

IN THE FEDERAL SHARIAT COURT

(Original Jurisdiction)

PRESENT

MR. JUSTICE AGHA RAFIQ AHMED KHAN, CHIEF JUSTICE

MR. JUSTICE SYED AFZAL HAIDER

MR. JUSTICE SHAHZADO SHAIKH

SHARIAT PETITION NO. 1/K OF 2002

1. Mohtarma Benazir Bhutto,
Belawal House, Clifton,
Karachi
2. Mrs. Gulzar Ahmed Muslim, Adult,
Resident of Bath Island, Clifton,
Karachi.

.... Petitioners

Versus

Federation of Pakistan through Secretary Finance
Islamabad Respondent

For the petitioners ... Barrister Kamal Azfar,
Syed Riaz-ul-Hassan Gillani,
Advocate, Sardar Zulqarnain,
Advocate and Mr. Rafey Altaf,
Advocate

For the Federal Government ... Mr. Rizwan Ahmed Siddiqui,
Deputy Attorney General,
Mr. Aamir Raza Naqvi, Deputy
Attorney General, Mr.
Muhammad Ashraf Khan
Mughal, Deputy Attorney
General, Sardar Abdul
Majeed, Advocate, Mr.
Muhammad Nazir Abbasi,
Standing Counsel, Mr. Tariq
Ali, Advocate, Mr. Fareed-ul-
Hassan, A.A.G, Sindh, Syed
Sajid Ali, Joint Admn Officer
Pak P.W.D. Ministry of
Housing and Works, Karachi,
Mr. Khalid Tepu Rana,
Solicitor, Mr. Muhammad Arif

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Chaudhary, Federal Inspector of Drugs, M/o Health, Mr. Muhammad Aslam Shaikh, Joint Admn Officer M/o Housing and Works and Mr. Ihsan Karim, Audit Officer, Auditor General Office.

Jurisconsult Dr. Sajid-ur-Rehman Siddiqui

Date of Institution ... 15.03.2002

Date of hearing ... 23.10.2007, 12.02.2008, 26.03.2008, 09.04.2008, 22.10.2008, 20.11.2008, 06.01.2009, 13.01.2009, 11.03.2009, 10.04.2009, 07.04.2010.

Date of decision ... 15.04.2010

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JUDGMENT

SYED AFZAL HAIDER, J. - This petition was moved in this Court in March 2002. It remained dormant till pre-admission notice was issued to the Federal Government on 23.10.2007. The petition was heard at Karachi and Islamabad on 11 occasions. Lastly it was heard at the principle seat of this Court on 15.04.2010 when a short order allowing the petition was announced after the contending parties had concluded their argument. This judgment proceeds to give reasons for the said short order whereby the instant petition was accepted and the impugned Martial Law Orders were declared repugnant to the Injunctions of Islam.

FACTUAL BACKGROUND

2. Begum Nusrat Bhutto, widow of late Prime Minister Zulfiqar Ali Bhutto along with her daughter Mohtarama Benazir Bhutto, the twice elected Prime Minister of Pakistan and her son Mir Murtaza Bhutto founded a Trust with the name and title of "Peoples Foundation" on 8th August 1974. It was duly registered as required by law. The three founders were the trustees while petitioner No.1 was also Chairperson of the Trust.

3. The said Trust was established with clear-cut objectives as indicated in the Deed attached to the petition. The affairs of the Trust were being managed smoothly by the trustees who were performing their stipulated rights and obligation in accordance with the procedure laid down in the Deed. The trustees in due course received donations including a contribution from the Head of State of United Arab Emirates to advance the purposes of the trust.

4. The petitioners, in paragraphs 06 through 14 of the Shariat Petition have detailed the background of the misery that befell them and their Trust on account of promulgation of Martial Law Orders and the consequents efforts they undertook to seek redress from 1977 October onwards. The said paragraphs are being reproduced verbatim:-

"6. That the Trustees were exercising their obligations freely and correctly. With untiring efforts the Trustees succeeded in building a people's Foundation building from the funds donated from time to time. A modern press known as the Peoples Foundation Trust was established. One newspaper and one periodical was being printed in the said press for the Trust and countless other publications also availed of the said press. The accounts of the Trust were duly audited to the satisfaction of the concerned authorities. All payments wee

made by cheque and received by cheque with supporting vouchers. The CBR extended the annual permission under Section 15-D of the Income Tax Act, 1922 being satisfied with the correctness of the accounts and operations of the Trust. No allegation of breach of Trust on the part of the Trustees was ever made nor could have been made.

7. That the petitioners have certain statutory duties and obligations as are prescribed in the Trust Act, 1882 with regard to the Trust. The manner of discharge is also prescribed in the Trust Deed. Furthermore, in case any person wishes to proceed against the Trust with regard to inquiries into its accounts or the removal of Trustees the procedure prescribed in Section 92 of the Code of Civil Procedure has to be followed and the permission of the Advocate General obtained.

8. General Zia-ul-Haq led a coup dated on 5th July 1977. The Bank accounts of the Trust and its associates with UBL and National Bank of Pakistan were frozen under MLO 26 issued by the MLA Zone C, on 28th September 1977.

"Copies of MLO 21 of CMLA and MLO 26 of Zone C are annexed hereto and marked as Annexure "C & D".

9. That a Petition was filed in the Honourable High Court of Sindh bearing No.501 of 1977 which was heard and disposed of on 27th February 1985.

Copy of the said amended Petition alongwith Judgment passed thereon are enclosed hereto and marked as Annexure "E & F".

10. That while the said Petition was pending hearing before this Honourable Court, the Chief Martial Law Administrator Respondent No.4 on 17.10.1977 issued Martial Law Order 21 which runs as follows:-

1. The Board of Trustees of the People's Foundation Trust and the Board of Directors of every institution connected therewith shall stand suspended forthwith and every member of the said Board of Directors of every such institution shall cease to function as such.
2. All powers and functions of the Board of Trustees and of the Board of Directors of every institution referred to in paragraph 1 shall vest in and be exercised and performed by the Chief Martial Law Administrator by such other person or body of persons as may be appointed by him in this behalf."

11. That during the pendency of the said Petition before the Honourable High Court of Sindh, General Zia-ul-Haq, issued President's Order No.4 titled as Zulfiqar Ali Bhutto Trust and People's Foundation Trust (Re-naming and Administration) Order 1978, which runs as under:

"In pursuance of the proclamation of the fifth day of July, 1977, read with the Laws (Continuance in Force) Order 1977 (CMLA Order No.1 of 1977), and in exercise of all powers enabling him in that behalf the President is pleased to make the following Order:

1. Short title and commencement.
(1) This Order may be called the Zulfiqar Ali Bhutto Trust and Peoples Foundation Trust (Re-

naming and Administration) Order 1978.”

(2) It shall come into force at once.

2. *Order to over ride other laws etc:-*

This order shall have effect notwithstanding anything contained in any other law for the time being in force or in Zulfikar Ali Bhutto Trust Deed of the sixth day of November, 1973, or the People's Foundation Trust Deed of the ninth day of August 1974.

3. *Re-naming etc. of Zulfikar Ali Bhutto Trust:*

i. The Zulfikar Ali Bhutto Trust shall be known as the "Sheikh Zayed Bin Sultan Al-Nahyn Trust" and the deed of the said trust dated the sixth day of November 1973, shall stand amended accordingly.

ii. All the powers and functions of the Board of Trustees of the aforesaid trust and of the Board of Directors of every institution connected therewith shall vest in and be exercised or performed by a Board of Trustees composed of such persons as the President may from time to time appoint.

4. *Re-naming, etc. of People's Foundation Trust-*

(i) The People's Foundation Trust shall be known as the "Sheikh Sultan Trust" and the deed of the said trust dated the ninth day of August 1974, shall stand amended accordingly.

(ii) All the powers and functions of the Board of Trustees of the aforesaid trust and of the Board of Directors of every institution connected therewith shall vest in and be exercised or performed by a Board of Trustees composed of such persons as the President may from time to time appoint.

A copy of the P.O. No.4 of 1978 is annexed and marked as Annexure "G".

12. That thereafter the President's Order No.6 of 1979 was issued altering the objects of

the Trust which is contrary to the injunctions of Islam as also the Trust Act 1882.

A copy of the P.O. No.6 of 1979 is annexed and marked as Annexure "H".

13. That the MLO 21 of 1977 of CMLA and MLO 26 of Zone C and P.O. No.4 of 1978 and P.O. No.6 of 1977 and the abovesaid action of the Martial Law Authorities are malafide in fact and in law and are repugnant to the Injunctions of Islam Law as per the law enunciated by the Shariat Appellate Bench of the Honourable Supreme Court of Pakistan in the case of Qazalbash Waqf Vs. Chief Land Commissioner Punjab, PLD 1990 SC 99.

14. That the Respondent has destroyed the entity of the Peoples Foundation Trust and its allied institutions and confiscated the properties and assets of the Trust. The Respondent is missing, mis-appropriating the funds and the assets of the Trust and applying its income for purposes other than those stipulated in the Trust Deed."

PETITIONER'S PLEA

5. The learned counsel for the petitioners inter-alia contended that:

- i. Martial Law Order No.21 issued by Chief Martial Law Administrator dated 17th October 1977 (printed on page 453 of PLD 1977 volume 5 Statutes Part);
- ii. Martial Law Order issued by Martial Law Administrator Zone "C" (Province of Sindh) dated

28th September, 1977 (printed on page 122 of PLD 1977 volume 6 Provincial Statues);

- iii. President's Order No.4 of 1978 entitled Zulfiqar Ali Bhutto Trust and Peoples Foundation Trust (Re-naming and Administration) Order, 1978 dated 26th March 1978, (printed on pages 77-78 of Volume 5 Statutes Part PLD 1977) and
- iv. President's Order 6 of 1979 entitled *Zulfikar Ali Bhutto Trust and Peoples Foundation Trust (Re-Naming and administration) (Amendment) Order, 1979* dated 28th February, 1979. (Printed on pages 69-70 of PLD 1979 volume 5 Statues Part).

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are repugnant to the Injunctions of Islam and should resultantly be declared as such and consequently of no legal effect. It is also prayed that the respondents be directed to hand over the properties and assets of the Trust to the petitioners forthwith.

6. In support of his contention that the impugned Martial Law Orders are void and of no legal effect, Barrister Kamal Azfar learned counsel for the petitioner, proceeded to elaborate the points for consideration of this Court as under:

(The contentions raised by learned counsel are mentioned in Part A while the points urged by the religious scholar on behalf of the petitioners are mentioned in Part B. below).

