

IN THE SPECIAL COURT, ISLAMABAD

(Established under Act XVII of 1976)

Complaint No.1 of 2013

The Federal Government of Islamic Republic of Pakistan through the Secretary Interior Division, Government of Pakistan.

..Complainant.**Versus**

General (R) Pervez Musharraf.

...Accused.**Present:**

Mr. Justice Waqar Ahmad Seth.
Mr. Justice Nazar Akbar.
Mr. Justice Shahid Karim.

Date of hearing: 17th Dec 2019.Date of decision: 17th Dec 2019.**ORDER**

1. This order shall decide the trial of General (R) Pervez Musharraf ("Accused") for high treason defined at article 6 of the Constitution of the Islamic Republic of Pakistan, 1973 ("Constitution") read with s. 3 and punishable by s.2 of the High Treason (Punishment) Act, 1973 ("Act") through abrogation of the Constitution on promulgation of self-declared emergency and dismantling of the judicial system.



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2. Chronological discourse of the events:

Mr. Iftikhar Muhammad Chaudhary, then Chief Justice of Pakistan (as he then was) was reinstated

through a judgment of the Hon'ble Supreme Court¹. Soon thereafter the matter of the eligibility of accused to contest Election came before the Hon'ble Supreme Court. The accused apprehending an adverse verdict decided to take action against judiciary. Sensing this the then Chief Justice of Pakistan constituted a larger Bench that passed a restraining order² against the apprehended instruments & measures and debarred *inter alia* that the judges of Hon'ble Supreme Court and the High Courts to take oath under PCO or to take any other extra constitutional step.

3. The accused proclaimed Emergency on 3rd Nov 2007 and prescribed a fresh oath of office for all the judges of the Supreme Court and the High Courts.³ This newly introduced oath prescribed that a judge not taking oath in the manner would cease to hold such office. Thus 15 judges of the Supreme Court and 56 judges of the Provincial High Courts were sacked. The then Chief Justice of Pakistan and few other Judges were put under house arrest. A



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¹ Iftikhar Muhammad Chaudhry Vs. President of Pakistan etc (PLD 2010 S.C.61)

² In case of Wajeeh Ud Din Ahmad in CMA No. 2869 of 2007 in Constitution petition no. 73 of 2007

³ Oath of Office (Judges) Order, 2007.

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petition was brought against the proclaimed emergency⁴. The Supreme Court validated these *ibid* acts. A review petition⁵ ended in fiasco. Meanwhile General Elections were held and as a result an elected Prime Minister⁶ assumed office. This elected Government restored the judges. Thus once again the vires of PCO was challenged before the Supreme Court⁷. The Hon'ble Supreme Court held: -



“The Accused in the garb of Emergency and the Provisional Constitution Order made amendments in the Constitution by self-acquired powers which all are unconstitutional, unauthorized, without any legal basis, hence, without any legal consequences; The Petition No.73 of 2007 filed by Mr. Justice (Rtd) Wajihuddin Ahmad challenging the eligibility of General Pervez Musharraf (Rtd) to contest for the office of President in uniform was dismissed purportedly on merits although the record maintained in the Supreme Court revealed otherwise; v) The decisions in the cases of Tikka Iqbal Muhammad Khan granting validity to the actions of General Pervez Musharraf

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⁴ Tikka Iqbal Muhammad Khan vs General Pervaiz Mushraf and other (PLD 2008 SC 178)

⁵ Tikka Iqbal Muhammad Khan vs General Pervaiz Mushraf and other (PLD 2008 SC 615)

⁶ Syed Yousef Raza Gillani.

⁷ Sindh High Court Bar Association vs Federation of Pakistan (PLD 2009 SC 789, 879)

(Rtd) were per incuriam, error-non-judice, without any legal basis hence, of no legal consequences; vi) The amendments in the Supreme Court (Number of Judges) Act, (XXXIII, 1997) 1997, by way of Finance Act, 2008, raising the strength of Judges in Supreme Court from 17 (1+16) to 30 (1+29) seemingly aimed at providing allocation of funds for increasing the strength of Judges is unconstitutional because the strengths of Judges of Supreme Court is to be increased by Parliament as defined in Article 50 to be read with Article 260 of the Constitution which defines the acts of Parliaments; vii) Surprisingly, in the past the Courts of the time used to extend favours empowering the adventurers to amend the Constitution in actual effect were to achieve their overt and covert agenda but this time, such powers were acquired by the General Pervez Musharraf (Rtd) himself through the PCO and brought a host of unconstitutional amendments for his own benefits; and viii) The present representative of people firmly believe in strong and independent judiciary and the democratic system which is evident that the deposed Judges of Supreme Court, High Courts and the de-jure Chief Justice of Pakistan were restored with effect from 3rd of November, 2007, implied that the present representatives of people denied the validity of the actions of General Pervez Musharraf (Rtd) taken from 3.11.2007 to 15.12.2007 during



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which the Constitution remained suspended. The judgment purported to have been delivered in Constitutional Petitions bearing No 87 and 88 of 2007 in the case titled as **TIKA IQBAL MUHAMMAD KHAN VS GENERAL PERVEZ MUSHARRAF AND OTHERS (PLD 2008 SC 25 and PLD 2008 SC178)** and the judgment dated 15.2.2008, purported to have been passed in CRP No.7 of 2008 titled as **TIKA IQBAL MUHAMMAD KHAN VS GENERAL PERVEZ MUSHARRAF AND OTHERS** and any other judgment/judgments passed on the strength of the said two judgments are hereby declared to be void ab initio. The Proclamation of Emergency issued by General Pervez Musharraf as the Chief of Army Staff (as he then was) on November 3, 2007; the Provisional Constitution Order No.1 of 2007 issued by him on the same date in his said capacity; the Oath of Office (Judges) Order of 2007 issued by him also on the same date though as the President of Pakistan but in exercise of powers under the aforesaid Proclamation of Emergency and the Provisional Constitution Order No.1 of 2007; The Provisional Constitution (Amendment) Order, 2007, issued by him likewise on 15.11.2007; the Constitution (Amendment) Order, 2007, being President's Order No.5 of 2007 issued on November 20, 2007; the Constitution (Second Amendment) Order, 2007,



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 Islamabad, Pakistan, 11/11/2007

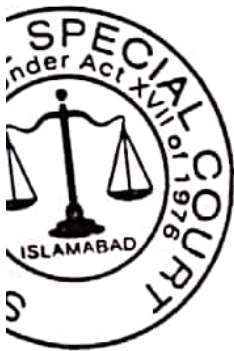
[Signature]

being the President's Order No.6 of 2007 issued on 14th December, 2007; the Islamabad High Court (Establishment) Order 2007 dated 14th December 2007 being the President's Order No.7 of 2007; the High Court Judges (Pensionary Benefits) Order, 2007, being President's Order No.8 of 2007; the Supreme Court Judges (Pensionary Benefits) Order, 2007, being President's Order No.9 of 2007 dated 14th December, 2007, are hereby declared to be unconstitutional, ultra-vires of the Constitution and consequently being illegal and of no legal effect."

4. One Moulvi Iqbal Haider⁸ brought a petition before the Hon'ble Supreme Court wherein he sought the trial of the accused for the offence of high treason. The petition was decided on the undertaking of the Federal Government that the matter would be investigated and sent for trial before the Special Court.

5. Thus on 26.06.2013 the then Prime Minister vide letter directed the Secretary Interior to direct FIA for constituting a team to conduct an investigation on charges of HIGH

⁸ Maulvi Iqbal Haider vs Federation of Pakistan, 2013 SCMR 1683



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TREASON. Investigation Team was constituted by FIA and investigation was conducted thereafter submitted its report on 16th Nov 2013. The Secretary Interior to the Government of Pakistan examined the report and consulted the Law Division and reached to the conclusion that a case is made out against the accused. On 13th December 2013 the complaint was lodged before this Court.

6. **Jurisdiction:** The offence of HIGH TREASON is defined at article 6 of the Constitution in the following words: -



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“Article 6: High treason

1. Any person who abrogates or subverts or suspends or holds in abeyance, or attempts or conspires to abrogate or subvert or suspend or hold in abeyance, the Constitution by use of force or show of force or by any other unconstitutional means shall be guilty of high treason.

2. Any person aiding or abetting or collaborating the acts mentioned in clause (1) shall likewise be guilty of high treason.

2A. An act of high treason mentioned in

clause (1) or clause (2) shall not be validated by any court including the Supreme Court and a High Court.

3. Majlis-e-Shoora (Parliament) shall by law provide for the punishment of persons found guilty of high treason."

7. Section 2 of the High Treason (Punishment) Act, 1973 has prescribed the punishment for this crime as under: -

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



8. Similarly, s.3 thereof provides for the procedure for lodging of such complaints: -

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"3. Procedure: No Court shall take cognizance of an offence punishable under this Act except upon a complaint in writing made by a person

authorized by the Federal Government in this behalf."

9. The Federal Government authorized the Secretary Interior to lodge a complaint in writing before this Court. The procedure regulating the proceedings of the Special Court is contained in the Criminal Law Amendment (Special Court) Act, 1976 (XVII of 1976). Section 3 thereof reads as under: -

"3. Certain offences triable by Special Court. — (1) Any offence punishable under sections 121, 121 A, 122, 123 and 123 A of the Pakistan Penal Code and any offence punishable under the High Treason (Punishment) Act, 1973, including an offence of conspiracy to commit any such offence, whether committed before or after the commencement of this shall be tried by a Special Court in accordance with the provisions of this Act.

(2) No court other than the Special Court shall try an offence which is triable by the Special Court under sub-section (1).

(3) If, in the course of a trial before the Special Court, the Court is of opinion that an accused before it has committed or appears to have committed any offence other than an offence referred to in sub-section (1), the Special Court shall record such



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opinion and refer such accused for the trial of such other offence to a court having jurisdiction to try the offence.

4. Special Court. — (1) For the trial of any of the offences specified in sub-section (1) of section 3, the Federal Government may, by notification in the official Gazette, set up one or more Special Courts composed of three persons each of whom is a Judge of a High Court, and shall nominate one of the said persons to be the President of the Special Court.

4[(1 A) The setting up of a Special Court under sub-section (1) shall not be deemed to affect the jurisdiction of any other Special Court in respect of the trial of a case pending before such other Special Court immediately before the setting up of the Special Court.]

Commencement of proceedings. (1) The Federal Government shall forward to the Special Court, on behalf of the prosecution, a complaint in the form of a statement of the case to be tried by the Court, together with a list of the accused persons, formal charges of offences alleged to have been committed by each one of them and a list of witnesses intended to be produced in support of each charge.

(2) For the purpose of taking cognizance of a case under this Act no other complaint would



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be necessary under any other law.

(3) The submission of a complaint or a list of accused persons or witnesses or formal charges under sub-section (1) shall not preclude, ---

(a) The Federal Government from submitting an amended or additional statement of the case or charge at any time before judgment is pronounced, or

(b) The Federal Government or the prosecution from submitting additional names of accused persons or witnesses at any subsequent stage of the prosecution evidence in the case.

6. Powers and procedure of Special Court. — (1) The Special Court shall have, in respect of a case liable by it, all the powers which a High Court has in relation to trial before it under the Code, but shall, notwithstanding anything contained in the Code, proceed with the trial in the following manner, namely: ---



(a) as soon as the accused appear or are brought before the Special Court, the formal charges referred to in section 5 shall be read and explained to them, and each one of them shall be asked whether he is guilty;

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(b) if the accused pleads guilty, the Special Court shall record

the plea, and may in its discretion convict him thereon;
(c) if the accused pleads not guilty or refuses to plead, or claims to be tried, the Special Court shall proceed to take all such evidence as may be produced in support of the prosecution;

Explanation. — For the purposes of this clause and clause (cc), an accused who refuses to plead or claims to be tried shall be deemed to be pleading not guilty.

(cc) if any accused is added to the list of accused persons referred to in sub-section (1) of section 5 after the examination of any witness and if such accused pleads not guilty or refuses to plead, or claims to be tried, or is not convicted by the Special Court on his plea of guilty (if made), the Special Court may recall and rehear all such witnesses whose evidence in its opinion affects such accused;

(d) On the close of the evidence of the prosecution, the Special Court shall examine the accused and record his statement as required by section 342 of the Code and, if the accused puts in any written statement, the Special Court shall file it with the record;

(e) after such statement of the accused as is referred to in clause (d) is recorded, the Special Court shall call upon the accused to enter upon his defense, and shall examine all such witnesses as may be



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produced by the accused or called at the instance of the accused:

Provided that the Special Court may refuse to examine or call any such witness, if the Special Court is satisfied that the accused intends to call or examine such witness to cause vexation or delay or to defeat the ends of justice;

(f) after all the evidence referred to in the foregoing clauses is recorded, the Special Court shall hear the prosecutor and defense counsel, and on conclusion of the same shall proceed to pronounce its judgment;

(g) the persons mentioned in the list of accused persons referred to in section 5 and the offences with which they are charged shall be tried together;

(h) the proceedings of the special Court shall be recorded under its direct supervision: ---

Provided that, if the special Court so directs, the evidence of any witness may be taken down in short-hand or typescript by a person specially appointed for the purpose; and the transcript of the shorthand or the typescript with necessary corrections shall form part of the record; and

(i) all orders and proceedings and the evidence of each witness shall be signed by at least two members of the Special Court and the final judgment shall be



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signed by each of the three members."

10. Summary of Trial: At the outset of the trial the question of bail sparked a debate over the applicability of the Criminal Procedure Code to proceedings before this Court. This Court on 10.01.2014 decided the matter in the following terms:-



"...From a combined reading of Subsection 2 of Section 1 and Subsection 2 of Section 5 of the Criminal Procedure Code 1898 read with Section 6(1) of Criminal Law Amendment (Special Court) Act of 1976 it comes to light that the provisions of CrPC can be invoked wherever procedural requirements of the Act XVII of 1976 are found lacking. Needless to say that where a specific provision of Act XVII of 1976 deals with a specific situation, resort need not be had to the provisions of CrPC, as the provisions of Act XVII of 1976 shall always have an overriding effect....."

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11. The accused was directed to appear before the Court and in response to this direction an application was brought challenging the validity of the notification dated: 20.11.2013 on the basis of which the complaint was filed. At the request of defense an

opportunity was granted for hearing of the application No. 3 of 2013. On 16.01.2014 the accused did not appear on the excuse of ailment thus appeared through his Counsel. This Court thus constituted a Medical Board comprising of the Senior Doctors of Armed Forces Institute of Cardiology (AFIC) to examine the accused and formulate their report. At that stage, Raja Muhammad Ibrahim Satti representing the accused informed this Court that before the Hon'ble Supreme Court a review application has been filed by accused, wherein the decision dated: 9.7.2009 in the case of Sindh High Court Bar Association had been impugned and prayed for the stay of the proceeding before this Court. The report of the Medical Boards dated: 24th Jan 2014 on being received was objected to by Prosecution. On 31st Jan 2014 this Court decided the applications no. 2/2014, 3/2014 and 4/2014 and the process was issued for procuring the attendance of the accused.

12. On 31st Jan 2014 the accused did not appeared thus bail-able warrants of arrest were issued. On 7th Feb 2014 the surety of accused appeared and undertook that the accused shall appear before the



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Court in future dates of hearing. However, on 7th Feb 2014 yet another application Cr.M.No 5/2014 was moved seeking to dispense the personal attendance of the accused. Defense objected in personal capacity to Mr. Muhammad Akram Shiekh ASC/Head of the Prosecution team on the allegation that the learned Counsel had personal enmity with the accused. A third application (Cr. M.No. 6 of 2013) was also brought to transfer the trial on the ground that the proceedings before this Court are *corum non judice* and that this court has no jurisdiction in the matter.

13. On 18th Feb 2014 the accused appeared before the Court. Formal charge was read over to him, in the following words: -



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"Firstly, on 3rd November, 2007 at Rawalpindi as Chief of the Army Staff, you issued an unconstitutional and unlawful "Proclamation of Emergency Order, 2007" which, unconstitutionally and unlawfully, held the Constitution of Islamic Republic of Pakistan, 1973 in abeyance and you thereby subverted the Constitution and thus committed the offence of high treason punishable under Section 2 of the High Treason (Punishment) Act, 1973 (Act LXVIII of 1973), which is within the jurisdiction of the

Special Court established under Section 4 of the Criminal Law Amendment (Special Courts) Act, 1976 (XVII of 1976).

Secondly, on 3rd November 2007 at Rawalpindi as Chief of the Army Staff, you issued an unconstitutional and unlawful "Provisional Constitution Order No.1 of 2007" which, unconstitutionally and unlawfully, empowered the President to amend the Constitution of Islamic Republic of Pakistan, 1973 from time to time and you also suspended the Fundamental Rights enshrined in Articles 9, 10, 15, 16, 17, 19 and 25 of the Constitution and you thereby subverted the Constitution and thus committed the offence of high treason punishable under Section 2 of the High Treason (Punishment) Act, 1973 (Act LXVIII of 1973), which is within the jurisdiction of the Special Court established under Section 4 of the Criminal Law Amendment (Special Courts) Act, 1976 (XVII of 1976).



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Thirdly, on 3rd November, 2007 at Rawalpindi as President of Islamic Republic of Pakistan, you issued an unconstitutional and unlawful "Oath of office (Judges) Order, 2007" whereby an oath was unconstitutionally and unlawfully, introduced in

the Schedule which required a Judge to abide by the provisions of the Proclamation of Emergency dated 03.11.2007 and the Provisional Constitutional Order dated: 03.11.2007 to perform acts and functions in accordance thereof and this order also resulted in removal of numerous Judges of the Superior Courts including the Honorable Chief Justice of Pakistan and you thereby subverted the Constitution of Islamic Republic of Pakistan, 1973 and thus committed the offence of high treason punishable under Section 2 of the High Treason (Punishment) Act, 1973 (Act LXVIII of 1973), which is within the jurisdiction of the Special Court established under Section 4 of the Criminal Law Amendment (Special Courts) Act, 1976 (XVII of 1976).

Fourthly, on 20th November 2007 at Rawalpindi as President of Islamic Republic of Pakistan, you issued an unconstitutional and unlawful Order 5 of 2007 "Constitution (Amendment) Order, 2007" whereby Articles 175, 186-A, 198, 218, 270B and 270C were, unconstitutionally and unlawfully, amended and Article 270AA was added to the Constitution of Islamic Republic of Pakistan, 1973 and you thereby subverted the Constitution and thus committed offence of high



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treason punishable under section 2 of the High Treason (Punishment) Act, 1973 (Act LXVIII of 1973), which is within the jurisdiction of the Special Court established under Section 4 of the Criminal Law Amendment (Special Courts) Act, 1976 (XVII of 1976).

Fifthly, on 14th December 2007 at Rawalpindi as President of Islamic Republic of Pakistan, you issued an unconstitutional and unlawful Order 6 of 2007 "Constitution (Second Amendment) Order, 2007" whereby the Constitution of Islamic Republic of Pakistan, 1973 was, unconstitutionally and unlawfully, amended and you thereby subverted the Constitution and thus committed the offence of high treason punishable under section 2 of the High Treason (Punishment) Act, 1973 (Act LXVIII of 1973), which is within the jurisdiction of the Special Court established under Section 4 of the Criminal Law Amendment (Special Courts) Act, 1976 (XVII of 1976).



The accused professed innocence on all 05 counts
and claimed trial.

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14. Dr. Muhammad Farogh Naseem, ASC appeared on behalf of the accused. On 18th Feb 2014 the personal appearance of accused was exempted till the stage of examination of the accused under section 342 CrPC. Thereafter the Cr.M.A No. 5/2013 and Cr.M.A No. 9, 10 & 11 of 2014 were disposed of having become infructuous and the case was adjourned to 16th April 2014. On 8th May 2014 the CrMA No. 12/2014 was allowed and a direction was issued for provision of certain documents to accused.

15. The Resume of the Prosecution evidence is as under: -

Prosecution witnesses.

Mr. Shahid Pw.1
Khan then
Secretary
Interior
Division

Document tendered in evidence.

Document dated: Ex.P-9/1
26.6.2013 containing
direction to the
Secretary Interior for
instructions to the
Director General, FIA.

Authentication of Ex.P-9/2
document dated:
26.6.2013 by the
Deputy Secretary to
Secretary Prime
Minister.

Copy of letter dated: Ex. P-9/3
26.6.2013 by Secretary
Interior to DG FIA for
the constitution of
special investigation
team

Office order dated: Ex P-9/4
27.6.2013 regarding
constitution of JIT.

Inquiry report dated: Ex P-9/5



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16.11.2013 (10 pages)
 Original complaint (08 Ex P-9/6
 pages)
 Statement of Formal Ex P-9/7
 Charges filed with
 complainant.
 List of documents (02 Ex P-9/8
 pages)
 List of witnesses Ex P-9/9
 Note of Ministry of ExP9/10
 Interior dated:
 9.12.2013
 Vetted copy of the ExP9/11
 complaint
 Interior Ministry's file ExP9/12
 (pages 1 – 29)
 Interior Ministry's file ExP9/13
 (pages 33 – 72)
 Judgment dt. 3.7.2013 ExP9/14
 passed by S.C. in C.P.
 No. 2255/2010
 Copy of S.R.O No. Ex.P9/15
 1234(I) /94 dated:
 29.12.1994
 Copy of Proclamation ExP9/16
 of Emergency dt.
 3.11.2007
 Questionnaire to ExP/17
 Governor Dr. Ishratul
 Ebad (2 pages)
 Bulletin of 44th Session ExP9/18
 of National Assembly
 (2 pages)
 List of MNA's during ExP9/19
 2002 to 2007
 Statement of Mr. ExP9/20
 Ghulam Rasool, Sr. PS
 to Secretary Law.
 Notification of original ExP9/21
 PCO (4 pages)
 Certified copy of the ExP9/22
 gazette PCO dt.
 3.11.2007 (3 pages)
 Copy of notification of ExP9/23
 proclamation of
 emergency (3 pages)
 Copy of oath of judges ExP9/24
 Order, 2007 (3 pages)
 Summary to PM for ExP9/25
 appointment of CJ
 Pakistan (03 pages)
 Memorandum / Minutes ExP9/26
 Cabinet Meeting (12



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pages)

CTCs of Notification Ex P-9/27
(10) recession of CJP to 9/37

and judges of Supreme
Court and the CJs and
Judges of the High
Courts.

Certified gazette copy Ex P-9/33
of the revocation of
Emergency Order.

Mr. Kaleem Pw.2
Ahmad
Shahzad,
Section
Officer,
Cabinet
Division

Requisition letter dt. Ex.10/1
4.12.2013 for supply of
documents.

CTC of Original Ex.10/2
Proclamation of
Emergency.

CTC of Original Order Ex.10/3
to amend Provisional
Constitution Order No.
1/2007.

CTC of endorsed copy Ex.10/4
of Proclamation of
Emergency.

CTC of original Oath of Ex.10/5
Office (Judges) Order,
2007

Seizure Memo dt. Ex.10/6
04.12.2013.

CTC of endorsed copy Ex.10/7
of Provisional
Constitution Order
(PCO).

Seizure memo dated: Ex.10/8
9.12.2013

Seizure memo dated: Ex.10/9
9.12.2013

CTC of Original Ex.10/10
Provisional Constitution
Order (No.1 of 2007)

Authorization / Office Ex.10/11
Note with approval for
supply of documents.

CTC of envelop type Ex.P-11/1
addressed to Syed
Masood Alam Rizvi,
Secretary, Cabinet
Division, Islamabad.

Copy of envelope hand Ex.P-11/2



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Mr. Siraj Pw.3
Ahmed,
Deputy
Secretary
®, Cabinet
Division

addressed to Syed
Masood Alam Rizvi,
Secretary, Cabinet
Division, Islamabad

Copy of envelope Ex.P-11/3

containing signature of
Syed Masood Alam
Rizvi, Secretary,
Cabinet Division,
Islamabad.

Copy of Requisition Ex.P-11/4

Letter dated 06.12.2013

Copy of Requisition Ex. P-11/5

letter dated: 18.12.2013

Mr. Taj Pw.4 Notification dt. Ex.P-12/1.
Umer
Khan,
Deputy
Solicitor,
Ministry of
Law,
Justice
recorded on
8th July
2014
03.11.2007 recessation
of CJP

Notification dt. Ex.P-12/2
03.11.2007 recessation
of Judges, Supreme
Court

Notification dt. Ex.P-12/3
10.11.2007 recessation
of Judges, Supreme
Court.

Notification dt. Ex.P-12/4
03.12.2007 recessation
of Judges, Lahore High
Court

Notification dt. Ex.P-12/5
03.11.2007 recessation
of CJ, SHC.

Notification dt. Ex.P-12/6
03.11.2007 recessation
of Judges, SHC.

Notification dt. Ex.P-12/7
03.12.2007 recessation
of Judges, SHC.

Notification dt. Ex.P-12/8
03.11.2007 recessation
of CJ PHC.

Notification dt. Ex.P-12/9
03.11.2007 recessation
of Judge of PHC.

Notification dt. Ex.P-12/10



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03.12.2007 recessation
of Judges PHC

CTC of notification Ex.P-12/11
dated: 3.11.2007 of
reappointment of Mr.
Justice Abdul Hameed
Dogar as CJP

CTC of notification Ex.P-12/12
dated: 12.11.2007
reappointment of the
judges of the SC
Pakistan.

CTC of notification Ex.P-12/13
dated: 3.11.2007
reappointment of Mr.
Justice Muhammad
Afzal Somoora as CJ
SHC.

CTC of notification Ex.P-12/14
dated: 3.11.2007
reappointment of Mr.
Justice Tallat Qayyum
Qureshi as CJ of PHC.

CTC of notification Ex.P-12/15
dated: 4.11.2007
reappointment of judges
SHC

CTC of notification Ex.P-12/16
dated: 13.12.2007
reappointment of judges
of PHC.

CTC of notification
dated: 14.12.2007
reappointment of judges
of LHC.

CTC of notification Ex.P-12/17
dated: 14.12.2007
reappointment of Judges
of SHC.

CTC of gazette copy of Ex.P-12/18
oath of office (judges)
order, 2007

Gazette copy of order of Ex.P-12/19
revocation of
emergency dated:
15.12.2007

CTC of gazette copy of Ex.P-12/20
the proclamation of
emergency dated:
03.11.2007

CTC of gazette copy of Ex.P-12/21
the PCO dated:
03.11.2007



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CTC of gazette to amend the PCO Ex.P-12/23
 Seizure memo dated: 03.12.2013 Ex.P-12/24
 CTC of endorsed copy of President Order V of 2007 Ex.P-12/25
 CTC of letter dated: 14.12.2007 to Printing Corporation of Pakistan Ex.P-12/26
 CTC of endorsed copy of President Order VI of 2007 Ex.P-12/27
 Seizure memo dated: 09.12.2013 Ex.P-12/28
 Requisition letter dt. 02.12.2013 for supply of documents Ex.P-12/29
 Requisition letter dt. 09.12.2013 for supply of documents Ex.P-12/30
 Office note about supply of documents. Ex.P-12/31
 Authorization and compliance note for supply of documents. Ex.P-12/32
 Notification dated: 05.11.2007 Ex.P-12/0
 (under objection)

Talib
 Hussain,
 Producer,
 PTV News,
 (recorded
 on
 08.7.2014)

Pw.5 Deposition of Talib
 Hussain.

Seizure Memo dated 06.12.201 in respect of Ex P -13/1
 Speech C.D.
 CD containing address "Article-I" of Gen. (R) Pervez Musharraf to the Nation
 Requisition letter dated 05.12.2013 for supply of Speech C.D. Ex P -13/3
 Pw.6 Deposition of Khalid Rasool

Khalid
 Rasool,
 Director(
 Anti-
 Corruption
 Wing) FIA,
 H.Qs
 recorded on



ATTESTED

[Signature]
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9th of July,
2014 and
5th of
August
2014.

