

[Supreme Court of Pakistan]

**Present: Umar Ata Bandial, Sajjad Ali Shah, Syed Mansoor Ali Shah, Qazi Muhammad Amin Ahmed
and Amin-ud-Din Khan, JJ**

HADAYAT ULLAH and others---Petitioners

Versus

FEDERATION OF PAKISTAN and others---Respondents

Civil Review Petitions Nos. 292 to 302, 351 to 432, 442 to 456 of 2021 along with C.M.As. Nos. 11812 to 11814, 11837, 11862 to 11864, 11902-11903, 11982-11983, 11987, 11679, 12017, 12019, 12020, 12024, 12025, 12028, 12029, 12031-12033, 12035, 12075, 11993, 12103-12104, 12161-12162, 12172-12173, 12403, 12372-12373 of 2021 along with Civil Misc. Appeals Nos. 168, 158 and 175 of 2021, decided on 17th December, 2021.

(For review of the judgment dated 17.08.2021 passed in C.A. No.491 of 2012 and others)

Per Umar Ata Bandial, J; Sajjad Ali Shah, Qazi Muhammad Amin Ahmed and Amin-ud-Din Khan, JJ agreeing; Syed Mansoor Ali Shah, J dissenting. (Majority view)

(a) Constitution of Pakistan---

---Art. 188---Review jurisdiction of the Supreme Court---Scope---Review jurisdiction of the Court operates in a limited area---Review does not succeed merely because a material error has crept into the disputed judgment--Instead, a review is only allowed when the material error alters the outcome of the case thereby rendering the disputed judgment bad law.

Mukhtar Mai v. Abdul Khaliq 2019 SCMR 1302 ref.

(b) Constitution of Pakistan---

---Arts. 240 & 260(1)---Civil Servants Act (LXXI of 1973), S. 2(1)(b)---Terms "Service of Pakistan" and "Civil Servant"---Said terms were not synonymous, in fact, the phrase 'service of Pakistan' appeared to be of wider import---Although the terms 'civil service' and 'service of Pakistan' are not identical they do overlap in that the former is a sub-category of the latter.

Registrar, Supreme Court of Pakistan v. Wali Muhammad 1997 SCMR 141 and Muhammad Mubeen-us-Salam v. Federation of Pakistan PLD 2006 SC 602 ref.

(c) Constitution of Pakistan---

---Art. 260(1)---Term "Service of Pakistan"---Test for determining whether a person is in the 'service of Pakistan'---Test whether a person is in the service of Pakistan is whether he is performing functions in connection with the affairs of the Federation---For an entity (where a person is employed) to qualify as being in the service of Pakistan, it must fulfill three criteria; first, it must exercise public or sovereign power in some form; second, the government must retain effective/substantial control over its functioning; and third its activities must be mainly financed by the government.

Salahuddin v. Frontier Sugar Mills and Distillery Ltd. PLD 1975 SC 244 and Aitchison College v. Muhammad Zubair PLD 2002 SC 326 ref.

(d) Constitution of Pakistan---

---Art. 240---Appointments to service of Pakistan---Principles of merit, non-discrimination, transparency and fairness---Article 240 of the Constitution is simply the bedrock on which appointments to the service of Pakistan are to be made; it is then the responsibility of the appointing authorities to ensure that appointments are made strictly in accordance with the relevant laws (including the applicable rules and regulations) that incorporate the principles of merit (selection through a competitive process), non-discrimination, transparency and fairness--Same principles apply to appointments on any post in public service since an organisation can only best serve the people when all its employees are qualified individuals who are selected through a fair and transparent process---In the absence of dedicated supporting staff, no senior officer sitting at the helm of affairs can succeed in guiding the nation towards prosperity---However, it is significant that said principles are not merely fruit of judge made law but they also emanate from the fundamental rights enshrined in the Constitution, especially Article 18 (freedom of trade, business or profession) for which reason they occupy an immutable character.

Mubashir Raza Jaffri v. Employees Old-Age Benefits Institutions 2014 SCMR 949; Mushtaq Ahmad Mohal v. Honourable Lahore High Court 1997 SCMR 1043; Munawar Khan v. Niaz Muhammad 1993 SCMR 1287 and Abdul Jabbar Memon: In re 1996 SCMR 1349 ref.

(e) Sacked Employees (Re-instatement) Act (XXII of 2010)---

---Ss. 2(d), 2(f)(vi), 4, 10, 11, 12 & 13 & Preamble---Constitution of Pakistan, Arts. 4, 9, 14, 18, 25, 184(3), 187, 188, 240 & 242---Supreme Court Rules, 1980, O. XXXIII, R. 6---[Per Umar Ata Bandial, J. (Majority view): Initial appointment of majority of the reinstated employees ('the beneficiary employees') was made without following the principles of merit, non-discrimination, transparency and fairness---Through operation of section 4 of the Sacked Employees (Re-instatement) Act, 2010 ('the 2010 Act') all beneficiary employees were ordered to be regularised (either on the same scale or on one-step higher scale) within a certain timeframe without complying any codal formalities and without regard to the nature of the post that they occupied prior to their dismissal, removal or termination from service---Furthermore the 2010 Act discriminated against similarly placed persons who were dismissed, removed or terminated from service in the periods prior to 01-11-1996 and subsequent to 12-10-1999---Such classification of the time period was neither reasonable nor based on any intelligible differentia---By giving leeway to the beneficiary employees and by placing them at the same (or in some cases better) footing in the organisational structure of the employers the fundamental rights of the regular employees were breached --- Act of 2010 was violative of the different provisions of the Constitution, specifically Articles 4, 9, 18, 25, 240 & 242, therefore the same was declared to be void with retrospective effect---Review petitions were dismissed with certain directions regarding services rendered by the re-instated employees of the "employers" [as defined in section 2(d) of the Sacked Employees (Re-instatement) Act, 2010]---[Per Syed Mansoor Ali Shah, J. (Minority view): Vires of the Sacked Employees (Re-instatement) Act, 2010 ('the 2010 Act') enacted by the Parliament could not be examined and declared ultra vires, on the touchstone of Articles 4, 240 & 242 of the Constitution, as said Articles did not provide any criterion to test the vires of a law---Parliamentary debates relating to the objects and reasons of the enactment of the 2010 Act showed that the persons to be reinstated in service had suffered "political victimization" in the matter of their dismissal, removal or termination from service, at the hands of the Government during that period, and the object of the 2010 Act was to provide relief to such persons---Hence, persons reinstated formed a distinct class, and their classification was based on intelligible differentia, distinguishing them from those who had been left out, and it had a rational nexus to the object sought to be achieved by the 2010 Act, therefore, only their reinstatement and regularization under the 2010 Act as such did not offend the fundamental right to equal treatment under Article 25(1) of the Constitution---However, the issue of seniority that affected the right to 'status' enshrined in fundamental 'right to life' of the regular employees serving in the relevant departments, had arisen only in cases of employees reinstated and regularized on "one scale higher", under sections 4(a) & 10 of the 2010 Act---Such reinstatement and regularization was violative of the right to 'status' enshrined in fundamental 'right to life' of the regular employees serving in the relevant departments at the time of promulgation of the 2010 Act, and it was also violative of the 'right to dignity' and 'right to equality before law' as it gave an undue advantage to the reinstated employees to the disadvantage of the rights of the already working regular employees---Proper course, in such circumstances, was for the Court to declare (as ultra vires) only that part of the provisions of sections 4(a) & 10 of the 2010 Act that had the said offending effect, i.e., the reinstatement and regularization on "one scale higher" and this could have easily been done by reading out (severing) the words "one scale higher to" from the provisions of section 4(f) and the words "one scale higher than" from the provisions of section 10 of the 2010 Act---Furthermore sections 2(f)(vi), 11, 12 & 13, of the 2010 Act which dealt with and provided for reinstatement and regularization of such sacked employees who had been dismissed, removed or terminated from service on account of absence from duty, misconduct, mis-appropriation of Government money or stock, or unfitness on medical grounds, and the determination of their guilt or medical unfitness had attained finality by being unchallenged or unsuccessfully challenged, were also ultra vires the Constitution].

Per Umar Ata Bandial, J. (Majority view):

The material on record in the present case, furnished by the relevant Ministries/Divisions, establishes that these principles of merit, non-discrimination, transparency and fairness were not followed in the vast majority of the

initial appointments (from 01.11.1993 to 30.11.1996). Therefore, such defective appointments suffered from illegality and were void.

For the initial appointments of reinstated employees ('the beneficiary employees') that were illegal from the outset, it was not within the competence of Parliament to enact laws that firstly, bypassed the settled requirements enshrined in the Constitution for joining public employment and secondly, protected these unlawful appointments without curing their respective defects. Such contravention can be seen in section 4 of the Sacked Employees (Re-instatement) Act, 2010 ('the 2010 Act') where all beneficiary employees were ordered to be regularised (either on the same scale or on one-step higher scale) within a certain timeframe without complying any codal formalities and without regard to the nature of the post that they occupied prior to their dismissal, removal or termination from service.

State and public functionaries act as fiduciaries for and are responsible/accountable to the people of the country. They are duty bound to act in the furtherance of public interest. However, how the public interest was promoted by reinstating the beneficiary employees in question who had been inducted without complying with the duly prescribed procedure for appointment is neither determinable nor defensible.

In re: Suo Motu 2010 SCMR 885 ref.

The 2010 Act was enacted to achieve a specific object and purpose, namely, the reinstatement of those employees who had been initially appointed during tenure of a political party. The 2010 Act discriminates against similarly placed persons who were dismissed, removed or terminated from service in the periods prior to 01-11-1996 and subsequent to 12-10-1999. The Preamble of the 2010 Act coupled with its substantive provisions do not disclose the reason for reinstatement of only those employees who had been dismissed, removed or terminated from service during the specific period of 01-11-1996 till 12-10-1999. Clearly then the Act's classification of the time period is neither reasonable nor based on any intelligible differentia. There is also no rational nexus with the object being sought to be achieved because if the intent of Parliament was to assist people who had been dismissed, removed or terminated from service on account of political victimisation then there is no rhyme or reason as to why only the persons dismissed, removed or terminated between 01-11-1996 and 12-10-1999 were granted this relief. Surely such a classification ought to have been preceded by some study, data collection and analysis, however, the same are lacking. There must exist a plethora of people since independence of the country (till date) who have been unfairly removed from service on account of political victimisation yet no favour is extended to them by the 2010 Act.

Mobashir Hassan v. Federation of Pakistan PLD 2010

SC 265 ref.

The reinstatements under the 2010 Act were carried out without following any proper procedure and without having regard to the nature of the posts occupied by the beneficiary employees during their initial appointments. On the other hand, the regular employees were inducted into service after fulfilling all the codal formalities. Therefore, by giving leeway to the beneficiary employees and by placing them at the same (or in some cases better) footing in the organisational structure of the employers the fundamental rights of the regular employees were breached, in particular Articles 4, 9 and 18 of the Constitution. Said three constitutional provisions envisage a State in which all aspects of a citizen's life, including his/her right to enter a profession, will be regulated by law. Nevertheless, the 2010 Act by reinstating the beneficiary employees whilst ignoring the applicable laws, rules and regulations, which detailed the process to be followed in making appointments, has flouted these guarantees of the Constitution. Therefore, the 2010 Act has directly impinged upon the fundamental rights of regular employees.

Argument that the judgment under review should have read down section 4 of the 2010 Act and preserved its watered-down version along with the other provisions of the Act that were not inconsistent with fundamental rights, fails to recognise two important aspects of section 4; firstly, section 4 as it stands does not suffer from just a singular defect. Instead, it is fundamentally flawed. It not only provides one-step higher regularisation in subsection (a) [which could potentially have been read down] but it also regularises all beneficiary employees regardless of the post they were occupying before their initial termination. This defect is so central to section 4 that to read it down would essentially require the Court to rewrite it which is not permissible as such an exercise

would enter into the realm of legislation. Secondly, section 4 is the governing/primary provision of the 2010 Act. Therefore, once it is declared unconstitutional no substance is left in the 2010 Act as all other provisions are secondary to section 4 and cannot control the operation of the 2010 Act on their own. As a result, no purpose will be achieved in retaining the 2010 Act on the statute book when its effect will have been destroyed by the deletion of section

Zahid Iqbal v. Muhammad Adnan 2016 SCMR 430 ref.

Since the 2010 Act has been adjudged to be violative of the different provisions of the Constitution, specifically Articles 4, 9, 18, 25, 240 and 242, the judgment under review would have retrospective effect.

Ali Azhar Khan Baloch v. Province of Sindh 2015 SCMR 456 and Shahid Pervaiz v. Ejaz Ahmad 2017 SCMR 206 ref.

Supreme Court considered that having rendered a service of 10 years or more since their reinstatement under the 2010 Act (and Ordinances before that), the beneficiary employees, most of whom are nearing retirement and have minimal future job prospects, have dedicated a considerable period of their life to their employers and so deserve to be treated with leniency. More so, when through no fault of their own, the beneficiary employees were inducted and subsequently reinstated into the service of their employers without the fulfilment of the necessary codal formalities. Therefore, in exercise of its inherent power conferred under Order XXXIII, Rule 6 of the Supreme Court Rules, 1980 and in reliance of its power to do *ex debito justitiae*, the Supreme Court converted present review proceedings filed under Article 188 of the Constitution into proceedings under Article 184(3) read with Article 187 to grant the following relief to the beneficiary employees:

- (i) The beneficiary employees who were holding posts for which no aptitude, scholastic or skill test was required at the time of initial termination (01-11-1996 to 12-10-1999) shall be restored to the same posts they were holding when they were terminated by the judgment under review;
- (ii) All other beneficiary employees who were holding posts on their initial termination (01-11-1996 to 12-10-1999) which required the passing of an aptitude, scholastic or skill test shall be restored to the posts, on the same terms and conditions, they were occupying on the date of their initial termination. However, to remain appointed on these posts and to uphold the principles of merit, non-discrimination, transparency and fairness expected in the process of appointment to public institutions these beneficiary employees shall have to undergo the relevant test, applicable to their posts, conducted by the Federal Public Service Commission within 3 months from the date of receipt of this judgment;
- (iii) The improvement in the terms and conditions of service of all the beneficiary employees shall be granted strictly in accordance with the applicable laws, rules and regulations;
- (iv) The relief granted in sub-paragraphs (i) and (ii) above shall not be granted to those beneficiary employees whose initial termination of service (01-11-1996 to 12-10-1999) was on grounds of absence from duty, misconduct, corruption, misappropriation of money/stock or unfitness on medical grounds if such termination was not set aside finally by a court of law. [pp. 1732, 1733, 1734] U, V, W, X & Y

Sher Alam Khan v. Abdul Munim PLD 2018 SC 449; Muhammad Akram v. Registrar, Islamabad High Court PLD 2016 SC 961 and Gul Taiz Khan Marwat v. Registrar, Peshawar High Court PLD 2021 SC 391 ref.

