories of Mahr Mu'ajjal, (prompt, i.e. immediately payable) and Mu'wajjal (deferred, i.e. payable later, after a certain time). However, where a part of the dower was described as Mu'wajjal, i.e. deferred but no time limit was fixed for its payment, according to some jurists, the condition was valid and the time of the deferred payment was either death or divorce. That this was considered to be the correct exposition of the law (the preferred view); thus, the division of dower into prompt and deferred was based on

the consistent opinion expressed from time to time by the Islamic jurists and the superior Courts, including the Supreme Court of India

Ultimately, the Court held that the prompt dower was payable on demand during the subsistence of the marriage tie whereas the deferred dower would be payable on the time stipulated between the parties, but where no time was stipulated, it would be payable on dissolution of marriage either by death or divorce. It was further held that the deferred dower would not become "prompt" merely because the wife had demanded it. In the present case, as no time was fixed for payment of the deferred dower, the Court held that it would be payable in the eventuality of dissolution of marriage either by death or divorce. Resultantly, the appeals of both the parties were dismissed.

10.9 Dr. M. Sohail Karim Hashmi Vs. Federation of Pakistan (2009 SCMR 1472)

The facts forming background of this case were that the petitioner was appointed as Medical Officer (BPS-17) in the Ministry of Health (MoH) through the Federal Public Service Commission (FPSC). Later, he was appointed to an administrative post in BS-18 in the MoH, again through the FPSC. While working as Assistant Director-General (ADG) in the MoH, he applied for the post of Additional Registrar/Additional Secretary (BPS-19) in the PMDC advertised in the press. After having been selected, he was appointed as such on probation on 07.11.2000. Vide Notification dated 04.12.2000 he relinquished the charge of the post of ADG on 04.12.2000 and was relieved to join the new post in the PMDC. Having worked as Additional Registrar/Additional Secretary of the PMDC for a period slightly over one year, he was appointed as Secretary/Registrar (BPS-20) of the PMDC. Based upon inquiry report dated 04.9.2007, conducted under the order of the Federal Government under section 35 of the Ordinance, the PMDC issued charge-sheet to the petitioner for having committed acts of commission and omission, which constituted inefficiency, misappropriation, misuse of power and misconduct. The validity of his appointment, first as Additional Registrar and later as Registrar, PMDC was also questioned in the inquiry proceedings. The petitioner submitted his reply to the charge-sheet. Later on, show-cause notice was issued to him stating, inter alia, that the charges had been established and proved against him. The petitioner challenged the show-cause notice before the Lahore High Court by means of a writ petition but the High Court directed the petitioner to appear before the respondent. Accordingly, the competent authority held that the petitioner was a regular Federal Government officer having lien, who was liable to be repatriated on the demand of his parent department and the authority competent to initiate proceedings against him was his parent department, i.e. the MoH. The petitioner challenged the above order before the High Court in writ petition, which was dismissed being not maintainable in view of the bar contained in Article 212 of the Constitution and the matter was remitted to the Federal Service Tribunal so as to treat the same as a service appeal. In the meanwhile, the petitioner also challenged the aforesaid order before the Service Tribunal. By the impugned judgment, the Tribunal declared the petitioner to be a civil servant with lien on the post of ADG (P&D), MoH and directed him to report to the MoH for assumption of charge on the post of ADG (P&D). The petitioner challenged the said order before the apex Court.

The petitions were converted into appeals and the same were allowed by the Supreme Court by observing that there was a difference between 'direct appointment' and 'appointment by transfer on deputation basis'. That the provisions relating to retention of lien or right of reversion were beneficial in nature vis-à-vis the government servants, which ought to be construed accordingly to their advantage, and not to their detriment. It was further observed that in case, for any valid reason, the incumbent was not confirmed or retained in the new service, the provision of F.R. 14-A would stand activated in his favour. That where an incumbent was allowed to apply for a post advertised in the press, and on his selection and appointment he was relieved to join that post, the parent department ought to retain his lien, and on completion of his probation, he should be given an option to rejoin his parent department, and in case of his failing to do so, his lien ought to be terminated and he should be apprised accordingly.