Letter dated 06.12.2013 Ex.P-14/0
by the Printing
Corporation to FIA
Team supplying Gazette
Notifications (under
objection)
Office Order whereby Ex.P-14/1
Khalid Rasool was
included in the E.Team

Maqsood ul Pw.7 Deposition of Maqsood
Hassan,
Director
FIA KPK,
recorded on
6th of
august, 9th
and 10th of
September

Acknowledgement of Ex.P-15/01
handing over documents
to FIA E.Team

Attested Copy (A.C) of Ex.P-15/02
Provisional Constitution
Order dated 03.11.2007

Attested copy of Ex.P-15/03
Proclamation of
Emergency dated 03.
11. 2007

Attested copy of Oath Ex.P-15/04
of Office (Judges)
Order. 2007

Letter from Law & Ex.P-15/05
Justice Division for
providing documents

AC of notifications Ex.P-15/06
dated 03.11.2007 re-
cessation of Chief
Justice of Pakistan

AC of Notifications Ex.P-15/07
dated 03.11.2007 re-
cessation of judges of
Supreme Court

AC of notification dated Ex.P-15/08
10.11.2007 recession of
Judges of Supreme
Court



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AC of notifications Ex.P-15/09
dated 08.08.2009 re-
retirement of Judges of
Supreme Court
AC of covering letter Ex.P-15/10
dated 03.11.2007 re-
oath by Mr. Justice
Saiyed Saeed Ashhad
AC of notification dated Ex.P-15/11
05.11.2007 re-
appointment of Judges
of Supreme Court
AC of Notification Ex.P-15/12
dated 12.11.2007 re-
appointment of Judges
of Supreme Court
AC of Notification Ex.P-15/13
dated 09.12.2007 re-
appointment of Judges
of Supreme Court
AC of Notification Ex.P-15/14
dated 07.2.2008 re-
appointment of Judges
of Supreme Court
AC of Notification Ex.P-15/15
dated 07.03.2009 re-
appointment of Judges
of Supreme Court
AC of notifications Ex.P-15/16
dated 03.11.2007 re-
appointment of Abdul
Hameed Dogar as Chief
Justice Supreme Court
Attested Copy of PCO Ex.P-15/17
dated 03.11.2007 duly
signed by Cabinet
Secretary
Attested copy of Ex.P-15/18
covering letter
regarding minutes of
Cabinet Meeting.
Attested copy of Ex.P-15/19
minutes of Cabinet
Meeting dated
12.09.2007.
Attested copy of Ex.P-15/20
minutes of Cabinet
Meeting dated
05.10.2007.
Attested copy of Ex.P-15/21
minutes of Cabinet
Meeting dated
15.11.2007.

Letter dated 21.10.2013 Ex.P-15/22
for clarification of
posting of Mohsin
Hafeez.

Notification dated Ex.P-15/23
19.05.2005 regarding
posting of Mohsin
Hafeez as Secretary to
the President of
Pakistan.

Covering Letter dt. Ex.P-15/24
22.10.2013 regarding
appointment of Mr.
Sharif ud Din Pirzada as
Senior Advisor to the
PM.

Notification dated: Ex.P-15/25
05.09.2004 regarding
the appointment of
advisor to the PM.

Letter dt. 28.10.2013 to Ex.P-15/26
Lt. Gen. (R) Khalid
Maqbool for recording
his statement.

Reply of Lt. Gen (R) Ex.P-15/27
Khalid Maqbool dt.
2.11.2013

Copy of envelope Ex.P-15/28
containing letter of Lt.
General.

DVD (envelop) Ex.P-15/29
containing speech dt.
03.11.2007 of Accused.

Transcript of speech dt. Ex.P-15/30
03.11.2007 of the
Accused.

Mr. Pw.8 Letter dt. 06.12.2013 by Ex.P-16/1
Muhammad
Khalid
Qureshi,
Additional
Director
FIA
the Printing corporation
to FIA Team supplying
Gazette Notification.

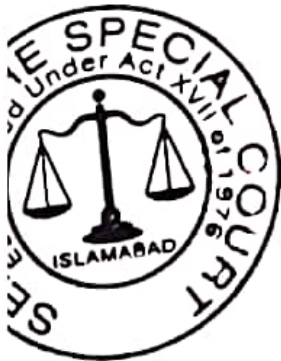


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16. Mr. Muhammad Akram Sheikh, ASC, on 18th
September 2014 *qua* Chief of the Prosecution Team
gave up Pw. Mr. Muhammad Hussain Asghar and
requested this Court to allow the Prosecution to close

its evidence. Thus the case was fixed for recording of the statement of accused under section 342 Cr.PC.

17. At this stage Mr. Farogh Naseem ASC pointed out that in terms of an order of this Court dated: 7.3.2014 his pending application no. CrL.M.A No. 26 of 2014 be heard and decided first (on the subject to dismiss the complaint or return the complaint to the complainant with the direction to refile and implicate and array the other co-accused *qua* aiders and abettors. On 21th Nov 2014 CrMA no. 26/2014 was disposed with a majority decision.



18. This order was assailed before the Hon'ble Islamabad High Court in writ petitions no. 5010, 4960 and 5155/2014. The High Court on 10th Nov 2015 allowed the writ and set aside the order of this court. Accordingly the Special Court passed the order dated 27th Nov 2015 in pursuance of the judgment of the Hon'ble High Court and directed the Federal Government to commence investigation against the said *ibid* individuals. This subsequent order of this Court was assailed through a writ petition (petition no. 3980/2015) before Hon'ble Islamabad High Court, but ended in fiasco in limine. An Intra-Court

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appeal was filed and during the pendency of those matters a consensus emerged *inter se* the parties including the Federal Government, that the role of 'any person' as an aider or abettor of accused may be properly investigated and that all such persons may be provided 'full opportunity of hearing' by the investigating agency. However, the matter was assailed before the Hon'ble Supreme Court and subsequently leave was granted on 27th Jan 2016 leading to the setting aside of the orders of the Islamabad High Court of 9th September & 29th Nov 2015.

19. Thus on receipt of the copy of the judgment this court fixed the trial for recording statement of accused under section 342 CrPC.



20. Due to nonappearance of the accused, a show-cause notice was issued to the surety. On date Mr. Taufeeq Asif, Advocate filed an application Cr. M.A. No. 28 of 2016 praying to implead him as a necessary party in the case. This application was dismissed on 19th April 2016. On the same date the application Cr.M.A. No. 30/2016 seeking substitution of surety was also dismissed. Similarly, the Cr.M.A.

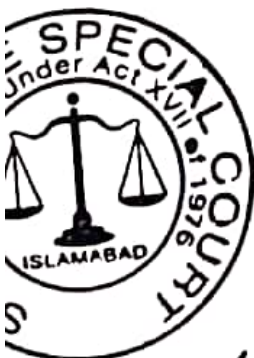
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No. 31/2016 seeking exemption from personal appearance of the accused was also dismissed on medical grounds and a show cause notice under section 514 CrPC was issued to the Surety.

21. Cr.M.A.No 32/2016 seeking expunction of the remarks in the second para of the order dated: 31.3.2016 was also dismissed and non-bailable warrants of arrest was issued for the arrest of accused, executable through DG, FIA Islamabad.

22. On 11th May 2016 the surety of the accused produced receipt of deposit of (PKR. 2.5 Million) before the Court, thus the surety was discharged of his liability.

23. The proceedings under section 87 CrPC were initiated and notices were directed to be issued besides ordinary modes, through publication in daily, 'The News International' and 'The Jung Islamabad'. While the prosecution was directed to provide a list of movable and immovable properties belonging to the accused for proceeding further in the matter.



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24. In response, the list of properties of the fugitive accused was not provided thus the prosecution was again directed to provide a list of movable and immoveable properties belonging to the accused. Similarly, the Defense was directed to assist the Court on the following legal preposition: -

Whether the accused can be represented after he has been declared fugitive from law on 12th July 2016?

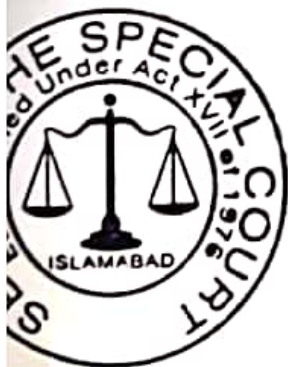
25. On 19th July 2016 a Joint Secretary of the Ministry of Interior submitted a list of moveable and immoveable properties of accused in connection with proceedings under section 88 CrPC for attachment. Thus these proceedings were initiated and warrant of arrest of the accused was issued. The case was adjourned till the arrest of the accused, thus, no proceedings took place from 19th July 2016 till 30th March 2017.

26. On 31st March 2017 Mrs. Saba Musharraf (wife) and Ms. Ayla Raza (daughter) of the accused through Mr. M.H.K Khanshgi Advocate moved an objection petition against the order of the attachment



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of the properties. The Cr.M.A no. 1/2017 was filed with the contention that the accused intends to appear before this Court, however apprehending threats to his life, he required security to be provided by the Ministry of Defense. It was ordered that the accused may approach the Ministry of Interior in writing for the requisite protection within 07 days, as had been offered by the head of Prosecution on 19th May 2017 and in case the accused fails to submit his written request, the Ministry of Interior and all other department/Divisions and Agencies of Government of Pakistan were to take positive steps such as blocking of the CNIC and Passport of Accused. Further the Ministry of Interior shall also make request to the Interpol for issuance of appropriate warrants for his arrest and production before this Court.



27. On 29th March 2018 the accused moved Cr.M.No. 3/2018 seeking that the then President of this Court may recuse himself from the trial similarly, the order dated: 8th March 2018 was sought to be recalled. Thus the Special Court, was reconstituted vide notification dated: 13th June 2018.

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28. On 20th August 2018, the accused did not appear before the Court despite issuance of non-bailable warrant of arrest, and was declared as proclaimed offender and the case was adjourned with the direction to prosecution to assist this court on the query, "As to whether the complaint can be proceeded further because the statement of the accused under section 342 Cr.PC had yet not been recorded?"

29. On 29th August 2018, Mr. Muhammad Akram Sheikh, ASC filed C.M. No. 7/2018 seeking to relieve him from the case. The application was allowed. The prosecution was directed to assist the Court, as in what manner they would henceforth proceed and whether it would be permissible in law to record the statement of the accused under section 342 Cr.P.C on Skype? On 10th September 2018, the case was adjourned at the request of the defense counsel, Mr. Naseer-ud-Din Nayyar, Advocate.



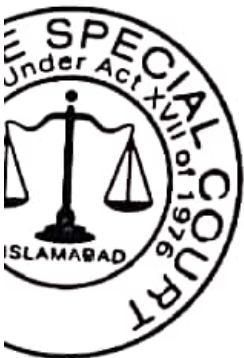
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30. On 9th Oct 2018 C.M. No 10/2018 was allowed. In C.M.No 9/2018 Bar. Salman Safdar appeared and submitted his power of attorney on

behalf of accused. It was not signed by accused to the contrary one Mr. Nazeer Ahmed was the executant.

31. It was on 15th Oct 2018 that Bar. Salman Safdar appeared for accused and stated that the accused had expressed his desire to return to Pakistan for recording his statement under section 342 CrPC as soon as his medical condition improves. His contentions were considered and it was ordered that the special procedure can be adopted by this Special Court in the given circumstance for examining the accused under section 342 CrPC in light of the sections 4, 6 of the Criminal Law Amendment Special Court Act, 1976 and for the purpose of recording of statement a commission shall be appointed as envisaged under section 6(1)(d) of the Criminal Law Amendment Special Court Act, 1976 and thus the court on the next date of hearing shall prepare questions as envisaged under Section 6(1)(D) of the Criminal Amendment (special Court) Act, 1976, and the case was adjourned for 14th Nov 2018. But due to the superannuation of Mr. Justice Muhammad Yawar Ali, the Special Court, became dysfunctional.



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32. The Federal Government issued a notification No. F.10(2)32015-A-II dated: 28.02.2019 of the appointment of Mrs. Justice Syeda Tahira Safdar, Chief Justice High Court of Baluchistan as the President of the Special Court and Mr. Justice Shahid Karim as a Judge of the Special Court. Thus the case was fixed for 19th March 2019. On date the defense counsel sought an adjournment, by contending that the accused is willing to appear before the Court but he is not able to appear for recording his statement due to his bad health condition. He is hospitalized and is under treatment at Dubai thus needs some time to recover. This contention was controverted by the Learned Prosecutor. He contended that the accused is duly represented therefore he cannot be treated as fugitive and could be examined under s. 342 CrPC.

At this Court formulated the following question: -

"How to record the examination of the accused without physically appearing before the Court?"



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On next date, the defense Counsel submitted that the accused intends to appear and would himself record his statement. Thus the matter was adjourned till 2nd May 2019 and the question so formulated became redundant.

33. On the next date of hearing, an adjournment application was brought by defense on medical grounds. In the meanwhile, the Hon'ble Supreme Court of Pakistan in Civil Review No. 513 of 2014 in CP No. 14 of 2013 on 1st April 2019 passed the following order: -

"The above section envisages that once the trial has begun, the trial shall not be adjourned by reason of absence of any accused person due to illness, or if the absence of the accused or his counsel has been brought about by the accused person himself, or if the behavior of the accused person prior to such absence has been, in the opinion of the Special Court, such as to impede the course of justice. Section 9 mandates that the Special Court to proceed with the trial after taking necessary steps to appoint an advocate to defend any such accused person. Section 9 is, therefore an extension of the procedure for trial provided under Section 6 of the Act and supports the purpose of the special law. Within the scope of this Act, if the accused voluntarily chooses not to exercise his right to appear and to be present at



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trial, it does not infringe the fairness of the trial nor does it violate the right to fair trial under Article 10A of the Constitution. To stop further proceedings of the trial, in this situation, would amount to putting a premium on the fault of the absconder. Besides the control over the proceedings of the trial cannot be allowed to vest in the accused.

5. In the present circumstances of the case, the accused is not merely absenting himself from attending the Special Court, he has also been declared a proclaimed offender on 12.7.2016. Being a fugitive from the law the accused loses his right to audience (see *Ikramullah V State* (2005 SCMR 1002); *Dr. Mobashir Hassan V. Federation of Pakistan* (PLD 2010 SC 265); *Hauat Bakhsk V. The State* (PLD 1981 SC 256) as a consequence the accused has lost the right to have an advocate appointed to defend him unless and until the accused surrenders before the Court.

6. We concluded that while section 342, Cr.P.C. enables the accused to explain any circumstances appearing against him in the evidence, however, in the context of this Act, if he voluntarily chooses not to appear or join the proceedings, he loses his right to such an explanation. Similarly, the accused being a proclaimed offender loses his right to audience and forfeits his right to put up a defense.

For the above reasons, the Special Court shall proceed with the trial on the next date of hearing. In case the accused surrenders and appears before the Court he would be entitled to record his statement under section 342, Cr.P.C. and lead any other defense under the law. However, in case the accused fails to appear on the next date of hearing, being a

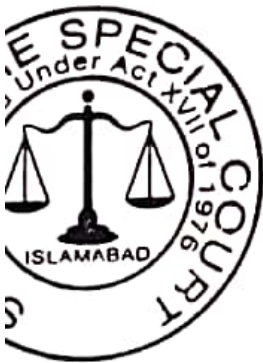


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proclaimed offender, the Special Court is empowered to proceed against the accused even in his absence under section 9 of the Act."

Thus this Court proceeded with the trial under the *supra* guidelines.

34. This Court on 22nd August 2019 appointed Mr. Raza Bashir Advocate as counsel for defense at State expenses. During the interregnum period the trial was delayed as the defense sought further time to prepare. Lately, on 24th Oct 2019 the Prosecution team submitted addendum to their written arguments. The notification of Ministry of Interior, Government of Pakistan subsequently de-notified the prosecution team. Show cause notices were issued to the concerned Secretary as to explain under what authority the prosecution team was de-notified? In response to the adjournment request of the defense, this Court passed the following directives: -



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".... Learned Defense Counsel has move an application for adjournment on medical ground duly supported by medical certificates, therefore he is granted last opportunity. In future, no adjournment shall be granted on any cost. He shall

appear to advance his arguments on the date of hearing.

The registrar of the Court is also directed to supply copies of the skeleton arguments to the Defense counsel before the next date of hearing."

35. On the date of hearing (19th Nov 2019) the Secretary to Government of Pakistan, Ministry of Interior, Islamabad appeared while Mr. Raza Bashir Advocate/ Defense Counsel had sent an application, seeking adjournment on the pretext of having proceeded for Umra. At this the following order was passed: -

"The Secretary to Government of Pakistan, Ministry of Interior, Islamabad, present in Court, as per instructions, informs the reasons for de-notifying the notification of earlier prosecution team and requests for some time to re-notify the fresh one. The reasons advanced by the Secretary are unacceptable and hence refused. Moreover, they had yet notified the fresh Prosecution team despite having 25 days.

The Learned Defense Counsel has once again moved an application for adjournment on the reasons mentioned therein. This is the third consecutive adjournment sought by the defense council. The same is also refused, however, the defense side is directed to file written arguments, if so advised, 02 days prior to the date fixed. To come up on 28th Nov 2019 for announcement of judgment."



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36. On 28th Nov 2019 a short order dated: 27.11.2019 of Islamabad High Court was received passed in W.P.No. 4075/2019.

37. Without commenting on the competence and jurisdiction, this Court directed the Representative of Ministry of Interior, to nominate their prosecutor or a team of prosecutors and further directed to come prepared for arguments on 5th Dec 2019. For that date of hearing the learned Defence Counsel was also directed to submit written arguments in rebuttal before the date fixed.

It was lastly provided in that order that all miscellaneous applications pending shall be decided along with the main case so there will be no adjournment at any cost besides day to day proceedings shall be conducted w.e.f., 5th Dec 2019.

38. On 5th instant, this Court observed: -

“Despite clear directions to the learned Defence Counsel for filing of written arguments prior to today’s day of hearing (05.12.2019) in rebuttal to the written arguments already submitted by the previous Prosecutors, he failed to submit the same. Therefore, he is once again directed to argue the case on the next date of hearing immediately after the conclusion of the arguments of newly appointed Special Prosecutors.

The newly appointed learned Special Prosecutors request for grant of final adjournment in order to prepare the case with the undertaking not to seek further adjournment at any cost failing which they would be submitting written arguments two days prior to the next date of hearing...”



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39. Today Messrs. Ali Zia Bajwa and Muneer Hussain Bhatti Advocates assisted by Bar. Husnain Ali Ramzan and Usama Malik Advocates for prosecution submitted during Court proceedings the following applications/documents: -

- i. Additional Statement/Amended Complaint whereby they sought to add the Former Prime Minister Mr. Shaukat Aziz, the former Federal Law Minister Mr. Zahid Hamid and the former Justice Mr. Abdul Hameed Dogar as co-accused on the ground of aiding and abetting.
- ii. A statement of amended formal charges not accompanied by supportive application whereby the *ibid* persons were sought to be implicated as co-accused on charge of aider and abettor, purportingly under section 5 sub section 3(a) of Criminal Law Amendment (Special Court), 1976 which reads as under: -



(3) The submission of a complaint or a list of witnesses or formal charges under sub-section (1) shall not preclude---

(a) the Federal Government from submitting an amended or additional statement of the case or charge at any time before judgment is pronounced, or

The said application was not submitted in the office as per procedure rather the same has been presented in court without seeking permission for amendment or addition in the case or charge. It is

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important to be noted here that in accordance with the ratio of Musfas Impex's case (PLD 2016 SC 808) the approval of the cabinet in this respect is mandatory; acknowledged by the learned Prosecutor but the same has not being obtained. The requirement of approval by the cabinet as per decision in Mustafa Impex's case has got prospective effect and not retrospective effect as decided by the Apex Court as such the application (not numbered) is disposed off accordingly.

The original complaint no. 1 was filed after proper investigation by FIA but the present application for adding three said persons; in respect whereof no investigation has been conducted, similarly, in respect of the aider and abettors a course of action has been prescribed at the later part of this judgment, so to say that at the more the Government is at liberty of file separate complaints against the ibid named persons and others but why only these three named above?

- iii. As regard the application for summoning the Pw. Mr. Azam Khan, Senior officer Joint investigation team, the same seems to be an afterthought as prosecution closed its evidence on 18.9.2014. Thus the application stand disposed of accordingly.



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- iv. Learned Prosecutors had made the undertaking on the previous date to argue the complaint on merit but unfortunately moved yet another application for adjournment, reasons cited therein. After going through the said application this Court refuses to grant adjournment and direct the Prosecutors to argue the complaint on merit especially in view of article 10-A of the Constitution of Islamic Republic of Pakistan, 1973 but they desist from arguing the case on merit rather insisted for decision on the above mentioned two applications.
- v. Thereafter the Learned Defense Counsel appointed by the Court was directed to argue the complaint on merits but instead of arguing the case on merits two further applications, firstly, for recording statement of accused through commission and for an opportunity to lead defense evidence under article 10-A of the Constitution were submitted. Learned Counsel was reminded of the judgments of the Apex Court in this respect especially the order passed on 1.04.2019 besides the orders of this Court whereby the accused was declared as a proclaimed offender after giving ample opportunity to appear before the court and the same orders were not



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challenged before the Apex / Appellate Court.

- vi. As regarding the applications moved under section 265K CrPC moved by the proclaimed offender, is concerned such like applications were previously decided against the defense. Although as per procedural law the application u/s 265K CrPC can be filed at any stage and to be argued on the available record and at the present the available record is complete file/ripe case.

In nutshell all applications are meritless, motivated with the ulterior motive of further delaying the complaint; having no nexus with justice, equity and fair trial, thus stands dismissed in case these are not returned.



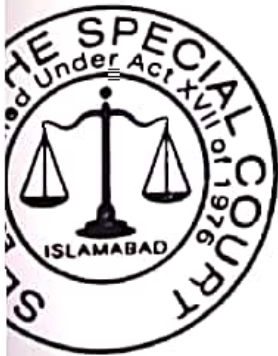
40. Lastly, the Learned Defense Counsel was yet again directed to argue the case on merit but he refused rather left the rostrum, thus being left with no other alternate we have perused the entire record and the written arguments so submitted by the earlier Prosecution Team.

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41. **Findings:** At the outset we would endeavor to address the pivotal question to which the fate of this trial hinges, i.e., should the trial continue in absence of accused or otherwise? No doubt s. 6(1) of the

Criminal Law Amendment (Special Court) Act, 1976, makes the Code of Criminal Procedure, 1898 applicable to instant proceedings; yet this application of the Code is limited and would fill the space in case the Act itself is silent in respect of a peculiar circumstance. The reason is not farfetched, i.e., the cumulative analysis of s.3 when viewed in juxtaposition with s. 5(2) CrPC would lead to this inference. This Court has settled this issue earlier vide order dated:10.1.2014. Interestingly, that order was to our knowledge not assailed, thus has attained finality.

42. We would now apply this *ibid* principle on the peculiar facts and circumstances of this trial in special reference to s. 9 of the Act when viewed in the prospective of s. 512(1) besides 366(2) of CrPC. It is patent by the act and conduct of the accused facing trial, that he has persistently and stubbornly strived ever since the commencement of this trial, to delay, retract and in fact evade it. It has been his plea throughout that either on account of ill health or for security hazards he could not reach up to this Court to face the trial. Infact, this Court has generously granted numerous opportunities to join the trial. His



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convenience was acceded to when the presence of the accused was dispensed with after framing of the charge, yet the accused opted to become a fugitive from law.

43. It is indeed the celebrated principle that a special law prevails over a general law, reliance is placed on Syed Mushhid Shah vs Federal Investigation Agency's case (2017 SCMR 1218); thus s. 366(2), 512(1) CrPC would give way to s. 9 of the Act. The ordinary sessions trial would halt on willful absence of the accused; as a judgment cannot be pronounced in absence of accused u/s 366(2) CrPC, yet s. 9 of the Act is couched in such words as to lead to the conclusion that the legislature had visualized the present scenario where the accused is evading the due process of law by willfully absenting himself. Such being the case, the command of s. 9 of the Act is to continue the trial and reach it to its logical ending.



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44. *Albeit*, in Lahore High Court Bar Association Vs General (R) Pervez Musharraf's (2019 SCMR 1029) the Hon'ble Supreme Court has while making

reference to s. 9 of the Act directed this Special Court to continue with the trial irrespective of the absence of the accused. Thus, we would now proceed to decide the fate of this trial.

45. The connotation, 'Special' has considerable significance and on account of the specialized sphere prescribed the mechanical application of the Code and the Qanoon e shahadat Order, 1984 would fall short of the purpose envisaged for this Special Court. Many matters on record are not disputed at all. Similarly, plea of privy raised by the accused of others being accomplice is already decided by the Hon'ble Supreme Court, are factors, that force us to reach to the conclusion that either the facts are admitted that need not be proved (*see. Ghulam Mustafa vs Senior Member Board of Revenue Sindh – 2008 PLC (CS) 317 Supreme Court and Nazir Ahmad vs M. Muzaffar Hussain's case 2008 SCMR 1639*) or in respect of which an illustrious judicial pronouncements exists (*see. Pervez Musharraf vs Nadeem Ahmad's case – 2014 PLD 585 SC*).



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46. As in any other criminal case two theories crops up in this trial. The first is advanced by prosecution and the other propounded by defense. These needs to be minutely analyzed. Before doing so we would need to formulate the following points for determination within the contemplation of s. 367(1) CrPC: -

- i. Whether the accused has subverted the constitution and has committed the offence of High Treason?
- ii. Whether the accused had criminal intent or *mens rea* to commit this offence or was instructed so by the Cabinet or advised by the Prime Minister?
- iii. Whether there were justifiable circumstances in favor of the accused leading to the legitimization of the act of High Treason through subversion of the Constitution?



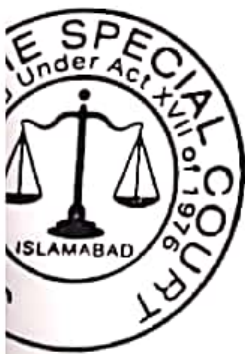
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47. We have earlier observed that on account of the circumscribed task of determination invested in this Special Court, the stereotype mechanical application of the general laws of evidence and

procedure would be improper. Even otherwise, it is a celebrated principle of Quanon-e-Shahdit Order, 1984 (*see. Article 113*) that facts admitted need not be proved. By transposing this principle on the evidence on record, it would transpire that the accused has not out rightly negated the acts alleged by Prosecution. He has not denied the imposition of emergency, the proclamation order, prescribing a novel oath for the judges of the Superior Courts and his speech on the eve he imposed the emergency rather his defense plea is two-fold: -

- a) That, there were compelling circumstances justifying these acts. These circumstances were the upsurge in terrorist activities, complete breakdown of the Governmental machinery on account of arbitrary interference of Courts under the garb of judicial activism and the poor state of economy.
- b) The second defense plea is that it was not the voluntary act of the accused. He was advised so by the Cabinet, the Prime Minister and by key leads of the State institutions. Thus, while keeping in foresight the twofold defense plea we are confident in concluding that the

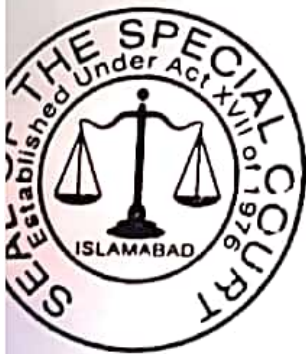


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accused never intended to contest the acts alleged by Prosecution. It is not at all in contest as to whether the accused had proclaimed the emergency, prescribed new oath of office for the judges of superior courts and house arrest some of them.