All review petitions were dismissed and all applications/appeals were disposed accordingly. [p. 1734] Z

Per Syed Mansoor Ali Shah, J. (Minority view):

The vires of the Sacked Employees (Re-instatement) Act, 2010 ('the 2010 Act') enacted by the Parliament (Legislature) cannot be examined and declared *ultra vires*, on the touchstone of Articles 240 and 242 of the Constitution as both these Articles only command for dealing with the matters specified therein by an Act of the Parliament, and provide for nothing more. Article 240 does not provide any criterion for judging the constitutionality of an Act of the Parliament, except that the Act of Parliament must relate to the appointments to and the conditions of service of persons in the service of Pakistan concerning the Federation, not concerning any Province other than All-Pakistan Service which is a service common to the Federation and the Provinces. Likewise, the constitutional limitation on the power of the Parliament to enact a law under Article 242 is that it can enact a law for the establishment of a Public Service Commission and prescribing its functions, in relation to the affairs of the Federation, not of any Province. Said aspect of the provisions of Articles 240 and 242 of

the Constitution was not presented by the parties before the Court, and the same thus escaped notice of the Court in applying the said Articles of the Constitution to judge the constitutional vires of the 2010 Act, in the judgment under review.

Fauji Foundation v. Shamimur Rehman PLD 1983 SC 457 and LDA v. Imrana Tiwana 2015 SCMR 1739 ref. Similarly, Article 4 of the Constitution, which provides for a right to be dealt with in accordance with law, does not provide any criterion, and thus cannot be a touchstone, to test the vires of a law such as the 2010 Act. [p. 1763] W₂

Fauji Foundation v. Shamimur Rehman PLD 1983 SC 457 and LDA v. Imrana Tiwana 2015 SCMR 1739 ref. Parts from the parliamentary debates relating to the objects and reasons of the enactment of the 2010 Act, made by the parliamentarians who were member(s) of the Standing Committee that had considered and approved the Bill as well as by the other parliamentarians who had supported the same, showed that the reason for choosing the persons appointed in and dismissed from service during the specified period, for the beneficial treatment of reinstatement and regularization in service notwithstanding any other law on the subject, was that they had suffered "political victimization" in the matter of their dismissal, removal or termination from service, at the hands of the Government (Executive) during that period, and the object of the enactment of the 2010 Act was that the Parliament (Legislature) intended to provide relief to such persons. Nobody disputed before the Supreme Court, the correctness of the factual statement regarding political victimization made by the parliamentarians, nor does such statement of fact appear to be inherently improbable; it is, rather, supported by the circumstance that a large number of employees, not a few, were sacked during the specified period. Therefore, the Court is to proceed on assuming that undisputed statement of fact to be correct.

After accepting the undisputed statement of fact that the persons going to be reinstated under the 2010 Act had suffered "political victimization", in the matter of their dismissal, removal or termination from service, there remains no difficulty to hold that they formed a distinct class, and their classification was based on intelligible differentia, distinguishing them from those who had been left out, and had a rational nexus to the object sought to be achieved by the 2010 Act. Therefore, only their reinstatement and regularization under the 2010 Act as such did not offend the fundamental right to equal treatment, guaranteed by Article 25(1) of the Constitution, of other employees sacked in other durations as well as of regular employees appointed under the general laws relating to the appointments to and terms of conditions of the service concerned.

Prabodh Verma v. State of U.P. AIR 1985 SC 167 and Amarendra Kumar v. State of Orissa AIR 2014 SC 1716 ref.

The issue of seniority that affected the right to 'status' enshrined in fundamental 'right to life' of the regular employees serving in the relevant departments, had arisen only in cases of employees reinstated and regularized on "one scale higher", under sections 4(a) and 10 of the 2010 Act. Their reinstatement and regularization on "one scale higher" had made them senior to those regular employees who were senior to them even as per their date of initial appointments and were serving in the same grade and post in which they had been appointed prior to the initial appointment of the reinstated employees, because of the slow channel of promotion. Therefore, to the extent of reinstatement and regularization of some sacked employees, under Sections 4(a) and 10, on "one scale higher", such reinstatement and regularization was violative of the right to 'status' enshrined in fundamental 'right to life' of the regular employees serving in the relevant departments at the time of promulgation of the 2010 Act, and it was also violative of the fundamental 'right to dignity' guaranteed under Article 14 and fundamental 'right to equality before law' guaranteed by Article 25 of the Constitution as it gave an undue advantage to the reinstated employees to the disadvantage of the rights of the already working regular employees. The proper course, in such circumstances, was that the Court should have declared (as ultra vires) only that part of the provisions of sections 4(a) and 10 of the 2010 Act that had the said offending effect, i.e., the reinstatement and regularization on "one scale higher". And this could have easily been done by reading out (severing) the words "one scale higher to" from the provisions of section 4(f) and the words "one scale higher than" from the provisions of section 10 of the 2010 Act, and reading down those provisions to mean that the sacked employees mentioned in those Sections were to be reinstated and regularized in the same or restructured, as the case may be, scale, grade, cadre, group, post or designation from which they had been dismissed, removed

or terminated from service, for the purpose of saving the constitutional validity of those provisions and construing them as constitution compliant.

Sections 2(f)(vi), 11, 12 and 13, of the 2010 Act which deal with and provide for reinstatement and regularization of such sacked employees who had been dismissed, removed or terminated from service on account of absence from duty, misconduct, mis-appropriation of Government money or stock, or unfitness on medical grounds, and the determination of their guilt or medical unfitness had attained finality by being unchallenged or unsuccessfully challenged, had the effect of nullifying, or giving the power to the Executive to nullify, the judicial orders passed on charge of misconduct, inefficiency or unfitness that had attained finality. Such employees, even, do not fall within the class of the sacked employees who had suffered "political victimization," envisaged by the 2010 Act for a beneficial treatment. The said Sections of the 2010 are, therefore, ultra vires the Constitution.

All the employees terminated from service on the basis of the judgment under review, stand restored in the service with effect from the date they were so terminated, and shall be paid the pay of the intervening period treating the said period as an extraordinary leave with pay. The cases decided by the judgment under review, which now stands recalled, shall be deemed pending and decided on their own merits by the regular Bench(es) of the Supreme Court in accordance with the provisions of the 2010 Act, subject to the above declarations regarding vires of certain provisions of the 2010 Act.

Per Umar Ata Bandial, J (Majority view):

(f) Constitution of Pakistan---

---Art. 25---Equality of citizens---Reasonable classification---Scope---Although Article 25 of the Constitution envisages equality amongst citizens, it also allows for differential treatment of persons who are not similarly placed under a reasonable classification---However, to justify this difference in treatment the reasonable classification needs to be based on intelligible differentia that has a rational nexus with the object being sought to be achieved'---Only if this test is satisfied can the distinct treatment meted out to a class of persons be sustained under Article 25 of the Constitution.

Commissioner Inland Revenue v. Tariq Mehmood 2021 SCMR 440 ref.

(g) Interpretation of statutes---

---Reference to legislative history---Scope---Reference to legislative history is permissible only as an aid to construction of legislation which is ambiguous or obscure or the literal meaning of which leads to an absurdity i.e. from the text of a statute, the court is unable to decipher the real intent of the Legislature.

Gulshan Bibi v. Muhammad Sadiq PLD 2016 SC 769 ref.

(h) Constitution of Pakistan---

---Arts. 184 & 185--- Judgments/orders of the Supreme Court---Academic exercise---Ordinarily the Supreme Court does not enter into purely academic exercises.

Munawar Iqbal Gondal v. Nasira Iqbal 2014 SCMR 860 ref.

(i) Constitution of Pakistan---

---Arts. 184 & 185--- Judgments of the Supreme Court---Prospective/retrospective effect---Scope---Judgments of the Supreme Court operate prospectively, however, they could operate retrospectively if so declared---Consequently, there is no binding rule that all judgments issued by the Court take effect only from the date of pronouncement.

Mobashir Hassan v. Federation of Pakistan PLD 2010 SC 265 and Pakistan Medical and Dental Council v. Muhammad Fahad Malik 2018 SCMR 1956 ref.

(j) Locus poenitentiae, principle of---

---Applicability---Principle of locus poenitentiae would not be attracted in a case under which the benefit has been extended by a law which was violative of the provisions of the Constitution.

Azam Shah v. Federation of Pakistan 2022 SCMR 201 ref.

Per Syed Mansoor Ali Shah, J; dissenting with Umar Ata Bandial, J.

(k) Separation of powers, doctrine of---

---Scope of the doctrine of Separation of powers in a constitutional democracy stated.

Separation of powers is the backbone of a constitutional system. The legislature, the executive and the judiciary have no authority beyond that granted to them under the Constitution. None of them is omnipotent.

Cooper v. Canada [1996] 3 S.C.R 854, 867 ref.

Separation of powers means reciprocal checks and balances between the different branches. It does not mean walls between the branches but rather bridges which balance and check. The concept of separation of powers is not to maximize efficiency but rather to maximize freedom. The principle of separation of powers has double meaning: First, it means distinguishing among different branches of government, giving each branch a central and primary function. Second, it means that different branches have reciprocal relationship in which each checks and balances over the other branches. Thus, for example, the legislature can change the rules of the game by amending the existing law or by enacting new law, but it must do so within the framework of the Constitution. On the other hand, the judiciary is authorized to interpret the Constitution and law but it is not authorized to create, amend or rewrite the Constitution or to enact a new law. Judiciary, like the other branches of the government, is also not invincible but is to function under the supreme law of the land i.e., the Constitution.

Myers v. United States 272 US 52, 293 (1926) and Responding to Imperfection: The Theory and Practice of Constitutional Amendments (Stanford Levison ed., 1995) and Aharon Barak, The Judge in Democracy ref.

The primary and central function of the legislative branch is to create laws and the courts must give weight to the purpose of the law remembering that legislation promotes social policy and is a tool for achieving a societal goal. This subjective purpose of the statute becomes a key factor in interpreting the statute. Therefore, in the first instance, the role of the courts is to safeguard and actualize these laws in the public interest. Judges should therefore give statutes a meaning that bridges the gap between the law and the social reality. Next is the objective purpose of the statute, where it honours and protects the constitutional values, and the fundamental rights of the people. It is only when the subjective or the objective purpose of the legislature outsteps the constitutional boundary that the courts interfere and set the course right by enforcing the constitutional limits. Even in that case when the courts rule that a statute is unconstitutional and invalidates it, it does not undermine the legislature or violate the separation of powers because it is the principle of separation of powers that informs us that legislative authority does not include the authority to pass unconstitutional laws. Hence, the principle of separation of powers is the very source of judicial review.

(l) Judicial review---

---Scope---Legislation is the manifestation of the will of the people and the collective wisdom of their chosen representatives in the Parliament---Courts must therefore tread carefully to judicially review the act of the legislature---First, efforts should be made by the Court to save the constitutionality of the legislation by exhausting the interpretative tools e.g. of "reading down" or "reading out" to make the legislation constitution compliant---Only when the legislation happens to be opposed to the constitutional values and the fundamental rights and allowing such a statute to remain on the statute book would be unconstitutional, should the courts interfere---Such freedom and respect is enjoyed by the branches of the government under a prosperous and a progressive constitutional democracy.

(m) Constitution of Pakistan---

---Arts. 184(3) & 188---Constitutional jurisdiction of the Supreme Court under Article 184(3) of the Constitution---Scope---Original jurisdiction of the Supreme Court under Article 184(3) of the Constitution cannot be exercised as a parallel review jurisdiction, and a judgment or an order of the Supreme Court can never be challenged by virtue of filing independent proceedings under Article 184(3) of the Constitution---Such course is absolutely impermissible.

Shabbar Raza's case 2018 SCMR 514 ref.

(n) Supreme Court Rules, 1980---

---O. XI, R. 1, Second proviso---Semper praesumitur pro negante, rule of---Scope---When the Judges of an appellate Court are equally divided in their opinion, the judgment of the Court below is affirmed and maintained, and the decision given pro negante is authoritative and binding as any other decision of the appellate Court---However, the said rule is not applicable to the final decision of a case by the Supreme Court in view of the

second proviso to Rule 1 of Order XI of the Supreme Court Rules, 1980, which provides that "if the Judges hearing a petition or an appeal are equally divided in opinion, the petition or appeal, as the case may be, shall, in the discretion of the Chief Justice, be placed for hearing and disposal either before another Judge or before a larger Bench to be nominated by the Chief Justice." Hence, the application of the rule of pro negante decision is restricted to the division of opinion on a point of law decided in the judgment of the Supreme Court, notwithstanding of which there is a majority of opinion on the final decision of the case.

Inland Revenue v. Scottish General Electric Power Co. (1931) UKHL 15 TC 761 ref.

(o) Judgment---

---Judgment in rem---Neither necessary nor the requirement of law that Court should issue a separate notice and offer an opportunity of hearing to each and every person who is likely to be affected, and bound, by judgment in rem---Meaning and scope of a judgment in rem stated.

A judgment in rem binds the parties and the nonparties alike. A judgment in rem settles the fate of the res by determining its status and thus operates directly on the res itself; it binds all persons claiming a right or interest in or under the res, even though pronounced in their absence.

Federation v. Qamar Hussain PLD 2004 SC 77 ref.

In actions in rem it is neither practicable nor is it the requirement of law that the Court should issue a separate notice and offer an opportunity of hearing to each and every person who is likely to be affected, and bound, by the judgment. However, for complying with the constitutional command of fair trial and due process to a possible extent in such cases, the Court may order, as it is usually done by the civil courts dealing with actions in rem, for service of the public notice of the case through its publication in the press or any other mode deemed appropriate, for the knowledge of the persons likely to be affected by the judgment, who may then appear before the Court and seek permission to intervene and argue in the proceedings.

Surinder Kumar v. Gian Chand 1958 SCR 548; *SHCBA v. Federation* PLD 2009 SC 879 and *Justice Bhinder v. Federation* PLD 2010 SC 483 ref.

(p) Interpretation of statutes---

---Aid to statutory interpretation---Parliamentary debates---Scope---Parliamentary debates, especially the speech made by the mover of the Bill or by the chairman or member(s) of the Standing Committee that considered the Bill, explaining the reason for introducing the Bill can be referred to for ascertaining the mischief sought to be remedied by the legislation and the object and purpose for which the legislation was enacted.

Mubeen-Us-Salam v. Federation PLD 2006 SC 602; *Benazir Bhutto v. Federation* PLD 1988 SC 416; *Pepper v. Hart* (UKHL) 1993 SCMR 1019 and *K. P. Varghese v. ITO, Ernakulam* AIR 1981 SC 1922 ref.