10.10 Shah Hussain Vs. The State

(PLD 2009 SC 460)

In the instant case, the accused was sentenced to 10 years' R.I. and imprisonment to life on two counts and the sentences were ordered to run consecutively. The benefit of section 382-B, Cr.P.C. was not given to him and the remissions granted by the Federal and the Provincial Governments during his presentence custody period were also not allowed to him.

The Supreme Court held that the proviso (a) to section 35, Cr.P.C. prohibited the grant of consecutive sentence in one trial beyond the period of 14 years and as the aggregate sentence of the accused amounted to sixty years, the same was contrary to the express provision of the statute. Therefore the sentences were directed to run concurrently. Regarding the extension to the accused the benefit of section 382-B, Cr.P.C, the Court observed that at the time of passing the sentence, it was mandatory for the trial Court to take into consideration the pre-sentence custody period of the accused. That the refusal to take into consideration the pre-sentence custody period at the time of passing the sentence was illegal for the reason that if a court sentenced a convict to imprisonment for life, which was the alternate but maximum sentence for the offence of murder, but did not make allowance for the pre-sentence custody period, it would be punishing the convict prisoner for more than the maximum legal punishment. Further held that the convict-prisoners who were granted the benefit of section 382-B, Cr.P.C., should be entitled to remissions granted by any authority in their post-sentence detention or during their pre-sentence detention in connection with such offence, however, the same should not be available to the convicts of offences under the National Accountability Ordinance, 1999, Anti-Terrorism Act, 1997, the offence of Karo Kari, etc., i.e., where the law itself prohibited the same. The Court held that under Article 45 of the Constitution, the President enjoyed unfettered powers to grant remissions in respect of offences

Supreme Court ordered that copies of the judgment should be sent to the Federal Secretary Interior, Chief Secretaries, Home Secretaries, Inspectors General of Police, Inspectors General of Prisons and Registrars of the High Courts of the Provinces for information and onward transmission to the concerned quarters, including the prisoners, etc., for the purpose of its implementation in letter and in spirit. Concerned authorities were directed to submit report within a period of two weeks to the Registrar of Supreme Court.

10.11 Qasim Wasti Vs. Secretary to the Government of Punjab (2009 SCMR 1204)

The appellants in the instant case were the civil servants, who were directly recruited as Extra Assistant Commissioners (E.A.C.) through the Public Service Commission. The respondents in these appeals had joined the service as Tehsildars; got promoted in due course and belonged to the same cadre of E.A.Cs. to which the appellants belonged. The appointment of Tehsildars in the Province was regulated and governed by the West Pakistan Tehsildari and Naib Tehsildari Service Rules, 1962. According to the said Rules, the appointing authority for the purpose was the Board of Revenue, which made selection of the persons qualified for direct appointment as Tehsildars. The persons so selected were then required to undergo training, extending normally, upto a period of two years as envisaged by the West Pakistan Tehsildari and Naib Tehsildari Departmental Examination and Training Rules and then to pass the requisite departmental examination and it was thereafter that the said selected persons were posted as Tehsildars.

The case of the Tehsildars group was that they should be deemed to have been appointed as Tehsildars on the dates that they were selected against the said posts and that the period spent by them in receiving the above referred training had to be counted towards their service for the purpose of seniority etc. The claim of the E.A.C. group, however, was that the training in question was not an in-service but a pre-service training and that the appointment of Tehsildars should be reckoned from the date on which they were actually posted as Tehsildars after completion of their training and passing of the required departmental examination.