PART A

i. That the four Martial Law Orders under examination are violative of the Injunctions of Islam and consequently of no legal effect;

ii. That the impugned Orders are contrary to the principles of law enunciated by the Shariat Appellate Bench of the Supreme Court of Pakistan in the case of Qazalbash Waqf versus Chief Land Commissioner, Punjab reported as PLD 1990 Supreme Court 99;

iii. That the Orders under examination are colourable and motivated by personal malice of General Muhammad Zia-ul-Haq who having deposed Zulfiqar Ali Bhutto, the duly elected Prime Minister of Pakistan, confiscated the properties, assets and records of the Peoples Foundation Trust founded by his family members.

iv. That although the Trust Act, 1882 and section 92 of the Code of Civil Procedure, 1908 provide adequate remedies for inquiring into the affairs of any Trust; yet the Chief Martial Law Administrator in utter violation of the existing and operative laws on the subject circumscribed the legal provisions without lawful authority and suspended the Board of Trustees and appropriated powers and functions of the Board. Hence his action under the impugned Orders was ultra virus the Constitution and law.

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v. That the procedure adopted by Chief Martial Law Administrator for taking over the Trust and its assets was violative of the principles of Natural Justice.

vi. That the step taken by Chief Martial Administrator was motivated by a desire to harm, harass and ultimately exterminate the petitioners.

vii. That there was not a single complaint lodged by any one with any authority against the petitioners in relation to the affairs of the Trust.

viii. That the malice of Chief Martial Law Administrator was so intense that after the promulgation of MLO 21 in October 1977 he caused even the name of the Trust to be altered through President's Order No.4 of 1978.

ix. That the actions of General Muhammad Zia-ul-Haq in removing the trustees and seizing the properties of the trust without due process of law was ultra vires of Articles 23 and 24 of the Constitution.

x. Relying on the time - honoured book Muhammadan Law by Syed Ameer Ali, Barrister Kamal Azfar urged that dedication of property was known in Islam and the law of *Waqf* had its origin with the Prophet PBUH himself who declared that all human actions come

to an end with the death of an individual except such benefactions as are perpetual in their character. It was therefore submitted that Trusts or Waqfs were frequent during and after the lifetime of the Prophet PBUH and consequently a Trust cannot be acquired without compensation. Reference was made to the Waqfs created by Hazrat Umar R.A, Zubair bin Awwam R.A, Hazrat Abu Bakr R.A and Saad bin Abi Waqas. It was stated that the doctrine of Waqf is interwoven with the entire religious life and social economy of the Muslims. Learned counsel for the petitioner, in support of his contentions stated that *Fidak* was returned to the Ahl-e-Bait ultimately by the Ummayyad Caliph Umar bin Abdul Aziz. It was therefore urged that the suit trust has to be restored to the petitioners.

xi. Reference was also made to another oft-quoted book entitled *Principles of Muhammadan Law* by F.D. Mulla as well as Rule 890 of the *Mejelle* which states that "If the property taken without leave is corporeally existing, it must be returned, and delivered to its owner, at the place where it was taken."

PART B

xii. Learned counsel for the petitioners then asked Maulana Sajid ur Rahman Siddiqui of Jama Dar-ul-Uloom Karachi to address the Court on the question that the impugned Martial Law Orders are

violative of the Injunctions of Islam. The following points were raised by the religions scholar:

a. Ayat No.58 of Sura 04 of Holy Quran enjoins that trusts should be handed over to its owners;

b. Ayat No.27 Sura 08 of Holy Quran proclaims:-

“O you who believe,
do not be faithless to God
and His Apostle, nor
violate you trusts knowingly”.

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c. Ayat No.08 of Sura 23 is appreciative of those persons who fulfil their trusts and honour their promises;

d. Ayaat 32 through 35 of Sura 70, of Holy Quran recounts the attributes of those persons who will be spared the torture in Hell and amongst them are the people who are faithful to their trusts and covenant.

e. Ayat No.29 of Sura 04, Al-Nisa, of Holy Quran enjoins not to devour the property of others by unlawful means. It was urged that except trade, inheritance and gift all other modes of acquisition of property are against the Injunctions of Islam. Since the properties of the petitioners were misappropriated so the action was violative of this Injunction as well.

f. It was urged on the basis of Ayat 128 of Sura 07, of Holy Quran that the entire land belongs to Allah. He gives to when He pleases and hence it is unlawful to deprive the owner of the property.

g. Ayat No.08 of Sura 05, of Holy Quran was also relied upon to urge that Allah commands the believers to be upright for His sake and that the believers should be bearer of witness with justice and the *hatred of a party should not incite you to act inequitably. Be always just for such a course is nearer to piety.* It is a duty imposed by Allah. This duty, it was maintained, was not fulfilled.

RIPOSTE

7. Learned Standing Counsel for the Federal Government in a short reply to the points urged on behalf of the petitioners stated that he was unable to controvert the Injunction of Holy Quran relied upon by the religious scholar on behalf of petitioner. On a Court question whether the impugned Martial Law Orders could be justified on the touchstone of any Injunctions of Islam, the learned counsel for Federal Government stated that he could neither quote any Ayat from Holy Quran nor any *NASS* from the plethora of tradition of the Holy Prophet PBUH.

8. The following Ministries/Division in response to notices issued by this Court submitted para-wise statements/comments which were duly verified and cleared by concerned authority:-

1. Finance Division
2. Auditor General of Pakistan
3. Ministry of Religious Affairs
4. Ministry of Population Welfare
5. Ministry of Social Welfare & Special Education
6. Ministry of Health
7. Ministry of Housing & Works
8. Ministry of Information and Broadcasting

All the above Ministries/Divisions, inter-alia, stated that: Ever since the promulgation of MLO 21 of 1997 by the CMLA, MLO 26 of Zone 'C' PO No.1 of 1978 and PO No.6 of 1979 the said trust is under the 7th Schedule of the Constitution in terms of Article 270-A of the Constitution. However, this does not preclude the determination of the list on the touchstone of Article 203-D of the Constitution to examine and decide the question whether or not the provisions under challenge are repugnant to the injunctions of Islam as laid down in the Holy Quran and Sunnah of the Holy Prophet. Such a proposition is also ascertainable from the preamble of the Constitution. It was also stated that Article 2-A of the Constitution makes the Objectives Resolution a substantive part of the Constitution. Reference in this context to articles 3,4,5,6,20,23,24,31,37 and 38 was also made.

The above-mentioned Ministries/Divisions further submitted following grounds in support of their statements:-

"The averments herein do infringe upon the provisions relating to "Trusts' as ordained under the Injunctions of Islam. The public welfare trust constituted by late Zulfiqar Ali Bhutto, Prime Minister of Pakistan was taken over by General Zia-ul-Haq who had removed the elected premier and embarked upon retracing the act and steps taken by him for motivations other than promoting the legal and constitutional doctrines germane to the welfare of the people of Pakistan or Mohammadan law regulating trust properties stand violated. Reference to Qazilbash Trust case reported as PLD 1990 SC 99 which clearly states that taking over trust under MLO 21 of CMLA 1997 and rule 26 MLA Zone C and P.O. 4 of 1978 and P.O. 6 of 1979 are contrary to the Injunctions of Islam."

The above mentioned Ministries/Divisions unanimously supported the prayer of the petitioner, in following terms:-

"The claim of the Petitioner is manifestly just and proper and the declaration sought legally sustainable as MLO's 21 of CMLA, 26 of MLA Zone 'C' P.O. 4 of 1978 and P.O. of 1979 are ostensibly repugnant to the Injunctions of Islam. Consequently, the Peoples Foundation Trust as originally registered with the substitution of legal heirs of the deceased trustees merits **to be restored along with properties and assets of the trust seize taken over and controlled under afore referred instruments.** This Court has no objection to return

assets/trust property etc to the original/founder trustees or their legal heirs of the deceased trustees."

THE JUDICIAL VIEW

9. The Hon'ble Chief Justice of Pakistan Mr. Justice Iftikhar Muhammad Chaudhry, while delivering his key note address in the inaugural session of the National Judicial Conference, 2010, held at the Supreme Court Auditorium Islamabad, on 16th April, 2010, in his personal capacity as well as on behalf of the Superior Judiciary declared as follows:-

Each of the two components of the profession of law, i.e, the judges and the lawyers is a very busy community. The cycle of their engagements goes on and on. Both the professions are noble and respectable. All the judges, and all the lawyers, who work with a passion for justice; who work with a passion to ameliorate the sufferings of the litigant public; who work to ameliorate the suffering of women, the juveniles and other prisoners in jails; who work to ameliorate the suffering of the litigants whose cases linger on for generations; who work to ameliorate the suffering of the litigants who travel from far off distances to reach courts; who work to ameliorate the suffering of the litigants whose, may be, lifetime earnings

are at stake on account of scrupulous maneuverings of their opponents; and who work to ameliorate the suffering of the litigants whose, may be, lifetime earnings are at stake on account of scrupulous maneuverings of their opponents; and who work to ameliorate the suffering of the families of the poor litigants - all such judges and lawyers earn for themselves a reward in this world, and still a greater reward in the world hereafter.

- ii. The aim of formulating a National Judicial Policy is to ensure adherence to the Constitutional principles of equality before law and equal protection of law. It also aims at strengthening the role of Judiciary as an organ independent of the Executive and Legislature.
- iii. Article 2-A of the Constitutional of Pakistan envisages that the independence of the judiciary shall be fully secured. It also speaks of a democratic form of Government guaranteeing all the freedoms, equality, tolerance and social justice in lines with the Islamic tenets. *The superior courts under the Constitutional powers may strike down any law inconsistent with the Injunctions of Islam as laid down in the Holy Quran and the Sunnah and the fundamental*

rights as enshrined in the Constitution. The Constitution invests the superior courts with the power of judicial review and inherent powers that may be exercised to smooth away the inter-institutional/governmental irritants.