(q) Constitution of Pakistan---

---Art. 25---Equality of citizens---Reasonable classification---Scope of reasonable classification stated.

Article 25(1) of the Constitution which declares, and guarantees as a fundamental right, that all citizens are equal before law and are entitled to equal protection of law, does not prohibit reasonable classification for equal treatment, that is, "equality among equals", which is based on intelligible differentia, distinguishing persons or things that are grouped together from those who are left out, and has a rational nexus to the object sought to be achieved by law. And a classification having a reasonable basis does not offend against fundamental right to equality, merely because it is not made with mathematical nicety or because in practice it results in some inequality. Further, when the classification made by a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed, and the one who assails the classification must carry the burden of showing that it does not rest upon any reasonable basis but is essentially arbitrary.

Jibendra Kishore v. East Pakistan PLD 1957 SC 9; *Fauji Foundation v. Shamimur Rehman* PLD 1983 SC 457; *I. A. Sharwani v. Government of Pakistan* 1991 SCMR 1041; *Government of Balochistan v. Azizullah Memon* PLD 1993 SC 341; *Schwartz, Constitution of the United States*, Vol. II, p. 501 and *Willis, Constitutional Law of the United States*, pp. 579-580 approvingly cited in *Fauji Foundation v. Shamimur Rehman* PLD 1983 SC 457 ref.

(r) Vires of statute---

---Courts lean in favour of upholding the constitutionality of laws and are reluctant to strike them down---
Cardinal principles of construction of statutes stated.

Two cardinal principles of construction of statutes are, (i) that there is always a presumption in favour of the constitutionality of a legislative enactment (a law); and (ii) that a law enacted by a competent legislature is to be construed in such a manner that its constitutional validity may be saved rather than destroyed. It is because of these principles that the courts lean in favour of upholding the constitutionality of laws and are reluctant to strike them down by declaring them as unconstitutional. The one who challenges the constitutionality of a law bears the burden to show that the law is violative of any of the constitutional provisions, and when two opinions as to the construction of a law are possible, the courts prefer to adopt that which upholds the constitutionality of the law, over that which does not. The courts, therefore, construe a law in such a manner that saves the law than destroys it, and declare it unconstitutional only when it clearly contravenes any constitutional provision and cannot be read as constitution compliant by applying any of the methods, techniques or tools of rule of constitution complaint construction, e.g., reading out or reading down. The primary purpose of applying these techniques, methods or tools, is to endeavor for saving the constitutional validity of the statute, to a possible extent, and the main reason for applying them in preference to declaring the law unconstitutional is that their application makes the process of judicial review of legislative actions less intrusive than invalidating the whole law, as the court should not strive officiously to kill a law to any extent greater than it is compelled to do. Declaring the law unconstitutional is thus one of the last resorts taken by the courts.

SSGCL v. Federation 2018 SCMR 802 and Dunkley v. Evans [1981] 1 W.L.R. 1522 ref.

(s) Vires of statute---

---'Reading out' (severance) and 'reading down' parts of a statute---Principles stated.

Courts apply the methods of "reading out" (severance) and "reading down", with certain conditions, for the purpose of construing the provisions of a law as constitution compliant and to save it, as much as possible, from being declared ultra vires the Constitution. The primary condition for applying these methods for a constitution compliant construction is to see whether the Legislature would have enacted the law in the form that remains or turns out to be after application of any of the said methods. Further, in case of applying the method of reading out (severance) the court is to see whether after reading out (severing) the invalid part, the remaining provisions of law would remain operative within the scope of the object of the law. Therefore, when confronting a constitutional flaw in a statute, court should try to limit the solution to the problem - severing the flawed portion while leaving the remainder intact. Because the unconstitutionality of a part of a statute does not necessarily defeat or affect the validity of its remaining provisions. If after severing the flawed part, the remaining provisions of law would remain fully operative, court must sustain those provisions unless it is evident that the Legislature would not have enacted those provisions independently of that which is invalid.

Haroon-Ur-Rashid v. LDA 2016 SCMR 931; Baz Muhammad Kakar v. Federation PLD 2012 SC 923; Province of Sindh v. M.Q.M. PLD 2014 SC 531 and Free Enterprise Fund v. Public Co. Accounting Oversight Board, (2010) 561 U.S. 477 ref.

In attendance:

Kh. Muhammad Arif, Advocate Supreme Court (in C.R.Ps. 292, 388 of 2021), Muhammad Yousaf Khan (in C.R.P. 293 of 2021), Muhammad Tariq Asad, Advocate Supreme Court (in C.R.P. 294 and C.M.A. 12033 of 2021), Khalid Javed Khan, Attorney General for Pakistan, Ayaz Shoukat, D.A.G. along with Ms. Maryam Rasheed and Usman Paracha, Advocates (in C.R.P. 295 of 2021), Muhammad Nawaz Abbasi (in person) (in C.R.Ps. 296 and 446 of 2021), S.A. Mehmood Khan Sadozai, Advocate Supreme Court (in C.R.Ps. 297-300 and 416 of 2021), Muhammad Ilyas Siddiqui, Advocate Supreme Court (in C.R.P. 301 of 2021), Hazrat Said (in C.R.P. 302 of 2021), S. Iftikhar Hussain Gillani, Senior Advocate Supreme Court (in C.R.Ps. 351 and 392 of 2021), Ms. Shireen Imran, Advocate Supreme Court (in C.R.Ps. 252, 393, 394, 448 and C.M.A. 12104 of 2021), M. Safdar Shaheen Pirzada, Advocate Supreme Court (in C.R.Ps. 253, 372 and 375 of 2021), Nisar A. Mujahid, Advocate Supreme Court (in C.R.P. 354 of 2021), Raja Abdul Ghafoor, Advocate-on-Record/Advocate Supreme Court (in C.R.Ps. 355, 374, C.M.As. 11982 and 12029 of 2021), Ch. Afrasiab Khan, Advocate Supreme Court (in C.R.P. 356 of 2021), Mian Raza Rabbani, Senior Advocate Supreme Court, Saalim

Salam Ansari, Advocate Supreme Court assisted by Zeeshan Abdullan (in C.R.P. 357, C.M.As. 175, 12172 and 12173 of 2021), Shah Khawar, Advocate Supreme Court, Hassan Rashid Qamar, Advocate Supreme Court (in C.R.Ps. 355, 378-381, 442, 455, 456, C.M.As. 12028 and 12162 of 2021), Zubair Hussain, Advocate Supreme Court (in C.R.P. 359 and C.M.A. 11983 of 2021), Syed M. Iqbal Hashmi, Advocate Supreme Court (in C.R.Ps. 360-363 of 2021), Mazullah Khan (in-person) (in C.R.P. 364 of 2021), Zulfikar Khalid Maluka, Advocate Supreme Court (in C.R.Ps. 365 and 428 of 2021), Ghulam Sajjad Gopang, Advocate Supreme Court (in C.R.P. 366 of 2021), Omer Farouk Adam, Advocate Supreme Court (in C.R.P. 367 of 2021), Tariq Mehmood Mughal, Advocate Supreme Court (in C.R.P. 368 of 2021), Syed Rifaqat Hussain Shah, Advocate-on-Record/Advocate Supreme Court (in C.R.Ps. 369, 385, 420, C.M.As. 168, 12032 and 12035 of 2021), Muhammad Sharif Janjua, Advocate-on-Record/Advocate Supreme Court (in C.R.Ps. 370, 386, 399, 400 and 423 of 2021), Saleem Ullah Ranazai, Advocate Supreme Court (in C.R.P. 371 of 2021), Kamran Murtaza, Senior Advocate Supreme Court (in C.R.Ps. 373 and 377 of 2021), Waseem Sajjad, Senior Advocate Supreme Court (in C.R.Ps. 376 and 383 of 2021), Dr. Saeed Ahmed (in person) (in C.R.P. 382 of 2021), Aftab Alam Yasir, Advocate Supreme Court (in C.R.P. 384 and C.M.A. 12020 of 2021), Abdul Razzaq Shar, Advocate Supreme Court (in C.R.Ps. 387, 454 and C.M.A. 12024 of 2021), Jam Khursheed Ahmed, Advocate Supreme Court (in C.R.P. 389 of 2021), Muhammad Sajid Khan, Advocate Supreme Court (in C.R.P. 390, C.M.As. 12031 and 12161 of 2021), Hamid Khan, Senior Advocate Supreme Court, M. Waqar Rana, Advocate Supreme Court (in C.R.P. 391 of 2021), Liauqat Ali Karim, Advocate Supreme Court (in C.R.P. 395 of 2021), Abid A. Zuberi, Advocate Supreme Court (in C.R.P. 396 of 2021), Azhar Navid Shah, Advocate Supreme Court (in C.R.P. 397 of 2021), Malik Faiz Rasool Rajwana, Advocate Supreme Court (in C.R.P. 398 of 2021), Muhammad Umair Baloch, Advocate Supreme Court, Shoaib Shaheen, Advocate Supreme Court (in C.R.Ps. 401-415, 418, 419 and C.M.A. 12372 of 2021), Muhammad Haseeb Jamali, Advocate Supreme Court (in C.R.P. 417 of 2021), Malik Mansoor Hussain, Advocate Supreme Court (in C.R.P. 421 of 2021), Ch. Aitzaz Ahsan, Advocate Supreme Court, Gohar Ali Khan, Advocate Supreme Court (in C.R.P. 422 of 2021), Shakirullah (in-person) (in C.R.P. 424 of 2021), Muhammad Nawaz Rai, Advocate Supreme Court (in C.R.P. 425 of 2021), Muddasar Khalid Abbasi, Advocate Supreme Court (in C.R.P. 426 of 2021), Mrs. Kausar Iqbal Bhatti, Advocate Supreme Court (in C.R.P. 427 of 2021), Khalid Javed (in-person) (in C.R.P. 429 of 2021), Abdul Latif Afridi, Senior Advocate Supreme Court (in C.R.Ps. 430-431 of 2021), S. Asghar Hussain Sabzwari, Senior Advocate Supreme Court, S. Qamar Hussain Shah Sabzwari, Advocate Supreme Court, S. Nayyar Hussain Bukhari, Advocate Supreme Court (in C.R.P. 432 of 2021), Sh. Mehmood Ahmed, Advocate-on-Record (in C.M.A. 11812 of 2021), Sikandar Javed, Advocate Supreme Court (in C.M.As. 11813 and 11993 of 2021), Ms. Attiya Khanam (in-person) (in C.M.A. 11814 of 2021), Fazal e Rabbi (in-person) (in C.M.A. 11837 of 2021), Malik Muhammad Riaz, (in-person) (in C.M.A. 11862 of 2021), Arshad Ali Makhdoom, Advocate Supreme Court (in C.M.A. 11863 of 2021), Muhammad Ibrahim (in-person) (in C.M.A. 11864 of 2021), Faisal Siddiqui, Advocate Supreme Court (in C.M.A. 11902 of 2021), Anees M. Shahzad, Advocate-on-Record/Advocate Supreme Court (in C.M.A. 11903 of 2021), Mir Aurangzeb, Advocate-on-Record/Advocate Supreme Court (in C.M.A. 11987 of 2021), Jawaid Masood Tahir Bhatti, Advocate Supreme Court (in C.M.A. 11679 and C.M.A. 158 of 2021), Mir Shahzad Khan Talpur (in-person) (in C.M.A. 12017 of 2021), Malik Muhammad Munsif Awan, Advocate Supreme Court (in C.M.A. 12019 of 2021), Muhammad Afzal Khan (in C.M.A. 12025 of 2021), Tassawar Abbas Tanvir (in-person) (in C.R.P. 443 of 2021), Dr. Umar Farooq Siddiqui (in-person) (in C.R.P. 444 of 2021), Sardar M. Latif Khosa, Senior Advocate Supreme Court, Sardar M. Shahbaz Khosa, Advocate Supreme Court (in C.R.Ps. 445 and 447 of 2021), Pervez Rauf, Advocate Supreme Court (in C.R.Ps. 449 and 452 of 2021), Mir Afzal Malik, Advocate Supreme Court (in C.R.P. 450 of 2021), Malik Saleem Iqbal Awan, Advocate Supreme Court (in C.R.P. 453 of 2021), Raja Farakh Arif Bhatti, Advocate Supreme Court (in C.M.A. 12075 of 2021), Rai M. Nawaz Kharal, Advocate Supreme Court (in C.M.A. 12103 of 2021), Ch. M. Younas, Advocate Supreme Court (in C.M.A. 12403 of 2021), Shahid Anwar Bajwa, Advocate Supreme Court (in C.M.A. 12373 of 2021) and Niazullah Niazi, AG ICT.

Barrister Umer Aslam for SSGPL.

Syed Waqar Naqvi, Advocate Supreme Court for State Life.

Aftab Alam Yasir, Advocate Supreme Court for OPF.

Asad Jan, Advocate Supreme Court for SNGPL.

Dates of hearing: 1st, 6th to 9th, 13th to 17th December, 2021.

JUDGMENT

UMAR ATA BANDIAL, J.---By this judgment we are deciding 108 Review Petitions, 35 Civil Misc. Applications and 3 Civil Misc. Appeals filed against the judgment of this Court reported as Muhammad Afzal v. Secretary Establishment Division (2021 SCMR 1569) dated 17.08.2021 ("judgment under review").

FACTUAL BACKGROUND

2. In order to understand the objections raised, it is helpful to briefly traverse the history of the matter at hand. The genesis of these proceedings can be found in the critical period of 01.11.1993 to 30.11.1996 (the significance of this time frame will be explained shortly) when numerous appointments, running into the thousands, were made to various corporation and government services and autonomous/semi-autonomous bodies ("employers") by the political government of the time i.e., the Pakistan Peoples Party ("PPP"). However, over the course of the next 2-3 years the appointments so made were reversed by the different political governments who came into power. Eventually, when PPP won the General Elections in 2008, the persons who had been removed were reinstated en masse with the aid of Ordinances, the first of which was promulgated on 14.02.2009. It was termed the 'Sacked Employees (Reinstatement) Ordinance, 2009' ("Ordinance I"). The purpose of this Ordinance was laid down in its preamble, which reads as below:

"Whereas it is expedient for the purpose of providing relief to persons who were appointed in a corporation service or autonomous or semi-autonomous bodies or in Government service during the period from the 1st day of November, 1993 to the 30th day of November, 1996 and were dismissed, removed or terminated from service during the period from the 1st day of November, 1996, to the 31st day of December, 1998;"

(emphasis supplied)

3. It may be observed from the above-cited passage that the Ordinance was indeed enacted to grant the relief, inter alia, of reinstatement to a group of people ("beneficiary employees") who were appointed in the service of employers between 01.11.1993 and 30.11.1996 but were removed during the period 01.11.1996 to 31.12.1998. However, no grounds were specified in the Ordinance to justify the relief being granted to only this specific class of persons. Ordinance I was followed by a chain of Ordinances promulgated on 11.06.2009 ("Ordinance II"), 30.10.2009 ("Ordinance III") and 05.02.2010 ("Ordinance IV"), respectively. All three subsequent Ordinances were almost verbatim replicas of their predecessor Ordinance with some very minor changes that are not relevant for present purposes.