The Supreme Court resolved the controversy by holding that Rule 8 of the above mentioned Rules of 1962 provided that "any person selected for appointment to the service shall, before his appointment to the service, be required to complete successfully such training and pass such departmental examinations and produce such certificates within such period or in such number of attempts as may be prescribed by Government from time to time." That the Rule clearly prescribed, without any ambiguity, that after a person was found fit and selected for the post of a Tehsildar and before he was appointed to the said post, a lot was needed to be done i.e. he had, *inter alia*, to successfully complete the prescribed training and to pass the prescribed departmental examination. And the said prescribed training was a two-year training ordained by Rules 50 to 58 of the above mentioned Rules of 1969 and the departmental examination was the one envisaged by Rule 3 thereof. It, therefore, followed that a person selected for

appointment did not get appointed as a Tehsildar till he successfully completed the said two years training and passed the said departmental examination. That as per Rule 4 and other Rules, including Rules 50 to 58 of the said Rules of 1969, a person so selected for appointment was called a 'candidate' till he had successfully completed the said two years' training and had passed the requisite departmental examination and till he was actually appointed/ posted as a Tehsildar.

The Court drew the inference that a person selected for appointment as a Tehsildar could not be said to have been appointed to the said post or to have been inducted into service till after he had satisfied the requirements of the above quoted Rule 8 of the said 1962 Rules.

The Court held that in the case of Tehsildars, a person could not be said to have got inducted into service on his selection for appointment to the said post but should be deemed to have been so appointed after he had successfully completed the prescribed training, and had passed the required departmental examination and when he was actually posted as a Tehsildar. It was further declared that the period spent by such a selected person in successfully completing the said training and passing the said departmental examination, could not be counted towards his service for the purposes of seniority etc. The impugned findings of the Service Tribunal to the contrary being not sustainable in law were, therefore, set aside.

10.12 Federation of Pakistan Vs. Mian Muhammad Nawaz Sharif

(PLD 2009 SC 531, Short Order) and (PLD 2009 SC 644, Detailed Reasons) (PLD 2009 SC 531, Short Order) and (PLD 2009 SC 644, Detailed Reasons)

Review Petitions were filed by the Federation of Pakistan and Mian Muhammad Nawaz Sharif and Mian Shahbaz Sharif against the judgment dated 25.02.2009 of the Supreme Court. Facts in brief leading to the institution of Review Petitions were that Mian Muhammad Nawaz Sharif filed his nomination papers for the election of NA-123, Lahore. Initially one of the contesting candidates namely Mian Ikhlaq Ahmad Guddu, filed an objection petition before the Returning Officer questioning the candidature of Mian Muhammad Nawaz Sharif. The objection petition was dismissed, inter alia, on the ground that the objection petition had not been supported by any documentary evidence despite opportunities given to the objector. This order was challenged in appeal before the Election Tribunal. However, on 27.05.2008 the said objector withdrew his appeal but the same day the other candidate, namely, Noor Elahi filed an application under Order I, Rule 10, C.P.C. with the prayer that he might be allowed to be transposed as appellant. He also raised similar objections. This application was dismissed with the observation that he could file a separate appeal. Later on, he filed a time barred appeal on 28.05.2008. In the meanwhile, one Syed Khuram Shah also filed an application dated 26.05.2008 under section 14(5-A) of the Representation of the People Act, 1976 alleging that Mian Nawaz Sharif was disqualified to contest election for being convicted by the NAB. The Election Appellate Tribunal passed a split judgment on 30.05.2008. One view

was that he was qualified to contest elections because he had been granted pardon in terms of Article 45 of the Constitution. Contrary to this, the other view was that the pardon under the afore-referred provision could not wash away conviction and its consequences. On account of this divergence of opinions, the matter was referred to the Chief Election Commissioner, who vide order dated 1-6-2008, held that since the appeals of the objectors had not been disposed of within the period specified in the election schedule, the same were deemed to have been dismissed in view of section 14(6) of the Act. Aggrieved by the order of the Chief Election Commissioner dated 1-6-2008, respondent Noor Elahi and Syed Khuram Shah filed separate writ petitions before the High Court, which were accepted vide judgment dated 23.06.2008, by a Full Bench of the Lahore High Court. Mian Muhammad Nawaz Sharif was declared to be disqualified to contest the elections inter alia, for being a convict in terms of the judgment of Accountability Court in Reference No. 2 of 2000 dated 22.07.2000 under section 9-A(v) of the National Accountability Ordinance. As Mian Muhammad Nawaz Sharif did not appear before the High Court, the Federation of Pakistan challenged the judgments of the High Court through separate Civil Petitions for leave to appeal which were dismissed by two separate judgments of the Supreme Court, which were sought to be reviewed in these petitions.