48. Coming to the two defense pleas raised by the accused. It appears that the accused is inspired by a solitary portion of the self-acclaimed saying of President Abraham Lincoln. That solitary selective portion was referred to in his speech justifying his imposition of emergency. The relevant excerpt is as under: -

"....as an idealist of Abraham Lincoln had one consuming passion. During the time of supreme crisis and this was to preserve the union because the union was in danger toward that end he broke laws, he violated the constitution, he usurped arbitrary power, he tripled individual liberties. His justification was necessity..."



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We believe that this inspiration of the accused is being ignorantly selective and disregarding the more pertinent sayings of Abraham Lincoln who

categorically and emphatically stated, *"Don't interfere with anything in the constitution that must be maintained for. It is the only safeguard of our liberties"*

49. In the like manner we believe that the reverence of the accused towards the doctrine of necessity is not in consonance with the pronouncements of the honorable Supreme Court of Pakistan. In our country, during 72 years of its independence, to our misfortune several times, the Constitutions framed by Legislative Bodies were desecrated. Sovereignty of people was not allowed to flourish and get deep-rooted in the polity of our country. Prior to 3rd November, 2007, the Constitutions were either abrogated or put in abeyance and the democratic system of governance was put to an end. For the first time, the Constitution of 1956 was abrogated on 7th October, 1958, and Martial Law was imposed by the then President Iskandar Mirza, who dismissed the Central and Provincial Governments; dissolved the Parliament and Provincial Assemblies and abolished all Political Parties and appointed General Muhammad Ayub



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Khan, the then Commander in Chief, as Martial Law Administrator. On 25th March, 1969, again the then head of Army, General Agha Muhammad Yahya Khan, abrogated the Constitution of 1962 and Promulgated⁹ Martial Law followed by Provisional Constitution Order¹⁰. On 5th July, 1977, once again Martial Law was imposed throughout the country by the then Army Chief¹¹, who, vide Proclamation of Martial Law¹² dissolved the National Assembly, the Senate, the Provincial Assemblies etc. and put the Constitution of 1973 in abeyance followed by Laws (Continuance in Force) Order, 1977.

50. Had the hon'ble Superior Judiciary, at that time, not introduced the *Doctrine of Necessity* and had proceeded against the usurpers, abrogators, subvertors, the Nation would not have seen this day at-least, where an officer in uniform repeats this offence.

51. The infamous '*Doctrine of necessity*' was introduced by the hon'ble Apex Court of the country



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⁹ PLD 1969 Central Statutes 42
¹⁰ (Gazette of Pakistan, Extraordinary 4th April, 1969)
¹¹ General Muhammad Zia-ul-Haq
¹² PLD 1969 Federal Statutes 326

in the case of Moulvi Tameezudin Khan¹³, which was nourished in the Dosso's case¹⁴. In the case of Syed Zafar Ali Shah¹⁵ this doctrine attained maturity but finally the hon'ble Apex Court in Syed Yousaf Raza Gillani, Prime Minister of Pakistan's case¹⁶, buried their self-endorsed doctrine of necessity, probably forever while observing "*...as a court of law, we cannot base our judgments on the anticipated consequences of our decision, else we will be reverting to the malignant doctrine of necessity which has already been buried, because of the valiant struggle of the people of Pakistan....*"

52. Later, there was another onslaught on the ongoing democratic system of governance. On 12th October, 1999, the then Chief of Army Staff, General Pervez Musharraf/ Accused once more, put the Constitution in abeyance and the whole of Pakistan was brought under the control of Armed Forces. The National Assembly, the Senate and the Provincial Assemblies were suspended, so also, the Chairman and Deputy Chairman of Senate, the Speaker and



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¹³ Federation of Pakistan vs Moulvi Tamzeeuddin Khan PLD 1955 SC 240
¹⁴ PLD 1958 SC 533
¹⁵ Syed Zafar Ali Shah versus General Pervez Musharraf - PLD 2000 SC 869
¹⁶ PLD 2012 SC 466

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Deputy Speaker of the National Assembly and the Provincial Assemblies were suspended and followed by issuance of Provisional Constitution Order and the Oath of Office (Judges) Order, resultantly as many as 61 Judges of superior judiciary including Chief Justice of Pakistan and Chief Justices of three Provinces were made dysfunctional.

53. Accused self-styled himself as Chief Executive and started ruling the country under the new dispensation.

54. This action of accused was, undeniably, taken to prevent the 11-member Bench of the Hon'ble Supreme Court hearing the Petition No. 73 of 2007 filed by Mr. Justice (Rtd) Wajihuddin Ahmad and others in which the qualification of the Accused was in question, and perhaps, he was not expecting a favorable decision.



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55. With utmost respect to the judgment of hon'ble Apex Court reported in PLD 2016 SC 454 regarding aiders and abettors, Article 6 sub-article 2 of the Constitution of Islamic Republic of Pakistan, 1973,

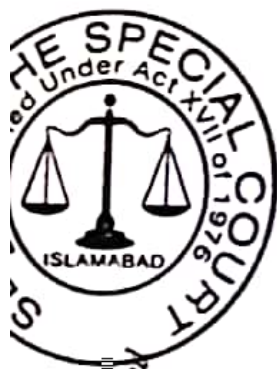
reads as, *'...any person aiding or abetting or collaborating the acts mentioned in clause (1) shall likewise, be guilty of high treason...'* The accused has confessed the officers / officials *qua* his accomplice yet the same have not been arrayed as co-accused by the Complainant, for reasons best known. Even otherwise, it is unbelievable and unimaginable that such an extreme act is committed alone by a single man in uniform. The then Corps Commanders Committee in addition to all other uniformed officer who were guarding him each and every time, with boots on, are equally and fully involved in the act and deeds of the accused person. The ratio decidendi of the above cited judgement is that the aiders and abettors cannot be inducted by the Court in a complaint filed by the Federal Government, meaning thereby the Federal Government / Complainant is not absolved of not investigating these officers and filing a complaint against them, which they can do at any time. If for a moment it is presumed that Military High Command including Corps Commanders were not involved then why they failed to defend and protect the constitution of Islamic Republic of Pakistan, 1973 by not restraining a man in uniform,

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but unfortunately the cronies of the accused has been left free till date.

56. Each and every member of the Armed Forces, as per their oath under the 3rd schedule to the Constitution in pursuance to Article 244 is bound to bear true faith and allegiance to Pakistan and uphold the constitution which embodies the will of the people. They have also sworn not to engage themselves in any political activities whatsoever. Every member of the Armed Forces have, also solemnly affirmed that he will honestly and faithfully serve Pakistan, as required by and under the law and in this respect, the oath has been violated by each and every member of the higher command in the armed forces by failing to preserve, protect and defend the constitution, either siding, aiding, supporting or facilitating the accused or remaining silent to this act while being in uniform as the accused's plane had not yet landed that his cronies acted unconstitutionally on the ground, for the first time when the constitution was usurped in the year 1999.



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57. Article 5 of the Constitution of Islamic Republic of Pakistan, 1973, reads as

- (1). Loyalty to the State is the basic duty of every citizen.
- (2). Obedience to the Constitution and law is the (inviolable) obligation of every citizen wherever he may be and of every other person for the time being within Pakistan. In the instant case, the accused violated the same twice along with others.

58. Therefore, we are of the considered view that the first defense plea does not stand on facts and law.

59. Considering the act of high treason as act of extreme unconstitutional crime, sub-article / clause-2A to Article - 6 of the Constitution of Islamic Republic of Pakistan, 1973, has been introduced vide 18th amendment Act, 2010, which reads, "*an act of high treason mentioned in clause (1) or clause (ii) shall not be validated by any Court including Supreme Court and a High Court.*" This amendment introduced, although, after the crime was committed by the accused, reflects that the act of high treason is an unpardonable act, not even condonable by the top most Courts of the Country and Article 6 is the only safeguard within the constitution that deal with an offender who challenges or attempts to challenge the boundary of the social contract between citizens and the State. The trial of the High Treason is the



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requirement of the constitution against all those individuals who undermines or attempts to undermine the constitution by any means.

60. Be it as it may, coming to the second limb of the defense plea, at the expense of repetition, it is the precise plea that the alleged imposition of emergency, promulgation by the provisional constitution order and the oath of office as claimed by the accused was not his brainchild but that of the Prime Minister, the Cabinet, and the stalwarts then at the helm of the affairs. To this we are very confident in observing that these matters have already been decided by the Supreme Court and even the review¹⁷ against this verdict has also been decided against the accused by a unanimous verdict of 14 to nil. The relevant extracts from the *ibid* judgment is reproduced hereunder in support of this conclusion: -



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“...The Court in the case of Sindh High Court Bar Association was instead primarily tasked with determining the constitutional validity of the Proclamation of Emergency made on November 3rd, 2007 and certain acts and other instruments following the said Proclamation. While

¹⁷ 2014 PLD SC 585

determining this issue, the Court struck down and declared unconstitutional inter alia the Proclamation of Emergency, the Provisional Constitution Order No.1 of 2007 and the Oath of Office (Judges) Order of 2007. These were all indeed actions taken by the petitioner, but the Court did not comment on the criminal or civil consequences which could flow against the petitioner as a result of this determination. The petitioner has conceded this much in paragraph 30 of the Review Petition in the following words:

30. That it is also pertinent to mention that though this Hon'ble Court after declaring that the Acts of 3rd November, 2007 were un-Constitutional yet in the operative part of the judgment this Hon'ble Court did not mention the prosecution of the petitioner under the High Treason Act..."

The actions of the Petitioner on 3.11.2007, may have well been taken for his personal benefit, as the judgment under review holds, but it cannot be held on this basis that the petitioner's act of appointment/removal of judges of the superior courts, attempts at making unilateral amendments to the constitution, declaring a state of emergency, and so forth were personal rights of the petitioner the adjudication of which showed bias of the former Chief Justice against the petitioner. The judgment under review was rendered by 14 Judges of this Court who held the aforesaid acts of the petitioner to be unconstitutional..."



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61. We, therefore conclude that the second defense plea has already been decided against the accused by the Hon'ble Supreme Court; The accused alone has been held responsible for the crime cited in the charge.

- a. The phrase, '**High Treason**' is defined in Oxford Dictionary to mean, the crime of betraying one's country, especially by attempting to kill the sovereign or overthrow the Government.
- b. The action of betraying someone or something.

Similarly, in Legal parlance it is defined at Article 6 of the Constitution as to mean, '...abrogates or subverts or suspends or holds in abeyance, or attempts or conspires to abrogate or subvert or suspend or hold in abeyance, the Constitution by use of force or show of force or by any other **unconstitutional** means shall be guilty of high treason...'. Thus the phrases abrogation, subversion, suspension and holding in abeyance are of considerable import. The term, 'Abrogate' in ordinary sense means Repeal or do away with (a law,



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right, or formal agreement) while Abrogation is a Latin term for legal annulment under the Roman Law¹⁸. The word, 'Subversion' is the process of overthrowing, destroying or corrupting¹⁹.

Subversive Activity is a pattern of acts designed to overthrow a Government by force or other illegal means. To pervert, as the mind, and turn it from the truth; to corrupt. A dictator stays in power only as long as he manages to subvert the will of his people. The usurpation of the functions of Government and other organs of State established by the constitution tantamount to subversion of the constitution. Exercise of undue influence over judiciary (such as making them cease office and/or take fresh extra-constitutional oath) do tantamount to subversion of the constitution. In ordinary parlance it means to temporarily prevent from continuing or being in force or effect. We believe that it is when officially one prohibit (someone) from holding their usual post or carrying out their usual role for a particular length of time.

Now coming to the word, 'Suspend', it in legal terms means to interrupt, postpone or defer. To temporarily



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¹⁸ (Black's Law Dictionary, 8th Edition 2004 p. 18)

¹⁹ Black's Law Dictionary, 8th Edition, 2004 at P. 4489.

keep (a person) from performing a function, occupying an office, holding a job, or exercising a right or privilege.

The connotation, 'Holds in abeyance' Ordinary meaning: A state of temporary disuse or suspension.

In Law it means the position of being without or of waiting for an owner or claimant.

The Legal meaning of, 'Abeyance' is temporary inactivity: suspension. Thus the phrase 'holds in abeyance' means to hold onto suspension or keep suspended. From these definitions of different phrases used in Art. 6 it can be easily gathered that accused impliedly suspended the constitution before ordering and proclaiming that "the constitution of the Islamic Republic of Pakistan shall remain in abeyance.

Unconstitutional means Not in accordance with a political constitution or with procedural rules. Its legal definition is some act contrary to or in conflict with the constitution²⁰.



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²⁰ (Black's Law Dictionary, 8th Edition, 2004 at p. 4738)

62. The meaning of these key terms would lead us to the conclusion that the offence charged squarely falls in the definition of High Treason as cited in Art. 6 of the Constitution. It is worth highlighting that accused had other legal options, if at all the situation as per his version so demanded. These legal ways included accountability of Judges under Art 209 through the Supreme Judicial Council, procedure of proclamation of Emergency Provisions [Part X of the Constitution] Article 232 on account of war, internal disturbance, etc., Article 233, power to suspend the Fundamental Rights, etc, during emergency period, Article 234 - Power to issue Proclamation in case of failure of constitutional machinery in a Province, Article 235 - Proclamation in case of financial emergency and Article 236 - Revocation of Proclamation, etc. Procedure for suspension (obeyance) also given in Emergency Provision (Part X, Constitution). In the like manner the procedure for removal of judges, provided in Articles 209 and 211 was not followed. Hence the actions were totally unconstitutional and void.

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63. Similarly, Article 6 is the only safeguard for the constitution that deals with an offender who

challenge the boundaries of the social contract between the citizens and the State. We believe the quantum of punishment for the act of high treason describes the gravity of this offence and the framers of the constitution inserted Article 6 in the constitution to provide an in build mechanism for its protection. The trial of high treason is the requirement of the constitution against those individuals who undermine or attempt to undermine the constitution by any means. This Court after presentation of undeniable, irrefutable and unimpeachable evidence by the prosecution against the accused reaches to the conclusion that indeed Accused is guilty and deserves exemplary punishment.

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64. We are of the considered view that the accused in this High Treason case has been afforded more than his due share of fair trial. The protected trial of a constitutional and not any ordinary offence that began six years ago in 2013, has yet to see its end in 2019. The accused, who has been given every opportunity to defend himself, has by his conduct in the proceedings only evinced his utter contempt for the law and legal institutions in this country. The

facts of this case are well documented. The documents clearly demonstrate the guilt on the part of the accused. It proves beyond a shadow of reasonable doubt all the charges of High Treason leveled against accused by the State.

65. As a necessary corollary to what has been observed we find the accused guilty as per charge. The convict be therefore hanged by his neck till he dies on each count as per charge.

66. We direct the Law Enforcement Agencies to strive their level best to apprehend the fugitive/convict and to ensure that the punishment is inflicted as per law and if found dead, his corpse be dragged to the D-Chowk, Islamabad, Pakistan and be hanged for 03 days.

67. Indeed, this portion of the judgment and execution of the sentence is nowhere defined but since it is first impression case and the sentence of death is announced in his absence after declaring the convict as proclaimed offender therefore the sentence is supposed to be executed and in case of his death a question would arise as to the mode of executing the



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sentence, to this extent para 65 prescribes the mode of execution.

68. It would be in the interest of justice that all those involved (if any) in facilitation of the escape of the fugitive accused may also be brought in the net of due course of law and their criminal acts (if any) may be investigated and tried in accordance with law.

69. The record inclusive of the case properties be kept under lock and key with the Registrar of the Court till further orders.

70. The Registrar of this Court shall forthwith provide copy of this judgment to the Learned Attorney General for Pakistan, besides the Learned Defense Counsel free of charge. Further to issue necessary committal and execution warrants to all concerned.



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**We with the majority of 02 as to 01
allow the complaint and hold the
accused guilty of high treason as
defined at article 6 of the Constitution**

and pass punishment under s. 2 High
Treason (Punishment) Act, 1973, thus
the Convict be hanged by his neck till
he is dead.

Justice Waqar Ahmad Seth
President

I have read the judgments of my learned
brothers and I respectfully disagree with their
findings. I have recorded my dissent on
separate note enclosed.

Justice Nazar Akbar

I have read, in draft, the judgment of the President
of the Special Court and concur with the findings
and punishment (except paragraph 66 of the
judgment which I shall deal with at the end of my
opinion) sought to be imposed on the accused.

Justice Shahid Karim



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Shahid Karim, J. This case is paradigmatic in more ways than one and is of first impression. I have, therefore, added a note of my own on the issues surrounding the law of treason.

'Judges! Let's Rectify History'

Article 6 is a constitutional offence; the only offence which the Constitution of Islamic Republic of Pakistan, 1973 ("the Constitution") prescribes. Its introduction aims to bring a transition from martial lawlessness to a constitutional order; from the mantra of 'Let History Judge' to 'Judges! Let's rectify history'. It is based on the notion of righting the wrongs of history. Article 6 was meant to be a bulwark against any creeping *coup d'etat* which may cause a constitutional deviation. The framers of the Constitution had seen this nation endure two martial laws and set out to right the course of recent history of dictatorship. Article 6 bears the mark of a provision the primary reference of which is to history. The policy of the treason clause is to be understood in the light of history, but likewise, that it is to be vigorously and sympathetically enforced out of respect to the lessons of that history. The Report of the Constitution Committee presented to the National Assembly of Pakistan on 31st December, 1972, is reminiscent of that historical context when



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introducing the *raison d'etre* of the offence of High

Treason:

"13. Another new provision regarding High Treason has been introduced to eliminate any possibility, in the future, of the Constitution being abrogated by any person. Under Article 5 any person who abrogates or attempts or conspires to abrogate, subverts or attempts or conspires to subvert, the Constitution by use of force or show of force or by other unconstitutional means shall be guilty of High Treason. In addition, a specific provision has been made to the effect that there shall be no protection under the Fundamental Rights to any offender from punishment retrospectively with effect from 23rd March, 1956."

2. Likewise, the debates which ensued robustly dealt with the issue and the members dwelt on the debilitating and egregious effect of repeated constitutional deviation and thus a need for the offence of High Treason to be inserted:

جناب محمد ظفر احمد انصاری: میں زیادہ وقت نہیں لوں گا کم سے کم وقت میں واضح کرتا ہوں۔ جناب والا ملک میں مشرقی پاکستان کے المیہ کے بعد جو اتنا شدید اضطراب پیدا ہوا اس کی بنیاد یہ نہیں تھی کہ 08ء میں کسی نے دستور توڑا یا 1969ء میں کسی نے دستور توڑا تاہم یہ بات بھی بہت غلط تھی اور اس کا نوٹس لیا جاتا چاہئے آئندہ کے لئے اس کا انسداد بھی ہونا چاہئے۔ لیکن اصل مسئلہ جس نے لوگوں کو اس درجہ مضرب کیا ہے وہ ملک کے دو ٹکڑے کئے جانے کا مسئلہ ہے حیرت کی بات یہ ہے کہ اس میں اس کا ذکر تک نہیں کیا گیا اور نہ صرف یہ کہ ذکر نہیں کیا گیا بلکہ اس دفعہ کے ذریعہ اور اس کے ساتھ 269-270 دفعات کے ذریعے مکمل تحفظ دے دیا گیا ہے جنرل یحییٰ کو کہ اب ان کے اوپر ملکی قانون کا کوئی مقدمہ کسی صورت سے چل ہی نہیں سکتا اس کی وجہ یہ ہے دستور توڑنے کا کام تو صرف ایک دن کا ہوتا ہے وہ انہوں نے 25 مارچ کو مکمل کر لیا اور دستور ٹوٹ گیا اسی طرح پہلا دستور جس نے توڑا وہ تو اب قبر میں جا چکا اس کے اس



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دستور توڑنے میں اس کے آلہ کار جو تھے وہ البتہ موجود ہیں لیکن پھر کئی سال تک مسلسل جو سازشیں ہوتی رہیں اور جو بالآخر ہمارے ملک کے دو ٹکڑے ہونے پر فتح ہوئی ان کا کوئی نوٹس اس میں نہیں ہے بلکہ اب اس کے بعد ممکن نہیں رہے گا نہ کوئی کارروائی کی جا سکے۔ میں جناب والا کی توجہ دفعہ 270 کی طرف مبذول کرانا چاہتا ہوں جہاں بہت واضح طور پر یہ کہہ دیا گیا ہے۔

[Mr. Muhammad Zafar Ahmed Ansari]

(2) All orders made, proceedings taken and acts done by any authority, or by any person, which were made, taken or done, or purported to have been made, taken or done, between the twentieth day of December 1971, and the twentieth day of April 1972 (both days inclusive), in exercise of the powers derived from any President's Orders, Martial Law Regulations, Martial Law Orders, enactments, notifications, rules, orders or bye-laws, or in execution of any orders made or sentences passed by any authority in the exercise or purported exercise of powers as aforesaid, shall, notwithstanding any judgment of any court, be deemed to be and always to have been validly made, taken or done, and shall not be called in question in any court.

لہذا اس کے بعد کوئی امکان نہیں رہ جاتا کہ کوئی ایسا مقدمہ چلے جس کے ذریعے جنرل یحییٰ خان کا اس پر مواخذہ کیا جا سکے۔ کہ انہوں نے اس ملک کو توڑا ہے اس لیے میری یہ گزارش ہے کہ دفعہ 5 میں اسی جملے کا اضافہ کیا جائے جو میں نے آپ کے سامنے پیش کیا ہے۔ دوسری بات یہ ہے کہ High Treason بڑا سنگین جرم ہے۔ پارلیمنٹ میں اس کے متعلق کوئی ایسا قانون بنایا جائے کہ اعلیٰ ترین عدالت ہی سنگین غداری کرنے والوں کا محاسبہ کر سکے ایسا نہ ہو کہ کوئی ٹریبیونل بنایا جائے یا کوئی عارضی عدالت قائم کر دی جائے جو سنگین غداری کرنے والوں کا محاسبہ کرے۔ اس میں سراحت ہونی چاہئے۔ کیونکہ یہ انتہائی سنگین جرم ہے اور اس کا نوٹس لینا لازمی ہے۔ لہذا میں عرض کروں گا کہ یہ مقدمہ ملک کی اعلیٰ ترین عدالت میں ہو اور عدالت کے تمام تقاضوں کو پورا کرتے ہوئے اس کی سماعت کی جائے۔ تاکہ بلا وجہ اس بھائے کوئی غیر مجرم بھی ماخوذ نہ ہو سکے۔



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3. The framers did not choose to contrive their own definition of the crime of attempting the subversion or abrogation of the Constitution. Treason is itself a term which was familiar to the law before it was used in Article 6. Terms thus weighted with historic significance were deliberately chosen, in order better to deal with a problem the practical dangers of which history was believed to teach. In *'The Law of Treason In The United States'*, James Willard Hurst, observed that:

"The appeal of Cramer v. United States, recently heard on reargument in the Supreme Court of the United States, illustrates both the need to resort to history and the limitations of the assistance which history can give, in applying the policy of the treason clause. As has been noted, the propriety or wisdom of resort to history is implicit in the framers deliberate use of a tradition-weighted concept of the crime of subversion of the state. This of course does not mean that constitutional policy is to be straitjacketed or to be easily evaded by skirting the edges of the peculiar situations which make up the history of the policy involved. The American decisions are uniform to the effect that the restrictive policy of the treason clause is to be understood in the light of history, but, likewise, that it is to be vigorously and sympathetically enforced out of respect to the lessons of that history...."



4. Almost every constitution around the world punishes treasonable conduct. Article III, Section 3 of the United States Constitution provides:

*"Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.
The Congress shall have power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attained."*

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5. According to the above definition, treason is the betrayal of allegiance owed a political sovereign either because of citizenship or because of the acceptance of the protection of laws:

"The treason clause of the United States Constitution was written, debated, and adopted by men whose ideas regarding the policy and historical implications of the law of treason were derived from English law. The very terms of Article III, Section 3 are in large part derived from the statute of 25 Edward III (1350), among whose seven categories of high treason the most important were to "compass or imagine the death of our lord the King," to "levy war against our lord the King in his realm," or to adhere to his enemies, giving them aid and comfort. The omission of any provision analogous to that against compassing the king's death, and the constitutional limitation of "treason" to the other two of the three principal branches of the Statute of Edward III, form the heart of the restrictive policy evidenced in the definition in Section 3 of Article III. Clearly, it is relevant to an understanding of the terms of that section to examine the English doctrine with which the Americans of 1787 were familiar. First importance in this undertaking should be given to the analysis of the accounts of "treason" in the great English law treatises prior to the adoption of the United States Constitution. This is both because only in the treatises do we find any careful effort to analyze the policy and the elements of the crime, and because the Americans obtained their knowledge of the English law and experience primarily from the treatises. Granting always the fundamental importance of the Statute of Edward III, other English legislative materials contribute little to explicit analysis of the crime. The case materials deserve only third rank in value; the impressive volumes of the State Trials contain a maximum of pleadings, tedious testimony and records of executions, and a minimum of helpful examination of the policy and elements of the offense. Moreover, one famous case after another proves, on close inspection, to be so interwoven with the peculiar political and religious motives and pressures of its time as to be of little value beyond furnishing cumulative evidence of the readiness with which the crime has been abused as an instrument of faction. Finally, there is little satisfactory evidence that Americans had access to, or extensive knowledge of the records of the English trials, as distinguished



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from their familiarity with the basic statute and the treatises."

6. However "little judicial imagination has been stirred to clarifying analysis in such cases" because:

"Perhaps this continuing lack of helpful judicial exploration in the field may be explained by the fact that after the nineteenth century the executive and legislative branches no longer considered the treason charge as the principal bulwark of state security. There have been less than two score treason prosecutions pressed to trial by the Federal government; there has been no execution on a federal treason conviction; and the Executive has commonly intervened to pardon, or at least mitigate the sentence of those convicted. In the states this trend is even more marked. The trials of Thomas Dorr, and of John Brown, for treason by levying war against the states of Rhode Island and Virginia, respectively, are the only completed treason prosecutions by state authorities. As the Supreme Court observed in the Cramer case, we have managed to do without treason prosecutions to a degree that probably would be impossible except while a people was singularly confident of external security and internal stability."

(Hurst, The Law of Treason in the United States, pp.15, 16, 187)

7. Thus the primary reason why (in the American context) "the executive and legislative branches no longer consider the treason charges as the principal bulwark of the state security" was that the "people was singularly confident of external security and internal stability". Sadly that is not the case in Pakistan where we continue to grapple with the felony of treasonable conduct. Despite Article 6, there have been no treason prosecutions and so lack of any treason charge (let alone a treason conviction) has allowed successive dictators to run amok.



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8. In *America's Constitution, A Biography*, Akhil

Reed Amar stated that:

"A general commitment to Enlightenment values (slavery aside) pulsed through the Constitution, and this theme also manifested itself in the treason clause. Under England's feudalistic treason rules (eventually abolished in 1834), the Crown could lawfully seize a traitor's homestead from the family members due to inherit it. The traitor's blood was deemed corrupt, and descendants whose property claims flowed through that blood were divested of these claims. By contrast, Article III barred the federal government from imposing any "Corruption of Blood" in treason cases. In the New World, the black mark—the taint, the "attainder"—of a treason conviction was to be individual, not familial. Just as no favorite son should be handed his sire's government post, so no child should be punished for the sins of his father."