4. Ultimately PPP, perhaps to achieve finality in the matter and to provide permanent relief to the beneficiary employees, introduced the Sacked Employees Reinstatement Bill, 2010. The same was passed by Parliament and received the assent of the President on 06.12.2010 bearing the title of 'Sacked Employees (Re-instatement) Act, 2010 ("Act")'. The preamble to this Act reads:

"Whereas it is expedient for the purpose of providing relief to persons who were appointed in a corporation service or autonomous or semi-autonomous bodies or in Government service during the period from the 1st day of November, 1993 to the 30th day of November, 1996 (both days inclusive) and were dismissed, removed or terminated from service during the period from the 1st day of November, 1996 to the 12th day of October 1999 (both days inclusive);"

(emphasis supplied)

It becomes apparent from the preamble quoted hereinabove that whilst the object of the Act remained consistent with that of the Ordinances, the class of persons who were entitled to its benefit was enlarged. This was done by moving the last date of dismissal, removal or termination from service from 31.12.1998 to 12.10.1999. Again the Act failed to indicate the rationale for favouring only such affected persons with this extraordinary relief. Allegedly, thousands of beneficiary employees (the exact figure is disputed) were reinstated pursuant to the Ordinances and the Act. This act of reinstatement triggered a two-fold series of litigation:

i. By the regular employees of the employers whose seniority had been affected due to the reinstatement of the beneficiary employees; and

ii. By the employees who were eligible to receive the benefit of the Act but were not granted the same by the employers.

5. These cases, decided primarily over a period of 2-4 years by the various High Courts, eventually arrived in the Supreme Court. They pertained to the employees of 10 employers, namely:

- i. Intelligence Bureau ("IB");
- ii. Commissioner Afghan Refugees, KPK ("CAR");
- iii. National Highway Authority ("NHA");
- iv. Pakistan Telecommunication Company Ltd. ("PTCL");
- v. Overseas Pakistani Foundation ("OPF");
- vi. State Life Insurance Corporation ("SLIC");
- vii. Civil Aviation Authority ("CAA");
- viii. Water and Power Development Authority ("WAPDA");
- ix. Sui Southern Gas Company Ltd ("SSGC"); and
- x. Trading Corporation of Pakistan ("TCP").

6. After hearing the parties, the judgment under review held that the Act had violated Articles 4, 9 and 25 of the Constitution by granting backdated seniority to the beneficiary employees; and it had contravened Articles 240 and 242 of the Constitution by overlooking the relevant framework established by the aforesaid provisions for regulating appointments to the civil service/service of Pakistan. Consequently, the following pronouncements were made in respect of the Act and the benefits extended under it to the beneficiary employees:

"59. Therefore, in light of the discussion above, the Act of 2010 is hereby declared to be ultra vires of the Constitution. The effect of such a declaration is that any/all the benefits accrued to the beneficiaries are to be ceased with immediate effect.

60. This Court, in light of Shahid Pervaiz (supra), is empowered/mandated to examine the benefits accruing to each recipient and undo the same if it is not a past and closed transaction. Therefore, the cases of employees who have retired and/or passed away are past and closed transactions as we do not find it appropriate to interfere in their cases as it will be an exercise in futility.

61. Whereas, the beneficiaries of the Act of 2010, who are still in service, will go back to their previous positions, i.e. to the date when the operation of the Act of 2010 has taken effect. However, it would be inequitable to reverse any monetary benefits received by them under the Act of 2010 for the period they have served and those shall remain intact as they were granted against service. However, the lump sum received by such 'sacked employees' upon reinstatement shall be reversed."

(emphasis supplied)

7. As a result of this decision, thousands of beneficiary employees who had rendered service of 10 years or more after their reinstatement under the Ordinances or Act were removed by their respective employers. Feeling aggrieved by this decision, many beneficiary employees and the Federation filed review petitions against the judgment under review.

ARGUMENTS OF COUNSEL

8. Mainly the contentions of learned counsel representing the beneficiary employees and the learned Attorney General can be summarised as follows:

- i. No notice under Order XXVII-A of C.P.C. was issued to the Attorney General before the judgment under review was released;
- ii. The non-obstante clause contained in section 4 of the Act did not have any bearing on the vires of the Act as a whole;
- iii. The reinstatement of the beneficiary employees has not infringed the fundamental rights of any regular employee;
- iv. The application of Articles 240 and 242 of the Constitution to the facts of the present case was misconceived as the beneficiary employees were not civil servants;

- v. The beneficiary employees granted relief under the Act constituted a distinct class based on reasonable classification;
 - vi. Some of the beneficiary employees were dismissed, removed or terminated by the caretaker government which was not legally permissible;
 - vii. Instead of declaring the Act void as whole, the judgment under review should have read down its unconstitutional provisions, if any; and
 - viii. Even if the Act was ultra vires the Constitution, such declaration should have been prospective in effect.
9. After hearing the petitions, applications and appeals over the course of 10 days, the Court by a majority of 4-1 dismissed the review petitions vide short order dated 17.12.2021:

"O R D E R

For reasons to be recorded later, these review petitions are dismissed. The impugned legislation, namely, the Sacked Employees (Re-instatement) Act, 2010 ("Act") is held to be violative of, inter alia, Articles 25, 18, 9 and 4 of the Constitution of Islamic Republic of Pakistan, 1973 ("Constitution") and therefore void under the provisions of Article 8 of the Constitution.

2. However, in exercise of the Court's jurisdiction under Article 184(3) of the Constitution read with Article 187, we have taken into consideration the services rendered by the re-instated employees of the "employers" [as defined in section 2(d) of the Act] and hereby order that:

- i. Employees who were holding posts that on the date of their initial termination of service (from 01.11.1996 to 12.10.1999) did not require any aptitude or scholastic or skill test, for appointment thereon, shall be restored from the date of the judgment under review to the posts they were holding on the same terms and conditions of service applicable on the date of their termination pursuant to the judgment under review.
- ii. Such other employees who were holding posts that on the date of their initial termination of service (from 01.11.1996 to 12.10.1999) required the passing of any aptitude or scholastic or skill test, for appointment thereon shall from the date of the judgment under review be restored to their said posts on the same terms and conditions of service applicable on the date of their initial termination.
- iii. Any improvement in the terms and conditions of service of all the restored employees shall be granted strictly in accordance with the laws and rules applicable to their service or employment and in the absence thereof by regulations laid down for this purpose by their respective employers.
- iv. The relief granted in sub-paragraphs (i) and (ii) above shall not be granted to employees whose initial termination of service (from 01.11.1996 to 12.10.1999) was on grounds of absence from duty, misconduct, corruption, misappropriation of money/ stock or unfitness on medical grounds if such termination was not set aside finally by a Court of law.

Syed Mansoor Ali Shah, J. Parliamentary sovereignty or legislative supremacy is the cornerstone of a strong democracy. We must, therefore, recognize the central role of the legislature. Undermining the legislature undermines democracy. Both the legislature and the judiciary must play their role in a spirit of profound respect for the other and within the limits set out in the Constitution. Rule of law is not merely public order, it is social justice based on public order. The law exists to ensure proper social life by balancing the needs of the society and the individual. The courts must protect this rich concept of rule of law. Under Article 8 of the Constitution, any law enacted by the legislature is void only to the extent it takes away or abridges fundamental rights of the people.

2. For the reasons to be recorded later and subject to ancillary and incidental declarations and orders (if any) to be made in the detailed judgment, I allow these review petitions in the following terms:

- i. The judgment under review is recalled;
- ii. The following Sections and part of Sections of the Sacked Employees Reinstatement Act 2010 are declared ultra vires the Constitution:
 - (a) Sections 4(a) and 10 to the extent of reinstatement and regularization on "one scale higher", which give an undue advantage to the reinstated employees to the detriment of the rights of the already working regular employees and thus violate their fundamental rights. The provisions of the said Sections, except the words "one scale higher", shall however remain operative with effect from the date of enactment of the Act, and be read to

mean the reinstatement and regularization in the same or restructured, as the case may be, scale, grade, cadre, group, post or designation.

(b) Sections 2(f)(vi), 11, 12 and 13, which deal with and provide for reinstatement and regularization of such sacked employees who had been dismissed, removed or terminated from service on account of absence from duty, misconduct, mis-appropriation of Government money or stock, or unfitness on medical grounds, and the determination of their guilt or medical unfitness attained finality by being unchallenged or unsuccessfully challenged. Such employees fall outside the class of sacked employees who suffered "political victimization," envisaged by the Act for a beneficial treatment, and they by themselves do not constitute a distinct class having an intelligible differentia, which bears a reasonable relation to the object and purpose of the Act.

iii. All the employees terminated from service on the basis of the judgment under review, stand restored in the service with effect from the date they were so terminated, and shall be paid the pay of the intervening period treating the said period as an extraordinary leave with pay; and

iv. The cases decided by the judgment under review, which now stands recalled, shall be deemed pending and decided on their own merits by the regular Bench(es) of this Court in accordance with the provisions of the Sacked Employees Reinstatement Act, 2010, subject to the declaration made at No. ii above.

ORDER OF THE BENCH

For reasons to be recorded later, by a majority of four to one (Justice Syed Mansoor Ali Shah dissenting), these review petitions are dismissed."

SCOPE OF REVIEW

10. Before setting out our detailed reasons for upholding the judgment under review dated 17.08.2021, we consider it appropriate to briefly specify the scope of review jurisdiction that has been conferred on this Court in terms of Article 188 of the Constitution. A succinct yet comprehensive explanation of this power can be found in the case of *Mukhtar Mai v. Abdul Khaliq* (2019 SCMR 1302):

"5. ... A review... will [not] be warranted merely because the conclusion drawn is wrong or erroneous but is limited to eventualities where something obvious has been overlooked or where there is a glaring omission or patent mistake of fact or law, which is self-evident, manifest and floating on the surface, materially affecting the outcome of the adjudicatory process..."

(emphasis supplied)

What becomes clear from the above-mentioned passage is that the review jurisdiction of the Court operates in a limited area. A review does not succeed merely because a material error has crept into the disputed judgment. Instead, a review is only allowed when the material error alters the outcome of the case thereby rendering the disputed judgment bad law. Therefore, it is against this test that the decision arrived at in the judgment under review shall now be examined.

OBJECTIONS TO THE JUDGMENT UNDER REVIEW

A. Notice to Attorney General under Order XXVII-A, C.P.C.

11. One of the main objections raised by learned counsel against the judgment under review was the failure of the Court to issue a notice to the Attorney General even though the matter at hand involved a 'substantial question as to the interpretation of constitutional law.' Reliance was placed on two judgments of this Court reported as *Federation of Pakistan v. Aftab Ahmad Khan Sherpao* (PLD 1992 SC 723) and *Federal Public Service Commission v. Muhammad Afaq* (PLD 2002 SC 167).

12. In our view, there may have been weight in learned counsel' arguments if no notice had actually been served on the learned Attorney General. However, the record suggests otherwise. In the leave granting order dated 18.05.2012, passed in the main Civil Appeal No.491 of 2012 titled *Muhammad Afzal v. Secretary Establishment Division*, notice was specifically issued to the learned Attorney General (pg.61).

Therefore, when compliance was made with Order XXVII-A of the C.P.C., no ground for review is made out in this regard.

B. Articles 240 and 242 of the Constitution

13. The next argument of learned counsel was that the judgment under review had wrongly held Articles 240 and 242 of the Constitution to be applicable to the reinstatement process of the beneficiary employees under the Act when none of them were in fact civil servants.

14. To better understand the proposition put forward by learned counsel, Articles 240 and 242 are being produced below:

"240. Appointments to service of Pakistan and conditions of service. Subject to the Constitution, the appointments to and the conditions of service of persons in the service of Pakistan shall be determined-

(a) in the case of the services of the Federation, posts in connection with the affairs of the Federation and All-Pakistan Services, by or under Act of [Majlis-e -Shoora (Parliament)];

...

242. Public Service Commission. (1) [Majlis-e-Shoora (Parliament)] in relation to the affairs of the Federation, and the Provincial Assembly of a Province in relation to affairs of a Province may, by law provide for the establishment and constitution of a Public Service Commission."

It may be observed from the text of Articles 240 and 242 that the two govern/regulate appointments to the service of Pakistan and not the civil service as argued by learned counsel. The term 'civil service' has been defined in the Civil Servants Act, 1973:

"2. Definitions.---(1) In this act, unless there is anything repugnant in the subject or context,--

...

(b) "civil servant" means a person who is a member of an All-Pakistan Service or of a civil service of the Federation, or who holds a civil post in connection with the affairs of the Federation, including any such post connected with defence,..."

(emphasis supplied)

On the other hand, the phrase 'service of Pakistan' has been explained in Article 260 of the Constitution as follows:

"260. Definitions (1) In the Constitution, unless the context otherwise requires, the following expressions have the meaning hereby respectively assigned to them, that is to say,-

...

"service of Pakistan" means any service, post or office in connection with the affairs of the Federation or of a Province, and includes an All-Pakistan Service, service in the Armed Forces and any other service declared to be a service of Pakistan by or under Act of [Majlis-e-Shoora (Parliament)] or of a Provincial Assembly..."

(emphasis supplied)

15. It may be observed from the meanings assigned to the two terms that they are not synonymous. In fact, the phrase 'service of Pakistan' appears to be of wider import, a fact which was confirmed by the Court in Registrar, Supreme Court of Pakistan v. Wali Muhammad (1997 SCMR 141):

"...The expression 'service of Pakistan' used in Article 260 of the Constitution has a much wider connotation than the term 'Civil Servant' employed in the Civil Servants Act. While a 'Civil Servant' is included in the expression 'service of Pakistan', the vice versa is not true. 'Civil Servant' as defined in the Civil Servants Act, 1973 is just a category of service of Pakistan mentioned in Article 260 of the Constitution..."

(emphasis supplied)

This dictum was later cited with approval by the Court in the case of Muhammad Mubeen-us-Salam v. Federation of Pakistan (PLD 2006 SC 602) at para 35. These definitions and declarations of the Court show that although the terms 'civil service' and 'service of Pakistan' are not identical they do overlap in that the former is a sub-category of the latter. Consequently, the argument of learned counsel that Articles 240 and 242 do not apply because the beneficiary employees helped by the Act are not civil servants is a tenuous one. It may very well be possible that these employees fall within the category of service of Pakistan.