In these Review Petitions the Supreme Court observed that the judgment dated 25.02.2009 under review as well as the judgments of the Lahore High Court dated 23.06.2008 were ex-parte on account of which certain factual aspects and legal provisions having bearing on the issues raised, were not brought to the notice of both the Courts and therefore were not considered, leading to miscarriage of justice. That while realizing the exceptional and extraordinary events relating to unconstitutional removal of Judges of the superior Courts which in the judgments under review had been described as, "enforced by a brutal force, by deviating from constitutional provisions", triggered an unprecedented nationwide movement, culminating in the restoration of those Judges, and during the interregnum, non-appearance of Mian Muhammad Nawaz Sharif and Mian Muhammad Shahbaz Sharif before the Courts then constituted, could neither be termed as contumacious nor reflecting acquiescence, therefore, the findings of fact rendered on such assumptions merited to be interfered with in the review jurisdiction.

The Hon'ble Court held that both the appeals filed under section 14(5) of the Representation of Peoples Act 1976 and the information laid or directed against the acceptance of nomination papers were mandated to be decided by or before 31st of May 2008, the period fixed for deciding the appeals. Since the appeals were not decided by then, the order of the Chief Election Commissioner holding that the appeal stood dismissed was in accord with section 14(6) of the Act and the finding that information laid under section 14(5A) of the said Act could remain pending and decided beyond the said date fixed for disposal of appeals was not in consonance with the legislative intent.

It was held that the High Court not only allowed respondents' writ petitions against this order but while doing so, passed two inconsistent judgments of even date i.e. while in the case of Mian Muhammad Shahbaz Sharif, it held that the source

information/petition should be deemed to be pending before the Appellate Tribunal, whereas in the case of Mian Muhammad Nawaz Sharif, declared him disqualified to contest the elections. That the mandate of Article 225 of the Constitution was not appreciated in the context of the instant cases. The Article placed a bar to challenge an election dispute except through an election petition under the Representation of the People Act, 1976. In exceptional circumstances, however, the qualification or disqualification of a candidate could be challenged under Article 199 of the Constitution provided the order passed during the election process was patently illegal. That the law did not provide any remedy either before or after the election, and the alleged disqualification was floating on record requiring no probe and enquiry. In the cases in hand, the issues of unpaid loans, of Court contempt and of filing false affidavit were disputed questions of fact which could not have been adjudicated upon in the proceedings under Article 199 of the Constitution and even the material placed before the Court was not sufficient to render the impugned findings.

With respect to the 'Presidential Pardon' in the case of Mian Muhammad Nawaz Sharif, the Court observed that it stood admitted by the Federation of Pakistan. That to allege that it was conditional or qualified pardon required deeper probe which exercise entailed factual enquiry. Similarly, the question whether petitioners were hit by Article 63(h) and (1) of the Constitution or by section 99 of the Act could also not have been decided by the High Court or by the Supreme Court in the constitutional jurisdiction. The judgments under review, therefore, were declared to be not in accord with the law laid down by the Supreme Court in a number of cases.

It was held that one of the onerous functions of the Supreme Court was to protect the Constitution and to sustain democracy. Democracy was not merely holding of periodical elections or of governance by legislative majority. It was a multidimensional politico-moral concept epitomizing the abiding values of equality, human dignity, and tolerance, enjoyment of fundamental rights and due process of law. That whether it was the issue of denial of a substantive right or of construing a statutory provision, these principles should weigh with the Court. That Article 4 of the Constitution was a restraint on the legislative, executive and judicial organs of the State to abide by the rule of law and abdication of that awesome responsibility by any organ would lead to arbitrariness and injustice.