9. Treason is a political crime and so has been defined in the Constitution. James Watson, one of the members of the Convention for drafting the United States Constitution, cited the clause as an "ornament of the proposed constitution". At the same time, it has to be stressed that the crime of treason has to have careful bounds. In the words of celebrated Montesquieu;

"If the crime of treason be indeterminate this alone is sufficient to make any government degenerate into arbitrary power".

10. Chief Justice John Marshall (of the US Supreme Court) made the following observations, in ruling on the motion for commitment of Burr, as to why treason had been defined in the Constitution:

"As this is the most atrocious offence which can be committed against the political body, so is it the charge which is most capable of being employed as



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the instrument of those malignant and vindictive passions which may rage in the bosoms of contending parties struggling for power. It is that of which the people of America have been most jealous, and therefore, while other crimes are unnoticed, they have refused to trust the national legislature with the definition of this."

(United States v Burr, 25 Fed. Cas. No. 14, 692a, at 13)

11. In the words of Chief Justice Marshall in *Ex parte Bollman*, 4 Cranch 75, these are:

"crimes so atrocious as those which have for their object the subversion by violence of those laws and those institutions which have been ordained in order to secure the peace and happiness of society;..."

12. The crime of high treason:

"Now altho the crime of high treason is the greatest crime against faith, duty, and human society, and brings with it the greatest and most fatal dangers to the government, peace, and happiness of a kingdom, or state, and therefore is deservedly branded with the highest ignominy, and subjected to the greatest penalties, that the law can inflict..."
(Hale, History of the Pleas of the Crown)

13. As stated earlier, in the United Kingdom, treason and related offences are comprised in Offences against the State or security. The earliest law on the subject was enacted by Treason Act, 1352 (Commonly known as the Statute of Edward III). Halsbury's Laws of England (fifth edition), vol.25, deals with the subject in the following manner:

"356. Acts constituting treason. By statute a person is guilty of treason who:

- 1) levies war against the Sovereign in Her realm, or is adherent to the Sovereign's enemies in Her realm giving them aid and comfort in the realm, or elsewhere;
- 2) compasses or imagines the death of the Sovereign;



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- 3) compasses or imagines the death of the King's wife or of the Sovereign's eldest son and heir;
- 4) violates the King's wife or the Sovereign's eldest daughter unmarried or the wife of the Sovereign's eldest son and heir;
- 5) endeavours to deprive or hinder any person who is next in succession to the Crown for the time being from succeeding after the demise of the Sovereign to the Crown and the dominions and territories belonging to overt act or deed; or, knowing such offence to be done, is an abettor, procurer and comforter of the offender;
- 6) slays the chancellor, treasurer, or the king's justices, being in their places, doing their offices.

Anyone who owes allegiance to the Crown may commit treason.

A person convicted of treason is liable to life imprisonment or any shorter term.

"357. Duty of allegiance. The essence of the offence of treason lies in the violation of the allegiance owed to the Sovereign. Natural allegiance is due from all British subjects at all times wherever they may be; local allegiance is owed by an alien under the protection of the Crown so long as he is resident within the realm and by a resident alien who goes abroad leaving his family or effects within the realm or goes abroad in possession of a British passport. An alien enemy may also be convicted of treason if has accepted British protection during a war. An ambassador who is not a subject of the state to which he is accredited does not owe any temporary allegiance to that state."

14. Thus, in the United Kingdom, the crime of treason is an overt act of compassing the death of the sovereign, to enter into measures for deposing or imprisoning Her. Early English Treaties consider it an overt act of the treason to destroy the constitution of the country "apart from compassing the death of the sovereign or to enter into measures for deposing or imprisoning the sovereign."

15. The words 'treason' and 'traitor' are derived from the Latin *Tradere*, meaning to deliver or hand



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over. "Treason is the gravest crime known to society and by the law of every country, traitors are liable to the severest punishment. It is a crime directed against the very existence of the State itself and is therefore peculiarly odious." (Law Commission of India Report No.43 on "Offences against the National Security", Paragraph 1.1 (1971).

16. *Encyclopedia Britannica*, vol.22 (p.196) defines the crime as:

"Treason, a general term for the crime of attacking the safety of a sovereign state or its head. The law which punishes treason is a necessary consequence of the idea of a state, and is essential to the state's existence. Most, if not all, nations have at an early period of their history made provision by legislation or otherwise for its punishment."

17. In Black's Law Dictionary, it has been described as:

"The offence of attempting to overthrow the government of the state to which one owes allegiance, either by making war against the state or by materially supporting its enemies.—Also termed high treason."



18. The marks of distinction between ordinary crimes and treason have been brought forth in the following words by *Frederick Pollock & Frederic William Maitland* in *History of English Law Before the Time of Edward* (2d ed. 1899):

"Several important characteristics marked off high treason from all other crimes. For one thing, it earned a peculiarly ghastly punishment. For another, it was 'unclergyable', while every felony was 'clergyable' unless some statute had otherwise ordained. Thirdly, while the felon's land escheated to his lord, the traitor's land was forfeited to the king. This last distinction influenced the development of the law."

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19. In the United Kingdom, the penalty for treason was amended from death to a maximum of imprisonment for life in 1998 under the Crime and Disorder Act, 1998.

20. Before 1998, the death penalty was mandatory, subject to the royal prerogative of mercy. The Law Commission in its working paper No.72 on Treason, Sedition and Allied Offences (1977, paragraph 39, 57-61) sought to review, inter alia, laws relating to treason prevalent in the UK. The Commission, in a nub, recommended that there should be an additional offence to penalize even in peacetime, conduct aimed at the overthrow or supplanting of constitutional government by force:

21. Excerpts from the report give an inkling into the underlying purpose of the proposal viz. the crime of treason be regarded as the most reprehensible of offences and one against the State:

59. The contrary argument is that the State should treat as the most serious offence in its criminal law any conduct aimed at the overthrow by illegal means of the constitutional system under which it is governed. This is not so much a question necessarily of providing an offence with a greater penalty than any other offence as of having an offence which will be regarded by the ordinary person as the most reprehensible of offences. If there is a general intention to overthrow the constitutional system it should, on this argument, be punished not merely through the individual offences of murder, riot, unlawful assembly or criminal damage, but as an offence against the State.

61. We would, of course, not think it right to propose that the power of the criminal law to punish conduct aimed at illegally supplanting, or changing the form, of government in this country should be so restricted as to allow such serious conduct to go unpunished. It is,



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however, difficult to postulate a conspiracy illegally to overthrow or supplant constitutional government, without the use of force; there would, therefore, also be a conspiracy to commit serious offences (for example, damage to property contrary to s.1 (2) of the Criminal Damage Act, 1971, or causing an explosion contrary to s.3 of the Explosive Substances Act, 1883), which would be punishable with heavy penalties. Nevertheless, we think that there may be virtue in retaining an offence specifically dealing with such conduct in terms of treason or the like in order to emphasise the particularly reprehensible character of the conduct. Our provisional view is that conduct of this kind, even though it would necessarily involve the commission of other serious offences, needs to be a separate offence, and that there should be a specific offence applicable in peacetime to penalise conduct aimed at the overthrow, or supplanting, by force, of constitutional government."

22. The report also alluded to the offences of treason which apply in peacetime in different countries.

"60 Many countries have offences of treason or their equivalent which apply in peacetime. Canada and New Zealand each provide that it is treason to use force for the purpose of overthrowing the government of the country, (and in the case of Canada of a province) or to conspire so to do. Australia distinguishes between treason and treachery (depending upon whether the acts occur in peacetime or wartime), and provides that it is treachery by any act to (i) overthrow the Constitution of the Commonwealth by revolution or sabotage, or (ii) overthrow by force or violence the established government of the Commonwealth or of a State (Crimes Act, 1914-1966, s.24 and s.24AA (1)). In America, the Proposed New Federal Criminal Code (Final Report of the National Commission on Reform of Federal Criminal Laws (1971), s.1103) proposed an offence of armed insurrection with intent to overthrow, supplant or change the form of the government of the United States or of a State."



23. In Federalist No.43 (while drafting the Constitution of the United States), James Madison wrote regarding the treason clause:

"As treason may be committed against the United States, the authority of the United States ought to be enabled to punish it. But as new-fangled and artificial treasons have been the great engines by which violent factions, the natural offspring of free government, have usually wreaked their alternate malignity on each other, the convention have, with great judgment, opposed a barrier to this peculiar

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danger, by inserting a constitutional definition of the crime, fixing the proof necessary for conviction of it and restraining the Congress, even in punishing it, from extending the consequences of guilt beyond the person of its author."

Based on the above quotation, it was noted by the lawyer William J. Olson in an amicus curiae in the case Hedges v. Obama that the Treason Clause was one of the enumerated powers of the federal government. (Olson, William J. (16 April 2012). "Case 1:12-cv-00331-KBF Document 29-2 Filed 04/16/12 AMICUS CURIAE BRIEF" (PDF). Friedman, Harfenist, Kraut & Perlstein, PPC. lawandfreedom.com.pp. 15-16. He also stated that by defining treason in the U.S. Constitution and placing it in Article III "the founders intended the power to be checked by the judiciary, ruling out trials by military commissions. As James Madison noted, the Treason Clause also was designed to limit the power of the federal government to punish its citizens for 'adhering to the enemies of the United States by giving them aid and comfort.



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Analysis of some other clause:

There is no single crime of treason in Swiss law; instead, multiple criminal prohibitions apply. Article 265 of the Swiss Criminal Code prohibits "high treason" (Hochverrat/haute trahison) as follows:

Whoever commits an act with the objective of violently-changing the constitution of the

Confederation or of a canton; removing the constitutional authorities of the state from office or making them unable to exercise their authority.

New Zealand has treason laws that are stipulated under the Crimes Act 1961. Section 73 of the Crimes Act reads as follows:

Every one owing allegiance to Her Majesty the Queen in right of New Zealand commits treason who, within or outside New Zealand,—

- (a) Kills or wounds or does grievous bodily harm to Her Majesty the Queen, or imprisons or restrains her; or
- (b) Levies war against New Zealand; or
- (c) Assists an enemy at war with New Zealand, or any armed forces against which New Zealand forces are engaged in hostilities, whether or not a state of war exists between New Zealand and any other country; or
- (d) Incites or assists any person with force to invade New Zealand; or
- (e) Uses force for the purpose of overthrowing the Government of New Zealand; or
- (f) Conspires with any person to do anything mentioned in this section.

Article 39 of the Constitution of Ireland (adopted in 1937) states:



"treason shall consist only in levying war against the State, or assisting any State or person or inciting or conspiring with any person to levy war against the State, or attempting by force of arms or other violent means to overthrow the organs of government established by the Constitution, or taking part or being concerned in or inciting or conspiring with any person to make or to take part or be concerned in any such attempt.

German law differentiates between two types of treason: "High treason" (Hochverrat) and "treason" (Landesverrat). High treason, as defined in Section 81 of the German Criminal Code is defined as a violent attempt against the existence or the constitutional order

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of the Federal Republic of Germany, carrying a penalty of life imprisonment or a fixed term of at least ten years."

Section 46 of the Criminal Code of Canada has two degrees of treason, called "high treason" and "treason."

Section 46 reads as follows:

High treason

(1) Every one commits high treason who, in Canada,

(a) kills or attempts to kill Her Majesty, or does her any bodily harm tending to death or destruction, maims or wounds her, or imprisons or restrains her;
(b) levies war against Canada or does any act preparatory thereto; or

(c) assists an enemy at war with Canada, or any armed forces against whom Canadian Forces are engaged in hostilities, whether or not a state of war exists between Canada and the country whose forces they are.

Jurisprudence Relating to Military Coups and Treason:

24. There is a healthy body of jurisprudence relating to military coups and their aftermath. Successive democratic governments have grappled with the legacies of dictatorships and how to investigate a tyranny's legacy in order to confront their grim pasts. Since the French Revolution, it has been made clear that the choices now democracies make can set the course for a democratic system. Across the globe, examples abound in history where nations have met the challenge in contrasting ways. The lessons of Latin America and Eastern Europe



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might help other countries to choose their paths. In most cases however (particularly Latin American) newly democratic states were too weak to guarantee that the juntas will not return to power. Fledgling democracies have struggled with methods for dealing with the past. One such measure in the purge. Such purges are crucial for democracy.

25. Some of the articles and scholarly pieces by prominent writers and academics encapsulating the justification for such purges and the methods employed by different regimes may be alluded to for better understanding the historical context of political legitimisation of a constitutional order. From Latin America to Eastern Europe to Korea, the common strand that runs through these attempts to purge is a keen desire to restore the moral and constitutional foundations of the democratic institutions. To underline the basic object: As soon as the first opportunity arises, let it be known that the illegal usurpation was a treasonous act and ought to be visited with a suitable punishment for the crime of treason. I shall begin with the deathless observations of Yaqub Ali, 1 (p.243) in *Asma Jilani v Govt. of the Punjab*, PLD 1972 SC 139:

"May be, that on account of his holding the executive apparatus of the State, the people and the Courts are silenced temporarily, but let it be laid down firmly that the order which the usurper imposes will remain illegal"



and Courts will not recognize its rule and act upon them as de jure. As soon as the first opportunity arises, when the coercive apparatus falls from the hands of the usurper; he should be tried for high treason and suitably punished. This alone will serve as a deterrent to would be adventurers."

26. *Asma Jilani* and these lines in particular were the catalysts for inserting Article 6 in the Constitution. The members of the Constitution Committee thought they had seen the last of the dictators and that *Asma Jilani* firmly entrenched the demise of usurpers. Deriving strength out of that case, they set about drafting a clause relating to the crime of treason. Surely this was done with an eye on history, of Pakistan as well as others countries. But they studied history selectively and not in the entirety of the lessons that it had in store. The enactment of Article 6 was not followed up by a resolve on the part of successive democratic regimes to ensure that the perpetrators of Martial Law were tried and convicted for high treason. Article 6 remained a mere painting, to be looked at.



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27. *Jurisprudence of successful treason: Coup d'etat & Common Law*" by Tayyab Mahmood (27 Cornell Int'l L.J 49 (1994)) aims at a critical examination of judicial responses to *coup d'etat* in post-colonial common law jurisdictions.

28. It begins by reference to a stanza by *John Dryden, The Medalk A Satyre Against Sediton*, in

Poems of John Dryden 250, 254 (James Kinsley ed. 1958):

"But treason is not own'd when tis descry'd;

Successfully crimes alone are justify'd"

Further that:

"Orderly transfer of power contemplated by the constitutional order is the exception rather than the norm in most post-colonial societies. A change of government often issues from the threat or use of force against the incumbent regime, a phenomenon designated as a coup d'état. Since an incumbent regime forms part of the constitutional order, its extra-constitutional overthrow is not only illegal but amounts to the high crime of treason.

A successful coup d'etat raises some complex legal questions. Are perpetrators of coups d'etat guilty of treason? Should (or can) they be tried and punished for the high crime? Does the constitutional order survive a coup d'etat? What is the constitutional foundation of a regime born of a coup d'etat? What is the source of validity, legitimacy, and legislative power of an extra-constitutional order? Can the courts validate usurpation of state power? These and other related questions have long occupied political scientists and sociologists. Often in the wake of coups d'etat, courts in common law jurisdictions are called upon to resolve issues of the survival of the constitutional order and the validity legitimacy, and legislative power of usurper regimes."

29. *Asma Jilani* is the first case alluded to by *Mehmud*. The failed coup by the military of Bophuthatswana was referred where upon reinstatement of the deposed government, the leader of the attempted coup and 194 others were brought to trial on the charge of high treason. Mahmud then went on to distinguish between a revolution and a *coup d'etat*:



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"It is important for this inquiry to maintain a distinction between a revolution and a coup d'etat. Most legal scholars and courts tend to treat all political changes not contemplated by the constitution in the same light and use the terms revolution and coup d'etat interchangeably. This uniform treatment rests upon a formalistic legal concept which ignores the rapid tearing of the fabric of society by the forces of revolution."

building them anew on different foundations." This envisages a complete metamorphosis that affects both civil society and the entire state; the transformation is so pervasive that legitimacy of the new order is completely autonomous of the processes and institutions of the old order. The content of the legal order and the structure of judicial institutions are typically changed.

A coup d'etat, on the other hand, typically aims only at capturing political power extra-constitutionally. Only that part of the Constitution which bears on the formation of political organs of the state is subverted. The functional framework of the state, the judicial branch, and the wider legal order are typically kept in place. Typically the very first act of usurpers after assuming power following a coup d'etat is to proclaim that, except for a few specified ones, the laws of the land will remain in force, and the state will function as far as possible in accordance with the old Constitution. See e.g., Laws (Constitution in Force) Order, 1977 of Pakistan."

30. Thereafter he referred to the place of judiciary in the new regime and the urge for judicial pronouncements about the nature and merits of the change:

"As a result, the legitimacy of the new regime is not completely autonomous of the pre-existing processes and institutions. In the cases examined above, the judiciary survived the coups d'etat that destroyed the executive and legislative organs of the state. Beyond letting it survive institutionally, the judiciary was allowed to determine the validity of the new regime, even in the face of express preclusion of such review contained in proclamations and decrees of usurper regimes. For example in Rhodesia, the usurper regime first acquiesced in the refusal of the judges to take a new oath of office and then in the examination of the validity of UDI notwithstanding Decrees to the contrary. Macdonald, JA, accurately noted the importance of judicial posture for any usurper regime: "Indeed, it was only the uncertainty which existed in regards to the attitude of the High Court which cast doubt upon the status of the Government." (Madzimbamuto, [1968] 2 S. Afr. L.R. at 4120. Usurpers appear to recognize that judicial pronouncements about the nature and merits of the change and quantum of their legislative capacity have an impact on the legitimacy of the new regime, because words like "law" and "legality" function as titles of honor, and in common-law settings, "For all practical purposes a legal system or a constitution is valid when the judges have unambiguously accepted it as valid. To this extent the constitution is what the judges say it is. "Securing judicial recognition appears to be the key to gaining political legitimacy. Given the social respect enjoyed by the judiciary, recognition by courts of the old order furnishes a source of credibility for usurper



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regimes. The usurper's need for legitimacy and judicial recognition implies that the courts may not be entirely powerless when confronted with a coup d'etat and may be in a position to secure concessions in exchange for judicial recognition."

31. The Korean experience is unique and has been described as the first judicial decision in the world that punishes a successful coup. On August 26, 1996, two former presidents of the Republic of Korea, Chun Doo-Hwan and Roh Tae-Woo were convicted of insurrection, treason and corruption in the case titled "*Republic of Korea v Chun et al. 96 Do3376 (Korean Supreme Court, April 17, 1997)*". The charges arose out of their December 1979 coup. It was a watershed case and the criminal trial attracted worldwide attention. The South Korean head of state at the time proclaimed the conviction as a historic juncture opening a new era of constitutionalism for Korea. For a fuller historical perspective, excerpts are being reproduced from an article by Kak Cho (*Associate Professor of Law, Seoul National University College of Law, Korea*) hereunder:



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"For more than a decade, Korean society has taken legal steps to rectify past wrongs under the authoritarian-military regime. A cleansing campaign has developed since the "Civilian Government" was launched in 1993. It was a part of a global wave of political democratization after soviet communism's collapse. The nationwide "June Struggle" of 1987 led to the collapse of Korea's authoritarian-military regime and opened a road toward democratization...."

"The task of coping with past wrongs started with the punishment of military leaders, including two

former presidents, Chun Doo-Hwan and Roh Tae-Woo. They led the December military coup of 1979 after the assassination of President Park Chung-Hee, and ordered the brutal oppression of the May 18 Uprising of 1980 in the Kwangju area. Chun became President after dissolving the National Assembly and revising the Constitution under martial law. Roh was elected as president by popular referendum in 1987.

The "Civilian Government" that President Kim Young-Sam launched in 1993 faced strong demands from the public to investigate and punish these military leaders. Under the previous Roh government, redefining the Uprising as a "democratization movement," the National Assembly passed a law that allowed for victim compensation, and made Chun appear and testify in parliamentary hearings. However, these efforts did not alleviate the people's demands for justice and a full inquiry into the two historical incidents. In its inception, the Kim Young-Sam government was hesitant to pursue punishment against the two former presidents because he entered the Blue House with support from many politicians with military origins. Although President Kim strongly criticized the military leaders and praised the May 18 Uprising of 1980, he was reluctant to resort to criminal punishment, "arguing that the truth should be reserved for historical judgment in the future."

In 1994, the Seoul District Prosecutor's Office made a controversial decision to suspend prosecution of the military leaders although it recognized that the December coup of 1979 involved crimes of mutiny, insurrection, and murder, and the suppression of the May 18 Uprising of 1980 constituted treason and murder. They were concerned that prosecuting the military leaders might cause political, social, and legal confusion because, legally speaking, the democratic-civilian government was a legal successor to the previous Chun and Roh governments. Therefore, they concluded that "a victorious coup should not be punished after a substantial lapse of time." The office was faced with a "dilemma between formal legality and substantive justice, or between normative reality and a normative ideal."

In 1995, the majority opinion of the Constitutional Court held that this prosecutorial decision did not exceed the prosecutorial discretion allotted in Article 247 (1) of the Criminal Procedure Code, and was, hence, constitutional. The court held that the statute of limitations automatically ceases during the incumbencies of the former presidents according to Article 84 of the Constitution. Article 84 provides: "The President shall not be charged with a criminal offense during his tenure of office except for insurrection or treason." This meant that



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Chun and Roh could be subject to prosecution for mutiny or homicide. However, the court believed that it did not need to intervene into the prosecutorial decision, considering the conflicting interests between realizing justice by punishing the military leaders, and prolonged social confrontation caused by doing so.

2. *The 1995 Special Act Regarding the May 18 Democratization Movement Presented a Legislative Move to Punish the Perpetrators*

The Korean public was not satisfied with this compromised legal solution and kept pressing the government and the legislature to make a new law to punish the military leaders. Students demonstrated in the street demanding punishment of Chun and Roh. The newly revealed scandal that the two former presidents had amassed huge amounts of money from bribes they had received during their presidency made people even more infuriated. It became certain that Korean people did not want to leave their crimes to the judgment of history but to seek a legal response to the crimes. In response, President Kim directed his ruling party to enact new legislation and the National Assembly passed the Special Act Concerning the May 18 Democratization Movement in December 1995.

The Special Act was enacted to suspend the statute of limitations for the crimes against constitutional order which had been committed on and around December 12, 1979 and May 18, 1980. It stipulated that the limitation period ceased to run during the period of the presidencies of Chun and Roh in which "there existed obstacles for the State to institute prosecution." It also allowed the court to review prosecutorial disposition of cases where a prosecutor had declined to prosecute. On the other hand, a right to have a special retrial was given to people who had been punished because of their engagement in the May 18 Uprising or because of their opposition to crimes against the constitutional order.

In these new legal circumstances, the Seoul District Prosecutor's Office initiated prosecution and detained the two former presidents and former high-ranking officials who led the 1979 military coup and oppressed the May 18 Uprising of 1980.

B. *Judicial Decisions Allowed the Case to Go Forward.*

During the trial, the constitutionality of the 1995 Special Act was challenged by the defense. The defense argued that the Special Act was made to punish only specific groups, and, therefore, arbitrarily violated the equal protection principle. In addition, it applied retrospective punishment and, thus, violated the *ex post facto* principle. However, the Constitutional Court confirmed the



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constitutionality of Article 2 of the Special Act in 1996.

First, the Constitutional Court held that the Special Act cannot be regarded as automatically unconstitutional even though it was narrowly created for particular situations. The Special Act can be justified by other reasonable grounds: that the unlawfulness of the coup was grave and there exists national demand to rectify the past wrongs in the aim of establishing legitimate constitutionalism.

Second, the court held that the Special Act does not violate the ex post facto principle. The court based its decision on two hypothetical situations because the Supreme Court at that time had not decided the issue of whether the statute of limitations expired when the Special Act was applicable. It held that if the statute of limitations had not expired it would be constitutional to extend the statute of limitations. The justices' opinions were split in the case as to whether the statute had already expired. Four justices maintained the Special Act was still constitutional, while five justices argued it was unconstitutional. However, the vote of five dissenting justices did not meet the requirement for a decision of unconstitutionality, which requires a vote of six or more.

On April 17, 1997, the Supreme Court affirmed the defendants' convictions for treason and killing for the purpose of treason. The Supreme Court held that the statute of limitations for the crimes against constitutional order was lawfully suspended by the Special Act, and the prosecution was instituted before the period expired. It held:

The defendants grasped political power after they stopped the exercise of the authority of constitutional state institutions by mutiny and rebellion. Even if they had arguably ruled the State based on the Constitution which was revised by popular referendum, it should not be overlooked that a new legal order was established by mutiny and rebellion. It cannot be tolerated under any circumstances under our constitutional order to stop the exercise of the authority of constitutional state institutions and grasp political power by violence, not following democratic procedure. Therefore, the mutiny and rebellion can be punishable.

Chun was sentenced to life imprisonment and Roh was imprisoned for seventeen years. Others received prison sentences ranging from three and a half to eight years. Based on Article 7 of the Special Act, the decorations given to the military leaders were cancelled in 2006.

C. The Successful Prosecution and Trial Were "Collective Lessons in Justice"

Transitional justice in Korea did not sacrifice justice although the Kim Young-Sam government



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was established with support from many politicians with military origins. The government had to consider the people's power that overthrew the old regime. The trial of the military leaders declared that military coups and dictatorships will never be tolerated in Korea. It was a symbolic break with the old regime, providing education about democracy and the rule of law. In this context, the trial of the military leaders was a "political theatre" to provide "collective lessons in justice."

After the guilty verdict, the military leaders, including two former presidents, received presidential pardons and were released in 1997. Nobody expected they would fully serve their sentence. Investigation and prosecution for other inferior soldiers or government officials who served for them were not pursued. The fact that the transition from the authoritarian-military regime was not established through revolution, but rather through compromise, embracing some parts of the political forces that had backed the authoritarian-military regime, constituted the restrictive surroundings for transitional justice. In this sense, justice was limited."

32. Thus it is clear from the above analysis that punishing the leaders of military coup was a rallying cry of the people with the onset of civilian rule with vociferous demands to investigate and punish these military leaders. Special legislation was passed by the parliament and the judiciary helped clear cobwebs on the way to a successful trial culminating in convictions for treason and insurrection. The movement for restoration of the democratization process did not stop with the convictions. It has continued to this day with a robust legislative process such as the promulgation of the Act for Restoring the Honor of Democratization Movement Involveds and Providing Compensation for Them, Act no.6123 (2000). It was closely followed by The Special Act



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for Truth-Finding about suspicious deaths in 2001. The Presidential Truth Commission on Suspicious Deaths was established for this task. The Korean public wanted to disrupt the silence of the past to learn the truth. Notice the contrast with the Pakistani revivalist movement where successive democratic governments have made no tangible efforts at truth-finding but rather have cast the truth to oblivion. This, in turn, emboldened successive dictators who have caused constitutional disruptions with impunity and recklessness, notwithstanding the enactment of Article 6 which adorned the Constitution as an ornament of passivity. Out of the Constitutional enterprise that emerged we had no reason to echo the words of Walter Bagehot, "*A new world has arisen*". The Pakistani diaspora is still being fed on distorted history and skewed facts shrouding the truth under the cloak of expediency. Truth and reconciliation has never been at the forefront of the manifestos of the political parties and the institutionalized representative governments that they form. Our history has its share of judicial responses towards *coup d'etat* which occupy both ends of the spectrum. It has been a case of meandering jurisprudence, to say the least. As Felix Frankfurter said: "all constitutional adjudication is applied politics." (*The Zeitgeist & the Judiciary*, reprinted in



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Law & Politics: Occasional Papers of Felix Frankfurter 1913-1918).