16. The test whether a person is in the service of Pakistan is whether he is performing functions in connection with the affairs of the Federation. In the judgment reported as Salahuddin v. Frontier Sugar Mills and Distillery Ltd. (PLD 1975 SC 244) the Court elaborated this function test as follows:

"Now, what is meant by the phrase "performing functions in connection with the affairs of the Federation or a Province." It is clear that the reference is to governmental or state functions, involving, in one form or another, an element of exercise of public power. The functions may be the traditional police functions of the State, involving the maintenance of law and order and other regulatory activities; or they may comprise functions pertaining to economic development, social welfare, education, public utility services and other State enterprises of an industrial or commercial nature. Ordinarily, these functions would be performed by persons or agencies directly appointed, controlled and financed by the State, i.e. by the Federal Government or a Provincial Government. However, in recent years, there has been manifest a growing tendency on the part of Governments to create statutory corporations for undertaking many such functions, particularly in the industrial and commercial spheres, in the belief that free from the inhibiting effect of red-tapism, these semi-autonomous bodies may prove more effective, flexible and also profitable. Inevitably, Government retains effective control over their functioning by appointing the heads and other senior officers of these corporations, by regulating their composition and procedures by appropriate statutes, and by finding funds for financing their activities.

...The primary test must always be whether the functions entrusted to the organization or person concerned are indeed functions of the State involving same exercise of sovereign or public power; whether the control of the organization vests in a substantial manner in the hands of Government; and whether the bulk of the funds is provided by the State. If these conditions are fulfilled, then the person, including a body politic or body corporate, may indeed be regarded as a person performing functions in connection with the affairs of the Federation or a Province; otherwise not."

(emphasis supplied)

Therefore, in essence for an entity (where a person is employed) to qualify as being in the service of Pakistan, it must fulfill three criteria:

- i. It must exercise public or sovereign power in some form;
- ii. The government must retain effective/ substantial control over its functioning; and
- iii. Its activities must be mainly financed by the government.

The application of this test was duly explained in Aitchison College v. Muhammad Zubair (PLD 2002 SC 326): "Applying the above test (laid down in Frontier Sugar Mills) on the facts of instant cases, we feel no hesitation in drawing

inference that the Board of Governors, Aitchison College, Lahore headed by the Governor of the Province as its President along with other officers i.e. Secretaries Education, Finance and General Officer Commanding as well as unofficial Members are involved in providing education which is one of the responsibility of the State and by taking over its management and control the Board, exercises sovereign powers as well as public powers being a statutory functionary of Government... and even if for sake of arguments if it is presumed that no financial aid is being provided to the College from the Provincial Public exchequer, even then, the College remains in dominating control of the Provincial Government through Board of Governors. Therefore, the above test stands fully satisfied and we are persuaded to hold that organization of the Aitchison College, Lahore falls within the definition of a person."

(emphasis supplied)

17. We have already noted in para 5 above that the present matter pertains (primarily) to 10 employers, namely: IB; CAR; NHA; PTCL; OPF; SLIC; CAA; WAPDA; SSGC and TCP. Except for IB, which is a civilian intelligence agency, all other 9 employers are attached departments/ corporations of Ministries/ Divisions:

Sr No.	Employers	Ministry/ Division	Functions
1	CAR	Ministry of States and Frontier Regions	Facilitation of Afghan Refugees crossing the border into Pakistan.
2	NHA	Ministry of Communications	Planning, development, operation, repair and

			maintenance of National Highways and Strategic Roads.
3	PTCL	Ministry of Information Technology and Tele-communication	Provision of domestic and international tele-communication and related services.
4	OPF	Ministry of Overseas Pakistani and Human Resource Development	Welfare of overseas Pakistanis and their families.
5	SLIC	Ministry of Commerce	Life Insurance Business.
6	CAA	Cabinet Secretariat Aviation Division	Regulation and control of civil aviation activities within Pakistan.
7	WAPDA	Ministry of Water Resources	Development of water and hydropower resources in an efficient manner.
8	SSGC	Ministry of Energy	Transmission and distribution of natural gas.
9	TCP	Ministry of Commerce	Public sector trade house i.e., export of agricultural and consumer goods and import of essential commodities.

18. On an examination of the data listed above, it becomes clear that the vast majority of the employers involved in the litigation before us are performing functions which fall within the exclusive domain of the State. Equally, their affairs are also substantially controlled by the Federal Government:

Sr. No.	Employers	Administrative Control
1	CAR	All Chief Commissionerates and Commissioners work under the Ministry of States and Frontier Regions (http://kpkcar.org/about/introduction).
2	NHA	6 of the 7 members of the National Highway Council are either representatives of the Federal Government or are nominated by the President [Section 5(1) of the National Highway Authority Act, 1991].
3	PTCL	The Federal Government owns majority of the shares of PTCL (SRO 453(I)/2006 dated 09.05.2006).
4	OPF	Board of Governors is comprised of the relevant Minister and such other members as the Government nominates [Rule 2(gg) of the Emigration Rules, 1979]. All operations of OPF are managed by the Board of Governors taking into account the policy directions issued by the Government (https://www.opf.org.pk/about/).
5	SLIC	Directors are appointed by the Federal Government and Chairman of SLIC is also nominated by the Federal Government from amongst the Directors [Article 12(1) of Life Insurance (Nationalisation) Order, 1972].
6	CAA	5 of the 6 members of the Board are either representatives of the Federal Government or are nominated by it [Sections 4(2)

		and 14(1) of the Pakistan Civil Aviation Authority Ordinance, 2021 ("2021 Ordinance"). Additionally, the directives issued by the Federal Government on matters of policy are binding on CAA [Section 28(1) of the 2021 Ordinance].
7	WAPDA	The appointment and removal of the Chairman and members of WAPDA are under the control of the Government [Sections 4(1) and 6 of Pakistan Water and Power Development Authority Act, 1958].
8	SSGC	Government of Pakistan directly and indirectly owns majority of the shareholding of SSGC (https://www.ssgc.com.pk/web/?page_id=68).
9	TCP	Directors of TCP are appointed by, and hold office during, the pleasure of the Federal Government (Article 92 of Memorandum and Articles of Association of TCP). Shares of TCP are owned by the Ministry of Commerce (https://tcp.gov.pk/page-page-aboutus).

19. In view of the above information, it is clear that nearly all of the employers before us are involved in the service of Pakistan (except employees of IB who are civil servants) and so there employees are squarely covered by the provisions of Articles 240 and 242 of the Constitution.

20. Learned counsel then argued that Article 240 merely specifies that appointments to the service of Pakistan must be governed by Federal legislation. It does not lay down any specific conditions for compliance by the appointing authorities during the appointment process. We consider that the said argument is best addressed by the judgment of this Court in *Mubashir Raza Jaffri v. Employees Old-Age Benefits Institutions* (2014 SCMR 949):

"22. In the 1st case of *Muhammad Yasin* [PLD 2012 SC 132] (*supra*) the appointment of Chairman Oil and Gas Regulatory Authority (OGRA) was declared illegal. In the 2nd case of *Muhammad Ashraf Tiwana* [2013 SCMR 1159] (*supra*) the appointment of the Chairman Securities and Exchange Commission of Pakistan (SECP) was held to be in contravention to statutory requirements. Both these cases reiterated the principle that appointments made in a statutory body or Corporation under the control of Provincial or Federal Government in an arbitrary and capricious manner cannot be allowed to hold the field. In the 3rd case of *Tariq Aziz-ud-Din* [2010 SCMR 1301] (*supra*) this Court underscored the integral link between good governance and a strong and honest bureaucracy. It was stated that this could only come about if appointments made were based on a clear merit criterion, in accordance with the relevant laws and rules as opposed to favouritism and nepotism... All the cases discussed above reveal that the jurisdiction of this Court has been clear and consistent with regard to the manner in which appointments to public offices are to be made strictly in accordance with applicable rules and regulations, without any discrimination and in a transparent manner. Thus, it is essential that all appointments to public institutions must be based on a process that is palpably and tangibly fair and within the parameters of its applicable rules, regulations and bye-laws..."

(emphasis supplied)

21. It may be noticed from the dictum cited that Article 240 is simply the bedrock on which appointments to the service of Pakistan are to be made. It is then the responsibility of the appointing authorities to ensure that appointments are made strictly in accordance with the relevant laws (including the applicable rules and regulations) that incorporate the principles of merit (selection through a competitive process), non-discrimination, transparency and fairness. Whilst the cases just cited were primarily concerned with appointments to the senior most posts in an organisation, in our considered view the same principles apply to appointments on any post in public service since an organisation can only best serve the people of Pakistan when all its employees are qualified individuals who are selected through a fair and transparent process. In the

absence of dedicated supporting staff, no senior officer sitting at the helm of affairs can succeed in guiding the nation towards prosperity. However, it is significant that these cherished principles are not merely fruit of judge made law but they also emanate from the fundamental rights enshrined in the Constitution, especially Article 18 (freedom of trade, business or profession) wherefor they occupy an immutable character. This is confirmed by the Court in *Mushtaq Ahmad Mohal v. Honourable Lahore High Court* (1997 SCMR 1043):

"16. ...It may be observed that even otherwise, the Constitutional requirement, inter alia, enshrined in Article 18 of the Constitution... includes the right of a citizen to compete and participate for appointment to a post in any Federal or a Provincial Government department or an attached department or autonomous bodies/corporations etc. on the basis of open competition, which right he cannot exercise unless the process of appointment is transparent, fair, just and free from any complaint as to its transparency and fairness..."

(emphasis supplied)

The above enunciation of law reiterates principles laid down by the Court in *Munawar Khan v. Niaz Muhammad* (1993 SCMR 1287) at para 6 and *Abdul Jabbar Memon: In re* (1996 SCMR 1349). However, the material on record in the present case, furnished by the relevant Ministries/ Divisions, establishes that these principles of merit, non-discrimination, transparency and fairness were not followed in the vast majority of the initial appointments (from 01.11.1993 to 30.11.1996). Therefore, such defective appointments suffered from illegality and were void.

Sr. No.	Employer	Violations
1	IB	Appointed without advertisement and test and/or interview. FST and Hon'ble Supreme Court dismissed their appeals/petitions before their reinstatement under the Act.
2	NHA	Appointed without advertisement and competitive process.
3	OPF	Some employees were appointed on contract without observing codal formalities. Others were terminated on competition of respective projects. 01 was terminated after disciplinary proceedings.
4	SLIC	Appointed without following codal formalities.
5	CAA	Appointed without advertisement and rules.
6	WAPDA	Employees were terminated as they were irregularly appointed.
7	SSGC	Employees were hired on special projects on temporary assignments and were declared redundant after competition of projects.
8	TCP	Employees were terminated on winding up of their organizations (which subsequently merged with TCP).

22. For the initial appointments of beneficiary employees that were illegal from the outset, it was not within the competence of Parliament to enact laws that firstly, bypassed the settled requirements enshrined in the Constitution for joining public employment and secondly, protected these unlawful appointments without curing their respective defects. Such contravention can be seen in section 4 of the Act where all beneficiary employees were ordered to be regularised (either on the same scale or on one-step higher scale) within a certain timeframe without complying any codal formalities and without regard to the nature of the post that they occupied prior to their dismissal, removal or termination from service. A few examples of the types of employees who were required to be regularised under the Act are listed below for reference:

- i. Employees appointed on permanent, temporary, regular or ad hoc basis or otherwise against a regular or temporary post [section 4(a)];
- ii. Employees appointed on contract basis against a regular or temporary post [section 4(b)]; and
- iii. Employees appointed as any type of trainee [section 4(d)].

23. It is an established principle of law that State and public functionaries act as fiduciaries for and are responsible/accountable to the people of Pakistan. They are duty bound to act in the furtherance of public

interest [In re: Suo Motu (2010 SCMR 885) at para 63]. However, how the public interest was promoted by reinstating these beneficiary employees who had been inducted without complying with the duly prescribed procedure for appointment is neither determinable nor defensible. Consequently, this ground raised by the review petitioners fails to satisfy the test of 'error apparent on the face of the record.'

C. Beneficiary Employees Constitute a Distinct Class

24. In the alternate to provide constitutional protection to the Ordinances and Act, learned counsel for the parties vehemently argued that these pieces of legislation were promulgated and enacted to redress the grievous wrong committed by the unlawful dismissal, removal or termination of the beneficiary employees. It was emphasised that the beneficiary employees had been appointed during PPP's rule which is why they were later removed by the caretaker government. Reference was made to the Debates of the Senate from the relevant time period by the learned Attorney General to demonstrate that the Act was indeed passed to provide relief to the beneficiary employees as casualties of political victimisation. Therefore, the learned counsel argued that the beneficiary employees formed a distinct class founded on reasonable classification so their reinstatement did not violate the command in Article 25 for equal treatment.

25. It is by now settled law that although Article 25 of the Constitution envisages equality amongst citizens, it also allows for differential treatment of persons who are not similarly placed under a reasonable classification. However, to justify this difference in treatment the reasonable classification needs to be 'based on intelligible differentia that has a rational nexus with the object being sought to be achieved' [Commissioner Inland Revenue v. Tariq Mehmood (2021 SCMR 440) at para 14]. Only if this test is satisfied can the distinct treatment meted out to a class of persons be sustained under Article 25. Consequently, it needs to be examined whether the beneficiary employees formed members of a class on the basis of reasonable classification in order to be entitled to the relief granted by the Act.

26. As great emphasis was laid by learned counsel on political victimisation, it would be appropriate to consider that point first. A similar matter of this nature, albeit in the context of criminal prosecution for offences, came up in *Mobashir Hassan v. Federation of Pakistan* (PLD 2010 SC 265). In that case the constitutionality of the National Reconciliation Ordinance, 2007 ("2007 Ordinance") was challenged before this Court. Whilst many objections were raised against the 2007 Ordinance, the only provision pertinent for our present attention is section 2 *ibid* which provided:

"2. Amendment of section 494, Act V of 1898.---

In the Code of Criminal Procedure, 1898 (Act V of 1898), section 494 shall be renumbered as subsection (1) thereof and after sub section (1) renumbered as aforesaid, the following subsections (2) and (3) shall be added, namely:-

(2) Notwithstanding anything to the contrary in subsection (1), the Federal Government or a Provincial Government may, before the judgment is pronounced by a trial court, withdraw from the prosecution of any person including an absconding accused who is found to be falsely involved for political reasons or through political victimization in any case initiated between 1st day of January, 1986 to 12th day of October, 1999..." (emphasis supplied)

27. The Court, whilst examining the vires of section 2 observed:

"64. The amendment in section 494 Cr.P.C had also created discrimination with the accused, who were facing trial prior to 1st January, 1986 or had been charged for the offence after 12th October, 1999. The preamble of the NRO, 2007 coupled with any of its substantive part, had not disclosed the reasons, calling for so-called 'national reconciliation' in between this period, presuming that an accused, facing charge entailing major penalty of death, is not entitled for discharge, by means of extra judicial forum, or for the same treatment, if he has committed the crime after 13th October, 1999, and up till now. We have posed a question to ourselves i.e. whether there had been no political victimization after 12th October, 1999 uptill now, on account of which accused persons were involved falsely in the commission of the offence but we could not succeed in getting the answer of the same except observing that specific dates were incorporated in the NRO, 2007 for achieving specific object as well as the specific purpose...