The Court observed that no one should be condemned unheard. The non-hearing of Mian Muhammad Nawaz Sharif and Mian Muhammad Shahbaz Sharif was an error on the face of record meriting interference in review jurisdiction. That the legislative intent with regard to disposal of appeals against orders of Returning Officers could be appreciated by a combined reading of subsections (5) and (6) of section 14 of the Representation Act. That the High Court judgment dated 23-6-2008 declaring Mian Muhammad Nawaz Sharif to be disqualified and Shahbaz Sharif to be qualified for being inconsistent was violative of legislative intent and reflective of misconception of law and fact .

The Court held that in the case of Mian Muhammad Shahbaz Sharif, there was no conviction in a criminal case while the alleged disqualifications in the cases of both the petitioners were not floating on surface warranting interference by the High Court under Article 199 of the Constitution. The Court, therefore, accepted the review petitions of Mian Muhammad Nawaz Sharif and Mian Muhammad Shahbaz Sharif and dismissed that of the Federation.

10.13 Mian Muhammad Nawaz Sharif Vs. State (PLD 2009 SC 814)

Succinct facts of this case were that the petitioner, Mian Muhammad Nawaz Sharif, was elected Prime Minister of Pakistan in the year 1996 for the second time and held the additional portfolio of Minister of Defence. He appointed General Pervez Musharraf as the Chief of Army Staff. On 12.10.1999, at around 4:30 p.m., the petitioner replaced him by General Ziauddin Ahmed. The news of this change was flashed on the electronic media at 5:00 p.m., around that time General Pervez Musharraf was on board PIA Flight No. PK-805, returning to Pakistan from Sri Lanka. After the announcement of the change and while the aircraft was still in air, the Pakistan Army took over important installations and premises, including the Pakistan Television, Islamabad and the Prime Minister House and seized power, apparently as a reaction to the change in the leadership of the Army. General Pervez Musharraf later declared himself as Chief Executive and took control of the affairs of the country, whereas the petitioner along with his close relatives and political associates was taken into custody and detained. It was alleged that in order to prevent General Pervez Musharraf's return to the country, the petitioner ordered that the flight PK-805 should not be permitted to land at Karachi or any other airport in the country and instead be diverted to another country.

FIR No.201 of 1999 was registered under sections 402-B, 365, 120-B, 324/34, P.P.C. read with section 7 of Anti-Terrorism Act, 1997, wherein it was alleged that the petitioner and his co-accused had conspired and engineered the hijacking of aircraft of Flight PK-805 and put at risk the lives of the passengers on board as there was imminent danger of its crash in view of the shortage of fuel, and thereby also attempted to commit Qatl-e-Amd. Later, Aminullah Chaudhry, co-accused became an approver in the case and was accordingly granted conditional pardon. The remaining seven accused were tried by the Anti-Terrorism Court and were acquitted except the petitioner, who was convicted and sentenced to imprisonment for life under sections 402-B, PPC and 7(ii) of the Anti-Terrorism Act, 1997, each and to pay compensation of Rs.2000,000 to the passengers. His entire property was ordered to be confiscated.

Against the judgment of the Trial Court, three appeals were filed; one by the petitioner against his conviction and sentences and the other two by the State, for enhancement of the sentence of the petitioner from life imprisonment to death and against the acquittal of co-accused. The appeals were heard by a Full Bench of the Sindh High Court and were disposed of by a short order dated 30.10.2000. Two Members of the Bench maintained the conviction of the petitioner with modification in the sentences