- iv. The role of Judiciary is not that of an opposition to the Legislature and the Executive but that of a custodian and a bastion of the Constitutional rights and liberties of the citizens. An independent judiciary sets and declares the constitutional limits on the powers of the State organs including the executive, legislature and the courts. *It supervises a regime of the rule of law and not the rule of men.* The judiciary acts as a guardian of the Constitution; therefore, it is described as a citadel of justice. In a democratic system, none of the three organs i.e. the Executive, legislature and the Judiciary is empowered to assume/exercise unbridled powers. An independent judicial system is a pre-requisite of a democratic society. The independence of judiciary guarantees improved law and order standards, strengthened national security, better economic development and social well being of the people." (Excerpts Quated and Emphasis added)

This Conference was attended by the Hon'ble Judges of the Supreme Court, Hon'ble Chief Justice and Hon'ble Judges of the Federal Shariat Court, Chief Justices and Hon'bl Judges of the provincial High Courts, members of the District Judiciary and learned members of the Bar including elected representations of Bar Associations and Bar Councils.

10. This speech reminds us of Ayat No.251 Sura 2, Al-Baqra, of Holy Quran, which, after recalling the story of defeat of *Jalud* (the Midianites) at the hand of *Talut* (Gideon) during the times of *Syedna Daud* (David) A.S, proclaims as under:-

So they routed them by the command of Allah,
and Daud slew Jalut, and Allah gave him
sovereignty and wisdom and taught him of
what He pleased. *And had not Allah repelled
some people by other people, the earth would
indeed be full of mischief, but Allah is the Lord
of Grace to all people. (Emphasis added)*

EXAMINATION OF LAWS

11. We now take up examination of the impugned instruments on the touchstone of Injunctions of Islam as visualized by Article 203D of the Constitution of Islamic Republic of Pakistan. We propose examining these provisions initially in the light of various principles of legal import enunciated in Holy Quran and Sunnah.

PRINCIPLE OF SHOORA

12. Ayat 38 of Sura 42 (Ash-Shoora) of Holy Quran reads as follows:-

“And those who respond to their Lord and keep up prayer, and their **rule is to take counsel among themselves**, and who spend out of what We have given them.”

This is an early Meccan revelation. At that point of time when administration of the affairs of state was not within sight, the Muslims were being mandated, as usual, to observe prayer and to spend from what Allah had given them. Yet between these two injunctions, which always go together in the Holy Quran, is placed a third; **and their rule is to take counsel among themselves**. It is clear that even at that early period when the Muslims had no important matter to decide for which they might have stood in need of counsel, yet between two injunctions, which are the basis of Islamic life, a third is inserted enjoining that, *as a rule, counsel should be taken*. The wisdom behind this injunction indicates that the believers were being prepared for transacting the momentous affairs of state through *Counsel* in all matters connected with national weal or woe. The use of the word *AMR* in this verse refers certainly to the Islamic Kingdom, the affairs of which must be transacted by Counsel. In this Islam laid the basis of government by parliament, and this God-given idea found a clear practical expression in the early days of the Caliphate, when *Khalifa* had to refer every

important affair to a *Majli-e-Shoora*. The important questions whether the traditions of the Holy Prophet PBUH have to be recorded and whether the conquered agricultural land was to be distributed among the combatants or retained by State for public welfare were referred to the Council for debate and decision.

ii. Ayat 159, Sura 03 Ale-Imran, of Holy Quran contains another Injunction about Counsel-(SHOORA)

Thus it is due to mercy from Allah that *you deal* with them gently, and *had you* been rough, hard-hearted, they would have dispersed from around you; pardon them therefore and ask protection for them, and *take counsel with them in the affair*; so when you have (thus) determined, then place your trust in Allah; Surely Allah loves those who trust.

iii. In support of the above mentioned Ayaat relating to mutual consultation we find that Holy Quran at a number of places, mentioned below, prompts the believers to express themselves freely and fairly because human beings have been invested with the power of speech.

a. Ayaat 01 through 05 Sura 55, Ar-Rahman:

The Beneficent God,
Taught the Quran,
He created human beings,
Taught them the mode of expression.

The word *Bayan*, used in Holy Quran, has a broad significance. It includes the meanings: to express, unravel the hidden realities etc.

b. Ayat 83 Sura 02 Al-Baqra:

And recall when We made a covenant with the Children of Israel: "You shall serve none but Allah and *do good to parents, kinsmen, orphans and the needy; you shall speak kindly to people,* and establish Prayer and give Zakah (Purifying alms). And yet, except for a few, you turned back on this covenant, and you are still backsliders.

c. Ayat 110 Sura 03 Ale-Imran of Holy Quran:

You are *now the best nation brought forth for mankind. You enjoin what is right and forbid what is wrong.* and believe in Allah. Had the people of the Book believed, it were better for them. Some of them are believers but most of them are transgressors.

d. Ayat 67 Sura 09 Al-Tawbah:

The hypocrites, be they men or women, are all alike. They *enjoin what is evil, and forbid what is good, and withhold their hands from doing good.* They forgot Allah, so Allah also forgot them. Surely the hypocrites are wicked.

e. Ayat 01 through 04 Sura 96 Al-Alaq of Holy Quran:

Read in the name of your Lord who created; He created human being from a clot, Read and you Lord is Most Honourable, who taught (to write) with pen, taught the human being what he knew not.

f. Ayat 149 Sura 04, Al-Nisa concedes the right of protest (speech in public) to every aggrieved person. This right of expression is extremely important freedom recognized by Divine commandment. To the

same effect is Ayat 01 Sura 58 Al-Mujadalah of Holy Quran. It opens with the words:

“Allah has, indeed, heard the talk of her who pleads with there concerning her husband.”

The Holy Quran at innumerable places prompted its readers to think, ponder and exert mental faculties for appreciation of things and events around him. This process is indeed a vehicle for advancement of knowledge. At the same time Holy Quran declares in Ayat 71 Sura 17, Bani Israel of Holy Quran that Allah has conferred *dignity on children of Adam*. Dignity, freedom to choose, empowerment and freedom to express, freedom to lodge protest signify that the affairs of people shall be governed by consensus, consultation, debate and dialogue. The Martial Law Orders issued by an adventurer, without taking the vicegerent (people) into confidence is blatant violation of a number of Injunctions of Islam.

THE OBJECTIVES RESOLUTION

13. The Pre-amble of the Constitution of Islamic Republic of Pakistan enshrines the Objective Resolution. It was moved by Nawabzada Liquat Ali Khan, the first Prime Minister of Pakistan and passed by the first Constituent Assembly on 7th March, 1949. The third clause of this resolution reads as follows:-

“Wherein the State shall exercise its *power and authority* through *the chosen representatives* of the people”

The opening clause of this resolution declares:-

“Whereas sovereignty over the entire Universe belongs to Almighty Allah alone, and the authority to be exercised *by the people of Pakistan* within the limits prescribed by Him is a sacred trust”.
(Emphasis Added)

The impugned Martial Law Orders is a clear violation of the Objectives Resolution.

TRUSTS REVERT TO THE OWNERS

14. It is worth noticing that Ayat 58 of Chapters 4 Al-Nisa of Holy Quran makes a pointed reference to the *trusts* in the following terms:-

“Surely Allah *commands* you to make over *trust* to those worthy of them (those who are entitled to it) and that *when you judge between people, you judge them with justice*, surely excellent is that with which Allah admonishes you. Allah is All-hearing, All - seeing.”

This Ayat is a clear pointer to the fact that:

- a. the trust property/assets (and public offices) must be restored to the real owners;
- b. the affairs of government must be assigned to those worthy of handling the authority;
- c. such recipients of power should adjudicate matters between people with justice;

d. those entrusted with authority should be free from bias,
and

e. that these commandments are from Allah who is *Seeing* and *Hearing*. Reference to the two Divine attributes i.e, *Seeing* and *Observing* in this Ayat indicates the importance attached to this very commandment. He sees every one in authority and He is listening to what they say or what is being said to them by the supplicant or is being said about them. This *Ayat* is an instance where the governors are being warned of their duties to the governed and the verse that follows (obey Allah, His Apostle and those in authority) mentions the obligation of the governed toward the governors. The word *trust* as used in this Ayat includes covenants. People are enjoined to be true to their trusts.

f. Maulana Mufti Muhammad Shafi, in his voluminous work *Maaraful Quran*, a commentary of the Holy Book (volume 2 page 444-445 first edition while commenting upon Ayat 58 of Sura Al-Nisa) has narrated the historic event of **conquest of Macca**. He recounts the story of Usman bin Talha who was trustee - custodian of Holy Kaaba. He used to open the door of House of God on Mondays and Thursdays during the *Ayyaam-Jahiliya*. Once, before *Hijrat*, the Holy Prophet PBUH along with his companions expressed the desire to enter the House which wish was spurned by Usman. The latter recalled that the Holy Prophet PBUH on that occasion told him that a day will come when you will see the key of the House of God in my hand and I will hand over the same to whom I desire. Thereupon Usman retorted that in that case it will be all doom, gloom and degradation for the Quraish

whereupon the Holy Prophet PBUH said No: that will be the day when Quraish will become honourable and shall flourish. Time passed and the Muslims conquered Macca. Usman bin Talha was summoned by the Holy Prophet PBUH when he presented the key of the House of God to the Holy Prophet PBUH. The merciful conqueror while returning the key to Usman proclaimed that this key shall remain with Usman and his progeny till eternity and he will enjoy the benefit of all the gifts and presents that he or his progeny receives in consideration of the service of the House of God. Hazrat Umar R.A. reported that this very Ayat was being recited by the Holy Prophet PBUH on that day which he had not heard before. It is also reported that when Usman received back the key the Holy Prophet PBUH reminded him of that day when he had refused to open the door for him and it was said that a day will come when this key will be in his hand.

g. Learned counsel had also relied upon the historical incident of the return of *Fidk* to the action of Hazrat Umar bin Abdul Aziz undoubtedly established the principle that properties dedicated to a cause must be restored even though considerable period has elapsed. Rights of owners in the properties do not die when the property is confiscated, usurped or taken over by the government. Rights descend upon the progeny of the original beneficiary and may be honoured by a successor government.

COVENANTS ARE SACRED

15. Our Constitution is a social contract. It enshrines certain

conditions which people have accepted and adopted. The ruling elite takes oath under the Constitution to preserve its sanctity. One who takes oath to preserve and protect it cannot break it to the detriment of entire nation. It is not like breaking the oath of an individual whose atonement is made possible by Islamic Injunctions. Constitution does not provide any expiation for the transgressors who were under oath to preserve it. On the contrary Constitution declares it to be a very serious offence. In this back ground let us examine Articles 4 and 5 of Constitution which mandate as follows:-

4. (1) *To enjoy the protection of law and to be treated in accordance with law is the inalienable right of every citizen, wherever he may be, and of every other person for the time being within Pakistan.*
 - (2) In particular--
 - (a) *no action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with law;*
 - (b) *no person shall be prevented from or be hindered in doing that which is not prohibited by law; and*
 - (c) *no person shall be compelled to do that which the law does not require him to do.*
5. (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. (Emphasis added)*

These articles make it abundantly clear that deviation from law has not to be countenanced. This is an assurance to the people of Pakistan that people in authority shall treat them in accordance with law. Each one is bound by these stipulations.