...

66. Above discussion... persuades us to hold that the classification amongst the accused persons, facing trial during the specific period i.e. 1st January 1986 to 12th October 1999, is based on arbitrariness and no reasons have been disclosed in the NRO, 2007 for entering into so-called 'reconciliation' with particular group of accused persons, except in the name of 'national reconciliation' on the pretext that the cases were politically motivated against them... Similarly on the basis of intelligible differentia for reasonable classification, the differentiation has not been understood logically and it seems that for specific purpose, an artificial grouping was made, causing injustice to the accused persons, who were placed in the same position and instead of achieving the 'national reconciliation' the NRO, 2007 had served the purpose of 'individual reconciliation'."

(emphasis supplied)

28. The extracts produced hereinabove make it clear that the features of section 2 that persuaded the Court, *inter alia*, to declare the 2007 Ordinance *ultra vires* the Constitution also exist in the present case. These are as follows:

- i. The Act discriminates against similarly placed persons who were dismissed, removed or terminated from service in the periods prior to 01.11.1996 and subsequent to 12.10.1999;
- ii. The preamble of the Act coupled with its substantive provisions do not disclose the reason for reinstatement of only those employees who had been dismissed, removed or terminated from service during the specific period of 01.11.1996 till 12.10.1999; and
- iii. The Act was enacted to achieve a specific object and purpose, namely, the reinstatement of those employees who had been initially appointed during PPP's tenure.

29. Clearly then the Act's classification of the time period is neither reasonable nor based on any intelligible differentia. There is also no rational nexus with the object being sought to be achieved because if the intent of Parliament was to assist people who had been dismissed, removed or terminated from service on account of political victimisation then there is no rhyme or reason as to why only the persons dismissed, removed or terminated between 01.11.1996 and 12.10.1999 were granted this relief. Surely such a classification ought to have been preceded by some study, data collection and analysis, however, the same are lacking. In our view there must exist a plethora of people since 1947 (till date) who have been unfairly removed from service on account of political victimisation yet no favour is extended to them by the Act. Even the Debates of the Senate are of no help to the review petitioners because it is well-established 'that reference to legislative history is permissible only as an aid to construction of legislation which is ambiguous or obscure or the literal meaning of which leads to an absurdity i.e. from the text of a statute, the court is unable to decipher the real intent of the Legislature' [*Gulshan Bibi v. Muhammad Sadiq* (PLD 2016 SC 769) at para 6]. However, no such absurdity or obscurity exists in the present case because the Act categorically omits to mention any reason for only reinstating the beneficiary employees who were initially appointed during the relevant period (between 01.11.1993 and 30.11.1996). In this way, the Act is on an even worse footing than the 2007 Ordinance which at least referred to political victimisation in section 2 to justify its chosen time period. As a result, this contention of learned counsel also does not satisfy the test of review.

D. Caretaker Government had no Power to Dismiss, Remove or Terminate the Beneficiary Employees

30. To sustain the validity of the legislation, learned counsel next submitted that the beneficiary employees were removed by the caretaker government even though the latter possessed no such power. However, even if for the sake of argument we were to accept this contention of learned counsel, the issue arises that the time period (from 01.11.1996 till 12.10.1999) for which relief has been granted by the Act significantly exceeds the tenure of the caretaker government of the time (from 05.11.1996 till 17.02.1997). If indeed the purpose of reinstating the beneficiary employees was solely to redress this illegality then it needs to be pondered why the Act granted relief to beneficiary employees who had been dismissed, removed or terminated prior to 05.11.1996 and subsequent to 17.02.1997 when no caretaker government was in office. In fact, a substantial portion of the time period fixed by the Act (during which the allegedly illegal dismissals, removals or terminations took place) overlaps with the tenure of constitutionally elected governments which enjoyed the power to dismiss, remove or terminate persons from service. Therefore, this argument of learned counsel has no relevance to the facts of the present case.

E. Fundamental Rights of the Regular Employees

31. Learned counsel then submitted that by the reinstatement of the beneficiary employees, no fundamental rights of any regular employee had been violated. Specifically, it was argued that if at all there was some disadvantage suffered by the regular employees it was limited only to the extent of seniority/promotion which in any event was not a right, let alone a fundamental right.

32. We respectfully disagree with this contention put forward by learned counsel. We have already observed in paras 21 and 22 that the reinstatements under the Act were carried out without following any proper procedure and without having regard to the nature of the posts occupied by the beneficiary employees during their initial appointments. On the other hand, the regular employees were inducted into service after fulfilling all the codal formalities. Therefore, by giving leeway to the beneficiary employees and by placing them at the same (or in some cases better) footing in the organisational structure of the employers the fundamental rights of the regular employees were breached, in particular Articles 4, 9 and 18 of the Constitution, which read:

"4. Right of individuals to be dealt with in accordance with law, etc. (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.

...

9. Security of person. No person shall be deprived of life or liberty save in accordance with law.

...

18. Freedom of trade, business or profession. Subject to such qualifications, if any, as may be prescribed by law, every citizen shall have the right to enter upon any lawful profession or occupation, and to conduct any lawful trade or business:"

(emphasis supplied)

33. All three constitutional provisions envisage a State in which all aspects of a citizen's life, including his/her right to enter a profession, will be regulated by law. Nevertheless, the Act by reinstating the beneficiary employees whilst ignoring the applicable laws, rules and regulations, which detailed the process to be followed in making appointments, has flouted these guarantees of the Constitution. Therefore, the Act has directly impinged upon the fundamental rights of regular employees. Consequently, no exception can be taken to the finding recorded in the judgment under review in this regard.

F. Non-Obstante Clause

34. Learned counsel then submitted that the judgment under review attached undue weightage to the non - obstante clause contained in Section 4 of the Act. It was argued that it was within the legislative competence of Parliament to nullify a Judgment of the Supreme Court, therefore, the judgment under review could not hold that the 'non-obstante clause has failed abysmally to provide unfettered protection to the Act of 2010' (refer to para 23 of the judgment under review).

35. As already pointed out in para 5, the cases before us are chiefly concerned with the beneficiary employees of 10 employers. These employees run into the thousands and in many cases employees of the same employer are represented by different counsel. During arguments, it was argued by counsel and became clear to us that of the beneficiary employees before us only some had challenged their removal, dismissal or termination before the relevant fora whereas the rest had not pursued any legal action (this is also the case with beneficiary employees who have worked for the same employer). In light of these unusual circumstances and our findings recorded above, we consider it best not to delve deeper into this issue as it will purely be an academic exercise which this Court does not ordinarily enter into [Munawar Iqbal Gondal v. Nasira Iqbal (2014 SCMR 860) at para 4]. We are solidified in our view by the fact that this ground was primarily used in the judgment under review not as a reason to strike down the Act but to simply hold that the non-obstante clause did not prevent judicial scrutiny of the Act on the constitutional plane. Therefore, not much substance, if any, is left in determining what the implication of the non-obstante clause is.

G. Reading Down of the Act

36. The next challenge thrown to the decision in the judgment under review by learned counsel was that it exceeded the mandate of Article 8(1) of the Constitution. For ease of reference, this provision is produced below:

"8. Laws inconsistent with or in derogation of fundamental rights to be void. (1) Any law, or any custom or usage having the force of law, in so far as it is inconsistent with the rights conferred by this Chapter, shall, to the extent of such inconsistency, be void."

(emphasis supplied)

Learned counsel argued that in deference to Article 8(1) of the Constitution, the judgment under review should have read down section 4 of the Act and preserved its watered-down version along with the other provisions of the Act that were not inconsistent with fundamental rights. However, such contention of learned counsel fails to recognise two important aspects of section 4:

- i. Firstly, section 4 as it stands does not suffer from just a singular defect. Instead, it is fundamentally flawed. It not only provides one-step higher regularisation in subsection (a) [which could potentially have been read down] but it also, as already observed in para 22, regularises all beneficiary employees regardless of the post they were occupying before their initial termination. This defect is so central to section 4 that to read it down would essentially require this Court to re write it which is not permissible as such an exercise would enter into the realm of legislation [*Zahid Iqbal v. Muhammad Adnan* (2016 SCMR 430) at para 14]; and
- ii. Secondly, section 4 is the governing/primary provision of the Act. Therefore, once it is declared unconstitutional no substance is left in the Act as all other provisions are secondary to section 4 and cannot control the operation of the Act on their own. As a result, no purpose will be achieved in retaining the Act on the statute book when its effect will have been destroyed by the deletion of section 4.

H. Prospective Application of Judgment Under Review

37. Learned counsel finally argued that even if the Act was ultra vires the Constitution, the declaration in the judgment under review should have applied prospectively, in accordance with law settled by this Court, thereby protecting the benefits accorded to the beneficiary employees.

38. In our considered opinion, the proposition put forward by learned counsel does not fully understand the true import of the judgments of this Court on the effect of a declaration made by it. In *Pakistan Medical and Dental Council v. Muhammad Fahad Malik* (2018 SCMR 1956) the Court acknowledged that judgments of the Court operate prospectively, however, it qualified the said finding by holding that the judgments of this Court could operate retrospectively if so declared [para 24(k)]. Consequently, there is no binding rule that all judgments issued by the Court take effect only from the date of pronouncement. An example of this can be seen in the *Mobashir Hassan* case (*supra*) wherein the Court observed:

"171. We... have come to the conclusion that the NRO, 2007 as a whole, particularly its sections 2, 6 and 7, is declared void ab initio being ultra vires and violative of Articles 4, 8, 12, 13, 25, 62(f), 63(1)(h), 63(1)(p), 89, 175, 227 of the Constitution, therefore, it shall be deemed non est from the day of its promulgation i.e. 5th October 2007 as a consequence whereof all steps taken, actions suffered, and all orders passed by whatever authority, any orders passed by the Courts of law including the orders of discharge and acquittals recorded in favour of accused persons, are also declared never to have existed in the eyes of law and resultantly of no legal effect."

(emphasis supplied)

39. In the instant case, we are also faced with a similar situation since the Act has been adjudged to be violative of the different provisions of the Constitution, specifically Articles 4, 9, 18, 25, 240 and 242. The judgment under review has placed reliance on two other judgments of this Court reported as *Ali Azhar Khan Baloch v. Province of Sindh* (2015 SCMR 456) and *Shahid Pervaiz v. Ejaz Ahmad* (2017 SCMR 206) [refer to paras 54-56 of the judgment under review] to arrive at the same decision. We have perused these judgments and find no cavil with what has been stated therein. Even the principle of *locus poenitentiae* is of no help to learned counsel since the consistent stance of this Court has been that the said principle 'would not be attracted in a case under which the benefit has been extended by a law which was violative of the provisions of the Constitution' [*Azam*

Shah v. Federation of Pakistan (2022 SCMR 201) at para 13]. As a result, no ground for review is made out on this front.

CONCLUSION

40. For the detailed reasons set out above, we dismiss the 108 review petitions. The 35 Civil Misc. Applications and 3 Civil Misc. Appeals are disposed of as having become infructuous.

41. However, we consider that having rendered a service of 10 years or more since their reinstatement under the Ordinances and the Act the beneficiary employees, most of whom are nearing retirement and have minimal future job prospects, have dedicated a considerable period of their life to their employers and so deserve to be treated with leniency. More so, when through no fault of their own, the beneficiary employees were inducted and subsequently reinstated into the service of their employers without the fulfilment of the necessary codal formalities. Therefore, in exercise of our inherent power conferred under Order XXXIII, Rule 6 of the Supreme Court Rules, 1980 and in reliance on our power to do *ex debito justitiae*, as elaborated in the judgment reported as *Sher Alam Khan v. Abdul Munim* (PLD 2018 SC 449):

"20. We are aware that in the instant case, the lis has reached this Court not by invoking Article 184(3) of the Constitution (though the learned High Court was exercising its Constitutional jurisdiction under Article 199). Be that as it may, this Court is not precluded from converting one type of proceedings into another type, including the existing proceedings under Article 185(3) of the Constitution and exercising our jurisdiction under Article 184(3) of the Constitution so as to adjudicate upon disqualification or lack of qualification of Respondent No.1. This Court in the judgment reported as *Muhammad Akram v. DCO, Rahim Yar Khan and others* (2017 SCMR 56) held as follows:

"7. The Courts are sanctuaries of justice, and in exercise of authority to do *ex debito justitiae*, that is to say remedy a wrong and to suppress a mischief to which a litigant is entitled. No fetters or bar could be placed on the High Court and or this court to convert and treat one type of proceeding into another type and proceed to decide the matter either itself provided it has jurisdiction over the lis before it in exercise of another jurisdiction vested in the very court... Courts have been treating and or converting appeal into revisions and vice versa and Constitution Petitions into appeal or revision and vice versa."

we convert these review proceedings filed under Article 188 of the Constitution into proceedings under Article 184(3) read with Article 187 *ibid* to grant the following relief to the beneficiary employees:

- i. Following the principle set out in *Muhammad Akram v. Registrar, Islamabad High Court* (PLD 2016 SC 961) at para 79 [we note that this judgment was subsequently overruled in *Gul Taiz Khan Marwat v. Registrar, Peshawar High Court* (PLD 2021 SC 391), however, that declaration was only to the extent that the administrative orders of a Chief Justice of a High Court are not amenable to writ jurisdiction], we hold that the beneficiary employees who were holding posts for which no aptitude, scholastic or skill test was required at the time of initial termination (01.11.1996 to 12.10.1999) shall be restored to the same posts they were holding when they were terminated by the judgment under review;
- ii. All other beneficiary employees who were holding posts on their initial termination (01.11.1996 to 12.10.1999) which required the passing of an aptitude, scholastic or skill test shall be restored to the posts, on the same terms and conditions, they were occupying on the date of their initial termination. However, to remain appointed on these posts and to uphold the cherished principles of merit, non-discrimination, transparency and fairness expected in the process of appointment to public institutions these beneficiary employees shall have to undergo the relevant test, applicable to their posts, conducted by the Federal Public Service Commission within 3 months from the date of receipt of this judgment;
- iii. The improvement in the terms and conditions of service of all the beneficiary employees shall be granted strictly in accordance with the applicable laws, rules and regulations; and
- iv. The relief granted in sub-paragraphs (i) and (ii) shall not be granted to those beneficiary employees whose initial termination of service (01.11.1996 to 12.10.1999) was on grounds of absence from duty, misconduct, corruption, misappropriation of money/stock or unfitness on medical grounds if such termination was not set aside finally by a court of law.