to the extent that the separate sentences under Section 402-B, PPC and Section 7(ii) of the Anti-Terrorism Act, were to be read as single sentence under Section 402-B, PPC. The order of forfeiture of the entire property ordered by the Trial Court was also altered to forfeiture of moveable and immoveable property of the petitioner to the extent of the value of Rs.500 millions. The order of payment of compensation under section 544-A, Cr.P.C. to the passengers of the Flight was set aside. The appeals filed by the State were dismissed. The third Member of the Bench did not find the petitioner guilty of hijacking and, therefore, set aside his conviction under Section 402-B, PPC, but found him guilty of the offence of abduction and thus, sentenced him under section 365, PPC to undergo 3 years' rigorous imprisonment with a fine of Rs.500. Detailed judgment in the case was delivered after more than a year on 01.11.2001. By then, the petitioner had left the country to live in exile after he was granted pardon by the President of Pakistan. The petitioner returned to the country on 25.11.2007 and filed the petition for leave to appeal on 28.04.2009 before Supreme Court, against the judgment and order of the High Court of Sindh, assailing his conviction and sentence.

The Supreme Court observed that that the effects of the grant of pardon, even full, were not the same as an order of acquittal by a Court of law. That the former was granted in the exercise of executive authority as a matter of grace, regardless of merits, and could not be a true substitute for a finding of not guilty through judicial determination. Further observed that despite pardon, the conviction itself remained intact until annulled through a judicial process. Thus, notwithstanding the pardon granted to the petitioner, whether complete or limited, he remained invested with a cause to get the question of his guilt determined judicially. Till his acquittal by a Court of law, he would continue to carry the stigma of conviction for a crime. It was observed that every citizen was entitled to have his name cleared, if unjustifiably sullied and the petitioner, who remained Prime Minister of the country twice and was leading a major political party, had the right to remove the stigma of conviction for a crime and that too of hijacking, generally associated with terrorism.

The Court condoned the period of delay of more than eight years in filing the present petition for leave to appeal, by holding that the petitioner was prevented from returning to Pakistan. Moreover, the petitioner did not want his case to be heard by those judges who had taken oath under the Provisional Constitution Order, 2007. The Court observed that as per second proviso to Rule 4 of Order XXIII of the Supreme Court Rules, 1980, it was empowered to extend the period of limitation on the ground of sufficient cause. That the circumstances which prevented the petitioner from filing petition against his conviction and sentences were extraordinary and were considered to be sufficient cause for extension of time.

Judicial scrutiny of the evidence brought to the notice of the Court showed that as serious differences had developed between the petitioner and General Pervez Musharraf, the then Chief of Army Staff and the petitioner was led to believe that General Pervez Musharraf was planning a military takeover, therefore the petitioner

brought about a change in the military leadership. It was under these circumstances that the petitioner had decided to divert the aircraft carrying General Pervez Musharraf to another country, firstly, to prevent division in the Army ranks with two claimants to the office of the Chief of Army Staff and secondly, to protect the constitutional government headed by the petitioner. At the relevant time the petitioner was not only possessed with the authority under Section 6 of the Ordinance to order diversion of the aircraft but its exercise was not unjustified. The instructions by the petitioner to divert the flight were, therefore, not unlawful. The prosecution failed to prove the ingredients of the offence of hijacking. The finding of the Appellate Court on this point was reversed.

The apex Court while taking notice of the inordinate delay in lodging the FIR observed that no plausible reason had been put forward by the prosecution. It was further observed that the prosecution had failed to establish paucity of fuel in the aircraft and the aircraft could safely land at the Nawab Shah or Karachi. The conviction under offence of abduction was also set aside by the Court on the ground that the prosecution had failed to prove the essential elements of the same. The petitioner was exonerated of all the charges and the judgments and decrees of the lower fora were set aside.

10.14 Ghulam Abbas Niazi Vs. Federation of Pakistan

(P L D 2009 Supreme Court 866)

Brief facts were that Ghulam Abbas Niazi and Muhammad Saleem, appellants, were the carriage contractors who had entered into a contract with Pakistan Air Force authorities for the carriage of jet petroleum (JP-4) from Karachi to different Pakistan Air Bases. They had duly executed Hired Mechanical Transport contracts. Over the passage of time, it was detected that seals of the tankers were broken; the jet petroleum was sold on its way to the destination by stealing the material. This was done in connivance with the Air Force officers, who were made to receive the short supply of jet petroleum in collusion with the carriers for monetary considerations.