33. Oliver W. Holmes, (a US Supreme Court Justice) writing in The Common Law I (1909) said that:

"The life of the law has not been logic: It has been experience. The felt necessities of the time, the prevalent moral and political theories, even the prejudices which judges share with their fellowmen, have had a good deal more to do than the syllogism in determining the rules by which men should be governed."

34. We next come to the Greek experience and the trial of Greek Military Junta of 1967-74. It is commonly known as the Regime of the Colonels or simply The Junta. The dictatorship ended on 24 July, 1974. The restoration of democracy led to the Colonel's trials in 1975:

"In addition to the early movements of Karamanlis' New Democracy party to restoring democracy, there were two major events that aided in and asserted that democracy in Greece was workable. One was the colonels' Trials in 1975...Firstly, the trials of the Colonels in 1975 provided closure to many Greeks and reassured them that there was no leniency for the illegal actions of the Colonels. The three main perpetrator were tried and convicted for high treason. However, their trial included questioning over torture against citizens, inhumane legislation as well as the events of the Polytechnic, with all of these serving to ensure a heavy sentence of the death penalty, which was reduce to life imprisonment. These trials showed the public that there was justice in Greece, and that those responsible for the seven years of economic decline, political unrest and social destruction would be held accountable."



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35. In Making History (Disappear): Greek's Junta Trials and the Staging of Political Legitimation, Haralambous, C.H. (Journal of Modern Greek

Studies 35(2), 307-337, John Hopkins University Press), recites a telling verbal encounter between the Judge and the main accused:

"In July 1975, Giorgos Papadopoulos burst out of a Korydallos prison courtroom where he and his fellow junta ringleaders stood trial for high treason and sedition, crying: 'I will answer only to History and to the Greek people.' The voice of the presiding judge, Yannis Ntegiannis, followed him: 'Do you think that History is absent from this courtroom?'"

36. History was indeed being made in the courtroom and the ensuing result is captured by the following observations:

"What the past lacked in drama was compensated for by the trials that followed the fall of the junta—a postmortem meant to render a spectacular confrontation between democracy and authoritarianism after the fact. In the first part of this article, I argue that the cycle of transitional trials, also known as Greece's Nuremberg trials did make history through a public ceremony of rupture with Greece's authoritarian past, of which the colonels were posited as an appropriate embodiment."

37. Thus the "cycle of transitional trials" severed Greek's authoritarian past and set it on course to democratization from which it has never looked back. Haralambous then dwelt on the social and political importance of the trials:

"....In this context, I argue that the social and political importance of the trials of the junta leaders did not lie simply in the truth brought to light by the trial, but also in the truth that the trials sought to perform and, in so doing, produce; they emerged as an attempt to reshape a popular understanding both of the junta and, more importantly, of the people—and by extension, of the Third Greek Republic claiming to represent them."

"In these trials, a la Nuremberg, what was on trial was history itself, as is implied by Ntegiannis's response to Papadopoulos that history was present in the courtroom. But I suggest that it was not



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present as a witness, or as a judge, but rather as a narrative under construction. This history was to be so constructed as to be embodied by the leaders of the junta, that their vanquishing might raze the institution of authoritarianism to the ground and begin history again, with democracy."

"...By interpellating the public to participate in a demonization of the junta after its downfall, the trials allowed for the social sphere to situate itself into a history of overt opposition that it had not inhabited under the regime itself. In this way, the trials created not only a history through which to cleanse the nation of the authoritarian, but one through which to cleanse the collective conscience of its own past—of its collective guilt."

38. In *'Overcoming the Legacies of Dictatorship'*

(*Foreign Affairs*, vol.74, no.3, 1995, pp. 134-152)

Tina Rosenberg, delineates the two main reasons to confront a grim past:

"There are two main reasons to confront a grim past: to heal tyranny's victims and to alter the conditions that nurtured dictatorship in order to prevent its return. The new democracies have dreamed up a plethora of creative and often contradictory methods for fulfilling these broad obligations to past and future. They include choosing to leave the past behind and start afresh, an official apology by the new head of state, monetary reparations to the victims or their families, employment bans and purges that keep abusers from positions of public trust, truth commission and trials of political leaders or those who carried out torture and murder."

"...Sadly, for many countries, democracy will be only a temporary phenomenon. If they do not successfully deal with a repressive past today, future opportunities may await."



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39. Rosenberg alludes to the contrasting methods of dealing with the past. One such measure is the purge and the other is the setting up of high profile official commissions to investigate crimes.

"The contrast between Latin America, with its dangerously weak governments, and Eastern Europe, with its dangerously strong ones, becomes starker as the fledgling republics consider bold methods for dealing with the past. One such

measure is the purge. Victims everywhere deserve to feel confidence in their new democratic governments, to know that the torturers and repressors are now outcasts who neither represent the state nor are able to continue their old practice. Spain's remarkable transformation after General Franco's death shows that this is not necessarily an absolute- people can break their old habits and forgive their enemies for events long past without purges. But in Latin America, such purges are crucial for democracy. There, the victims' blood is fresh, and the vicious cycle of repression and impunity that has plagued Latin America for centuries cannot be broken unless the military accepts civilian rule. Spain may have experienced real reconciliation, but most Latin countries have only an uneasy truce in which both sides are acutely aware of the distribution of power. True reconciliation cannot take place at gunpoint."

In both Eastern Europe and Latin America, high-profile official commissions to investigate a former dictatorship's crimes can help restore integrity to a country's political life. Truth commissions are especially necessary after dictatorships or wars marked by widespread torture and disappearance-crimes whose hideousness hinges in part on secrecy. Unveiling the full scope of tyranny lets its victims come to terms with their suffering and starts replacing the legacies of dictatorship with the habits of democracy."

Transitional Justice:

40. In a basic source book, Neil Kritz coined the term transitional justice for events characterizing transitions from authoritarian to democratic regimes. In his article "coming to terms with the past. A framework for the study of justice in the Transition to Democracy" John Elster articulates the beliefs, values and other variables (and constraints) under which policy choices are made in this regard:

"Over the last fifty years there have been a number of transitions from authoritarian or totalitarian to democratic regimes. (For verbal convenience, I shall use 'authoritarian' for both pre-democratic regime types.) In most of them, the new regimes have had to come to terms with their pre-democratic past. They have had to decide whether



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leaders of, collaborators with or agents of the former regime should be brought to court or otherwise penalized, and whether and how the victims of the regimes should be rehabilitated and compensated. Large-scale trials and investigations have taken place or are still unfolding in the German occupied countries after WWII, in several South European countries in the 1970s, in the East Bloc countries after 1989, and in a number of Latin American countries in the 1980s. As these examples indicate, transitional justice often occurs in regional waves, allowing earlier experiences within each wave to influence later ones. Isolated cases also occur, as in South Africa after 1993 or South Korea in 1996."

In transitional justice, many of the judges themselves have been implicated in the regime they are judging. In war trials, judges can be taken from outside the country. Also, in many cases of transitional justice the pre-democratic regime continues to be an important political presence (most obviously in cases of military dictatorships) that may necessitate compromises that a victorious or occupying power need not worry about. Even when external powers have been responsible for bringing about the transition itself, once it has been accomplished the new democratic regimes are often on their own. They must, as it were, rebuild the boat in the open sea. For this reason I exclude the Nuremberg trials from the scope of transitional justice, but include the trials that took place in German-occupied countries. Many events that take place after a regime transition can be classified roughly as 'retroactive justice'. Here, I limit myself to a subset of these events that seem sufficiently homogeneous to find place in a unified framework. These are political decisions made in the immediate aftermath of the transition and directed towards individuals on the basis of what they did or what was done to them under the earlier regime."

"The basic decision. The issue on which all others turn is obviously whether to engage in transitional justice at all. In a few cases, the decision has been made to abstain from such measures. The Spanish transition of 1976-1978 is the most prominent example. 'In keeping with the non-confrontational approach to the legacy of the former regime, police files from the long Franco era have not been used to purge those implicated in the abuses of the regime; these files have remained sealed to the present day. In 1976, Juan Carlos issued a royal amnesty for many convicted of political crimes, excluding those sentences for acts of terrorism. In 1977, the newly elected parliament approved an amnesty which covered all political crimes previously committed by both government forces and the opposition' (Spain:



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Editor's Introduction, in Krits (ed.), Transitional Justice, vol.11, 298)... "

41. Reference may also be made to another article, "Transitional jurisprudence: The Role of Law in Political Transformation": by Ruti Teitel (*The Yale Law Journal* 106, no.7 (1997)) which neatly illustrates the significance of successor trials in transitional periods as foundations for liberalizing political change and for consolidating democracy:

"Recognizing a distinct domain of transitional jurisprudence should have profound consequences for prevailing legal theorizing, and in particular, for our normative understanding of law's relation to politics. Beyond its contribution to understanding law's role in periods of political change, transitional jurisprudence advances critique of prevailing theories of justice. An understanding of conception of law proposed here can help mediate the liberal-critical debate over theories of law. The liberal idealization views law as independent from culture and politics, and conceptualizes justice from an idealist "original" position. The view of the justice offered here in contrast is concededly from a transitional position. The legal practices discussed above suggest that the concept of justice and rights are understandings determined not in the abstracts, but rather in response and in relation to the legacies of injustice within a distinctive transitional context."



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Written Constitution—Its Implications:

42. This case concerns with the subversion of our Constitution. It would be in order, therefore, for me to pause here for introspection regarding an insight into the constitutional enterprise and its place in the life of a people. "A written constitution" so said Chief Justice John Marshall in *Marbury v Madison* (1803) 5 US 137, "is the greatest improvement on political institutions".

Further that certainly:

"all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and, consequently the theory of every such government must be, that an act of the legislature repugnant to the Constitution is void. This theory is essentially attached to a written Constitution, and is consequently to be considered by this Court as one of the fundamental principles of our society."

43. He went on to state that the constitution establishes fundamental principles for future government which is defined and limited:

"This original and supreme will organize the government, and assigns to different departments their respective powers. It may either stop here, or establish certain limits not to be transcended by those departments. The powers of the legislature are defined and limited; and that those powers may not be mistaken or forgotten, the constitution is written. To what purpose are powers limited and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed and if acts prohibited and acts allowed are of equal obligation. It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it, or that the legislature may alter the constitution by an ordinary act."



44. Chief Justice Hamood ur Rehman put it with remarkable lucidity in Fazlul Quader Chaudhry v Muhammad Abdul Haq (PLD 1963 SC 486), reiterated in State v Zia ur Rehman (PLD 1973 SC 49):

"The written Constitution is the source from which all governmental powers must emanate and it defines its scope and ambit so that each functionary should act within his respective sphere. No power can, therefore, be claimed by any functionary which is not to be found within the four corners of the

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Constitution nor can any one transgress the limit therein specified."

45. The powerful enunciation of the principle that "no power can, therefore, be claimed by any functionary which is not to be found within the four corners of the Constitution nor can anyone transgress the limits therein specified" is the foundational rule which animates Article 6 and makes the crime to be of such grave consequences. On this touchstone, the actions of the accused run afoul of the grund norm and the well-entrenched limits of the paramount law.

"A written constitution seeks to formulate with precision the powers and duties of the various agencies that it holds in balance" (Adegerbo case, (1963) 3 All ER 544, 550 (PC))

46. To quote from the language of Mr. Justice Hoar of the Supreme Court of Massachusetts in the case of *Burnham v Morrissey*, 1 Gray 226:

".....living under a written constitution, no branch or department of the government is supreme, and it is the province and duty of the judicial department to determine, in cases regularly brought before them, whether the powers of any branch of the government, and even of those of the legislature in the enactment of law, have been exercised in conformity to the Constitution; and if they have not, to treat their acts as null and void."

47. The system in Pakistan is one of constitutional supremacy, or what has been described as constitutional absolutism. The limitations imposed by the Constitution are essential for preservation of the public and private rights of the people and thereby to create written boundaries for all those on



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whom are conferred powers and duties. It must be preserved inviolate.

Articles 12 and 6:

48. The general rule is that the power to legislate includes the power to legislate retrospectively. Article 12 enacts an exception to the above stated general rule and hence a limitation upon the legislative power of the state. It embodies the basic principle of criminal jurisprudence, namely, there can be no crime or punishment unless it is in accordance with law and is not retroactive. The rationale was laid out with erudition in *Nabi Ahmad Case*—PLD 1969 SC 599 at 610 by Qadeeruddin, J. in the following words:

"Law-abiding members of society regulate their lives according to the law as it exists at the time of their actions and they expect the law to be steadfast and reliable....they assess and weigh the consequences according to the demands of existing law, including the requirements implicit in the existing system of law and are entitled to feel cheated if the law later lets them down by taking or reducing their rights, or creating their burdens."



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49. Article 12 provides that:

"12. (1) No law shall authorize the punishment of a person—

- (a) for an act or omission that was not punishable by law at the time of the act or omission; or*
- (b) for an offence by a penalty greater than, or of a kind different from, the penalty*

prescribed by law for that offence at the time the offence was committed

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

50. Clause (2) of Article 12 is an exception to the right against retrospective punishment. It permits the making of a retroactive law of high treason, involving the abrogation or subversion of the Constitution. The reason for creating this exception is clear: Abrogation, subversion or suspension of Constitution is a crime of high treason and treasons, under the Constitution, are not allowed to go unpunished, even though *ex post facto*.

51. Perhaps while enacting Article 6, the framers had in mind the example of retroactive punishment given to Oliver Cromwell, who died in 1659 and was buried in Westminster Abbey. He was at the vanguard of the revolution that overturned constitutional system of government in Britain. Oliver Cromwell's body was exhumed and subjected to the ritual of posthumous execution.

52. Thus not only the framers carved out a new strain of the offence of high treason but also applied it retroactively. The most common form of high treason was the compassing or waging war on the Sovereign, State or the King. But in the Pakistani context (and perhaps Latin America, Greece and



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Korea) abrogation and subversion of the Constitution was also enacted as treasonable conduct. These acts, too, were disruptive of the constitutional order, overturned democratic institutions and settled notions of representative government.

53. *"The law is not malleable or optional. It is what stands between civilization and barbarism, democracy and despotism (Roger Cohen, NYJ, 27.9.2019). What is the central premise of the criminal proceedings that we are called upon to determine? What are the factors which lend the system a moral legitimacy. The point has been made in Criminal Evidence by Paul Roberts and Adrian Zuckerman in the following terms:*

"Criminal trials apportion moral blame, which in turn justifies the infliction of suffering and public censure, in addition to a formal determination of legal liability. Underpinning a system of penal law is a claim to moral legitimacy and public acceptance which cannot be sustained – except by deception or force, and even then, history teaches us, not for very long – unless the system itself exhibits moral integrity. Amongst the many factors contributing to the moral integrity of criminal proceedings (independent judiciary; open, public justice; respect for citizens' rights; proof by reliable evidence, etc.), the attitude of the judiciary towards official impropriety is a significant consideration."

54. The authors quoted Cf. Justices Holmes and Brandeis (US Supreme Court) from *Olmstead v US* 277 US 438, 484-5 (1928) in remarks regarding rule of law and the attitude of judge towards official rule-breaking:



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"If judges routinely winked at rights violations by state investigators and prosecutors, criminal proceedings would be tainted by the appearance of double standards, and the public would quickly lose respect for a system of law that would apparently be announcing 'do as we say, not as we do'. In a liberal constitutional democracy under the Rule of Law all state officials, including even monarchs and prime ministers, are subjects of the law, not its masters. Judges are bound to take official rule-breaking seriously, because to fail to do so is to betray the liberal democratic ideal of 'rule by law, not by men'. Beyond identifiable instances of illegality, moreover, judges are charged with the general responsibility of upholding high standards of moral integrity in criminal proceedings, because a system of law that purports to teach moral lessons to others must itself at least aspire to be beyond moral criticism."

55. In observations which are all too pertinent and apt in the context of the present case, it was said that:

"...Our government is the potent, the omnipresent teacher. For good or for ill, it teaches... by its example... if the government becomes a law breaker it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy."

56. Article 6 as originally enacted, provided that:

6. (1) Any person who abrogates or attempts or conspires to subvert the Constitution by use of force or show of force or by any other unconstitutional means shall be guilty of high treason.

(2) Any person aiding or abetting the acts mentioned in clause (1) shall likewise be guilty of high treason.

(3) Majlis-e-Shoora (Parliament) shall by law provide for the punishment of persons found guilty of high treason."



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57. Thus high treason had been defined to mean abrogation or subversion of the constitution by use of force or show of force or by any other unconstitutional means. The constitutional offence of high treason operates within a limited periphery. It concerns itself only with abrogation and

58. This substitution was clearly brought in the aftermath of the Proclamation of Emergency of 3.11.2007 (Ex.P.10/4) ("the Proclamation") which primarily sought to achieve the following result:

"Now, therefore, in pursuance of the deliberation and decisions of the said meetings, I, General Pervaiz Musharraf, Chief of the Army Staff, proclaim Emergency throughout Pakistan."

I, hereby order and proclaim that the Constitution of Islamic Republic of Pakistan shall remain in abeyance."

59. Provisional Constitution Order No.1 of 2007 (Ex.P.10/7) (PCO1) followed soon thereafter and which basically provided the template for the governance of the country by the Constitution subject only to the PCO1. Simultaneously, the power to amend the Constitution was also wrested by the accused to reside in himself. These were sweeping and enormous powers indeed and clothed the accused with the authority of a dictator, to be exercised unabashedly without regard to the Constitution which was conveniently held in abeyance. This prompted the framers of 18th amendment to insert the words "or holds in abeyance" to bolster the effect of Article 6 and to hold this act to be treasonous as well. Thus with each Martial Law, the definition of high treason was suitably amended to include within it the new form of proclamation of Martial Law. The legislature did



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not feel the terms "abrogate" and "subvert" to be sufficiently wide to comprise different forms of abrupt unconstitutional changes. This was despite the observations of Hamood ur Rehman, J. in *Asma Jilani* with regard to an omnipotent President and Chief Martial Law Administration:

"...So, after a change is brought by a revolution or coup d'etat, the State must have Constitution and subject itself to that order. Every single norm of the new legal order will be valid not because the order is efficacious, but because it is made in the manner provided by the constitution of the State. Kelsen, therefore, does not contemplate an all omnipotent President and Chief Martial Law Administrator sitting high above the society and handing its behests downwards. No single man can give a constitution to the society which, in one sense, is an agreement between the people to live together under an Order which will fulfill their expectations, reflect their aspirations and hold promise for the realisation of themselves. It must, therefore, embody the will of the people which is usually expressed through the medium of chosen representatives. It must be this type of constitution from which the norms of the new legal order will derive their validity..."

Further that:

"From the examination of the various authorities on the subject one is driven to the conclusion that the Proclamation of Martial Law does not by itself involve the abrogation of the civil law and the functioning of the civil authorities and certainly does not vest the Commander of the Armed Forces with the power of abrogating the fundamental law of the country. It would be paradoxical indeed if such a result could flow from the invocation in the aid of a State or an agency set up and maintained by the State itself for its own protection from external invasion and internal disorder. If the argument is valid that the proclamation of the Martial Law by itself leads to the complete destruction of the legal order, then the armed forces, do not assist the State in suppressing disorder but actually create further disorder, by disrupting the entire legal order of the State. It is therefore not correct to say that the proclamation of Martial Law by itself must necessarily give the Commander of the armed forces the power to abrogate the Constitution, which he is bound by his oath to defend..."

"...There is no provision in any law which gives the Commander of the armed forces the right to proclaim Martial Law, although he has like all other loyal citizens of the country a bounden duty to assist the State, when called upon to do so. If the magnitude of the insurrection is so great that the Courts and the civil administration



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are unable to function, the military may exercise all such powers that may be necessary to achieve their objective and in doing so may even set up Military Tribunals to promptly punish wrong-doers but this, whether done throughout the country or in a restricted area within the country, merely temporarily suspends the functioning of the civil Courts and the civil administration. As soon as the necessity for the exercise of the military power is over, the civil administration must, of necessity, be restored, and assume its normal role...."

60. In my opinion the terms 'suspend' and 'hold in abeyance' are comprised in the compedious term 'subvert' used originally. The Proclamation and PCOI subverted the Constitution notwithstanding the use of the term 'held in abeyance'. Justice Robert H. Jackson (US Supreme Court) said in *Youngstown Sheet Tube Co. v. Sawyer*:

"The President is Commander in Chief of the Armed Forces, not, Commander in Chief of the Country, its industries and its inhabitants."

61. This was precisely echoed by Hamood ur Rehman in the above excerpt regarding the Commander of the Armed Forces.

62. The Constitution is *sui generis*, a unique legal document susceptible to rules of interpretation peculiar to its nature and character. That interpretation calls for less rigidity and greater elasticity since a Constitution is intended to endure for ages to come. The meaning to be ascribed to a word used in a Constitution must bear relation to the subject, the context in which it occurs and the intention. After all, in the matchless words of Chief



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Justice John Marshall "it is the Constitution that we are expounding." (*McCulloch v Maryland* (1819) 17US316).

63. As stated above, Article 6 must gather its meaning from experience and history. Time and again, a legal and constitutional order had been overthrown by imposing dictatorships and Article 6 was meant to be a constitutional deterrence of any such attempt in future. But the words employed were 'abrogate' or 'subvert' the Constitution. However, that does not detract from the very basic theme of Article 6 which is to forestall any act to destroy an established legal order by an unconstitutional means. Thus, in the context of Article 6, the words 'abrogate' and 'subvert' will have to be generously interpreted to include all acts which destroy a constitutional order established by the Constitution itself. As was said by Justice Frankfurter in *National Mutual Insurance v Tidewater* (1949) 337 US 582, "Great concepts like commerce.....liberty, property, were purposely left to gather meaning from experience."



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64. Possibly to stunt the effect of Article 6, the accused, on both occasions that he imposed martial laws, used the term 'held in abeyance'. This term has not been mentioned in Article 6 with specificity (in the original text) and so it can be presumed that

the drafting of the documents was done with an eye on the letter of the law. We will bear in mind that the Article 6 was amended to include these words in 2010 by the Eighteenth amendment. However, the concept that the original Article 6 exuded was to be understood in the empirical sense and could not be undone by a contrivance or contraption devised by the accused. Semantics alone could not nullify the effect of Article 6 and if the act came about by unconstitutional means and overthrew a government established under a Constitution, doubtless it was high treason.

65. This may further be illustrated by the definition of the word 'subvert' gives in various authoritative dictionaries of English language. In *Webster's Unabridged Dictionary, Second Edition*, it has been defined as:



"sub-ver-sive 1. Also, sub-ver-sion-ar-y tending to subvert or advocating subversion, esp. in an attempt to overthrow or cause the destruction of an established or legally constituted government. 2. a person who adopts subversive principles of policies."

"sub-vert 1. to overthrow (something established or existing). 2. to cause the downfall, ruin, or destruction of. 3. to undermine the principles of; corrupt."

66. In Chambers Concise Dictionary, its meaning has been given as follows:

"subversion 1. an act or instance of overthrowing a rule, law, government, etc. 2. the act or practice of subverting (usually a government).

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"subvert (subverted, subverting) 1. to undermine or overthrow (especially a government or other legally established body) 2. to corrupt someone; to undermine (a principle, etc). [14c: from Latin *subvertere* to overturn, from *sub* away + *vertere* to turn]."

67. Lastly in Black's Law Dictionary, Tenth Edition, the term has been mentioned as:

"subversion (14c) The process of overthrowing, destroying, or corrupting <subversion of legal principles> <subversion of the government>"

68. The above definitions of the term 'subvert' and 'subversion' are wide enough to include within its fold the act of the accused to hold the Constitution in abeyance as plainly the effect was subversion of an established constitutional order.

69. No further dilation is required on the act of the accused in promulgating the Proclamation and PCO1 than the observations of The Supreme Court of Pakistan in Sindh High Court Bar Association through its Secretary and another v. Federation of Pakistan through Secretary, Ministry of Law and Justice, Islamabad and others (PLD 2009 SC 879) which held the actions of the accused in civil and constitutional litigation to be *ultra vires* and *void ab initio*. The accused had arrogated to himself wide range of powers after holding the Constitution in abeyance and seeking to amend the Constitution at will. This had no provenance in law and was a naked usurpation of powers. He became the fountainhead of all powers, be it fundamental law or the sub



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constitutional law. For the period that the Constitution was held in abeyance it did not exist and stood subverted for all intents and purposes. The Proclamation, firstly, proclaimed an Emergency throughout Pakistan. This was a blatant contravention of Articles 232 to 237 of the Constitution dealing with imposition of Emergency. In fact no reference was made to these provisions and the Proclamation was made by the accused as the Chief of Army Staff. Suffice to say that the Constitution did not contemplate such powers to vest in the Chief of Army Staff and it was an action *extra jus*. They were the very epitome of unconstitutionality and a *carte blanche*.

70. The accumulation of all powers, legislative, executive and judiciary in the same hands, whether of one, a few or many and whether hereditary, self-appointed or elective, may justly be pronounced the very definition of 'tyranny. (James Madison).

71. The very acts of abrogation or subversion of the Constitution are unconstitutional for the Constitution does not contain provisions which remotely allude to these acts in respect of the Constitution. Thus there is no concept of the Constitution being abrogated, subverted or held in abeyance, under the Constitution. Any person committing these acts will do so by unconstitutional means and no other, and so

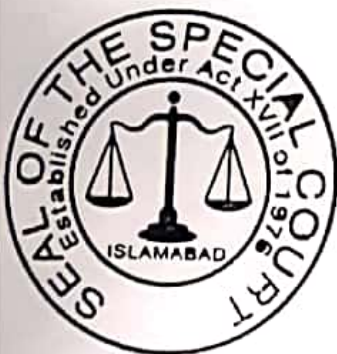


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the use of the term "by any other unconstitutional means" on the part of framers was otiose and unnecessary. It was as if an act to abrogate, subvert or suspend the Constitution was possible constitutionally but not unconstitutionally. Perhaps the drafting could have been tidier but the concept should not be muddled. Whatever the means employed, abrogation and subversion is unconstitutional and constitutes the offence of high treason.

72. *Sindh High Court Bar Association* dealt with the constitutional aspect of the Proclamation and PCOI etc. While doing so, the Supreme Court touched upon the question of Article 6 as well and the observations to this effect clearly indicate that the Court was not in doubt that the core ingredients of Article 6 permeated the case. Excerpts from the case are being reproduced to demonstrate that the Supreme Court held, without equivocation, that a subversion of the Constitution took place by the acts unleashed by the accused and that this was done by unconstitutional means. It was said in no uncertain terms that:

"...Let it be made clear that any action of the Armed Forces undertaken without a direction by the Federal Government shall be unconstitutional, illegal, void ab initio and consequently of no legal effect. Any member of the Armed Forces, including the Chairman, Joint Chiefs of Staff Committee and the three Services Chiefs, namely, the Chief of Army Staff, the Chief of Naval Staff and the Chief of Air Staff, or any person acting under



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their authority, or on their behalf, who acts in the performance of either of his functions of defending Pakistan against external aggression, or of acting, subject to law, in aid of civil power without any direction by the Federal Government acts in violation of the Constitution and the law and does so at his own risk and cost. This Court, in *Chagat Hussain's case* (at page 626 of the report), has held that martial law cannot be imposed in Pakistan in view of the change in the language of Article 237 of the Constitution wherein the words "martial law" have been omitted, the legal effect of which is that the Parliament cannot make any law indemnifying any person in the service of the Federal Government or a Provincial Government, or any other person in respect of any act done in connection with the maintenance or restoration of order in any area in Pakistan...."