16. In this view of the matter the following tradition of the Holy Prophet PBUH assumes significance:-

"وَالْمُسْلِمُونَ عَلَى شُرُوطِهِمْ إِلَّا شَرَطَا حَرَمَ حَلَالًا أَوْ أَحَلَّ حَرَامًا
 قَالَ أَبُو عِيسَى هَذَا حَدِيثٌ حَسَنٌ صَحِيحٌ"
 (جامع ترمذی: جلد اول: حدیث نمبر 1363 حدیث مرفوع)

The Muslims are bound by the conditions they accept a condition which forbids what is lawful and permits what has been made unlawful.

Jamay Tirmazi Volume 1, Tradition No.1363

Resultantly the impugned Martial Orders are clearly violative of the provisions of the Constitution which could not have been suspended. The Constitution does not authorize even an adventurer to undertake legislation. The principle enunciated by the *Nass* is that the conditions once stipulated cannot be altered unilaterally through extraneous intervention. The change of conditions involves consent of both the parties.

17. Ayat 9 of Sura 33, al-Mu'minun of Holy Quran says:-

“Successful indeed are the believers who
are watchful of their trusts and covenants.”

18. The stipulated Martial Law Orders are violative of the
above mention Injunctions of Islam because:

- a. The name of the Trust was altered;
- b. The objectives underwent a change;
- c. The administrative machinery was substituted for
the original trustees;
- d. The intrinsic rights of the appropriator were hacked
without lawful authority; and
- e. The wishes of the Dedicators as regards the
appointment of a Mutwalli i.e, Managing Trustee
have altogether been altered.

RIGHT OF APPEAL/REPRESENTATION

19. Islamic Injunctions and teachings grant to every aggrieved
person the freedom to lodge protest. Every aggrieved person has a
right of representation. He is free to lodge an appeal against an order
affecting him adversely and it is his right that his appeal will be
adjudicated upon without inordinate delay by an independent tribunal.
He can, under no circumstances be stopped from exercising his basic
right. Reference may be made to the following two Ayaat of Holy
Quran:-

- i. Ayat No.148 Sura 4 Al-Nisa of Holy Quran:

“Allah does not love the public utterance of hurtful speech, unless (it be) by one to whom injustice has been done.”

ii. Ayat No.1 Sura 58 Al-Mujadilah (The Pleading one) of Holy

Quran:

“Allah indeed knows the plea of the woman who pleads with you about her husband and complains to Allah, and Allah knows the contentions of both of you; Surely Allah is Hearing, Seeing.”

Ayat No.1 of Sura Mujadilah, quoted above, has a reference to one Khaula, wife of Aus bin Samit, who had been separated by her husband on account of an old but a degrading custom whereby the husband could, with impunity, exercise *Zihar* i.e. he would compare the wife to the back of his mother and thereby succeed in denuding her of her marital status. The consequence of this declaration was a total estrangement between the spouses. The aggrieved women henceforth was neither a wife nor a divorcee. Her rights were held in abeyance. Khaula, a genuinely aggrieved spouse, injured on account of the prevailing but inhuman custom, appeared before the Holy Prophet PBUH and lodged her protest. Her legal entity was at stake. Who was she? Neither a wife nor a divorcee. She could not withstand such a humiliating situation. In fact she demanded review of the custom which had the force of law. This is probably the only instance in human

history when a time-honoured custom, having the force of law, was reviewed by Almighty Allah *on the protest of a lady*. Quick came the response through the medium of revelation. It is significant that Quran, which is a source of guidance till eternity, preserves this particular incident of violation of human right for the benefit of future generations. This episode brings into prominence inter-alia the following principles:

- a. There exists in the aggrieved person the unfettered right to lodge a protest or prefer an appeal before a higher authority with the object of seeking redressal of grievance;
- b. The authority hearing the appeal is under obligation to decide the same;
- c. The arbiter is required to give due weight to violation of human rights and human dignity;
- d. The authority may, where necessary, impose a penalty upon the violator of human rights (reference Ayat No.4 of same Sura), and
- e. Even a law can be amended/repealed on account of a protest and
- f. The right of an individual to initiate proceedings cannot be circumscribed.

SAMEE AND BASEER

20. The reference to Divine attribute of Hearing and Seeing for well over four score times in Holy Quran shows that the right of an aggrieved person to lodge protest, appeal or representation against the wrong doer before a higher tribunal ie, a person other than the one whose order is to be challenged has Divine sanction. The repeated reminders by Holy Quran that Allah is Hearing and Seeing is, on one hand, a permission to an injured soul to initiate proceedings and on the other hand a warning to the adjudicator that Allah constantly watches the way matters are being adjudicated upon. These oft-repeated attributes of Allah ie, Seeing and Hearing, mentioned in the Holy Quran are designed to act as guarantees. In other words the rights and freedoms are justiciable.

21. The Constitution as well as legal instruments in force in Pakistan, provide ample remedies to aggrieved persons by way of appeals, revisions, reviews. The Constitution mandates that the Supreme Court, Federal Shariat Court and the High Courts shall have power to exercise original and Suo Moto jurisdiction, and thereby provide relief to aggrieved persons. The Superior judiciary has, while interpreting various provisions of law held that right of appeal, representation, show cause notice is *inherent in Islamic teachings*. An instrument, having the force of law, which purportedly denies the right

of appeal etc or which does not provide for a show cause notice will be deemed to be violative of the Injunctions of Islam. Reliance is placed on the following precedents:-

- a. Pakistan and other vs. Public at Large and others PLD 1987 Supreme Court 304
- b. Pakistan through Secretary Ministry of Defence vs. the General Public PLD 1989 Supreme Court 6.
- c. In re: The Civil Servants Act, (LXXI of 1973) PLD 1984 Federal Shariat Court 34.
- d. Messrs Sadiq Brothers vs. Appellate Additional Commissioner, Income Tax/Wealth Tax, Rawalpindi and another 2004 PTD 122. (AppealBarring a right of appeal offends against Injunctions of Islam. [P.126]E
- e. Dr. Muhammad Aslam Khaki and others vs. Govt. of Punjab and others PLD 2005 Federal Shariat Court 3

22. Islam has conferred upon human beings the freedom of expression. Grievances have to be redressed. Any bar on this right is negation of the Divine principle of human dignity. A portion of the famous *Khutba* known as *Khutba-e-Ajeeba* (a wonderful sermon) and *Khutba-e-Ghurra* (an eminent sermon) mentioned in Nahjul Balega as *Khutba* No.86, delivered by Imam Ali R.A. the fourth Caliph, is illustrative of this point:

“He has given ears to you so that you may hear and preserve in mind things useful to you. He has given eyes to you so that you may acquire such knowledge

which will bring you out of the darkness of ignorance and make you see the light of reasoning and wisdom. He has also given to you so many useful organs of body, each of which is composed of many parts, their functioning depends upon their interdependence and their symmetry; their forms and periods of their utility, their co-ordinated action to serve the body, their connection with a heart which is properly fed (with blood) and nourished, in fact this perfectly expedient body and mind are the blessings bestowed upon you besides so many other bounties and thank-worthy boons and protections. He then fixed a limit of life for everyone of you and has kept it a secret from you.

In the histories of the past nations and lives of individuals, He provided opportunities for you to study the foot-prints on the sands of time and to be warned of the consequences of evil deeds. Lives of men, who were enjoying themselves to their hearts' contents and had perfect freedom of action, have such useful lessons in them to teach. Just read them over and over again and see how quickly death overtook them. They did not get time to satisfy their desires fully before death put an end to their lives and placed them beyond and further possibility of fulfillment of those wishes."

This sermon appears to be a commentary upon the Ayat No.257 of Sura 2, Al-Baqra which declares as follows:

“Allah is the Guardian of those who believe, he brings them out of every darkness into light. And those who disbelieve, their guardians are the evil ones; they bring them out of light into all kinds of darkness. These are destined for the Fire, and there shall they abide.”

Human freedom has thus been guaranteed by the Creator Himself for all times to come.

SUPREMACY OF RULE OF LAW

23. Holy Quran contains stern warning for all those who are charged with the onerous duty of regulating the affairs of State or administering justice among people. The arbiter cannot deviate from the principles laid down in the revelation. His decisions must be in accord with the revealed rules. Ayaat 44, 45 and 47 of Sura 5, Al-Maida of Holy Quran declare such persons as *Kafir* (unbeliever), *Zalim* (unjust) and *Fasiq* (transgressor) who decide cases without reference to principles laid down by revealed text. Ayat 42 of this very Sura declares further that *Allah loves those who judge people equitably*.

24. Ayat 105 of Sura 04, Al-Nisa of Holy Quran reiterates the commandment that the purpose of revealing *the Book with truth* was

that *people should be judged by means of precepts and values ordained by Allah for human guidance*. This verse closes with a warning that the balance of justice must be held equal irrespective of the fact that parties are friends or foes. The following Ayaat of Holy Quran will illustrate the point further:-

i. Ayat No.135 Sura 04 Al-Nisa of Holy Quran:

“O you who believe! Be upholders of justice, and bearers of witness to Truth for the sake of Allah, even though it may be against yourselves or against your parents and kinsmen, or the rich or the poor, for Allah is more concerned with their well-being than you are. Do not, then, follow your own desires lest you keep away from justice. If you twist or turn away from (the Truth), know that Allah is well aware of all that you do.”

ii. Ayat No.90 Sura 16 Al-Nahl of Holy Quran :

“Surely Allah enjoins justice, kindness and the doing of good to kith and kin, and forbids all that is shameful, evil and oppressive. He exhorts you so that you may be mindful.”

iii. Ayat No.08 Sura 05, Al-Maida, of Holy Quran:

“O you who believe! Be upright, bearers of witness for Allah, and do not let the enmity of any people move you to deviate from justice. Act justly, that is nearer to God-fearing. And fear Allah. Surely Allah is well aware of what you do.”

iv. Ayat No.152 Sura 06, Al Anaam, of Holy Quran:

“And do not even draw near to the property of the orphan in his minority except in the best manner; and *give full measures and weight with justice*, We do not burden anyone beyond his capacity; when you speak, be just, even though it concerns a near of kin; *and fulfil the covenant of Allah*. That is what He has enjoined upon you so that you may take heed.”