The serving Air Force officers were tried for theft under section 52 of the Pakistan Air Force Act, 1953, while the appellants were tried under section 37(e) of the Act for "endeavoring to seduce the officers of the Air Force from their duty or allegiance to the Government". Upon conclusion of the trial, on 30.09.2002, Muhammad Saleem was sentenced to 25 years rigorous imprisonment, subsequently reduced to 20 years. Ghulam Abbas Niazi on conclusion of his trial on 08.02.2003 was sentenced to 23 years rigorous imprisonment.

The above convictions and sentences were challenged before Lahore High Court on the ground that both the appellants being civilian contractors, were not subject to the Pakistan Air Force Act, 1953 and hence could not be tried by illegal application of section 2(dd)(i) of the Act. That even if conceded, the offence committed by them was either theft or criminal breach of trust, falling under section 52 of the Act for which the civilians could not be tried by the Court Martial. This plea was rejected by the High Court on twofold-ground; namely, that the appellants, due to their conduct, had become

subject to the Pakistan Air Force Act, 1953 and hence rightly tried under section 37(e) of the Act; and thus that their writ petitions were not maintainable under Article 199(3) of the Constitution.

The Supreme Court held that the bar under Article 199(3) of the Constitution was not attracted to a case, where authority involved had acted without jurisdiction, mala fide and coram non judice. Authorities had conducted separate trial of Air Force officials who were convicted for theft only whereas civilian contractors were put to Field General Court Martial on the charges of mutiny and endeavoring to seduce officers of Air Force from their duty or allegiance to government Offence. It was observed that the acts committed by accused persons was theft simpliciter as defined by section 52 of Pakistan Air Force Act, 1953, read with section 34, PPC for which civilians could not be tried by Field General Court Martial and the trial of civilians by Field General Court martial was coram non judice, without jurisdiction and mala fide in law. That the civilian accused were subject to normal law of the land and the same was recognized by Pakistan Air Force Act, 1953 as well except when they were guilty of commission or attempt to commit offence of sedition or mutiny. Further observed that mala fide in law was apparent from the fact that Pakistan Air Force officers accused were not only tried for much smaller offence as compared to civilian accused but punishment awarded to such accused officers were more than four times lesser than that awarded to civilian accused. That in service, officers of highly disciplined force should have been punished more severely as compared to civilian contractors. That the Pakistan Air Force officers should also have been booked for corruption and corrupt practices.

The Supreme Court observed that such disparity in punishment represented mala fide in the application of law. That the act of unlawfully attracting provisions of sections 2(dd)(i) and 37(e) of Pakistan Air Force Act, 1953, in order only, to hook civilian contractors was highly unjustified. The Court found it rather a stunning situation as same evidence in same set of circumstances in one trial against Air Force officers was treated as theft while against civilian accused it was treated as mutiny. If civilian accused had seduced Air Force officers from their duty or allegiance to government and hence committed mutiny, then Air Force officers must also have been tried for mutiny and then it would have sounded to be based on equality but still unreasonable because under no stretch of imagination, theft could be transformed into mutiny. It was observed that even if one civilian instigated military officer for any insubordination etc., it could not fall under section 37(e) of Pakistan Air Force Act, 1937, because not an individual but a collective act of insubordination could be dubbed as mutiny. As accused had already remained in jail for a period longer than the sentence of Air Force Officers, their fresh trial by regular Courts of the country was declared to be nothing but a double jeopardy and violative of Article 13 of the Constitution read with section 403, Cr.P.C. Resultantly, the conviction and sentence awarded to civilian accused by Field General Court Martial were set aside and they were acquitted of the charges under section 37(e) of Pakistan Air Force Act, 1937.