73. As to Article 6 and the variation in the language used in the Proclamations of 1999 and 2007 (as compared to the earlier ones), it was observed that:

"Along with Article 237 as finally approved, the framers of the Constitution also legislated Article 6 of the Constitution, which provided that any person who abrogated or attempted or conspired to abrogate, subverted or attempted or conspired to subvert the Constitution by use of force or show of force or by other unconstitutional means shall be guilty of high treason.

55. It appears that the draftsman, who drafted the Proclamations of Emergency of 14th October, 1999 and 3rd November, 2007 and the relevant PCOs had an eye on the constitutional developments taking place in the country at the legislative and the judicial forums. He changed the earlier methodology to facilitate the intending military adventurer to wriggle out of the fence erected by the judiciary and the legislature to prevent repetition of the military takeovers. In 1999, as opposed to the previous practice of imposing martial law, the draftsman came up with the idea of promulgating a simple Proclamation of Emergency and holding the Constitution in abeyance and by the PCO making a provision that subject to the PCO and any other Order issued by the Chief of Army Staff, Pakistan shall, as nearly as may be, be governed in accordance with the Constitution of 1973. Thus the term martial law was not used, but a mere emergency proclaimed, the Practical effect of which was exactly the same as it was of the Impositions of martial law on 5th July, 1977, 25th March, 1969 or 7th October, 1958. In 1977 and 1999, Oath Orders were issued and attempts made to make the superior Courts subservient to the orders and other legislative and administrative measures issued by the Chief of Army Staff. In October, 1958 and March, 1969 the Constitutions were abrogated, and martial law imposed. But in July 1977, though martial law was imposed, but the Constitution was not abrogated, rather



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it was held in abeyance. In October 1999, a new methodology was adopted, i.e., only an emergency was proclaimed, which was nothing but a chip off the old block. On all the previous four occasions, the Parliament and the Provincial Assemblies were dissolved; the Federal and the Provincial Governments were dismissed and Prime Minister, Federal Ministers, Chief Ministers, Provincial Ministers, Chairman and Deputy Chairman Senate and Speakers and Deputy Speakers of the National and the provincial Assemblies were declared to have ceased to hold office. In November 2007, though emergency was proclaimed and the PCO and the Oath Order issued on the pattern of 12 October, 1999, but as opposed to the past practice, the legislative and executive organs of the State were kept intact, and the judiciary alone was shown the door because it was apprehended that a favourable decision was not likely to be rendered in the disqualification case of General Pervez Musharraf. However, a new dimension in the present case 'was that the vast majority of the Judges including Chief Justice of Pakistan did not make oath under PCO No. 1 of 2007 read with Oath Order, 2007. All such non-compliant Judges were put under house arrest along with their family members. In the above background, we affirm and approve the law laid down in Asma Jilani's case that martial law in any form and by whatever name called, for any purpose whatsoever cannot be imposed in Pakistan. We also firmly lay down that no proclamation of emergency can be issued, the effect of which is to hold in abeyance the Constitution, or its subsequent mutilation by incorporating amendments in it by an authority not mentioned in the Constitution and in a manner not provided for in the Constitution.



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56. Each member of the Armed Forces, as per his oath under the Third Schedule to the Constitution in pursuance of Article 244, is bound to bear true faith and allegiance to Pakistan and uphold the Constitution which embodies the will of the people. He is also sworn not to engage himself in any political activities whatsoever. He also solemnly affirms and declares that he will honestly and faithfully serve Pakistan in the Pakistan Army (or Navy or Air Force) as required by and under the law. The learned counsel for the petitioners vehemently contended that General Pervez Musharraf, by his actions of 3rd November, 2007, not only violated his oath as a member of the Armed Forces, but also overthrew the solemn pledge he made as President of Pakistan of performing his functions and discharging his duties honestly, to the best of his ability, faithfully in accordance with the Constitution and the law. We agree with the contention of the learned counsel that General Pervez Musharraf failed to abide by his oath to preserve, protect and defend the Constitution. The Constitution was framed to continue to be in force at all times. By Article 6, an in-built mechanism was provided to safeguard the Constitution from its abrogation or subversion by anyone, that is to say, it could neither be cancelled by anyone nor could it be overthrown or undermined by anyone in any manner or mode whatsoever. Thus, unless and until the Constitution is altered or amended in accordance with

the procedure laid down in Articles 238 and 239, or it is repealed on the pattern of the Interim Constitution under the provisions of Article 266, which too, is possible by recourse to the provisions of Articles 238 and 239, its operation and enforceability cannot be interrupted even for a single day, nay a single moment except as specifically provided in the Constitution itself. The Constitution has not contemplated any situation where it can be held in abeyance at the will or whims of the Chief of Army Staff and to be revived after he has achieved his objectives. Let it be stated in unequivocal terms that the validity accorded in the past did not give a license to any holder of the office of Chief of Army Staff of repeating such acts at his will. It is hereby firmly laid down that the holding in abeyance of the Constitution or any other act having the effect of discontinuing the operation and the enforceability of the Constitution for a single moment in a manner not authorized under the Constitution is nothing but an overthrowing of the Constitution, so to say, the subversion of the Constitution and thus constitutes the offence of high treason."

74. It was found by the Supreme Court that different phraseology used in 2007 will not diminish the ultimate effect of the actions which was the imposition of martial law by unconstitutional means. There could not have been a more emphatic iteration of the rule that 'no proclamation of emergency can be issued the effect of which is to hold in abeyance the Constitution.'" Also that "the holding in abeyance of the Constitution or any other act having the effect of discontinuing the operation and the enforceability of the Constitution for a single moment in a manner not authorized under the Constitution is nothing but an overthrowing of the Constitution, so to say, the subversion of the Constitution and thus constitutes the offence of high treason.



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Further:

"It was not right to expend so much judicial talent, legal acumen, industry, time and energy on the part of the Bench and the Bar to coin the terms of "supra-constitutional" and "extra-constitutional", that is to say, in an exercise, which was aimed at finding justifications for the unconstitutional and illegal acts of usurpers of power by devising and using such or similar terms and phrases. In our view, such terminology would hardly change the unconstitutional nature and character of the said actions, which not only ex facie lacked the backing of any provision of the Constitution or the law, but were done in violation of the Constitution and the law."

75. Finally, the Supreme Court established the connection between the acts of the accused and Article 6 in the following words:

"Fourthly, Article 6 provides that any person who abrogates or attempts or conspires to abrogate, subverts or attempts or conspires to subvert the Constitution by use of force or show of force or by other unconstitutional means shall be guilty of high treason. As a matter of fact, Article 6 has built a stronghold around the body of the Constitution to safeguard it from any encroachment or violation from without. If each time an authority were to put it aside at his will, and do whatever he liked to do with it, that too, by the use or show of force or by other unconstitutional means, the provisions of Article 6 would be rendered redundant and nugatory, rather meaningless, which was not the intent, nor was the same permissible. Indeed, the Constitution is an organic whole and a living document meant for all times to come. We, therefore, are of the view that the holding in abeyance of the Constitution and/or making amendments therein by any authority not mentioned in the Constitution otherwise than in accordance with the procedure prescribed in the Constitution itself, is tantamount to mutilating and/or subverting the Constitution. Thus, so long as Article 6 is part of the Constitution, the Parliament is debarred from even condoning unconstitutional acts of a usurper, what to talk of validating, affirming and adopting the same, or deeming the same to have been made by the competent authority on any ground whatsoever."



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76. Hence, we are not called upon to proffer an opinion afresh on the question regarding constitutionality or otherwise of the actions subject-matter of the complaint or whether the elements of Article 6 exist or not. We can only hope that with

the holding of the Supreme Court in *Shadh High Court Bar Association* and the conviction in this case, the twilight of that era is upon us.

77. This view was reaffirmed by the Supreme Court in *Gen. (R.) Parvez Musharraf v. Nadeem Ahmad (Advocate) and another* (PLD 2014 SC 585) (on a review application by the accused). It was reiterated that:

"How could petitioner in his capacity as Chief of Army Staff or even as President act on his own discretion. He had no power under the law to impose State of Emergency and make Judges of the Supreme Court and High Courts dysfunctional..."

*"38. Yet another argument raised was that although in the judgment under challenge, there was no direction for trial of petitioner under Article 6, but a 3-Member Bench has directed trial (2013 SCMR 1683) which is not warranted in law. First this argument is no ground to seek review of the judgment under challenge because it seems the petitioner's grievance is against the order of the three Member Bench (2013 SCMR 1683). But the said judgment has not been challenged in review. Second, a violation of Article 6 has two aspects/consequences i.e. constitutional and criminal. In the judgment under review, the former aspect was dealt with and the Court held that the acts of petitioner were violative of the constitutional provisions. While in *Moulvi Iqbal Haider v. Federation of Pakistan* (2013 SCMR 1683), the Court dealt with the latter aspect i.e. criminal. But while doing so it did not give a finding on merit, lest it may prejudice the case of either side during trial..."*



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78. The elements or constituents of the crime of high treason have been prescribed by the definition given in Article 6, which together make up its *actus reus*. The expression *actus reus* means:

"5. The actus reus. Every crime has specified elements, prescribed by the common law or by the statutory definition of the offence, which together make up its actus reus. The expression 'actus reus' can be summarized as meaning an act (or sometimes an omission or state of affairs)

indicated in the definition of the offence charged together with:

- 1) any consequences of that act which are indicated by that definitions; and
- 2) any surrounding circumstances so indicated (other than references to the mens rea or element of negligence required on the part of the defendant, or to any defence).

(para 5, Halsbury's Laws of England, vol. 25, Fifth edition, 2010).

79. The constituents of the crime of high treason prescribed in Article 6 are the abrogation, subversion, suspension or holding in abeyance of the Constitution, by use of force or other unconstitutional means. The conduct of the accused has caused consequences required by statute to constitute the crime of high treason. The requisite state of mind (*mens rea*) as to the elements which constitute the crime or incur criminal liability need not be brought home as in my opinion, strict liability is imposed and this is the effect of the provision of high treason. Such an interpretation is necessary and desirable in the public interest. No presumption of *mens rea* arises in an offence under Article 6 for such an intention of the legislature is not discernable from a reading of Article 6: In 1958, Devlin J. wrote:

"The fact is that Parliament has no intention whatever of troubling itself about mens rea. If it had, the thing would have been settled long ago. All that Parliament would have to do would be to use express words that left no room for implication. One is driven to the conclusion that the reason why Parliament has never done that is that it prefers to leave the point to the judges and does not want to legislate about it."



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80. It was said in Smith and Hogan's Criminal Law (13th Edition) that:

"In addition to the statutory form of the offence, the court must have regard to the context of the legislation and the purpose it was designed to serve, and this will be highly influential..."

81. Three documents exercise a gravitational pull in the facts and circumstances of the present case. They are at the heart of the controversy. They have been produced in evidence by the prosecution and there is no effort (during cross-examination of witnesses) to deny these documents at any stage. The Proclamation, PCOI and the Oath of Office (Judge) Order, 2007 are official documents and were duly published in the official Gazette. These are public documents within the meaning of Article 85 of the Qanun-e-Shahadat Order, 1984 and certified copies (as well as originals) have been produced in proof of the contents of these public documents (Article 88). The Court is obliged to presume every such document to be genuine (Article 90). The Proclamation and PCOI were the provenance of all powers exercised by the accused until they were revoked by the Revocation of Proclamation of Emergency Order, 2007 (The Revocation Order). The Constitution stood revived on the promulgation of the Revocation Order. However, even while reviving the Constitution, primacy was given to the



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provisions of the Revocation Order notwithstanding anything contained in the Constitution or any other law for the time being in. If nothing else, the Revocation Order (Ex.P.12/20) firmly established and proved the intention of the accused to hold the Constitution in abeyance and to rule, during interregnum, by extra constitutional means beyond the contemplation of the Constitution. Reading these documents cumulatively would lead to the ineluctable conclusion that the act of the accused was caught by the mischief of Article 6 and was a criminal wrongdoing within its meaning.

82. The contents of Proclamation itself show that it conferred wide-ranging and polycentric powers in the person of the accused. In the context of its relation with the elements of Article 6, the intention is made clear by the following statement:

"WHEREAS a situation has thus arisen where the government of the country cannot be carried on in accordance with the Constitution and as the Constitution provides no solution for this situation, there is no way out except through emergent and extraordinary measures."

83. So the Constitution was thought redundant for a certain period, providing no solution for the situation and it was ordained that the country will not be carried on in accordance with the Constitution. This was subversion of the Constitution, pure and simple.



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Significantly, the Proclamation and PCOI were signed by the accused in his capacity as the Chief of Army Staff. No provision of the Constitution (or law) was invoked to aid by the accused to show that he was empowered to proclaim Emergency or to hold the Constitution in abeyance. Plainly, the means employed by the accused were unconstitutional and had the pernicious effect of subverting the Constitution. He is squarely guilty of the crime of high treason as defined in Article 6. The prosecution has produced clear, convincing and unequivocal evidence to bring home the charges.

Punishment:

84. Judgments (and punishment) in cases of high treason are not discretionary. Historically the sentence was barbarous in the extreme. In the law of England as to treason, until 1945 the position was that in certain cases of treason the procedure on the trial was the same as upon a charge of murder. The effect of the Treason Act, 1945 was to extend the above provisions to all cases of treason, so that the procedure and rules of evidence are now the same as on charge of murder. That the judgments are not discretionary was stated in *Miscellany at Law* by R.E. Megarry with reference to a case:

"The giving of judgment against malefactors," said the court, "is part of the constitution of the government, therefore, it was something extraordinary to affirm at THE BAR, that judgments



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in high treason were discretionary, which indeed is only a softer word for arbitrary. If that doctrine should once pass for law, then the Courts which give judgments might make new punishments as they should think more suitable to the crimes; they might pronounce a Jewish judgment, 'that the offender should be stoned to death'; or a Turkish judgment, 'that he should be strangled'; or a Roman judgment, 'that he should be murdered'; or a French judgment, 'that he should be broken on the wheel'; all which are contrary to the known laws of this realm. This being then an essential part of the judgment settled and stated by the common law of England, the omission of these words makes it void."

85. In most cases, treason punishment involved outlawry; it involved not only the punishment of the accused but also his posterity. One such instance has been described by Megarry in *Miscellany at Law*:

"In 1729 the Duke of Wharton, who had attached himself to the exiled Stuarts, was outlawed by judgment of the coroners of Middlesex for not appearing to answer an indictment for treason. Two years later he died, leaving no issue, and his dignities of duke, marquis and earl died within him. Apart from the outlawry, however, no event occurred which could affect his barony, to which coheirs became entitled..."

86. Referring to the punishment of treason at common law, *Encyclopaedia Britannica* (vol. 22) gives a brief history of how the punishment has evolved over time:

Punishment: The punishment of treason at common law was barbarous in the extreme. The sentence in the case of a man was that the offender be drawn on a hurdle to the place of execution, that there he be hanged by the neck but not till he be dead, and that while yet alive he be disemboweled and that then his body be divided into four quarters, the head and quarters to be at the disposal of the crown. Until 1790 at common law a woman was drawn to the place of execution and there burned. In that year hanging was substituted for burning in the case of female traitors. In 1814 the part of the



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sentence relating to hanging and to disemboweling was altered to hanging until death supervened. Drawing and beheading and quartering after hanging were abolished in 1870. The act of 1814 in the case of men enables the crown by warrant under the sign manual, countersigned by a secretary of state, to change the sentence to beheading. Attainder and forfeiture for treason are abolished by the Forfeitures act, 1870, except where the offender has been outlawed."

87. The above statement clearly shows the reprehensible nature of the crime of treason. Not only the rules as to indictment but also the punishment were stricter than in normal cases of felony and misdemeanor. It was considered a crime in its own league and one which was to be visited by punishment of an extreme form often bordering on bestiality.

88. As stated above, I dissent with the President on the further sentence at paragraph 63 of the judgment sought to be imposed on the accused upon conviction. It has no basis in law and will be *ultra vires* for this Court to do so. In my opinion it is enough to sentence the accused to death.

*"Treason doth never prosper: Whats the reason?/
For if it prosper, none dare call it treason".
(Sir John Hartington)*

89. For these reasons, I agree with the orders proposed by the President of the Court.



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(SHAHID KARIM)
JUDGE

Registrar, Special Court, Islamabad

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Nazar Akbar, J. - I have respectfully gone through the proposed judgment authored by my brother Waqar Ahmad Seth, J, President of this Special Court established under **Section 3** of the Criminal Law Amendment (Special Court) Act, 1976 for the trial of accused General (R) Pervez Musharaf under **Article 6** of the Constitution (High Treason) on the complaint filed by the Federal Government in terms of **Section 5** of the Special Court Act. With due respect to the observations/findings of President of this Court, with my humble comprehension of law and justice, I happened to dissent with majority view of my learned brothers.

BRIEF FACTS

2. The origin of this criminal complaint is a statement filed by the Federal Government before the Hon'ble Supreme Court in **Petition No.2255 of 2010** filed by Moulvi Iqbal Haider by invoking original jurisdiction of Supreme Court under **Article 184(3)** of the Constitution. Later on Lahore High Court Bar Association, Rawalpindi Bench, Rawalpindi on **27.3.2013** also filed a similar petition. It was registered as **C.P No.14 of 2013**. Soon after, Barrister Amjad Malik, Shaikh Ikramuddin and Abdul Hakeem Khan, advocates also filed similar petitions bearing **C.P Nos.16, 17 and 18 of 2013** respectively. The petitioners have prayed that *Federal Government be directed to lodge a complaint under Article 6 of the Constitution against the respondent General (Retd.) Pervez Musharaf and others*. Lahore High Court Bar, Rawalpindi Bench, in their petition **No.14 of 2013** has also made the following prayer:-

It is further prayed that the Respondent No.2 may kindly be directed to take Respondent No.1 in custody immediately awaiting his investigation and prosecution under the High Treason (punishment) Act, 1973.



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3. The Federal Government did not contest and got the petitions disposed of on the statement/undertaking filed by the learned Attorney General on behalf of the Federation in the said petitions which reads as follows:-

"(1) The Prime Minister has directed the Secretary Interior to forthwith direct the Director-General FIA to constitute a special investigative team of senior officers to commence an inquiry and investigation in relation to the acts of General (R) Parvez Musharraf of 3rd November, 2007 that may amount to high treason under Article 6 of the Constitution and to finalize as expeditiously as possible the statement of case to be put up by the Federal Government before the Special Court to be constituted under the Criminal Law Amendment (Special Courts) Act, 1976.

(2) The Law entrusts the investigation of the offence of high treason to the FIA under entry No.14 of the Schedule of the FIA Act, 1974 read with sections 3(a) and 6 thereof. However, in order to ensure expeditious completion of the inquiry and investigation, the Prime Minister is also considering the constitution of a Commission to oversee and monitor the progress of the proceedings.

(3) On the completion of the investigation, the Federal Government shall file the requisite complaint under section 5 of the Criminal Law Amendment (Special Courts) Act, 1976 and take steps to constitute the Special Court in accordance with section 4 of the said Act for the trial of the offence."



All the petitioners have shown their satisfaction for disposal of their petitions on the basis of above statement/undertaking. None pressed the prayer of taking the accused in custody pending the investigation and prosecution. The Hon'ble Supreme Court disposed of all the petitions by a common short order dated **03.07.2013** reported as **2013 SCMR 1683** in the following terms:-

4. The Federal Government has, as noted above, proceeded in furtherance of its constitutional obligation envisioned in Article 6 of the Constitution and for the present this suffices in

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terms of the said Article and the reliefs respectively sought by the petitioners in these petitions. **We, therefor, dispose of these petitions in the above terms with the observations that the Federal Government shall proceed as per undertaking dated 26.6.2013, reproduced above without unnecessary delay.**

4. On **12.12.2013**, pursuant to the undertaking, the Federal Government, through Secretary Interior filed a complaint against General (Retd.) Pervez Musharaf (accused) for committing an offence of High Treason by him. It was registered on **13.12.2013** and notices/summons were issued to the accused. In all, the complaint contained five charges and each charge was based on an instrument issued by the Federal Government during **03.11.2007** to **14.12.2007**. These instruments of charges are as follows:-

- i. Proclamation of Emergency dated 3 November 2007 by General Pervez Musharaf **as Chief of Army Staff.**
- ii. Provisional Constitution Order dated 3 November 2007 by General Pervez Musharaf **as Chief of Army Staff.**
- iii. Oath of Office (Judges) Order dated 3 November 2007 by General Pervez Musharaf **as President of Pakistan.**
- iv. **President's** Order No.5 dated 20 November 2007
- v. **President's** Order No.6 dated 14 December 2007



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5. On **18.02.2014** the accused appeared in Court along with his surety. But on the said date formal charge required to be read out to him in terms of **Section 6(1)(a)** of the Special Court Act, could not be read and explained to him because the question of jurisdiction of the Court was still pending. However, on **31.03.2014** when the accused again appeared before the Court along with his counsel Dr. Farogh Naseem, charges were read and explained to him and even his reply statement was recorded and signed by him. In view of the statement of the Prosecutor, by order dated **31.03.2014** the accused was

exempted from personal appearance in Court. Para-2 and 4 of the said order are reproduced below:-

2. Though certainly time would be given to the newly appointed counsel to prepare himself but as the accused has appeared who on account of security threats is unable to frequently appear before this Court and the fact that the matter is fixed for reading out the charges, therefore, we deem it appropriate to read out the statement of formal charges to the accused and record his plea, however we reserve the right of the counsel of the accused to examine any relevant documents and take additional pleas in the matter. With this caveat the learned counsel consented for reading out the charge to the accused. **The statement of formal charges was read out to the accused who pleaded not guilty to each charge and claimed trial. The plea of the accused on each of the five charges were duly recorded who then placed his signatures on it.**

3. _____

4. In addition to the security concerns and taking into consideration **the statement of the Prosecutor made on 18.02.2014 to the effect that after reading of the formal charges the presence of the accused would not be required until the stage of examination of the accused under Section 342 of the Criminal Procedure Code**, coupled with the fact that he is still hospitalized, we intend not to take him into custody or impose any other restriction rather exempt him from his appearance before the Court until otherwise directed. In the meantime, the case shall proceed and the accused shall be represented through his counsel.



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6. On **17.06.2014** prosecution started recording evidence and after examining eight witnesses who were cross-examined by the counsel for the accused, the prosecution on **18.09.2014** closed its side for evidence. Since then the case was repeatedly fixed for recording of statement of accused as required under **Section 342** of the Cr.P.C in terms of **Section 6(1)(d)** of the Special Court Act, 1976. The accused was enjoying exemption from appearing in Court till the

stage of his examination under **Section 342** of the Cr.P.C. Therefore, when he failed to appear before the Court for his examination, show cause notice was issued to his surety namely Gen. (R) Rashid Qureshi and when the surety also failed to produce the accused before the Court, on **11.05.2016** he deposited the surety amount as penalty in Court and the **accused in presence of his counsel was declared absconder**. However, the defence team continued to represent the accused in Court even after the accused had been declared absconder, therefore, this Court by order dated **12.07.2016** questioned the status of defence team as under:-



4. *Since the accused has become fugitive from law and all the legal formalities as required under Sections 204, 514 and 87 of the Cr.P.C have been completed against him, the defence team, present in Court, is directed to assist the Court whether now it can represent the accused anymore.*

7. The accused even after 12.07.2016 continued to seek adjournments through different lawyers, therefore, after exhausting all possible efforts to record his statement under **Section 342** of the Cr.P.C, his right to be examined was forfeited by order dated **12.06.2019** as by that date, the Special Court has also received an order dated **01.4.2019** passed by the Hon'ble Supreme Court in Civil Review Petition No.513 of 2014 in **C.P No.14 of 2013**. It is pertinent to mention here that **C.P No.14 of 2013** was one of the connected petitions with petition No.2255 of 2010 filed by Moulvi Iqbal Haider and it was also disposed of by consent of the parties before the Hon'ble Supreme Court by order dated **03.7.2013**. My learned brother in para-32 of his order has already reproduced the directions of the Hon'ble Supreme Court dated **01.4.2019** to this Court. The said order of Hon'ble Supreme Court is also reported as Lahore High

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[Signature]

Court Bar v/s General (R) Pervez Musharaf (2019 SCMR 1029). Therefore, in compliance of the directions of the Hon'ble Supreme Court, this Court by order dated 12.6.2019 stopped Mr. Salman Safdar, advocate to represent the accused and appointed one Mr. Raza Bashir, Advocate. The first prosecution team was withdrawn by the Secretary of Interior through notification dated 23.10.2019 without any lawful justification. The second prosecution team entered appearance on 05.12.2019 and they were asked to make oral submissions or file written arguments before the next date. They failed to make their submissions orally and or in writing despite opportunity. However first team of prosecutors led by Dr. Tariq Hassan has already filed written arguments which are on the record and therefore whenever I refer to the contention of the counsel of the prosecution I mean the contention in the written arguments available on the record.



POINT FOR DETERMINATION

8. The only question before this Court in terms of **Section 367(1)** of the Cr.P.C is that:-

Whether the proclamation of emergency and Provisional Constitution Order both dated 03.11.2007 issued by General Pervez Musharaf as **Chief of Army Staff** as well as the Oath of Office (Judges) Order also dated 03.11.2007 as President of Pakistan as well as President Order No.5 dated 20.11.2007 and President Order No.6 dated 14.11.2007 issued by him as the **President of Pakistan** constitute an act of high treason in terms of Article 6 of the Constitution?.

The prosecution in support of the charges has examine 8 witnesses and produced official documents which obviously have not been denied and these documents include Exhibit P-10/2, P-10/10, P-

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10/15, P-12/25 and P-12/27 which are the five basic documents mentioned in the charges.

REASONS:-

9. In the offence under Article 6 of the Constitution, the charging word is "**high treason**", therefore, without properly appreciating what does it mean, this Court cannot pass a just and fair verdict. Admittedly the word "high treason" is not defined in the Constitution or any other relevant law for the benefit of this Court. But for this reason, both the learned counsel for the prosecution and my learned brothers have referred to the definition of "high treason" by relying on the meaning of "High Treason" given in the Oxford Dictionary (Tenth Edition). I also reproduce the same as under:-



Treason. 1 (also high treason) the crime of betraying one's country, especially by attempting to kill or overthrow the sovereign or government.

2. (petty treason) historical the crime of murdering a master or husband.

also refer to the Black's Law Dictionary for ascertaining the meaning of "**treason**". It reads as follows:-

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Treason. A breach of allegiance to one's government, **usually committed through levying war against such government or by giving aid or comfort to the enemy.** The offense attempting by overt acts to overthrow the government of the state to which the offender owes allegiance; **or of betraying the state in to the hands of a foreign power.** Treason consists of two elements: adherence to the enemy, and rendering him aid and comfort. *Cramer v. U.S.*, U.S.N.Y., 325 U.S. 1, 65 S.Ct. 918, 932, 89 L.Ed. 1441. See 18 U.S.C.A. 2381. A person can be convicted of treason only on the testimony of two witnesses, or confession in open court. Art.III, Sec. 3, U.S. Constitution.

High Treason. In English law, treason against the king or sovereign, as distinguished from *petit* or *petty treason*, which might formerly be committed against a subject.

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Besides the above dictionary meaning of the term "high treason", one may refer to Justice Muhammad Munir's commentary on the Constitution of Islamic Republic of Pakistan, 1973. In its introduction in volume-1 in the discussion on "high treason", he has first explained the terms "Abrogate" and "Subvert" used in the original **Article 6** of the Constitution as it was on the date of alleged offence in November, 2007. It is quoted as under:-

"Abrogation means annulment while "subversion" means overthrowing, the real distinction between the two being difficult to discover, perhaps there is none, because overthrowing of a Constitution is the same thing as its annulment which means abolition. Abettors and conspirators are as much responsible as persons actually guilty of treason.