42. Copies of this judgment shall be sent to the concerned employers, the Ministry of Law and Justice and the Establishment Division for appropriate action. Consequently, all review petitions are dismissed and all applications/appeals are disposed of in the above terms.

Sd/- Umar Ata Bandial, J Shah, J	Sd/- Sajjad Ali Sd/- Qazi Muhammad Amin Ahmed, J Sd/- Amin-ud-Din Khan, J
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SYED MANSOOR ALI SHAH, J.---

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Preface

"Unless we protect democracy, democracy cannot protect us."¹ One of the foundations of democracy is a legislature elected freely and periodically by the people. This dissent recognizes the central role of legislature and the principle of separation of powers in a constitutional democracy. Justice McLachlin² has rightly said that in democracies, "the elected legislators, the executive and the courts all have their role to play. Each must play that role in a spirit of profound respect for the other. We are not adversaries. We are all in the justice business, together." Separation of powers is the backbone of a constitutional system.³ The legislature, the executive and the judiciary have no authority beyond that granted to them under the Constitution. **None of them is omnipotent.**

2. Separation of powers means reciprocal checks and balances between the different branches. It does not mean walls between the branches but rather bridges which balance and check.⁴ Montesquieu put freedom at the core of separation of powers.⁵ The concept of separation of powers is not to maximize efficiency but rather to maximize freedom.⁶ The principle of separation of powers has double meaning: First, it means distinguishing

among different branches of government, giving each branch a central and primary function. Second, it means that different branches have reciprocal relationship in which each checks and balances over the other branches. Thus, for example, the legislature can change the rules of the game by amending the existing law or by enacting new law, but it must do so within the framework of the Constitution. On the other hand, the judiciary is authorized to interpret the Constitution and law but it is not authorized to create, amend or rewrite the Constitution or to enact a new law.⁷ Judiciary, like the other branches of the government, is also not invincible but is to function under the supreme law of the land i.e., the Constitution.

3. The primary and central function of the legislative branch is to create laws and the courts must give weight to the purpose of the law remembering that legislation promotes social policy and is a tool for achieving a societal goal. This subjective purpose of the statute becomes a key factor in interpreting the statute. Therefore, in the first instance, the role of the courts is to safeguard and actualize these laws in the public interest. Judges should therefore give statutes a meaning that bridges the gap between the law and the social reality. Next is the objective purpose of the statute, where it honours and protects the constitutional values, and the fundamental rights of the people. It is only when the subjective or the objective purpose of the legislature outsteps the constitutional boundary that the courts interfere and set the course right by enforcing the constitutional limits. Even in that case when the courts rule that a statute is unconstitutional and invalidates it, it does not undermine the legislature or violate the separation of powers because it is the principle of separation of powers that informs us that legislative authority does not include the authority to pass unconstitutional laws. Hence, the principle of separation of powers is the very source of judicial review.

Reasons for Dissent

4. As I have differed with the view of all my learned colleagues on this Bench, I owe an obligation to explain why I remained unable to subscribe to their opinion.

5. First and foremost, I hold the principles of separation of powers and legislative supremacy, subject to the overarching constitutional limitations, to be the bedrock of a constitutional democracy. The courts must remember that the legislation is the manifestation of the will of the people and the collective wisdom of their chosen representatives in the Parliament. Courts must therefore tread carefully to judicially review the act of the legislature. First, efforts should be made by the Court to save the constitutionality of the legislation by exhausting the interpretative tools e.g. of "reading down" or "reading out" to make the legislation constitution compliant. Only when the legislation happens to be opposed to the constitutional values and the fundamental rights and allowing such a statute to remain on the statute book would be unconstitutional, should the courts interfere. Such freedom and respect is enjoyed by the branches of the government under a prosperous and a progressive constitutional democracy. Instead of adopting this route the majority struck down the legislation and granted similar relief to the sacked employees, already granted by the legislation, in the first place. I found myself in minority in subscribing to this constitutional construct.

6. Secondly, I could not sidestep the decision of a 7-Member Bench of this Court in *Shabbar Raza*⁸ which was overlooked by the majority. Needless to mention that the declaration of law made in *Shabbar Raza* by a larger Bench of 7-Members is binding on the present 5-Member Bench. *Shabbar Raza* categorically and authoritatively holds that the original jurisdiction of this Court under Article 184(3) of the Constitution "cannot be exercised as a parallel review jurisdiction", and a judgment or an order of this Court "can never be challenged by virtue of filing independent proceedings under Article 184(3) of the Constitution". Such course has been held to be "absolutely impermissible". In utmost humility, I am at loss to comprehend how the majority after dismissing all the review petitions, and other miscellaneous applications, could go ahead and convert the proceedings of the same review petitions into proceedings under Article 184(3) of the Constitution. After dismissal of the review petitions, there remain no proceedings that can be converted into some other proceedings. I also regret my inability to understand how a judgment of this Court can be modified in exercise of the jurisdiction under Article 184(3), after the dismissal of the review petitions which also prayed for similar modification.

7. Thirdly, the initial appointments of the review petitioners were not challenged either before us or before the Bench that originally heard these cases. In this background, the assumption of jurisdiction regarding

appointments by the majority on its own without specifying the jurisdiction under which it has such power to do so, in my humble view, was a jurisdictional overstepping to which I could not be a party. Further, the expression of adverse remarks against a political party in making appointments of the petitioners through executive actions and in making their reinstatement through legislative actions, without impleading that political party in the present proceedings and without providing the political party an opportunity of hearing, appears to me to be negation of the elementary principle of natural justice. Without impleading the political party, in my view, the Court could only discuss the appointment of the petitioners as an executive action of the Government and their reinstatement as a legislative action of the Parliament, and not of a particular political party.

Enactment of the Sacked Employees (Re-instatement) Act 2010 and its salient features

8. The Parliament of Pakistan enacted the Sacked Employees (Re-instatement) Act, 2010 ("Re-instatement Act"), on 8 December 2010, "for the purpose of providing relief to persons who were appointed in a corporation service or autonomous or semi-autonomous bodies or in Government service during the period from the 1st day of November, 1993 to the 30th day of November, 1996 (both days inclusive) and were dismissed, removed or terminated from service during the period from the 1st day of November, 1996 to the 12th day of October, 1999 (both days inclusive)."⁹ Earlier to the enactment of the Re-instatement Act, the President of Pakistan, on the advice of the Federal Cabinet, had promulgated four Sacked Employees (Re-instatement) Ordinances for the same purpose: Ordinance No. II of 2009 promulgated on 14 February 2009, Ordinance No. XI of 2009 promulgated on 11 June 2009, Ordinance No. XIII of 2009 promulgated on 30 October 2009¹⁰ and Ordinance No. XII of 2010 promulgated on 5 February 2010.

9. Under the Re-instatement Act, the persons of the specified class were to be reinstated and regularized in service, mostly in the same scale, grade, cadre, group, post or designation from which they were dismissed, removed or terminated.¹¹ Only two categories of the persons, namely, (i) the persons who had earlier been appointed on permanent or temporary basis, or regular or ad hoc basis,¹² and (ii) the persons the structure of whose posts had been changed meanwhile,¹³ were to be reinstated and regularized in service on one scale higher than the scale, grade, cadre, group, post or designation from which they were dismissed, removed or terminated. The persons who had been dismissed, removed or terminated from service on any charges or allegations were also classified into two categories: (i) the persons who were proved not guilty of those charges or allegations in enquiry conducted on directions of any administrative authority or of any court or tribunal,¹⁴ and (ii) the persons the determination of whose guilt was either unchallenged or unsuccessfully challenged. For reinstatement and regularization of persons belonging to category (ii), a Review Board was established.¹⁵ The Review Board was to make, on the review petitions of such employees,¹⁶ a fresh enquiry into facts and pass an order of reinstatement and regularization if it was satisfied that they were not guilty of the charges or allegations.¹⁷ As to the date of regularization and seniority of the reinstated employees, the Re-instatement Act provided that an employee reinstated under the Act in a post, scale, grade, cadre, group or designation would be regularized as a permanent employee in that post, scale, grade, cadre, group or designation with effect from the day of enactment of the Act and would be placed at the bottom of the seniority list effective as on the date of enactment of the Act.¹⁸

Disputes under the Re-instatement Act in the cases decided by the judgment under review

10. In the course of implementation of the Re-instatement Act, the disputes started arising between the persons claiming their reinstatement and regularization under the Re-instatement Act and persons working as regular employees at the time of enactment of the Re instatement Act, in Government departments, corporations or bodies. The disputes between the former were regarding the entitlement of such persons to the relief provided under the Re-instatement Act, while the disputes between the latter were regarding the issue of seniority arising from the reinstatement and regularization of such persons on one scale higher than the scale, grade, cadre, group, post or designation from which they had been dismissed, removed or terminated. These two types of disputes also arose in the cases decided by the judgment under review, and were stated in para 2 of the judgment:

2. There are a number of groups of cases, in which appellants/petitioners have impugned the appointments/promotions under the Sacked Employees (Reinstatement) Ordinance Act, 2010 ... Those groups can be divided into two categories, i.e. (i) those employees who were the regular employees of the organizations/ departments,

whose seniority has been affected by the employees inducted under the Act of 2010; and (ii) those persons who have not been extended the benefit of the Act of 2010.

It was in the backdrop of these disputes that this Court took up and decided the question of constitutional vires of the Re-instatement Act. The Court, by the judgment under review, held that the Re-instatement Act is ultra vires the Constitution with the following findings:

52 ... The Act has extended undue advantage to a certain class of citizens thereby violating the fundamental rights under Articles 4, 9, and 25 of the employees in the Service of Pakistan and being [sic - is] void under Article 8 of the Constitution.

53. The Legislature also lacked the legislative competence to enact The Act of 2010 as it has wrongfully attempted to circumvent the jurisprudence of this Court and Article 240 and Article 242 of the Constitution for which reason we are inclined to hold the Act to be ultra vires of the Constitution.

Contentions of the petitioners

11. To persuade the Court to recall its judgment under review, the learned Attorney-General for Pakistan and other learned counsel for the petitioners made the following main contentions: (i) that the question of vires of the Re-instatement Act had neither been raised before, nor decided by, the forums below, therefore, the Court should not have taken up and decided the said question, for the first time in the appeals/ petitions filed against the judgments of the forums below; (ii) that the substantial question as to the interpretation of constitutional law that concerns the Federal Government was involved in the cases decided by the judgment under review, therefore, the Court could not have proceeded to determine the question without giving notice to the Attorney-General for Pakistan, as mandated by Rule 1 of Order XXVII-A of the Code of Civil Procedure 1908 ("C.P.C."); (iii) that the persons likely to be affected by the decision of the Court on the question of constitutionality of the Reinstatement Act were neither issued notice nor heard before passing the judgment under review, thus, the Court breached their right of hearing guaranteed by the principles of natural justice; (iv) that the Court wrongly held that the "sacked employees", as per the definition given in section 2(f), fell into the definition of either a "civil servant" or a person in the "service of Pakistan", for major portion of the reinstated employees were employees of the corporations and other autonomous or semi-autonomous bodies, thus, they did not fall under either of the said two categories; (v) that the Court misconstrued and misapplied Articles 240 and 242 of the Constitution for judging the constitutionality of the Reinstatement Act; (vi) that the Court overlooked the important aspect of the case that the employees reinstated under the Reinstatement Act belonged to a distinct class of employees who suffered "political victimization", in the matter of their dismissal, removal or termination during the relevant period, and the Parliament (Legislature) had enacted the Reinstatement Act for the benefit of this distinct class of employees, therefore, the said Act did not offend Article 25 of the Constitution; and (vii) that the Court instead of declaring the whole Reinstatement Act to be ultra vires the Constitution may have declared only those provisions of the Reinstatement Act which infringed the fundamental rights to 'status' of the regular employees, guaranteed under Article 9 of the Constitution, by applying the rules of severance and reading down.

12. No one appeared before us to oppose the review petitions, and defend the judgment under review that has declared the Reinstatement Act to be ultra vires the Constitution. The Court, however, cannot decide the questions of law either way by consent of parties or on concession made at the Bar, or on the ground that there is no contesting respondent before it. We, therefore, must proceed to determine the questions arising out of the contentions of the petitioners on their merits irrespective of no-contest.

Constitution of larger bench for hearing review petitions

13. It would be pertinent to mention here that it was because of the importance of the contentions/questions (ii), (iii), (iv), (v) and (viii) raised by the learned Attorney-General, noted in order dated 11.11.2021, that the three member Bench hearing these review petitions referred the matter to the Hon'ble Chief Justice of Pakistan for constitution of a larger Bench, and this larger Bench of five members was thus constituted.

Short Order

14. After hearing and considering the contentions of the petitioners, I allowed the review petitions vide my short order dated 17 December 2021, in the following terms:

- i. The judgment under review is recalled;
- ii. The following Sections and part of Sections of the Sacked Employees Reinstatement Act 2010 are declared ultra vires the Constitution:
 - (a) Sections 4(a) and 10 to the extent of reinstatement and regularization on "one scale higher", which give an undue advantage to the reinstated employees to the detriment of the rights of the already working regular employees and thus violate their fundamental rights. The provisions of the said Sections, except the words "one scale higher", shall however remain operative with effect from the date of enactment of the Act, and be read to mean the reinstatement and regularization in the same or restructured, as the case may be, scale, grade, cadre, group, post or designation.
 - (b) Sections 2(f)(vi), 11, 12 and 13, which deal with and provide for reinstatement and regularization of such sacked employees who had been dismissed, removed or terminated from service on account of absence from duty, misconduct, mis-appropriation of Government money or stock, or unfitness on medical grounds, and the determination of their guilt or medical unfitness attained finality by being unchallenged or unsuccessfully challenged. Such employees fall outside the class of sacked employees who suffered "political victimization," envisaged by the Act for a beneficial treatment, and they by themselves do not constitute a distinct class having an intelligible differentia, which bears a reasonable relation to the object and purpose of the Act.
- iii. All the employees terminated from service on the basis of the judgment under review, stand restored in the service with effect from the date they were so terminated, and shall be paid the pay of the intervening period treating the said period as an extraordinary leave with pay; and
- iv. The cases decided by the judgment under review, which now stands recalled, shall be deemed pending and decided on their own merits by the regular Bench(es) of this Court in accordance with the provisions of the Sacked Employees Re-instatement Act, 2010, subject to the declaration made at No. ii above.