- v. Ayat No.26 Sura 38, Suad, of Holy Quran:

“(We said to him): “O David, We have appointed you vicegerent on earth. Therefore, *rule among people and do not follow (your) desire lest it should lead you astray from Allah’s path*. Allah’s severe chastisement awaits those who stray away from Allah’s path, for they had forgotten the Day of Reckoning.”

- vi. Ayat No.15 Sura 42, Al-Shura, of Holy Quran:

“(This being so, O Muhammad), call people to the same religion and be steadfast about it as you were commanded, *and do not follow their desires*, and say (to them): “I believe in the Book Allah has sent down. *I have been commanded to establish justice among you*. Allah is our Lord and your Lord. We have our deeds and you have your deeds. There is no contention between us and you. Allah will bring us altogether. To Him all are destined to return.”

- vii. Ayat No.29 Sura 07, Al-Aaraf, of Holy Quran:

“Say to them (O Muhammad): “*My lord enjoins justice*; and that you set your faces aright at the time of every Prayer; and that you call upon Him, exclusively dedicating your faith to Him. You shall return to Him as you were created.”

- viii. Ayat No.42 Sura 05, Al-Maida, of Holy Quran:

“They are listeners of falsehood and greedy devourers of unlawful earnings. If they come to you (for your judgment), *you may either judge between them* or turn away from them. And were you to turn away from them they shall not be able to harm you”.

- ix. Ayat No.09 Sura 49, Al-Hujraat, of Holy Quran:

“If two parties of the believers happen to fight, make peace between them. But then, if one of them transgresses against the other, fight the one that transgresses until it reverts to Allah’s command. And if it does revert, make *peace between them with justice, and be equitable* for Allah loves the equitable.”

- x. Ayat No.09 Sura 55, Al-Rehman, of Holy Quran:

“*But weigh things equitably and skimp not in the balance.*”

- xi. Ayat No.126 Sura 16, Al-Nahl, of Holy Quran:

“If you take retribution, then *do so in proportion to the wrong done* to you. But if you can bear such conduct with patience, indeed that is best for the steadfast.”

- xii. The well known tradition quoted by Imam Bukhari shows that the Holy Prophet PBUH stated that earlier nations suffered fall because punishment were not awarded to rich and influential persons but poor people alone would be convicted and sentenced. The principle of Discrimination/Pick and Choose in dispensing justice must be eschewed. This rule, of universal nature, has been emphatically asserted in in this tradition:

(Tradition No.1962 Vol. 3, Bukhari)

- xiii. The Khutba Hujjatul Wida contains a specific injunction that the things (assets, properties) lying *in your custody must be returned to their rightful owners*. The sermon also contains a warning that Allah will certainly reckon your deeds- Relevant portion of the Khutba reads as under:

O people! Just as you regard this month, this day, this city as sacred, *so regard the life and property of every Muslim as a sacred trust. Return the goods lying with you to the rightful owners*. Hurt no one so that no one may hurt you. Remember that you will indeed meet your Lord and that He will certainly reckon your deeds.

- xiv. Justice must prevail. Justice is an absolute value. It cannot be circumscribed by conditionalities. This principle is evident from a careful perusal of Ayat 153 Sura 06, Ayat 29 Sura 07 and Ayat 135 Sura 04.

Muslim are under an obligation to honour the stipulated the covenant except when a conditions which converts a *Halal* (permissible) in *Haram* (forbidden) or vice versa. Hadith No.1363 Volume 1 Jame Tirmazi,

ILLEGAL ACQUISITIONS ARE OF NO LEGAL EFFECT

25. Ayat No.188 Sura 02, Al-Baqra and Ayat No.29 Sura 04, Al-Nisa of Holy Quran forbid in very stern terms from acquiring assets, interests, properties of others without lawful means. Modes of acquisition of property other than the accepted customary or legally

permissible methods have been termed as *Batil* by Holy Quran. The word *Batil* is antonym of Haq ie. truth. A thing which causes mischief would be *batil*. It is significant to note that Ayat No.29 of Sura 04, though of general import, finds mention in that part of the Sura which deals with protection of the rights of women. And it so happened that all the petitioner trustees, who were affected by the impugned Martial Law Orders, were at the time of promulgation of such Orders, womenfolk.

26. Ayat 50 Sura 05, Al-Maida, of Holy Quran directs that people should be judged according to the principles enunciated in the revelation. A departure from this rule has been termed repressible act of the times of Ignorance.

LEGAL CAPACITY

27. According to Islamic Jurisprudence the legal capacity of an adult is complete after he/she has attained puberty as well as *Rushd*. This capacity is the ability or fitness to acquire and exercise rights and to accept and perform corresponding duties and obligations. Both the capacities i.e, acceptance or acquisition of rights and the performance of duties is termed in Islamic Law as *Ahliyyat al wajib* and *Ahliyyat al ada* respectively. This legal capacity or *Dhimma*, is complete and has legal effect. It means the capacity to sue and be sued. It means the

capacity to lodge protest or file an appeal as well the capacity of being called upon to answer a charge. It is a status without which an individual cannot be treated as a legal, responsible entity. It is a Divine gift and it cannot be limited by a unilateral Order of any mundane authority without recourse to Injunctions of Islam. Any such attempt would be a challenge to the Creator who conferred not only dignity upon human beings but also clothed them with legal capacity. It is on account of this legal capacity that a human being becomes a *Mukallif* i.e. an Obligee and thus a subject of *Khitab* i.e. communication from his Lord. A person having legal capacity is answerable to God and no one has the authority to deny a person of the status conferred upon him by his Creator. The action of Chief Martial Administrator whereby he denied through a special Order the petitioners their rights to supervise and control the Trust without of course recourse to the provisions of law, and thus the act of issuance of Martial Law Order debarring the Courts of Pakistan from providing legal remedy to the petitioners is also violative of the principle of Legal Capacity as well. *Extra-Ordinary Power* of an individual is death knell of human freedom. Absolute power vests in Allah Almighty alone.

PRINCIPLE OF WUSAAT

اصول وسعت

28. The impugned instruments are violative of the following principles enunciated in Holy Quran:-

That no one shall be burdened beyond his capacity.

It is mentioned at four following places:-

a. Ayat No.286 Sura 02 Al-Baqra:

"Allah does not lay a responsibility on anyone beyond his capacity."

b. Ayat No.233 Sura 02 Al-Baqra:

"If they (i.e. the fathers) wish that the period of suckling for their children be completed, mothers may suckle their children for two whole years. (In such a case) it is incumbent upon him who has begotten the child to provide them (i.e. divorced women) their sustenance and clothing in a fair manner. But none shall be burdened with more than he is able to ear; neither shall a mother suffer because of her child nor shall the father be made to suffer because he has begotten him. The same duty towards the suckling mother rests upon the heir as upon him (i.e. the father). And if both (the parents) decide, by mutual consent and consultation, to wean the child, there is no blame on them; if you decide to have other women suckle your children there is no blame upon you, provided you hand over its compensation in a fair manner. Fear Allah and know well that Allah sees all that you do."

c. Ayat No.152 Sura 06 Al-An'am:

“And do not even draw near to the property of the orphan in his minority except in the manner; and give full measures and weight with justice, We do not burden anyone beyond his capacity; when you speak, be just, even though it concerns a near of kin; and fulfil the covenant of Allah. That is what He has enjoined upon you so that you may take heed.”

d. Ayat No.42 Sura 07 Al-A 'raf:

“As for those who believe and do good, We do not impose upon any of them a burden beyond his capacity. They are the people of Paradise. And there they shall abide.”

PRINCIPLE OF ADAM HARJ

اصول عدم حرج

29. The Holy Quran lays down the principle of *Adam Harj* i.e.

Removal of Hardship in the following Ayaat:-

a. Ayat No.06 Sura 05, Al Ma 'idah:

“Believers! When you stand up for Prayer wash your faces and your hands up to the elbows, and wipe your heads, and wash your feet up to the ankles. And if you are in the state of ritual impurity, purify yourselves (by taking a bath). But if you are either ill, or travelling, or have satisfied a want of nature or have had (intimate) contact with women and find no water, then have *recourse to clean earth* and wipe *your faces* and your hands therewith. Allah does not want to *lay any hardship upon you; rather He* wants to purify you and

complete His favours upon you so that you may give thanks.”

b. Ayat No.78 Sura 22, Al-Hajj:

“Strive in the cause of Allah in a manner worthy of that striving. He has chosen you (for His task), and He has not *laid upon you any hardship in religion*. Keep to the faith of your father Abraham. Allah named you Muslims earlier and even in this (Book), that the Messenger may be a witness over you, and that you may be witnesses over all mankind. So establish Prayer, and pay Zakah, and hold fast to Allah. He is your Protector. What an excellent Protector; what an excellent Helper!”

PRINCIPLE OF TAISEER

اصول تيسير

30. The Principle of Ease ie, *Taiseer* has been enunciated by Holy Quran in the following Suras:-

a. Ayat No.184 Sura 02, Al-Baqra:

“Fasting is for a fixed number of days, and if one of you be sick, or if one of you be on a journey, you will fast the same number of other days later on. For those who are capable of fasting (but still do not fast) there is a redemption: feeding a needy man for each day missed. Whoever voluntarily does more good than is required, will find it better for him; and that you should fast is better for you, if you only know.”

b. Ayat No.185 Sura 02, Al-Baqra:

*"During the month of Ramadan the Quran was sent down as a guidance to the people with Clear Signs of the true guidance and as the Criterion (between right and wrong). So those of you who live to see that month should fast it, and whoever is sick or on a journey should fast the same number of other days instead. **Allah wants ease and not hardship for you** so that you may complete the number of days required, magnify Allah for what He has guided you to, and give thanks to Him."*

c. Ayat No.196, Sura 02, Al-Baqra:

*"Complete Hajj and Umrah for Allah. And if you are prevented from doing so, then **make the offering which is available to you**, and do not shave your heads until the offering reaches its appointed place. If any of you should have to shave your head before that because of illness, or injury to the head, **then you should make redemption** by fasting, or alms-giving, or ritual sacrifice. And when you are secure, then he who avails of Umrah before the time of Hajj **shall give the offering he can afford**; and if he cannot afford the offering, he shall fast for three days during Hajj and for seven days after he returns home; that is, ten days in all. This privilege is for those whose families do not live near the Holy Mosque. Guard*

against violating these ordinances of Allah and be mindful that Allah is severe in chastisement."