Then Justice Muhammad Munir proceeded to define the term "High Treason" by referring to the language of the Article itself as follows:-



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*"In Constitution of Pakistan the word "High Treason" has not been defined separately but language of Article 6(1) has clearly provided that any person who **abrogates or subverts** the Constitution or attempts to conspires to do so by use or show of force or by other unconstitutional means, shall be guilty of high treason as also any person who aids or abets such abrogation or subversion of Constitution. **In other words the meaning and scope of "high treason" has been restricted to the said acts of abrogation and subversion of Constitution and other concepts of high treason prevailing in foreign legal systems and contained in series of Treason Acts in England defining various forms of treason as also ordinary dictionary meaning of treason have been necessarily excluded.** It means that only that person can be held to be guilty of high treason whose case strictly falls within the mischief of Article 6 of the Constitution and no other act, however grossly detrimental to the interest of country, but not attracting the provisions of Article 6 can be said to fall within the meaning of High Treason". (Emphasis is provided).*

10. Learned counsel for the prosecution has relied on the language of **Article 6** of the Constitution which was introduced in the

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Constitution by the 18th Amendment on **20.4.2010**, whereas, the accused has been charged on five counts committed on different dates in the year 2007. Out of five, he is allegedly guilty of three offences on **03rd** November, 2007 and other two on **20th** November and **14th** December, 2007 respectively. The offence of high treason under Article 6 of the Constitution on the dates of commission of alleged high treason was to the following effect:-

6. High treason. -- 1[(1) Any person who abrogates or subverts or suspends or holds in abeyance, or attempts or conspires to abrogate or subvert or suspend or hold in abeyance, the Constitution by use of force or show of force or by any other unconstitutional means shall be guilty of high treason.]

(2) Any person aiding or abetting the acts mentioned in clause (1) shall likewise be guilty of high treason.

(3) ⁹⁴[Majlis-e-Shoora (Parliament)] shall by law provide for the punishment of persons found guilty of high treason.



11. Learned counsel for the complainant has referred to the meanings of words "abrogation", "subversion", "suspend" and "abeyance" as well as unconstitutional to explain that by issuance of five (5) instruments mentioned in the charges constitute commission of an offence under **Article 6** of the Constitution. However, he has failed to appreciate that on the date of offence except "**abrogate**" and "**subvert**" no other act of any person was considered as an offence under Article 6 of the Constitution. Only the act of "abrogation" and "subversion" of Constitution was considered as an act of high treason. The words "**suspension**" and "**abeyance**" were not used in the language of **Article 6** of the Constitution until **20.4.2010** when the same were introduced through the 18th Amendment in the Constitution almost after two and half years to the date of alleged

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[Signature]

offence of High Treason on **03.11.2007**. The Parliament has redefined the offence of High Treason on **20.04.2010** in the 18th amendment as under:-

6. High treason. -- ¹[(1) Any person who abrogates or subverts **or suspends or holds in abeyance**, or attempts or conspires to abrogate or subvert or **suspend or hold in abeyance**, the Constitution by use of force or show of force or by any other unconstitutional means shall be guilty of high treason.]

(2) Any person aiding or abetting ²[or **collaborating**] the acts mentioned in clause (1) shall likewise be guilty of high treason.

³(2A) An act of high treason mentioned in clause (1) or clause (2) **shall not be validated by any court including the Supreme Court and a High Court.**]

(3) ⁴[Majlis-e-Shoora (Parliament)] shall by law provide for the punishment of persons found guilty of high treason. (High lighted words are additions by 18th amendment).



12. Learned counsel for the prosecution by referring to the new definition of high treason in the Constitution has argued that in November, 2007 the accused has repeated the offence of high treason as his acts of **03.11.2007** were clear constitutional transgression. He, in the written arguments has repeatedly relied on the judgments of the Hon'ble Supreme Court in the cases of Moulvi Iqbal Haider and Sindh High Court Bar Association. He has extensively quoted observations of Hon'ble Supreme Court from the judgment in the case of Sindh High Court Bar Association. I will discuss relevance of the case of Sindh High Court Bar Association and other cases in the instant criminal proceedings in later part of my findings. Learned counsel for prosecution in support has contended that the acts of accused in **November, 2007** were similar constitutional violations

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[Signature]

which the accused has committed in **October, 1999**, but he has not read or referred to the earlier acts of accused in **October, 1999** to draw parallel with the acts of accused in **November, 2007**. In my humble view, without comparing Proclamation of Emergency and Provisional Constitution Order both dated **3rd November, 2007** (Ex: P-10/2 and P-10/10) with the earlier Proclamation of Emergency and Provisional Constitution Order both dated **14th October, 1999**, irrespective of its validation, the argument is fallacious. In view of the fact that by now we have two versions of the definition of high treason; one which was existing in **November, 2007** and the other in which the Parliament has added another mode of suspending the Constitution (holding in abeyance) in the definition of high treason introduced in **April, 2010**, therefore, both the Proclamations and PCOs of **October 1999** and **November, 2007** respectively are reproduced for comparison and ready reference as under:-

Government of Pakistan

CABINET DIVISION

"PROCLAMATION OF EMERGENCY"

Islamabad, the 14th October, 1999



No.2-10/99-Min. L—(1) In pursuance of deliberations and decisions of Chiefs of Staff of the Armed Forces and Corps Commanders of Pakistan Army, 1 General Pervez Musharraf, Chairman Joint Chiefs of Staff Committee and Chief of Army Staff, proclaim Emergency through Pakistan and assume the office of the Chief Executive of the Islamic Republic of Pakistan.

(2) I hereby order and proclaim as follows:--

- (a) The Constitution of the Islamic Republic of Pakistan shall remain in abeyance;
- (b) The President of Pakistan shall continue in office;
- (c) The National Assembly, the Provincial Assemblies and Senate shall stand suspended;
- (d) The Chairman and Deputy Chairman of the Senate, the Speaker and Deputy Speaker of the National Assembly and the Provincial Assemblies shall stand suspended;
- (e) 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

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Ministers and the Advisors to the Chief Ministers shall cease to hold office;

- (f) The whole of Pakistan will come under the control of the Armed Forces of Pakistan.
- (3) This proclamation shall come into force at once and be deemed to have taken effect on and from 12th day of October, 1999.

Rawalpindi:
14 October, 1999.

Sd/-
General
Chairman Joint Chiefs of Staff Committee,
Chief of Army Staff and Chief Executive of Pakistan,
(Pervez Musharraf)
14 Oct 99

PROVISIONAL CONSTITUTION ORDER

No.1 OF 1999

No.2-10/99-Min. L—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 day of October 1999 (hereinafter referred to as the Chief Executive) is pleased to make and promulgate the following Order:

1. (1) This Order may be called Provincial Constitution Order No.1 of 1999.
- (2) It extends to the whole of Pakistan.
- (3) It shall come into force at once.



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(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 I 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.

[Signature]

4. (1) No court, tribunal or other authority shall call or permit to be called in question the Proclamation of Emergency of the 14th day of October, 1999, or any Order made in pursuance thereof.
- (2) No judgment, 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. Notwithstanding the abeyance of the provisions of the Constitution, but subject to the Orders of the Chief Executive all laws other than the Constitution shall continue in force until altered, amended or repealed by the Chief Executive or any authority designated by him.
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 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 Eh-resab Commissioner, shall continue in the said service on the same terms and conditions and shall enjoy the same privileges, if any.

Rawalpindi:
14 October, 1999.

Sd/-
General

Chairman Joint Chiefs of Staff Committee,
Chief of Army Staff and Chief Executive of Pakistan,
(Pervez Musharaf)
14 Oct 99



PROCLAMATION OF EMERGENCY

[Gazette of Pakistan, Extraordinary, Part I,
3rd November 3, 2007]

No.2-9/2007-Min-I, dated 3-11-2007.--Whereas there is visible ascendancy in the activities of extremists and incidents of terrorist attacks, including suicide bombings, IED explosions, rocket firing and bomb explosions and the banding together of some militant groups have taken such activities to an unprecedented level of violent intensity posing a grave threat to the life and property of the citizens of Pakistan;

Whereas there has also been a spate of attacks on State infrastructure and on law enforcement agencies;

Whereas some members of the judiciary are working at cross purposes with the executive and legislature in the fight against terrorism and extremism thereby weakening the Government and the nation's resolve and diluting the efficacy of its actions to control this menace;

Whereas there has been increasing interference by some members of the judiciary in government policy, adversely affecting economic growth in particular;

Whereas constant interference in executive functions, including but not limited to the control of terrorist activity, economic policy, price controls, downsizing of corporations and urban planning, has

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weakened the writ of the government; the police force has been completely demoralized and is fast losing its efficacy to fight terrorism and Intelligence Agencies have been thwarted in their activities and prevented from pursuing terrorists;

Whereas some hard core militants, extremists, terrorists and suicide bombers, who were arrested and being investigated were ordered to be released. The persons so released have subsequently been involved in heinous terrorist activities, resulting in loss of human life and property. Militants across the country have, thus, been encouraged while law enforcement agencies subdued;

Whereas some judges by overstepping the limits of judicial authority have taken over the executive and legislative functions;

Whereas the Government is committed to the independence of the judiciary and the rule of law and holds the superior judiciary in high esteem, it is nonetheless of paramount importance that the Honourable Judges confine the scope of their activity to the judicial function and not assume charge of administration;

Whereas an important Constitutional institution, the Supreme Judicial Council, has been made entirely irrelevant and non est by a recent order and judges have, thus, made themselves immune from inquiry into their conduct and put themselves beyond accountability;

Whereas the humiliating treatment meted to government officials by some members of the judiciary on a routine basis during court proceedings has demoralized the civil bureaucracy and senior government functionaries, to avoid being harassed, prefer inaction;

Whereas the law and order situation in the country as well as the economy have been adversely affected and trichotomy of powers eroded;

Whereas a situation has thus arisen where the Government of the country cannot be carried on in accordance with the Constitution and as the Constitution provides no solution for this situation, there is no way out except through emergent and extraordinary measures;

And whereas the situation has been reviewed in meetings with the Prime Minister, Governors of all four Provinces, and with Chairman Joint Chiefs of Staff Committee, Chiefs of the Armed Forces, Vice-Chief of Army Staff and Corps Commanders of the Pakistan Army;

Now, therefore, in pursuance of the deliberations and decisions of the said meetings, I, General Pervez Musharraf, Chief of the Army Staff, proclaim Emergency throughout Pakistan.

2. I hereby order and proclaim that the Constitution of the Islamic Republic of Pakistan shall remain in abeyance.

3. This Proclamation shall come into force at once.

Government of Pakistan
Cabinet Secretariat of Pakistan
Cabinet Division

No.2-9/2007-M:n-I(A)

Islamabad, the 3rd November, 2007

PROCLAMATION CONSTITUTION ORDER



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In pursuance of the Proclamation of 3rd November, 2007, and in exercise of all powers enabling him in that behalf, the Chief of Army Staff under the Proclamation of Emergency of the 3rd November, 2007, is pleased to make and promulgate the following Order:-

1. (1) This Order may be called the Provincial Constitutional Order No.1 of 2007.
- (2) It extends to the whole of Pakistan.
- (3) It shall come into force at once.
2. (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 Order made by the President be governed, as nearly as may be, in accordance with the Constitution:

Provided that the President may, from time to time, by Order amend the Constitution, as is deemed expedient:

Provided further that the Fundamental Rights under Articles 9, 10, 15, 16, 17, 19 and 25 shall remain suspended.

(2) Notwithstanding anything contained in the Proclamation of the 3rd day of November, 2007, or this Order or any other law for the time being in force, all provisions of the Constitutions of the Islamic Republic of Pakistan embodying Islamic injunctions including Articles 2, 2A, 31, 203A, 203J, 227 to 231 and 260(3)(a) and (b) shall continue to be in force.

(3) Subject to clause (1) above and the Oath of Office (Judges) Order, 2007, 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 a High Court and any other court shall not have the power to make any order against the President or the Prime Minister or any person exercising powers or jurisdiction under their authority.

(4) All persons who immediately before the commencement of this Order were in office as judges of the Supreme Court, the Federal Shariat Court or a High Court, shall be governed by and be subject to the Oath of Office (Judges) Order, 2007, and such further Orders as the President may pass.

(5) Subject to clause (1) above, the Majlis-e-Shoora (Parliament) and the Provincial Assemblies shall continue of function.

(6) All persons who, immediately before the commencement of this Order, were holding any service, post or office in connection with the affairs of the Federation or of a Province, including an All Pakistan Service, Service in the Armed Forces and any other Service declared to be a Service of Pakistan by or under Act of Majlis-e-Shoora (Parliament) or of a Provincial Assembly, or Chief Election Commissioner or Auditor General shall continue in the said service on the same terms and conditions and shall enjoy the same privileges, if any, unless these are changed under Orders of the President.

3. (1) No court including the Supreme Court, the Federal Shariat Court, and the High Courts, and any tribunal or



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other authority shall call or permit to be called in question this Order, the Proclamation of Emergency of the 3rd day of November, 2007, the Oath of Office (Judges) Order, 2007 or any Order made in pursuance thereof.

(2) No judgment, decree, writ order or process whatsoever shall be made or issued by any court or tribunal against the President or the Prime Minister or any authority designated by the President.

4. (1) Notwithstanding the abeyance of the provisions of the Constitution, but subject to the Orders of the President, all laws other than the Constitution, all Ordinances, Order, 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 continue in force until altered, amended or repealed by the President or any authority designated by him.

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

(2) The provisions of clause (1) shall also apply to an Ordinance issued by the President or by a Governor which was in force immediately before the commencement of the Proclamation of Emergency of the 3rd day of November, 2007.



Rawalpindi
the 3rd November, 2007.

-Sd/-
(Pervez Musharraf)
Chief of Army Staff

13. In October, 1999, on Proclamation of Emergency, the Chief of Army Staff has assumed the office of the Chief Executive in place of the then Prime Minister and the whole of Pakistan has come under the control of armed forces of Pakistan [clause 2(f)], and by virtue of **sub-clause c, d and e** of Clause-2 the entire state machinery was suspended. The National Assembly, Provincial Assemblies, Senate had stood suspended; the Chairman, Deputy Chairman of Senate and Speaker and Deputy Speakers of the National and Provincial Assemblies had stood suspended; and the entire cabinet of the Prime Minister in the federation and entire cabinet of provincial Chief Ministers in the provinces had ceased to hold their offices. And through PCO of October, 1999 all the **fundamental rights** conferred by chapter I of part-II of the Constitution were suspended and the President of Pakistan was made to act only on the advice of the Chief

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Executive/**Chief of Army Staff**, instead of the then Prime Minister. The entire Constitution was replaced by the **Legal Framework Order**. As against the aforesaid Proclamation of Emergency and Provincial Constitutional Order of **October 1999**, in the Proclamation of Emergency of **November 2007** (exhibit P-10/2), the Chief of Army Staff has not replaced the elected Prime Minister, nor the armed forces have taken over any part of the country or any institution whatsoever. Neither the Senate, National Assembly or Provincial Assembly were wrapped up nor the Chairman and Deputy Chairman of Senate and the Speakers and Deputy Speakers of National and Provincial Assemblies were suspended. Likewise the Prime Minister in the federation and the provincial Chief Ministers in the provinces and their cabinet **did not** cease to hold their offices rather they continued to perform their functions in accordance with the Constitution.



14. After the comparison of two definitions of High Treason as above, on examining the language of "high treason" in Article 6 of the Constitution of 1973 as it was on **3rd November, 2007**, in the light of definition/explanation of the term "high treason" from the commentary on the Constitution by Justice Muhammad Munir reproduced in para-9 above, one cannot conclude that the emergency of **3rd November 2007** was "**subversion**" or "**abrogation**" of the Constitution. Neither the Constitution was replaced by any Legal Framework Order nor even the basic structure of the Constitution has been changed. No new 17th Amendment has followed.

15. The accused in view of the 18th Amendment at initial stage of the proceeding of criminal complaint in **December, 2013** has taken two defenses. **First**, that he has been singled out by the Federal Government; **second**, that the 18th amendment in **Article 6** of the

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Constitution has re-defined the offence of High Treason and it cannot be given retrospective effect to include the acts and omissions of accused of **03.11.2007**. He had taken these two pleas in his application bearing Cr. Misc. Application **No.03/2013**. This Court while disposing of the said application by order dated **07.3.2014** has refrained from adjudicating on both the pleas on the ground that it was premature stage to decide the same. Relevant observations from order of this Court dated **07.3.2014** are reproduced as under:-



"Further, the decision if recorded on the submissions pertaining to being singled out and the retrospective effect of Article 6 of the Constitution would amount to decide the case at premature stage, hence we intend not to record findings thereon at this stage of the proceedings."

The accused has also raised this legal question of retrospective effect of the amendment in Article 6 of the Constitution even before the Hon'ble Supreme Court in his **Civil Review Petition** in the case of **Pervez Musharaf vs. Nadeem Ahmed and others** reported in **2014 SCMR 665**. The Hon'ble Supreme Court in the said judgment has also not decided this plea on the ground that it is outside the scope of review petition. Relevant observations in para-42 to 44 from the said judgment are reproduced as follows:-

42. Article 6 of the Constitution as it stands today was amended by virtue of Constitution (Eighteenth Amendment) Act, 2010 (10 of 2010). The amended parts of Article 6 which have been highlighted indicate following additions/ changes:-

"(i) In Article 6(1), words "or hold in abeyance";

(ii) In Article 6(2) words, "or collaborating"; and

(iii) Article 6(2A): This is a new sub-clause whereby it has been amended that any act of high treason within the meaning of Article 6(1) and Article 6(2) "shall not be validated by any court including the Supreme Court and a High Court".

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43. The nature of offence, definition and procedure of trial substantially remain the same except that another mode of suspending the Constitution (hold in abeyance) in the definition clause of high treason have been added. The major change brought is the addition of Article 6(2A). By this newly added sub-clause there is prohibition for courts including the High Court and Supreme Court to validate it.

44. The Court is seized of a review petition against a judgment wherein neither the question of petitioner's trial or the retrospective or prospective effect of Article 6 were moot points. The argument qua this is therefore misplaced and is accordingly repelled.

16. Since the accused has taken the defense of retrospective effect of the amendment in Article 6 of the Constitution before this Court and even before the Hon'ble Supreme Court, and the decision on such plea has been deferred, in the final judgment I believe this Court is under obligation to give findings both on the questions of retrospective effect of the amendment in **Article 6** of the Constitution and being singled out. The order dated **07.3.2013** passed by this Court was obviously passed in presence of the prosecution team. Mr. **Ali Zia Bajwa** and Mr. **Munir Hussain Bhatti**, advocates who have replaced earlier prosecution team seems to have not even read the order sheet of present proceedings to rebut or raise objection on these two points of defense. Strangely enough even the defence team seems to have forgotten that they have to press their plea of retrospective effect of amendment and wilful discrimination by the prosecution to single out their client to prosecute him for an offence of High Treason which by its design is such act that it cannot be committed by an individual single handedly. Both the prosecution and the defence teams were competing with each other to win an adjournment to ensure that the trial should not conclude come what may. Be that as it may, the plea of retrospective effect of amended



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Article 6 of the Constitution has to be dealt with by this Court in either case as it is a legal plea and unlike an ordinary criminal Court, this Court is Special Court constituted under the Criminal Law Amendment (Special Court) Act, 1976 to deal with an offence of High Treason defined in the Constitution. Dr. Tariq Hasan, advocate while appearing for the prosecution has used the term "constitutional offence" I am feeling a bit handicap in deciding this preposition in the given facts of the case in hand as neither the prosecution nor the defence has advanced any argument on this important legal and constitutional issue of amendment in the "constitutional offence" My brothers, too, in their judgment have not commented on it to enlighten me on the subject of retrospective effect of a constitutional provision dealing with a specific offence defined only in the Constitution itself.

17. Therefore to examine the effect of Amendment in Article 6 of the Constitution on the actions of accused of **03.11.2007**, for which he is charged by the Court, I have to rely on the judgments of Hon'ble Supreme Court on the subject. In this context as early as in 1969, Hon'ble Mr. Justice Hamoodur Rehman, Hon'ble Chief Justice of Supreme Court of Pakistan (as he then was) while speaking for the bench in the case of Adnan Afzal vs. Capt. Sher Afzal (**PLD 1969 SC 187**) has relied and approved earlier case law to explain retrospective effect of an amendment in the act in the following passage:-

The general principle with regard to the interpretation of statutes as laid down in the well known case of the Colonial Sugar Refining Company Limited v. Irving (1905 A C 369) is that "if the matter in question be a matter of procedure only", the provisions would be retrospective. "On the other hand, if it be more than a matter of procedure, if it touches a right in existence at the A passing of the Act", then "in accordance with a long line of



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authorities extending from the time of Lord Coke to the present day", the legislation would not operate retrospectively, unless the Legislature had either "by express enactment or by necessary intendment" given the legislation retroactive effect.

The above principle has more elaborately been reiterated by the Hon'ble Supreme Court in a recent judgment in the case of Messrs Super Engineering and another vs. Commissioner Inland Revenue, Karachi reported as **2019 SCMR 1111**. In this case the **Hon'ble Mr. Justice Yahya Afridi**, (who was one of the members of this Court on **07.3.2014**) authored the said judgment, has extensively relied on and referred to several case laws on the subject of retrospective and prospective effect of amendments in law from **PLD 1956 SC 256** to **2018 SCMR 991**. I reproduce relevant para-17 and 18 as follows:-

17. Now, to the crucial issue of applicability of amendments introduced in fiscal statutes. It was in 1905, when Lord Macnaghten, in *The Colonial Sugar Refining Company v. Irving* (1905 AC 369) case, speaking for the Privy Council, opined that:

"As regards the general principles applicable to the case there was no controversy. On the one hand, it was not disputed that if the matter in question be a matter of procedure only, the petition is well founded. On the other hand, if it be more than a matter of procedure, if it touches a right in existence at the passing of the Act, it was conceded that, in accordance with a long line of authorities extending from the time of Lord Coke to the present day, the appellants would be entitled to succeed. The Judiciary Act is not retrospective by express enactment or by necessary intendment. And therefore the only question is, was the appeal to His Majesty in Council a right vested in the appellants at the date of the passing of the Act, or was it a mere matter of procedure? It seems to their Lordships that the question does not admit of doubt. To deprive a suitor in a pending action of an appeal to a superior tribunal which belonged to him as of right is a very different thing from regulating procedure. In principle, their Lordships see no difference between abolishing an appeal altogether and transferring the appeal to a new



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tribunal. In either case, there is an interference with existing rights contrary to the well-known general principle that statutes are not to be held to act retrospectively unless a clear intention to that effect is manifested." (Emphasis provided).

18. The above principle of interpretation of statutes was followed and further developed in our jurisdiction. Some of the early leading cases are *Muhammad Ishaq v. State* (PLD 1956 SC 256), *Nagina Silk Mill, Lyallpur v. Income Tax Officer, A-Ward, Lyallpur* (PLD 1963 SC 322), *The State v. Muhammad Jamel* (PLD 1965 SC 681) and *Abdul Rehman v. Settlement Commissioner* (PLD 1966 SC 362). It was the case of *Adnan Afzal v. Capt. Sher Afzal* (PLD 1969 SC 187) that the said principle was articulated by this Court in terms that:

"Nevertheless, it must be pointed out that if in this case process any existing rights are affected or the giving of retroactive operation cause inconvenience or injustice, then the Courts will not even in the case of a procedural statute, favour an interpretation giving retrospective effect to the statute. On the other hand, if the new procedural statute is of such a character that its retroactive application will tend to promote justice without any consequential embarrassment or detriment to any of the parties concerned, the Courts would favourably incline towards giving effect to such procedural statutes retroactively." (Emphasis provided).



18. If we examine the language of the amended Article 6 of the Constitution by the 18th Amendment, we will notice that there is hardly any word or phrase which can give us a feeling that the legislature has intended to apply the amended definition of high treason retrospectively to any person for such act prior to the date of (Eighteenth Amendment) Act, 2010 (Act No.X of 2010) published in the gazette of Pakistan, Extr., Pt.I, P.No.267, dt. **20th April, 2010**. In view of the case law on the subject of retrospective effect of amendment as explained by the Hon'ble Supreme Court in the above case, I do not find any clear intention from the language of amendment that it was intended to be effective retrospectively.

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Additionally, the use of words "**shall be**" guilty of high treason, cannot be read to include a person who had suspended or held in abeyance the Constitution in the past. In my humble view, one reason for not giving retrospective effect to the amendment to Article 6 of the Constitution was perhaps that the Parliament itself in **December, 2003** was guilty of "suspending" Constitutional Provision through the 17th Amendment by adding a Proviso to **Article 41** of the Constitution whereby operation of **Article 63(1)(d)** of the Constitution was suspended and/or held in abeyance for one year till **31st December, 2004**. The relevant part of the 17th Amendment is reproduced below:-

2. Amendment of Article 41 of the Constitution:



*In the Constitution of the Islamic Republic of Pakistan, hereinafter referred to as the Constitution, in Article 41,
(1) In clause (7), in paragraph (b), for the full stop at the end, a colon shall be substituted and thereafter the following proviso shall be added, namely,*

"Provided that paragraph (d) of clause (1) of Article 63 shall become operative on and from the 31st day of December, 2004. ";

Article 63(1)(d) of the Constitution is as follows:-

***{63. Disqualifications for membership of Majlis-e-Shoora (Parliament).- (1) A person shall be disqualified from being elected or chosen as, and from being, a member of the Majlis-e-Shoora (Parliament), if -**

- (a) _____
- (b) _____
- (c) _____
- (d) **he holds an office of profit in the service of Pakistan other than an office declared by law not to disqualify its holder; or**

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19. Another reason for not giving retrospective effect was that the Proclamation of Emergency and the Provisional Constitution Order of 3rd November, 2007 have not adversely affected political parties rights in the Parliament and in running the Federal and Provincial Governments, therefore, one can safely say that Parliament by first keeping silence and then amending **Article 6** of the Constitution has betrayed the Judiciary, the only target of the acts of **03.11.2007**. There was not a single formal protest in National Assembly or in any Provincial Assembly from the Government benches or opposition parties on the legitimacy or otherwise of the proclamation of emergency by the accused. Not a single Member of Parliament has raised any voice in the Parliament. In fact, to the contrary, evidence has come on the record that National Assembly through a resolution in its **44th Session** on **07.11.2007** has endorsed the Proclamation of Emergency. This fact has been admitted by PW-1 in his cross-examination in response to a question by the counsel for the accused and I reproduce the relevant portion of his cross examination as follows:-



It is correct to suggest that the action of the Proclamation of Emergency was endorsed by the National Assembly subsequently through a Resolution. I see copy of the Resolution passed by National Assembly in its 44th Session on 07.11.2007 marked as Ex.P-9/19 and state that no action for violation of the Constitution was taken against the parliamentarians in their capacity as alders, abettors and facilitators for the reason that they passed the Resolution. The Resolution does not find any mention in the Inquiry Report. It is correct that the record of the Assembly would establish as to who were these parliamentarians who voted in favour of the Resolution that was passed by the National Assembly in its 44th Session. I see the list of the members of the 12th National Assembly which is marked as Ex.P-9/20.