- d. Ayat No.280 Sura 02, Al-Baqra:

*"But if the debtor is in straitened circumstance, **let him have respite until the time of ease** and whatever you remit by way of charity is better for you, if only you know."*

- e. Ayat No.92 Sura 04, Al-Nisa:

*"It is not for a believer to slay another believer unless by mistake. And he who has slain a believer by mistake, **his atonement is to set free from bondage a believing person and to pay blood-money to his** (that is, the slain person's) heirs, unless they forgo it by way of charity. And if the slain belonged to a hostile people, but was a believer, then the atonement is to set free from bondage a believing person. And if the slain belonged to a (non-Muslim) people with whom you have a covenant, then the atonement is to pay the blood-money to his heirs, and to set free from bondage a believing person. But he who cannot (free a slave) should fast for two consecutive months. This is the penance ordained by Allah. Allah is All-knowing, All-Wise".*

- f. Ayat No. 157 Sura 07, Al-A 'raf:

"(Today this Mercy is for) those who follow the ummi Prophet, whom they find mentioned in the Torah and the Gospel that they have. He enjoins upon them what is good and forbids them what

*is evil. He makes the clean things lawful to them and prohibits all corrupt things **and removes from them their burdens and the shackles that** were upon them. So those who believe in him and assist him, and succor him and follow the Light which has been sent down with him, it is they who shall prosper."*

- g. Ayat No.04 Sura 58, Al-Mujadalah:

*"And he who does not find a slave (to free), shall fast for two months consecutively before they may touch each other, **and he who is unable to do so shall feed sixty needy people. All this is in order that you may truly believe in Allah and His Messenger.** These are the bounds set by Allah; and a grievous chastisement awaits the unbelievers."*

- h. Ayaat 19, 20 Sura 80, Abasa of Holy Quran:

*"Of a small life-germ; He created him, then **empowered him;** Then (as for) the way- He has made it **easy** for him."*

- i. The principle of *Taiseer* may be illustrated from a ruling of the second caliph when he did not enforce the *had* penalty of amputation of hand for theft during a widespread famine. He is also reported to have imposed a ban on the sale of slave-mother (*umm-al-walad*). Principle of *Taiseer* partakes of the principle of *Istehsan* which is not only an integral part of *Shariah* but an important branch of *Ijtehad*. It is inspired by the values and principles of *Shariah*. This principle can also be deduced from the following verses of Holy Quran:

j. Ayat No.55, Sura 39. Al-Zumr:

“And follow the best of what has been sent down to you from your Lord.”

The following traditions of the Holy Prophet PBUH can be referred with convenience in this regard:-

k. What the Muslims deem to be good is good also in the sight of Allah

“مأراه المسلمون حسناً فهو عند الله حسن ومأراه المسلمون سيئاً فهو عند الله سئاً”
(مجمع الزوائد، للهيثمى، جلد اول، ص ١٤٨، بحواله اصول الفقه الاسلامى،
دار الفكر دمشق، جلد ٢، ص ٨٣)

l. Harm is neither inflicted nor tolerated in Islam

“لا ضرر ولا ضرار”
(مسند الامام احمد بن حنبل، دار الفكر بيروت،
جلد ٥، صفحہ ٣٢٤)

m. Allah loves to see that His concessions are observed in the same way that His strict laws (Azaim) are obeyed

“ان الله يحب ان تؤتى رخصه كما يكره ان تؤتى معصيته”
(مسند الامام احمد بن حنبل، دار الفكر بيروت، جلد ٢، صفحہ ١٠٨)

n. The Prophet (PBUH) did not choose but the easier of the two alternatives so long as it did not amount to sin

“ما خير النبي صلى الله عليه و على آله وسلم بين امرين إلا اختار ايسرهما ما لم يكن إثماً
فاذا كان الإثم كان ابعدهما منه”
(الجامع الصحيح للبخارى، باب اقامة الحدود، المكتبة الاسلامية استانبول تركيا،
جلد ٨، صفحہ ٢١)

(Reported by Hazrat Aisha R.A)

- o. The best of your *Deen* is that which brings ease to the people

“إن خير دينكم ايسره”

(مسند الامام احمد بن حنبل، دار الفكر بيروت، جلد ٥، صفحہ ٣٢)

These principles have provided for the Islamic Law necessary means to encourage flexibility and development of law for the solution of ever increasing human problems. Avoidance of hardship is a salient feature of the Islamic teachings.

PRINCIPLE OF TAKHFEEF

اصول تخفيف

31. The Principle of Reduction of Burden commonly known as

Takhfeef finds mention in Ayat 28 Sura 4, Al-Nisa:

*“Allah wants to lighten your burdens,
for man was created weak.”*

This principle finds support from the following tradition of the Holy Prophet:

“ يَسِّرًا وَلَا تُعَسِّرًا وَبَشْرًا وَلَا تُنْفِرًا ”

Make thing easy; Do not create difficulties;

Give good tiding; Do not incite hatred.

(Tradition No.630 volume 5, Bukhari)

PRINCIPLE OF LEGALITY

32. The Orders under examination also violate the Principle of legality. The principle of legality is in fact supremacy of rule of law. Supremacy of law has two clear-cut objectives: a/ protection of human freedoms, b/ limitation on the power of persons who exercise authority on behalf of the State. This concept pre-supposes the existence of a legal rule before its violation can be generalized. The rule has to be upheld in all circumstances. This age old principle is expressed in Latin as *Nulla Crime Nulla Poena Sine legs*. The consequences of this rule are that penal statutes have to be followed strictly and that penal provisions cannot become retroactive. In other words a penalty can be imposed *only if the impugned action had been declared an offence before the proposed action and proceedings are initiated*. Muslim Jurists discovered this principle from the following

Ayaat of Holy Quran:-

a. Ayat No.38 Sura 08, Al-Anfal:

“(O Prophet), tell the unbelievers that if they desist from evil, their past deeds shall be forgiven and if they revert to their past ways, then it is well known what happened with the people of the past.

b. Ayat No.15 Sura 17, Bani Israel:

“He who follows the Right Way shall do so to his own advantage; and he who strays shall incur his own loss. No one shall bear another’s burden. *And never do We send a Messenger (to make the Truth distinct from falsehood).*”

c. Ayat No.59 Sura 28, Al-Qasas:

“Your Lord would not destroy a town until He had sent to its centre a Messenger who would recite to them Our verses. Nor would We destroy any town unless its inhabitants were iniquitous.”

On the basis of these Injunctions the Muslim Jurists deduced the principles that an impugned action cannot be termed as crime unless it has legal sanction:

“لا جريمة ولا عقوبة بلانص في جرائم الحدود”

(عبدالقادر عوده، التشريع الجنائي الاسلامي، دارالكتاب العربي، بيروت،

جلد اول، ص 118)

This is by now a universally acknowledged principle. The American Jurisdiction has introduced the “due process clause”. No criminal liability can be imposed without fair notice in advance. Every *arbitrary* and *discriminatory* action by state authority has to be avoided. The Constitution of Pakistan in Article 12 recognizes this principle in the following words:-

“(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."

It is therefore clear that the impugned Martial Law Orders, put into effect by force, denied to the petitioners, the rights and privileges available to them under the Trusts Act, 188, without following the principles of Natural Justice or Principle of legality action adverse to the interest of the petitioner was taken. There was no legal trial and the properties of the petitioners were confiscated. The Impugned Orders are therefore violative of the injunctions of Islam referred to above.

REVOLUTIONS DONOT ALTER TRUSTS

33. The conquest of Mecca in January 630 AD corresponding to Ramzan 08 A.H, is a historic event. It has also established certain principles of law. On the Political side a silent bloodless revolution had effected a change in the administrations. At this point of time the restoration of key of the House of Allah to Usman bin Talha established a new principle in the Islamic Jurisprudence that *even a revolutionary change of government will not alter the existing right of a trustee to*

continue retaining the legal office of trustee-ship which office shall remain with the progeny of the trustee till eternity. The said Usman was the custodian and trustee of the Holy Kaaba and had on one occasion contumaciously denied to the Holy Prophet PBUH the opportunity of entering the Kaaba when he was in Mecca and had not migrated yet to Yasreb. On the event of conquest of Mecca, when Usman surrendered the keys of the House of God to the Prophet of God PBUH, a few senior companions coveted the opportunity to be entrusted with the sacred key and thus become custodian or trustees of the house of God. The Holy Prophet PBUH however, restored the key to the said Usman. In this view of the matter we are obliged to restore the Trust to its rightful owners.

THE SEVENTH SCHEDULE

34. Learned counsel for the petitioner very candidly stated that an objection could be taken against him that since the Presidential Order No.04 of 1978 finds mention in the 07th Schedule of the Constitution of Pakistan so it is not amenable to the jurisdiction of this Court. We are conscious of the fact that certain laws were mentioned in the 7th Schedule and it was stated therein that these law could be amended in the manner provided for amendment of the Constitution. This 7th Schedule has nexus with Article 271A (Clause 6). It is

abundantly clear that only the procedure for amendment of these laws has been mentioned in the 7th schedule but these laws are not part of the Constitution. In this view of the matter the Federal Shariat Court has the jurisdiction to examine any legal instrument on the touch stone of Injunctions of Islam. Moreover the recently promulgated Constitution (Eighteenth Amendment) Act, 2010 has, by virtue of section 91 (b) substituted clause 6 of Article 271A of the Constitution with the following new clause:-

“(6) The laws referred to in clause (1) may be amended by the appropriate Legislature in the manner provided for amendment of such laws”.

This clearly means that the laws referred to in clause (1) may be amended by appropriate Legislature in the manner provided for amendment of such laws. The jurisdiction of this Court is not restricted to the manner in which the laws under examination are amended. The jurisdiction vests in this court to examine every instrument having the force of law on the touch stone of Injunctions of Islam.

35. The impugned Martial Law Orders are consequently of no legal effect as these instruments suffer on account of following legal infirmities:

i. The impugned Orders, when examined on the touch-stone of above mentioned Injunctions of Islam are found utterly deficient. The Orders under survey are repugnant to a number of Injunctions of Islam.

ii Action adverse to the interests of petitioners was taken against the petitioner trustees and they were penalized and forced to run from pillar to post when there was neither any irregularity nor any complaint nor breach of any legal provision whatsoever.

iii. Neither any show cause notice was served upon the petitioner trustees nor were the petitioners asked to submit explanation to one or more specific charges before the action of confiscation of property by Chief Martial Law Administrator. A penalty can be imposed only if an action is covered by the mischief of a offence which has been declared an offence before the action complained of was committed.

iv. The petitioners were denied the right of appeal or representation before any independent tribunal. The lawfully

established Constitutional Courts were debarred, by naked force, from adjudicating upon petitions moved by petitioners against Martial Law Orders and Authorities, though the Courts continued functioning throughout the country and dispensed justice in accordance with law. The Martial Law Orders proceeded to usurp the lawful jurisdiction of Courts in the case of a legal person.

v. During the pendency of constitutional petition No. 501 of 1977 of the petitioner-trustees in the High Court of Sindh at Karachi, the Chief Martial Law administrator through an arbitrary executive fiat issued Martial Law Order No.21 on 17.10.1977 against the fundamental principles of Islam. The lawfully constituted court was stopped from calling in question the decree of the Martial Law Administrator. Clause 3 of the impugned Order proclaimed as under:

"This order shall have effect notwithstanding anything contained in the Peoples Foundation Trust Deed of 9th day of August, 1974 as amended from time to time, or in any law including a Martial Law Regulation or a Martial Law Order or other instrument having the force of law or in any contract or an agreement and shall not be called in question in or before any Court including the Supreme Court and a High Court."

vi. The four impugned Martial Law Regulations were neither promulgated by chosen representatives of the people nor were these

instruments issues under the umbrella of the Constitution. The Constitution is the only legal document which determines the forum as well as the procedure for the promulgation of laws;

vii. There was consequently no debate, consultation, counsel or consensus by constitutionally recognized institutions before issuance of the Orders under examination;

viii. The impugned Martial Law Order were promulgated without recourse to the provisions of section 92 of the Code of Civil Procedure, 1908 and Chapter 2 and 4 of the Trust Act 1882 which were existing laws in terms of constitutional provisions. The Constitution and laws of land do not authorize an adventurer to override the provisions of the Code of Civil Procedure, 1908 and or Trust Act. 1882 and take punitive action against a legal entity over and above the prescribed course. These laws were in existence and fully operative in 1977 when the impugned Orders were promulgated

ix. The impugned orders were promulgated only to punish one particular person and no other Trust, duly registered under the Trust Act, in Pakistan was either taken over or its nomenclature changed.

x. The element of Bias and bad faith cannot be ruled out in this case. The person issuing the impugned regulations was also the person responsible for the over throw of the Government of Zulfikar Ali Bhutto and order his immediate arrest. General Muhammad Zia-ul-Haq himself decided unilaterally to take over the trust property of the family of Zulfikar Ali Bhutto. So long as General Zia-ul-Haq lived he saw to it that the petitioners are denied every possible remedy to challenge his arbitrary and unilateral action of take over of the trust. As a matter of last resort the General Muhammad Zia-ul-Haq amended the Constitution and added 7th Schedule which declared that the Zulfikar Ali Bhutto Trust and Peoples Foundation Trust (Renaming and Administration) Order, 1978 (P.O. No.4 of 1978) could be amended in the manner provided for the amendment of Constitution. There was thus an intentional act to create insurmountable hurdle in the way of petitioners. This is against the principle of *Taiseer* of Islamic Jurisprudence. It has also been urged that venom of General Muhammad Zia-ul-Haq was so intense that he did not permit the petitioners even to attend burial ritual of Zulfikar Ali Bhutto, whose dead body was secretly flown to Larkana while the petitioners were kept in confinement elsewhere. In this view of the matter the only inference is that the Martial Law Regulations were not motivated with

fair intentions. Bias is the paralysis, complete or partial, of judicious faculties and a person who is personally interested cannot be arbitrator according to Islamic provision. The law demands transparency Justice should not only be done but seen to be done. The aggrieved parties and people should be satisfied that the action taken did not lack bona-fides. Justice and laws weld the broken ties. They do not cut asunder human freedoms. Justice is a Divine attribute. It is always pro-people. Laws and justice cannot be anti-people.

xi. The initial action of the Chief Martial Law Administrator in issuing Martial Law Order No.21 dated 17th October 1977 whereby the Peoples Foundation Trust created by late Zulfiqar Ali Bhutto, the elected Prime Minister of Pakistan, was taken over after deposing him through a Military coup and the subsequent actions by way of issuance of three other impugned Orders to carry out the errand mentioned in MLA Order 21 whereby the lawful trustees, by show of naked force were debarred from exercising their rightful statutory and religious duties, obligations and functions, which were otherwise safeguarded by The Trust Act, 1882 and the Code of Civil Procedure 1908 and further the act of seizing all the assets, records and moneys of the Trust was taken in utter violation of the Injunctions of Islam.

xii. Section 92 of the Code of Civil Procedure, 1908 read with chapters 3 and 4 of The trusts Act, 1882 provide a forum for enquiring into and taking action against the trustees. The Martial Law Order by-passed these legal provisions which, under Article 227 of the Constitution, are presumed to be not violative of the Injunction of Islam. Neither the Council of Islamic Ideology nor the Federal Shariat Court had ever held the said provisions of the Code of Civil Procedure or the Trusts Act, 1882 to be repugnant to the Injunctions of Islam. Unless these two institutions, created by the Constitution, declare any law or a provision of Law to be averse to the Injunctions of Islam, the presumption is that all existing laws are in conformity with Islamic principles. The laws have to be obeyed, observed and implemented. No one is above law.

xiii. Article 24 of the Constitution of Islamic Republic of Pakistan mandates in unambiguous terms that no person shall be deprived of his property save in accordance with law. The property of the petitioners was not taken over for a limited period to exclude it from the protection contemplated by Article 24 *ibid*. The action of Chief Martial Law Administrative was clearly violative of Article 24 of the Constitution.

xiv. Promulgation of Martial Law Order No. 21 dated 17.10.1977 by Chief Martial Law Administrator targeted only one Trust out of innumerable Trust operating in the Country. It therefore created a divide amongst the various Trusts functioning all over Pakistan. Such an instrument which *discriminates* among the equals is void ab-initio as it offends various provisions of Constitution and law. Hence it is ultra vires of various provisions of Constitution and law including Articles 4, 23 and 25 of the Constitution.

xv. The procedure of take over of the Trust adopted by General Muhammad Zia-ul-Haq was alien to the domain of law. One man cannot combine in himself the status of a complainant, a grabber as well as an arbitrator and an executor. Such an act has no sanction in Islamic teachings. No Jurisprudence from any Jurisdiction in this globe approves such a unilateral action. Ayat 115 of Sura 04, Al-Nisa, forbids following a path other than the path of believers. The path of believers is paved with consensus, mercy and accommodation. This aspect of the case is violative of the Injunctions of Islam which vouch-saves transparency in the administration of justice.

xvi General Assembly of the United State had proclaimed Universal Declaration of Human Rights which was accepted by the Members State. Article 8 of this declaration declares:-

Everyone has the *right to an effective remedy* by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.

Article 17 of the declaration declares as under:-

- “1. Everyone has the *right to own property* alone as well as in association with others.
2. No one shall be *arbitrarily deprived of his property*.

Article 19 of the declaration is in the following words:

“Everyone has the *right to freedom of opinion and expression*; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.” (Emphasis Added)

These three above mentioned principles form part of Universal Jurisprudence and have to be kept in view by the Legislature Executive and Judiciary of any State.

xix. The following tradition of are Holy Prophet PBUH makes it incumbent upon every judge must declare every wrong a illegal action as of the no legal effect:

“It has been narrated on the authority of Umm Salama that the messenger of Allah (may peace be upon him) said: In the near future there will be Amirs and you will like their good deeds and dislike their bad deeds. One who sees through their bad deeds (and tries to prevent their repletion by his

hand or through his speech), is absolved from blame, but one who hates their bad deeds (in the heart of his heart, being unable to prevent their recurrence by his hand or his tongue), is (also) safe (so far as God's wrath is concerned). But one who approves of their bad deeds and imitates them is spiritually ruined. People asked (the Holy Prophet): Should not we fight against them? He replied: No, as long as they say their prayers. (Sahih Muslim (English Translation) vol.III, Page 1032-1033, Hadith No. 4569)."

xx. In this view of the matter, the four impugned Martial Law Orders are void, ineffective, without lawful authority being repugnant to the above-mentioned Injunctions of Islam.

BENEFICIENT LEGISLATION

36. (a) The impugned Martial Law Orders are also violative of the principle enunciated in *Ayat No.17 Sura 13, Al-Ra'd* of Holy Quran which states:

"Allah sends down water from the heavens and the river-beds flow, each according to its measure, and the torrent carries along a swelling scum. In like manner, from that metal which they smelt in the fire to make ornaments and utensils, there arises scum like it. Thus does Allah depict truth and falsehood. As for the scum, it passes away as dross; *but that which benefits mankind abides on the earth. Thus does Allah explain (the truth) through examples.*

The principle of beneficent legislation is thus clearly enunciated in this Ayat. No legislation or even an Executive Order which is not for the benefit of people can hold field according to this injunction.

(b) The impugned orders are also violative of the following principles established at the time of the conquest of Mecca. Another principle in the domain of legislation and administration of justice is that if the law-giver or the arbiter happens to be a person who is either personally aggrieved by the opposite party or who has played a successful part in bringing about a change in the government through revolution or conquest to the detriment of the opposite party he shall then neither be an arbiter in the cause of his opponents nor shall he pass any order to the detriment of his adversaries. This principle also finds support from Ayat No.04 Sura 48, Muhammad, wherein only two options are given as regards the fate of the defeated foe ie, the prisoners of war should either be freed as an act of grace or released after payment of ransom. The option of social, political, economic or physical murder is not available at all.

PRECEDENT LAW

37. In the famous case of Nusrat Bhutto, which was also initiated by petitioner No.1 and is reported as PLD 1977 Supreme Court 657 the Supreme Court of Pakistan, it was held as under:

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

38. In the case of Sindh High Court Bar Association vs. Federation of Pakistan, PLD 2009 Supreme Court 879, this very finding was reaffirmed at page 1001.