20. It is indeed very pertinent to note that many of the parliamentarians, who are lawyers and they were participating in the lawyers movement, even they had no courage to make any motion in the Parliament. May be for the fear that the scope of Emergency may not be extended to the entire Constitutional setup. The Parliament in support of earlier Proclamation of Emergency in October, 1999 has outrightly applied the infamous theory of "necessity" by introducing the 17th Amendment to specifically favour the accused. And this time through the 18th Amendment by amending **Article 6** of the Constitution, the Parliament has not only endorsed the resolution of earlier National Assembly dated **07.11.2007**, but it has also given its verdict that the acts of General (R) Pervez Musharraf of **03.11.2007** were not the acts of High Treason as such acts were not included in the definition of High Treason in the Constitution prior to **20.4.2010**. In my humble view, the chosen representation of the people of Pakistan by "suspending or holding in abeyance" **Article 63(1)(d)** of the Constitution had only one purpose before them that they wanted to declare that the people of Pakistan want to decorate the office of the President of Pakistan with a serving General in violation of constitutional embargo on the person "holding an office of profit" to even become member of Parliament. They knew that as a result of suspending **Article 63(1)(d)** of the Constitution even basic structure of the Constitution could be changed and yet they did it, out of their personal needs to retain their seats in the Parliament. Many of the Parliamentarians on the date of passing of 18th Amendment were the same who were in the Parliament on the date of passing of 17th amendment when the act of "**abrogation and subversion**" of Constitution of Pakistan through the Legal Framework Order was affirmed and such acts of General (R) Pervez Musharraf were not



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treated as High Treason, as if **Article 6** was missing from the Constitution at the relevant time. The Parliament in the 18th Amendment had to protect the Parliamentarians of the Constitution who were guilty of holding **paragraph (d) of Clause (1) of Article 63** of the constitution in abeyance from December, 2003 to 31st December, 2004.

21. In fact, the Parliament by amending the definition of High Treason, has clearly approved and understood the definition of High Treason explained by Justice Muhammad Munir in his commentary on the Constitution quoted in para-9 above. Until **20.4.2010**, the definition of high treason was restricted to the acts of "**abrogation**" and "**subversion**" and in the language of Justice Muhammad Munir from his commentary "**no other act, however grossly detrimental to the interest of country, but not attracting the provisions of Article 6 can be said to fall within the meaning of High Treason**". Had the Parliament intended that the amended Article 6 of the Constitution should have retrospective effect, the honest, brave and powerful representations of the people in the Parliament could not have been shy of clearly expressing such intention in the amendment itself in respectful obedience to the various observations of the Hon'ble Supreme Court of Pakistan. It cannot be believed that the Parliamentarians were not aware of the law regarding retrospective effect of an amendment and that they were also not aware of declarations of Hon'ble Supreme Court in the case of Sindh High Court Bar Association with reference to the acts of accused of **03.11.2007**. Therefore, in my humble view, by redefining the offence of high treason the Parliament has, in fact, consciously validated all actions of the accused of 3rd November, 2007 or at least unanimously



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declared that such acts of the accused even if the same were "detrimental to the interest of country (Constitution)", the same were not attracting the provisions of Article 6 of the Constitution on the said date. The Parliament by amending Article 6 of the Constitution has left no room for this Court to charge the accused for an offence of high treason on account of his act of "**suspending and holding in abeyance**" certain provisions of the Constitution by Proclamation of Emergency and Provisional Constitution Order on **03.11.2007**.

22. Another aspect of the case is that the prosecution has vehemently relied on various observations and declarations of the Hon'ble Supreme Court with reference to the acts of accused of 3rd November, 2007 while deciding petitions including the case of Sindh High Court Bar Association in exercise of its **original jurisdiction under Article 184(3)**. The learned counsel for the prosecution while referring to the same have skipped the important legal and constitutional aspect distinguishing the features of civil and criminal jurisdiction of Courts. This legal aspect about exercise of jurisdiction by Civil and Criminal Courts has repeatedly been highlighted by the Hon'ble Supreme Court in most of the judgments on which the prosecution wants to rely and want to impress upon this Court that different defenses taken by the accused have already been decided by the Supreme Courts against him. Were we trying an accused already convicted ? The prosecution team has failed to take notice that in all such cases the Hon'ble Supreme Court after giving observations and even holding the actions as unlawful, unconstitutional and malafide has refrained from directing the Federal Government to initiate criminal proceedings against the accused for an offence of high treason. The Hon'ble Supreme Court for the first time on the petition



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filed by one Moulvi Iqbal Haider and few other individuals on **03.07.2013** has allowed an inquiry and investigation against the accused in terms of Article 6 of the Constitution for his actions of only **03.11.2007**, that too, on the statement of the Federation to this effect. And even in the said case (2013 SCMR 1683) the Hon'ble Supreme Court has clearly observed that:-



3. *We are consciously, deliberately and as submitted by Mr. Muhammad Ibrahim Satti, learned Senior Advocate Supreme Court for the respondent not touching the question of "abrogation" or "subversion" or "holding in abeyance the Constitution" or "any conspiracy in that behalf" or indeed the question of suspending or holding the Constitution in abeyance or the issue as to abetment or collaboration in the acts mentioned in Article 6 of the Constitution. This is so because any finding/observation or view expressed by us may potentially result in prejudice to the inquiry/investigation or subsequent trial should that take place as a result of such investigation.*

23. Similarly even in the case of Abdul Hameed Dogar vs. Federation of Pakistan reported as **PLD 2016 S.C 454** the Hon'ble Supreme Court after having discussed several case-laws on the subject, namely (i) Sindh High Court Bar Association vs. Federation of Pakistan (**PLD 2009 SC 879**), (ii) General (R) Pervez Musharraf vs. Nadeem Ahmed and others (**PLD 2014 SC 585**), (iii) unreported decision in C.P No.D-454/2009 by High Court of Sindh, Karachi and (iv) Moulvi Iqbal Haider vs. Federation of Pakistan (**2013 SCMR 1683**) in para-12 has categorically observed as follows:-

12. *We have reproduced above what this Court and the High Court of Sindh, Karachi have already observed and declared in various judgments and such observations and declarations are relevant to the issue of aiders and abettors of respondent No. 2 in the alleged commission of high treason by him brought before us through the present appeal. As the trial of respondent No. 2 for the said offence is presently pending before the*

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Special Court, therefore, we have restrained ourselves from recording our own opinions on the issue lest any opinion expressed by us may prejudice the case of the said respondent before the Special Court. (Emphasis provided).

24. The above quoted observations from the case of Abdul Hameed Dogar in **2016** were reiteration of the observations of the Hon'ble Supreme Court in **2013** in the case of Moulvi Iqbal Haider and others (2013 SCMR 1683). The ratio of the two observations is that the declaration/ observations of the Hon'ble Supreme Court in exercise of its original jurisdiction are not supposed to influence the criminal Court seized of criminal case arising out of even the same facts or on the same complaint. Even this Court in its Order dated **07.3.2014** authored by **Hon'ble Mr. Justice Faisal Arab** (as he then was President of this Court) has discussed this legal proposition in para-29 and I reproduce the same as follows:-



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29. In a criminal or a civil matter several orders are passed which are either tentative in nature or are passed as an interim measure. This act of passing interim orders in civil cases by no means prevent a judge from deciding a case after taking evidence. A judge hearing an application for grant of concession of bail may reject it after holding that there is sufficient material on record to connect the accused with the commission of the crime, but this decision would not disqualify the judge to record a final verdict on completion of trial on basis of the evidence that comes on record. **It is a well established principle of dispensation of justice that a criminal court shall not convict a person merely for the reason that some civil liability has been imposed on him in a civil matter already decided on same set of facts.** This is also true for a civil court which cannot impose civil liability merely on account of a decision of a criminal court against the defendant for committing an act which is subject matter of a civil litigation. **In each case both civil and criminal, decision is to be given on the basis of the evidence that comes on record, without being influenced by a decision given in the other version of the proceedings.** The civil cases are decided on the principle of preponderance of probabilities, whereas criminal liability is

established on the principle of "existence of proof beyond reasonable doubt". This principle is discussed in detail by the Honourable Supreme Court in the case of Ghulam Rasool VS. Muhammad Waris Bismil reported in 1995 SCMR 500. (Emphasis provided).

Besides the above observations of this Court, one may also refer to one more judgment of Hon'ble Supreme Court in the case of Malik Khuda Bakhsh vs. The State (1995 SCMR 1621). Relevant, Para-11 of the judgment is reproduced below:-

11. It may be seen that in case of Mst. Naseer Begum v. Sain and 6 others, reported in 1972 SCMR 584 the Supreme Court has observed that "the Evidence Act does not make a finding of fact arrived at on the evidence before the Court in one case evidence of that fact in another case". Thus, **a judgment in a Civil Court, as pointed out by M. Munir in his Law of Evidence, "is not admissible in a criminal proceeding to establish the truth of the facts upon which it is rendered. In a criminal trial it is for the Court to determine the question of the guilt of the accused and it must do so upon the evidence before it".** In the case of S.N. Gupta & Co. v. Sadanada Ghosh, it was held by the Dacca High Court that **a judgment of acquittal in a criminal case only decides that the accused has not been proved guilty and to this extent only and no more is it to be taken as correct and conclusive in a subsequent civil suit between the parties".** (Emphasis is supplied).



25. In view of the above precedents, I am unable to agree with the observations of my learned brother that the plea of accused that for issuance of proclamation of emergency the situation was reviewed in the meetings with the Prime Minister, Governors and Chiefs of Armed Forces and Corps Commanders has already been decided by the Hon'ble Supreme Court. In fact the plea of accused regarding having issued the proclamation after the situation was reviewed in the meetings with the Prime Minister, Governors of all Provinces and other Army Officers even if it has been discussed by the Hon'ble

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Supreme Court in any of its judgments, with respect, the said observations of the Hon'ble Supreme Court in view of the case laws from the jurisdiction of Hon'ble Supreme Court discussed in para-21, 22 and 23 above cannot be adopted by this Court as a decision already rendered on such plea. Whether there were meetings to review the situation or not being a question of fact, it is even otherwise required to be established by the prosecution in accordance with the principles of evidence act in criminal trial. In this context the prosecution without looking into the contents of **exhibit P-10/2** i.e the Proclamation of Emergency dated 3rd November, 2007, (para 3,4.4 of written arguments at page 14) has declared that *"the contents of proclamation of emergency do not reveal the existence of any such cabinet decision or order from Prime Minister"*. The perusal of **Exh.P-10/2**, negates this claim of prosecution as it is specifically mentioned in the document that the situation has been reviewed by the Government functionaries in meetings. To be exact it reads:-

And whereas the situation has been reviewed in meetings with the Prime Minister, Governors of all four Provinces, and with Chairman Joint Chiefs of Staff Committee, Chiefs of the Armed Forces, Vice-Chief of Army Staff and Corps Commanders of the Pakistan Army.

26. The other contention of the learned counsel for the prosecution (para 3.4 4(a) of arguments) on the same issue that almost all "concerned officials" were questioned about the decision of the cabinet or advice of the Prime Minister and they have denied it is equally misconceived. In my humble view no official except those clearly mentioned in the document (**Exh.P-10/2**) itself could disprove its contents. The first burden of proof was on the prosecution to disprove the contents of this document since it was the case of



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prosecution that only the accused was guilty and therefore the prosecution has not included any "aider" and "abettor" in the inquiry and investigation of an offence under Article 6 of the Constitution. Investigation Officers of the team of FIA while relying on the **Exh.P-10/2** should have examined the persons whose names were mentioned in the document to prove that such meetings were not held. The prosecution has not even mentioned their names in the list of witnesses. This document (**Exh.P-10/2**) was not a secret document. Even after Proclamation of Emergency through the **Exh.P-10/2**, the persons mentioned in the document have never contested that they were not privy to that decision. The record shows that the Prime Minister, his cabinet and all the Governors and Corps Commanders like the parliament (the mother of Constitution) continued to work with the same spirit. They were not ordinary people who could have any fear in disowning the Proclamation of Emergency at least after 7 years when through a letter dated **26.6.2013 (Exh.P-9/1)**, Secretary Interior (PW-1) was directed to constitute a team of Investigation Officers regarding the offence of High Treason by the accused. The prime witness of prosecution Mr. Shahid Khan (PW-1) in his cross examination has admitted that the prosecution team has not recorded their statement during inquiry and investigation. His cross-examination on this point is reproduced below:-



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It is in my knowledge that all those persons who were holding the office of Services Chiefs, Corps Commanders and Seniors Officers of the Armed Forces, at the time when Proclamation of Emergency was declared, have retired by now, I have not recorded the statements of any of such officers who are mentioned in my preceding answer. I have not given any direction to the Investigation Team to record the statement of the above mentioned military officers. It is correct to suggest that this fact was within my knowledge

that after the retirement of the military officers mentioned hereinabove they are no more stationed at GHQ as they have become civilians.

My learned brother in his findings has also very categorically observed that "it is unbelievable that such an extreme act is committed alone by a single man in uniform". In this context even the Inquiry Report (**Exh.P-9/5**) itself is sufficient. The following admission of PW-1 is very relevant to the plea of accused for having been singled out.

I see the last paragraph of the Inquiry Report produced as Ex.P-9/5 wherein the Joint Investigation Team has recommended that the competent authority may also take into account the role of various facilitators in the unconstitutional Proclamation of Emergency on 3rd November, 2007 and I state that action was not taken against any other person as there was no material against any other person in the Inquiry Report nor Joint Investigation Team specifically identified persons who were facilitators, aiders and abettors. Voluntarily states that if they are identified then action can be taken against them. The last paragraph of Inquiry Report is marked as "A". It is correct that in the light of the recommendations made in the last paragraph of the Inquiry Report no fresh inquiry was conducted in respect of the role of facilitators, aiders, abettors and collaborators.



Mr. Shahid Khan, Secretary Interior, who was PW-1, in his cross-examination when confronted with the question that the Interior Ministry has deliberately ignored to enquire into the question of aiders and abettors despite the recommendations, has also denied the existence of any material against them which was within the powers of Interior Ministry to collect to do complete justice with the fair and impartial enquiry. It may be appreciated from the following reply to certain questions by PW-1 in his cross-examination:-

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The statements made on Television by the then Prime Minister in the presence of some of the

members of the Cabinet of that time after 3rd November 2007 came to my knowledge.-----

I have not viewed the statement made by the then Prime Minister on television which was repeatedly telecast on Dunya T.V in program 'Kuon'. I have no knowledge of an article published on 7.11.2007 authored by Ms. Nasim Zehra in the daily News wherein it is stated that 3rd November action was taken by the accused after consulting other functionaries who are mentioned in the Proclamation of Emergency itself. Voluntarily states that at that time I used to read "Arab News" only. It is correct to suggest that the present Federal Minister Mr. Zahid Hamid was also a member of the Cabinet of the then Prime Minister Mr. Shoukat Aziz. I have no knowledge of the article that was published on 17.04.2014 in Express Tribune that Mr. Zahid Hamid and other top officials who are now part of the present government, at relevant time endorsed the 3rd November 2007 action.



The PW-1 though repeatedly attempted to claim that nobody else was privy or consulted or advised the President of Pakistan to issue the Proclamation of Emergency, however, in cross examination regarding attack on the judiciary through the Oath of Office (Judges) Order dated 3rd November, 2007 (**third charge**) he conceded as follows:-

It is correct to suggest that summary dated 3.11.2007 for appointment of Chief Justice of Pakistan was prepared by the then Prime Minister and thereupon a notification was issued for the appointment of Mr. Justice Abdul Hameed Dogar. These documents are marked as Ex.P-9/26 (Pages 761 to 765).-----

It is correct to suggest that this Ex.P-9/27 establishes that the cabinet endorsed to the Proclamation of Emergency and Provisional Constitution Order that were issued on 03.11.2007. It is incorrect to suggest that merely by endorsing Proclamation of Emergency the Cabinet members became aiders and abettors as defined in Article 6(2) of the Constitution. It is correct that issuance of the notification with regard to the fact that the Judges of the Supreme Court and the High Courts ceased to hold their offices and fresh appointments were made on the

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recommendations of the functionaries, upto the Prime Minister.

In view of the above admissions of Interior Secretary, irrespective of the fact that the accused has appeared before the Court or not, the first burden of proof on the prosecution to show that it was an individual act of the accused and no one else has even advised or consented for issuing the proclamation of emergency was not discharged from the shoulders of the prosecution.

27. While concluding I am conscious of the events consequent to the otherwise an illegal Oath of Office (Judges) Order, 2007 (Ex: P-10/5) issued from the office of the President of Pakistan on **03.11.2007**, under the cover of Provisional Constitution Order of 2007. In fact the accused with the help of Cabinet of Prime Minister Shoukat Aziz has taken advantage of weak and opportunist elements both amongst the Lawyers and in the then judiciary that encouraged him to attempt to manage the affairs in the judiciary to extend his stay in the political office of the President of Pakistan. Even prior to 3rd November, 2007 he has attempted to control judiciary on **9th March, 2007** by sending a Reference as the President of Pakistan against the then Hon'ble Chief Justice to the Supreme Judicial Council on the pretext of an infamous letter said to have been written by one lawyer. However, the act of filing Reference against the then Chief Justice was challenged before the Hon'ble Supreme Court through a Constitution Petition in the case titled **Chief Justice of Pakistan Istikhar Muhammad Chaudhry vs. President of Pakistan through Secretary and others**. Some other petitioners also filed identical petitions. In all around 25 petitions were on the point of sending Reference by the President against the then Chief Justice of



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Pakistan. A full bench of the Hon'ble Supreme Court headed by Hon'ble Justice Khalil-ur-Rehman Ramday heard the said petition from 15th May, 2007 to 20th July, 2007. It is pertinent to mention here that in the evening of **20.07.2007** the petition of the Hon'ble Chief Justice was allowed by a short order but its reasons could not be recorded till **03.11.2009**. In the intervening period the accused in consultation with top civil and military functionaries issued Proclamation of Emergency on 3rd November, 2007 and in the capacity of President of Pakistan he has also issued Oath of Office (Judges) Order dated 3rd November, 2007. On the same day pursuant to proclamation of emergency **Prime Minister Shoukat Aziz** through **Exh.P/26** advised the President of Pakistan to appoint Mr. Justice Abdul Hameed Dogar as Chief Justice of Pakistan who even after the new government was installed on **25th March, 2008** completed his tenure till the age of attaining superannuation on **21st March, 2009**. It was despite the fact that the newly elected Prime Minister in his first speech has promised to immediately restore the judiciary. Then why he took almost one year to announce restoration of judiciary after midnight on **15th March, 2009**. It is an open secret that who and from where made a phone call to Barrister Aitzaz Ahsan during the day time informing him that the judiciary will be restored before next morning. Why the Prime Minister addressed the nation on television at an odd hour of morning to announce that the Hon'ble Chief Justice Iftikhar Muhammad Chaudhry will be restored after five days that is from 21st March, 2009? Why the restoration of deposed judges was not with immediate effect? Was it not postpone till the age of retirement of Hon'ble Justice Abdul Hameed Dogar who was appointed by the accused through an illegal order on the basis of PCO read with another illegal Oath of Office (Judges) Order dated



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03.11.2007? Answers to these questions may be different with different persons but all these things point toward the single fact that even the newly elected Executive authority under Yousaf Raza Gillani has stepped into the shoes of the Executive authority under Mr. Shoukat Aziz on the issue of removal of judges of the superior courts through the Oath of Office (Judges) Order. I do not think any evidence is required to ascertain that for all practical purposes the newly elected government in **March 2008** was not on the same page on the issue of actions of General (R) Pervez Musharraf with regard to the action of removal of Judges. Be that as it may, even elected government took one year in redressing the grievance of the judiciary. And thereafter reasons in support of short order dated **20.07.2007** on the petition of the then deposed Hon'ble Chief Justice Iftikhar Muhammad Chaudhry were recorded on **03.11.2009** after eight months of petitioner's restoration as Chief Justice of Pakistan through an Executive order with effect from **22nd March, 2009**.



28. The legal fraternity had strongly reacted to the said move of General (R) Pervez Musharraf/President of Pakistan through unprecedented unity of Lawyers across the Pakistan. The legal fraternity was of the view that proclamation of emergency on 3rd November, 2007 was continuation of the action of the accused dated **9th March, 2007** whereby a Reference against the Chief Justice was sent to the Supreme Judicial Council on the pretext of a letter by a lawyer. The lawyer who authored the said letter was thrashed by the lawyers on **9th August, 2007** at Rawalpindi as reported in the media (Dawn Aug. 10, 2007). Like the entire legal fraternity I have also strongly reacted to such action of General (R) Pervez Musharraf and without naming the said lawyer, I have declared him a "**Tara Masih**"

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in one of my articles titled "**A Tara Masih Amongst the Lawyers**". It was published and available on Sindh High Court website. Even today my feelings with reference to the entire episode from **09.03.2007** to **22.03.2009** are same but the difference is that today as a Judge, I am under oath that *"in all circumstances, I will do right to all manner of people, according to law without fear or favor, affection or ill-will"*. In the case in hand, in my humble view, the entire cabinet of Prime Minister Shoukat Aziz and all others civil and military establishment along with parliament were on board to accomplish the task of retaining the political office of the President of Pakistan by (R) General Pervez Musharraf under National Reconciliation Ordinance - the famous NRO. Insecurity. All of them were supposed to be beneficiaries on second time returning of the General as President of Pakistan. It was, therefore, their common intention and without the help of each other, merely the action of issuing five instruments mentioned in the charge could not have been of any use nor the same could have been implemented. The language of these documents clearly indicate that it was not by just one person or without the involvement of the then Ministry of Law under the Premiership of Mr. Shoukat Aziz. The PW-1 has admitted in his cross examination that :-



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*"It is correct to suggest that summary dated 03.11.2007 for appointment of Chief Justice of Pakistan was prepared by the then **Minister of Law Justice and Human Rights** for the approval of the then Prime Minister and thereupon a notification was issued for the appointment of Mr. Justice Abdul Hameed Dogar."*

29. To be precise all the actions of **03.11.2007** were political actions of the civil government headed by the President as ceremonial head who alone was both the civilian and military Commander-in-Chief of the Armed Forces with Mr. Shoukat Aziz as Chief Executive.

The Executive authority had the support of the other pillar of the State namely the parliament. At the expense of repetition the then parliament through a Resolution dated **07.11.2007** (Ex.P-9/19) in its 44th Session of National Assembly and the next Parliament through the 18th Amendment by amending **Article 6** of the Constitution whereby the offence of High Treason has been redefined, have clearly protected actions of the President/Chief of Army Staff during the said period. Even the star witness (PW-1) has agreed to the suggestion that the two pillars of the State - the Legislature and the Executive - have never raised any voice against the promulgation of emergency.

Relevant cross examination is reproduced below: -

"It is correct that after the new dispensation under the proclamation of Emergency, no one, whether he was member of the Federal or Provincial Governments, or one, whether he was member of the Federal or Provincial Governments, or of the Federal and Provincial legislatures or of the Federal and Provincial bureaucracy, raised objection to the issuance of Proclamation of Emergency. It is correct that the new dispensation under the Proclamation of Emergency was followed by the members of the Federal and Provincial Governments, the bureaucrats and the members of the Federal and Provincial legislatures."



30. Not only this, Mr. Zahid Hamid who was Law Minister in the Cabinet of Prime Minister Shoukat Aziz under the patronage of a person who was holding dual office of the Chief of Army Staff and also the President of Pakistan through the courtesy of the 17th Amendment, smartly deceived all the petitioners who had filed petitions alongwith Molvi Iqbal Haider on **03.07.2013** by giving an undertaking in their petitions that the Federation has directed an inquiry and investigation in relation to the acts of General (R) Pervez Musharraf of 3rd November, 2007 that may amount to High Treason under Article 6 of the Constitution and shall be finalized as expeditiously as possible and the case be put up before the Special

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Court. The innocent petitioners did not press their petitions on the said undertaking though, in fact the Federation never had such intentions as is evident from the fact that the Law Minister on **03.11.2007** and on the date of giving undertaking (i.e. **26.06.2013**) in the petitions of Molvi Iqbal Haider & others was one and the same person. At last an important member of Cabinet on both the occasion. But for this reason the quality of the inquiry preceding the complaint was hopelessly defective as may be seen from the various evidence reproduced above in this Judgment as well as the conduct of prosecutors throughout six years of proceedings. The then Interior Secretary who appeared as star witness repeatedly made misstatement under oath whenever he stated in reply to questions from the counsel of accused that no material was found by the investigation team to extend the scope of inquiry and investigation to anyone else except the General (R) Pervez Musharaf. On the other hand even today the new prosecution team wants this Court to induct only three civilians without any fresh inquiry and investigation and contrary to the statement of the Interior Secretary that there was no material with inquiry committee against them. The Interior Secretary in his cross examination has stated that:-

"No other person was implicated in the present case for the reason that the Investigating Team did not identify any person other than the accused person on account of lack of evidence. It is correct that the identity of the members of the Cabinet of the then Prime Minister Mr. Shoukat Aziz is ascertainable. I did not order investigation against any member of the Cabinet of the then Prime Minister Mr. Shoukat Aziz as the Investigation Team had found no material against them."

The innocent idea in making as oral request to amend the complaint and include three more accused is to start the proceedings of trial of the offense of High Treason afresh after 06 years and that too without any evidence against them on the date of final argument. In this



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background the story of prosecution and the evidence of its witnesses cannot be considered as trustworthy for inflicting capital punishment on the accused.

31. In view of the above legal position with respect to the retrospective effect of the amendment in Article 6 of the Constitution and the evidence showing the failure of the Ministry of Interior to hold a fair and impartial inquiry against the person(s) who could be guilty of High Treason mentioned in sub Article 1 & 2 of Article 6 of the Constitution, the prosecution has wilfully and deliberately failed to make out a case of High Treason against the accused. The acts of 3rd November, 2007 and its consequences may be illegal, mala fide and unconstitutional as it has already been declared by the Hon'ble Supreme Court but such acts even if entails any penal liability of any kind the same in view of the quality of inquiry and evidence on record cannot be considered as an offence of High Treason. As for as the acts of mishandling of judges and their detention is concerned, the accused General (R) Pervez Musharaf is already facing four criminal trials including the "Judges Detention Case" pending before the Anti-Terrorism Court at Islamabad on the FIR in connection with detention of several Judges of the Superior Courts following the issuance of proclamation of emergency and Oath of Office (judges) Order both dated **03.11.2007**. The crux of story of the events from **09.03.2007** to **21.03.2009** is that at the time of trial of judiciary both the parliament and the Executive authority have been playing hide and seek. There was no law, no court for the redressal of grievance of judiciary during this period and every other thing was perfectly in place. Even the short order dated **20.07.2007** on the petition of Hon'ble Chief Justice had no sanctity to be implemented by the new



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executive authority who has declared judges as free men on the first day of National Assembly in **March, 2008**. The judiciary was, however, suddenly restored on **15.03.2009** after midnight by an executive order in the circumstances briefly hinted/narrated in para 27 above and everybody want and claim an exclusive credit for restoration of judiciary. The identity of the person who called senior advocate Mr. Aitzaz Ahsan to stop march towards Islamabad has yet to be discovered. For one thing I am sure that he was neither the President nor the Prime Minister of Pakistan and Mr. Nawaz Sharif leader of opposition was already sitting with Mr. Aitzaz Ahsan. No further comments. In a situation like this, I find consolation in the words of the great American judge Billings Learned Hand (27.01.1872 - 18.08.1961), who prescribed the following antidote to an excessive faith in the law:

"I often wonder whether we do not rest our hopes too much upon constitutions, upon laws and upon courts. These are false hopes; believe me, these are false hopes. Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can even do much to help it. While it lies there it needs no constitution, no law, no court to save it." (Reference : - LAW, A Very Short Introduction by Raymond Wack)

32. Consequent upon what has been discussed above, I hold that the prosecution has failed to make out a case of High Treason against the accused General (R) Pervez Musharraf.

Approved for reporting

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