39. Martial Law Regulation No. 115 known as Land Reform Regulation was the subject matter of examination by the Federal Shariat Court in the case of Qazalbash Waqf and others vs. Chief Land Commissioner, Punjab, Lahore and others reported as PLD 1990 Supreme Court 99. It was held by the Shariat Appellate Bench that the Federal Shariat Court as well as the Shariat Appellate Bench of the Supreme Court have the jurisdiction and the powers under Chapter 3-A of Part VII of the Constitution *to examine Martial Law Regulation and*

to decide whether or not the provisions thereof are repugnant to the Injunctions of Islam. In that case certain provisions of the regulation were in fact held to be violative of the Injunctions of Islam. We are therefore in no doubt as regards our jurisdiction to examine Martial Law Orders impugned in this petition.

40. The essence of Ayaat No.62 and 63 of Sura 4, Al-Nisa and Ayat No.114 of Sura 11- Hud, of Holy Quran, is that there is no use referring the matter to a tyrant for its resolution. The petitioners having been debarred by an absolute ruler through specially implemented Orders from seeking redress from the High Court of Sindh, ultimately decided to make a petition in this court. The significant feature of the jurisdiction of this Court is that law of limitation does not apply to these proceedings. Any citizen can challenge any provision at any time on the touchstone of Injunctions of Islam.

41. It would be advantageous to refer to some of the articles of Cairo Declaration on Human Rights in Islam at this juncture as they are relevant to the subject under consideration. This Declaration was adopted and issued at the Nineteenth Islamic Conference of Foreign Ministers of the Member States of the Organization of Islamic Conference on 5th August, 1990:

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"Article 8:

Every human being has the *right to enjoy his legal capacity in terms of both obligation and commitment*. Should this capacity be lost or impaired, he shall be represented by his guardian.

Article 15:

(a) Everyone shall have the *right to own property acquired in a legitimate way, and shall be entitled to the rights of ownership, without prejudice to oneself, others or to society in general*. Expropriation is not permissible except for the requirements of public interest and upon payment of immediate and fair compensation.

(b) *Confiscation and seizure of property is prohibited except for a necessity dictated by law.*

Article 16:

Everyone shall have *the right to enjoy the fruits of his scientific, literary, artistic or technical production and the right to protect the moral and material interests stemming therefrom, provided that such production is not contrary to the principles of Shari'ah.*

Article 19:

(a) *All individuals are equal before the law, without distinction between the ruler and the ruled.*

(b) *The right to resort to justice is guaranteed to everyone.*

© *Liability is in essence personal.*

(d) *There shall be no crime or punishment except as provided for in the Shari'ah.*

(e) *A defendant is innocent until his guilt is proven in a fair in which he shall be given all the guarantees of defence.*

Article 22:

(a) Everyone shall have the *right to express his opinion freely in such manner as would not be contrary to the principles of the Shari'ah.*

b) Everyone shall have the right to advocate what is right, and propagate what is good, and warn against what is wrong and evil according to the norms of Islamic Shari'ah.

© Information is a vital necessity to society. It may not be exploited or misused in such a way as may violate sanctities and the dignity of Prophets, undermine moral and ethical values or disintegrate, corrupt or harm society or weaken its faith.

(d) It is not permitted to arouse nationalistic or doctrinal hatred or to do anything that may be an incitement to any form of racial discrimination.

Article 23:

(a) *Authority is a trust; and abuse or malicious exploitation thereof is absolutely prohibited, so that fundamental human rights may be guaranteed.*

(b) Everyone shall have the right to participate, directly or indirectly in the administration of his country's public affairs. He shall also have the right to assume public office in accordance with the provisions of Shari'ah.

42. The impugned Martial Law Orders are also repugnant to the five basic values of Islam which are commonly known as *Maqasid-e-Shariah*. Reference Muhammad Aslam Khaki versus State PLD 2010

FSC 1 at page 106 wherein paragraph 85K reads as follows:

K. "Another reason that has weighed with us is that according to Islamic teachings the Divine revelation is purpose-oriented. Muslim Jurists have recognized a few Objectives of Shariah, known as *Maqasid-e-Shariah*. These objectives are in fact guarantees for the betterment of humanity. The five basic principles

or the five values/five *Maqasid-e-Shariah* are as follows:-

- (i) Preservation of Deen (Religion)
- (ii) Preservation of Intellect
- (iii) Preservation of Life
- (iv) Preservation of Property and
- (v) Preservation of Progeny

The second value i.e. preservation of Intellect (Tahafaz-e-Aql) is not possible without education for which reading and writing is the minimum requirement. Consequently any prohibition on reading and writing material would be tantamount to the basic philosophy of Islam. It is a Deen wherein the first word of the first revelation is *IQRA* i.e, *READ*, Denial of reading and writing could be a denial of a fundamental injunction of Islam:

“Thus does Allah make His
commandments manifest
and clear for you that you
may reflect”

Ayat 220 Sura 2 (Al-Baqra)

The fourth guarantee mentioned therein is the preservation of property of individuals. It is therefore abundantly clear that without recourse to legal provisions no one can be deprived of his property nor can he/she be restrained from pursuing remedies from the Courts duly established under law. Any attempt to deny a rightful owner from the exercise of his right over the property or denial to pursue remedies would be struck down as being repugnant to the Injunctions of Islam.

43. The primary object of examination of laws by the Federal Shariat Court under Article 203D of the Constitution is to uphold the

Injunctions of Islam as enunciated in Holy Quran and Sunnah of the Holy Prophet PBUH. The meaning and scope of the term Islam is establishment of peace which is possible only if Justice prevails in the society. Justice is a permanent value according to a number of Injunctions of Holy Quran. *Adl* is an attribute of Allah and He loves justice. The interests of the nation are best served when the Executive, Legislative and Judicial machinery of the State adheres to the principles of Justice and fair play i.e, *Adl* and *Ehsan*. More particularly when the rights of citizens are involved. The rights and freedoms of individuals are guarded by law, the Constitution and above all the Injunctions of Islam. Justice among people, though a purely mundane activity, has been declared an act of piety in the estimation the Lord Creator. The question of non-adherence to the legal provision under the garb of impugned Martial Law Orders which resulted in the mutilation of basic rights of petitioners has arisen in this petition which calls for a verdict of the Federal Shariat Court in the light of teachings of Islam. We are constrained to observe that notwithstanding God gifted rights, duly guaranteed by law and Constitution, the petitioners were denied their share by Martial Law Authority with the result that the aggrieved persons had to suffer additional agony of protracted litigation. It is not the first time that

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Martial Law Orders mutilated rights of individuals in the Islamic Republic of Pakistan. It is time the judicial organ of the State refuse to accept such arbitrary provisions which are promulgated by adventurers under the garb of Martial Law.

44. Before parting with the discussion undertaken in this judgment we would take this opportunity of referring to a few passages from the historic letter of Imam Ali R.A. addressed to Malik-e-Ashter, the Governor of Egypt. This letter is a statement of principles of good governance and administration of justice as established by different Injunctions of Islam:

“Malik! you must never forget that if you are a ruler over them then the Caliph is the ruler over you and God is the Supreme Lord over the Caliph. And the reality is that the Caliph has appointed you the Governor and tried and tested you through the responsibility of this ruler ship over them. Never think of raising yourself to such a false prestige that *you dare declaring war against God*. Because you cannot ward off His Punishment and Revenge and you can never be free from the need of His Mercy and Compassion:

“Do not feel ashamed to forgive and to forget. Do not hurry over punishments and do not be pleased and proud of your power to punish: Do not get angry and lose your temper quickly over the mistakes and failures of those over whom you rule. On the contrary, be patient and sympathetic with them.

Anger and desire of vengeance are not going to be of much help to you in your administration.

"Never say to yourself "I am their Lord, their ruler and all in all over them *and that I must be obeyed submissively and humbly*". Because such a thought will unbalance your mind, will make you vain and arrogant, will weaken your faith in religion and will make you seek support of any power other than that of God (perhaps that of your party or of your Government). *If you ever feel any pride or vanity on account of your sway and rule over your subjects then think of the supreme sway and rule of the Lord over the Universe, the extent of His creations, the supremacy of His Might and His Control over you which is more dominating than you can ever achieve yourself over anything around you.* Such thoughts will cure your mental weakness, will keep you away from vanity and rebellion (against God), will reduce your arrogance and haughtiness and will take you back to the sanity which you arrogance and haughtiness and will take you back to the sanity which you had foolishly deserted.

"Take care, never think of bringing yourself in level to God, never think of matching our power with Him and contesting His, Glory, and never pretend that you possess might and power like Him, because the Mighty Lord will always humble pitiless tyrants and will degrade all pretenders of His Power and Might."

Lastly we would be relying on Ayat No.1 Sura 14, Ibrahim of Holy Quran which addresses, in particular, all those who administer the affairs of State including judiciary.

“Alif. Lam. Ra. This is a Book which We have revealed to you that you may bring forth mankind from every kind of darkness into light, and direct them, with the leave of their Lord, to the Way of the Mighty, the Innately Praiseworthy.”

C O N C L U S I O N

45. As a consequence thereof, all the steps taken, actions suffered, and all orders passed by any court, tribunal or any authority including Martial Law Establishment, under any of the impugned Orders, are also declared repugnant to the aforementioned Injunctions of Islam, and thus never to have existed in the eyes of law and resultantly of no legal effect. The presumption would be that the situation that prevailed immediately before 17TH October, 1977 i.e. the date of issuance of Martial Law Order No. 21 of 1977 is still continuing.

VERDICT OF COURT

46. As a result of examination of the four impugned Martial Law Orders we hereby declare that:

- i. Martial Law Order NO.21 dated 17th October 1977;
- ii. Martial Law Order No.26 dated 28th September, 1977 issued by Martial Law Administrator Zone “C”.
- iii. President’s Order No.4 of 1978 dated 26th March 1978;
- iv. President’s Order 6 of 1979 dated 28th February, 1979

are in entirety repugnant to the above mentioned Injunctions of Islam.

The decision of this Court regarding the afore-mentioned impugned


Martial Law Orders shall take effect from the date of announcement of

this judgment/decision.

Syaid

JUSTICE SYED AFZAL HAIDER


JUSTICE AGHA RAFIQ AHMED KHAN
Chief Justice


JUSTICE SHAHZADO SHAIKH

Islamabad the 15th April, 2010
*Mujeeb-ur-Rehman/**

Fit for reporting

Syaid
JUSTICE SYED AFZAL HAIDER