In this discourse, I proceed to deal with the contentions of the petitioners and record my reasons for the above short order.

Discussion and decision on the contentions of the petitioners

(i) Question of vires of the Re-instatement Act, not raised in the forums below

15. So far as the contention that the Court should not have taken up and decided the question of constitutional vires of the Re instatement Act as the said question had neither been raised before nor decided by the forums below, is concerned, it is true that in petitions filed for leave to appeal under Article 185(3) of the Constitution, this Court generally does not permit to raise those questions of law that have not been urged before the forum below.¹⁹ In the present case, the leave granting Benches of this Court permitted to raise the question of constitutional vires of the Re-instatement Act and granted the leaves to appeal to consider the same, despite that the question had neither been raised before nor decided by the forums below, i.e., High Courts and Service Tribunal, and that too without explaining the circumstances that justified departure from the general practice of the Court. However, none of the respondents in those petitions filed any review petition to recall that leave granting order(s), nor was any such objection raised before the Bench that heard the appeals and decided the question. It is now too late in the day to make such contention before this Bench hearing review petitions against the judgment that decided the question, and not hearing the review petitions against the orders that granted the leaves to appeal to consider the question. The contention is, therefore, now untenable.

(ii) Omission to give notice to Attorney-General for Pakistan, under Rule 1 of Order XXVII-A of the C.P.C.

16. Much was argued on the point that the substantial question as to the interpretation of constitutional law that concerns the Federal Government was involved in the cases decided by the judgment under review, therefore, the Court could not have determined the question without giving notice to the Attorney-General for Pakistan, as mandated by Rule 1 of Order XXVII-A of the C.P.C. The reliance, in this regard, was placed on *Federation v. Aftab Sherpao*,²⁰ the judgment of a twelve-member Bench of this Court.

17. Careful reading of the cited case shows that the learned Judges in this case were equally divided by six to six, on the point of requirement of issuing a formal notice to the Attorney-General under Rule 1 of Order XXVII-A of the C.P.C. and effect of its non-issuance in the circumstances of the case. The ancient rule of the

common law - *semper praesumitur pro negante*, means that presumption always exists in favor of one who denies or that the presumption is always in favour of the negative. So when the Judges of an appellate Court are equally divided in their opinion, the judgment of the Court below is affirmed and maintained,²¹ and the decision given *pro negante* is authoritative and binding as any other decision of the appellate Court.²² However, the said rule is not applicable to the final decision of a case by this Court in view of the second proviso to Rule 1 of Order XI of the Supreme Court Rules, 1980, which provides that "if the Judges hearing a petition or an appeal are equally divided in opinion, the petition or appeal, as the case may be, shall, in the discretion of the Chief Justice, be placed for hearing and disposal either before another Judge or before a larger Bench to be nominated by the Chief Justice." Hence, the application of the rule of *pro negante* decision is restricted to the division of opinion on a point of law decided in the judgment of this Court, notwithstanding of which there is a majority of opinion on the final decision of the case. Exactly, this happened in the Aftab Sherpao case. Although the learned Judges were equally divided 6 to 6 in their opinion on the point of notice under Rule 1 of Order XXVII-A of the C.P.C., but there was a clear majority of 8 to 4 in the final decision of the appeals, viz, in allowing the appeals. Thus, the rule of *pro negante* decision was applicable to the point of notice under Rule 1 of Order XXVII-A of the C.P.C., and it was the decision of the High Court on this point that became the *pro negante* decision of this Court, having the authority and binding effect of a decision of a twelve-member Bench of this Court.

18. We, therefore, need to ascertain what was decided by the High Court on this point, which because of equal division of opinion in appeal became the *pro negante* decision of this Court. The decision of the High Court on this point has been reproduced in the leading judgment authored by Justice Shafiur Rahman in the Aftab Sherpao case. The relevant portions of the decision of the High Court on the point are reproduced here also for ready reference:

As the Federation of Pakistan is a party to these proceedings, no separate notice under the law is required to be issued to the Attorney-General and if he so chooses, he may represent the Federation in this case.

The Federation is already a party in this petition and there was no hindrance in the way of the Attorney-General of Pakistan to appear and argue the case on behalf of the applicant during the hearing of this matter.

Furthermore, Order XXVIIA, Rule 1, C.P.C. would normally deal with a situation where suit is filed before the Court wherein the Federation or the Province is not a party but a substantial question of Constitutional interpretation is involved concerning the Federal Government or the Provincial Government as the case may be. In such a situation it is quite obvious that either the Advocate-General of the Province or the Attorney-General of Pakistan shall assist the Court concerned. Here before us both the Province and the Federation are arraigned as parties. Due notice has been received by them. The Provincial Government has engaged a private counsel along with the Advocate-General of the Province to whom notice was issued by the Court on 22-8-1990. Similarly the Federal Government has decided to engage a counsel who represented it before us. If the Attorney-General had decided to represent the Federation we would, have been too happy to hear him as well. But we do not find it incumbent on us in the circumstances of the case to needlessly issue him a notice while he is busy in arguing similar cases before other High Courts and we were requested to wait for the conclusion of those cases in order to hear him.

In terms of the above observations of the High Court, the *pro negante* decision of a twelve-member Bench of this Court on the point was that Rule 1 of Order XXVII-A of the C.P.C. deals with a situation where the Federation of Pakistan or the Province concerned is not a party to the proceedings but a substantial question as to the interpretation of constitutional law is involved in those proceedings, concerning the Federal Government or the Provincial Government, as the case may be. However, in cases where the Federation of Pakistan or the Province concerned is already a party to the proceedings, no separate notice under the said Rule is required to be given to the Attorney-General for Pakistan or the Advocate-General of the Province, as the case may be.

19. In some of the cases decided by the judgment under review, the Federation of Pakistan was a party and represented before the Court by Mr. Sajid Ilyas Bhatti, Additional Attorney-General, and Mr. Sohail Mehmood, Deputy Attorney-General; therefore, no separate notice under Rule 1 of Order XXVII-A of the C.P.C. was required to be given to the Attorney-General for Pakistan. The contention that the Court could not have

determined the question of constitutional vires of the Re instatement Act without giving notice to the Attorney-General for Pakistan under Rule 1 of Order XXVII-A of the C.P.C., thus does not hold water and is accordingly rejected. However, it may be brought on record that the Court did issue the notice to the Attorney-General for Pakistan in the main case, i.e., *Muhamad Afzal v. Secretary Establishment* (C.A. 491/2012) wherein leave to appeal was granted to consider the question of vires of section 4 of the Reinstatement Act.

(iii) Non-issuing notice to and non-hearing of the persons likely to be affected by the decision of the Court

20. So far as the next contention that the persons likely to be affected by the decision of the Court on the question of constitutionality of the Reinstatement Act were neither issued notice nor heard before passing the judgment under review, thus, the Court breached their right of hearing guaranteed by the principles of natural justice, is concerned, it does not detain us long in view of the principle of law enunciated by a fourteen-member Bench of this Court, in the case of *Justice Bhinder v. Federation*²³.

21. In *Bhinder*, the Court had held in the judgment sought to be reviewed,²⁴ the Proclamation of Emergency, the Provisional Constitution Order and the Oath of Office (Judges) Order of 2007 to be ultra vires the Constitution and also passed some consequential orders, including the order as to unconstitutionality of the appointments of certain Judges. Some of such Judges, in their applications seeking permission to file review against that judgment, contended that they had not been issued notice nor had they been heard before making the adverse order as to their appointments, therefore, the judgment to that extent was not sustainable. The Court repelled that contention observing that a judgment in rem binds parties and non-parties alike as opposed to a judgment in personam which only affects the parties to a lis, and that a judgment in rem apply to all regardless of whether they were parties or not and a judgment in personam does not bind non-parties. The Court went on to hold that the judgment sought to be reviewed was a judgment in rem enunciating a legal principle; it, therefore, had the status of conclusiveness and finality, and no person could be allowed to challenge it merely for the reason that he was not a party in the case and had not been heard.

22. The same principle applies to the judgment that is under review in the present case. The judgment under review was also a judgment in rem²⁵ as it decided the status of the Re-instatement Act, that is, its constitutional vires; it, therefore, binds the parties and the non -parties alike. A judgment in rem settles the fate of the res by determining its status and thus operates directly on the res itself; it binds all persons claiming a right or interest in or under the res, even though pronounced in their absence. It is true that the actions (cases) brought before this Court were not originally in rem rather were in personam agitating the individual grievances, but the Court by granting leave to appeal to consider the status, i.e., the constitutional vires, of the Re-instatement Act, converted them into actions in rem and thus the consequent judgment under review was also delivered in rem. Needless to mention that in actions in rem it is neither practicable nor is it the requirement of law that the Court should issue a separate notice and offer an opportunity of hearing to each and every person who is likely to be affected, and bound, by the judgment. The objection that some or most of the persons affected by the judgment under review were neither issued notices nor heard before passing the judgment is, therefore, not sustainable because of the nature of the judgment under review²⁶ and cannot be accepted as a ground for recalling that judgment.

23. But, I must add, for complying with the constitutional command of fair trial and due process to a possible extent in such cases, the Court may order, as it is usually done by the civil courts dealing with actions in rem, for service of the public notice of the case through its publication in the press or any other mode deemed appropriate, for the knowledge of the persons likely to be affected by the judgment, who may then appear before the Court and seek permission to intervene and argue in the proceedings.²⁷ In fact, in the present case though no such public notice was served, some persons who thought them likely to be affected by the judgment on the question of vires of the Re-instatement Act did intervene and were allowed the opportunity of hearing; as they by themselves became aware of the pendency of the matter since it remained pending in the Court for a considerable period of about seven years from 2012 to 2019 for hearing.

(iv) All employees dealt with by the Re-instatement Act, not either "civil servants" or persons in the "service of Pakistan"

24. Next contention of the petitioners is that the Court wrongly held in para 44 of the judgment under review that the "sacked employees", as per the definition given in section 2(f) of the Re instatement Act, fell into the definition of either "civil servants" or persons in the "service of Pakistan", for major portion of the reinstated employees being employees of the corporations and other autonomous or semi-autonomous bodies did not fall under either of the said two categories. I find the contention correct, as not all the employees of the corporations and other autonomous or semi-autonomous bodies established by or under a Federal law, or owned or controlled by the Federal Government, falls within the definition of persons in the "service of Pakistan".²⁸ However, nothing turns on this point as to the legality of the judgment under review.

(v) Misconstruction and misapplication of Articles 240 and 242 of the Constitution

25. The petitioners have contended that the Court misconstrued and misapplied Articles 240 and 242 of the Constitution for judging the constitutionality of the Reinstatement Act. To appreciate this contention, we need to see what these Articles of the Constitution provide for in relation to the service of Pakistan concerning the Federation, as the Re instatement Act partly relates thereto, and what the Court has held in the judgment under review as regards thereto.

26. In relation to the service of Pakistan concerning the Federation, Article 240 of the Constitution provides that subject to the Constitution, the appointments to and the conditions of service of persons in the service of Pakistan shall be determined, "in the case of the services of the Federation, posts in connection with the affairs of the Federation and All-Pakistan Services, by or under Act of Majlis-e-Shoora (Parliament)"; while Article 242 provides that "Majlis-e-Shoora (Parliament) in relation to the affairs of the Federation... may, by law, provide for the establishment and constitution of a Public Service Commission" and the "Public Service Commission shall perform such functions as may be prescribed by law".

27. The Court has observed in the judgment under review that the Constitutional framework under Article 240 clearly envisions that any appointments in the service of Pakistan for the Federation shall be made under the Act of Parliament, and that in pursuance to Article 240 of the Constitution, the Parliament has enacted the Civil Servants Act, 1973. The Court has further observed that Article 240 of the Constitution is supplemented by Article 242, which envisions the creation of a Public Service Commission that is intended to be the supervisory body to oversee the process of recruitments. The Court, with the said observation, has held that the legislature, by enacting the Re -instatement Act, circumvented the constitutional process envisioned under Articles 240 and 242 of the Constitution, for which reason also the Re-instatement Act is ultra vires the Constitution.²⁹

28. No doubt, the appointments to and the conditions of service of persons in the service of Pakistan concerning the Federation, as per the constitutional mandate of Article 240, are to be determined by or under Act of Parliament. The Parliament (Legislature) is, thus, the only repository of the constitutional power in relation to the appointments to and the conditions of such service; the Executive has no direct and independent power in this regard and exercises such power delegated to it by or under an Act of the Parliament (Legislature).³⁰ However, the Parliament is not required, or bound, under Article 240, to enact only one Act for this purpose. The enactment of the Civil Servants Act, 1973, therefore, does not make the Parliament functus officio, or divest it of its legislative power, to enact another Act on the subject of appointment to and conditions of such service or a part of such service, and to give that Act an overriding effect against the provisions of the Civil Servants Act, 1973.

29. As for selection and recruitment of persons for appointment in the service of Pakistan concerning the Federation to be made through the Federal Public Service Commission ("FPSC"), Article 242 of the Constitution by itself neither establishes the FPSC nor prescribes the functions thereof, rather leaves these matters to be done by the Parliament by enacting law. The law enacted by the Parliament on these matters, is the Federal Public Service Commission Ordinance, 1977. The FPSC has been established under section 3 of the Ordinance, and its main functions, as prescribed under section 7 of the Ordinance, are: (a) to conduct tests and examinations for recruitment of persons to All- Pakistan Services, the civil services of the Federation and civil posts in connection with the affairs of the Federation in basic pay scales 16 and above or equivalent; and (b) to advise the President of Pakistan on matters relating to qualifications for and methods of recruitment to,

the said services and posts. The status of the FPSC established under the law, not under the Constitution, is thus of a statutory body not constitutional one, and its functions are also statutory not constitutional.³¹

30. In view of the above constitutional position, the vires of one law, i.e., the Re-instatement Act, enacted by the Parliament (Legislature) cannot be examined on the touchstone of another law, i.e., the FPSC Ordinance 1977, made by the same Legislature, especially when the law enacted later in time has been given an overriding effect against all other laws on the subject, nor can the same be examined, and declared ultra vires, on the touchstone of Articles 240 and 242 of the Constitution as both these Articles only command for dealing with the matters specified therein by an Act of the Parliament, and provide for nothing more.³² Article 240 does not provide any criterion for judging the constitutionality of an Act of the Parliament, except that the Act of Parliament must relate to the appointments to and the conditions of service of persons in the service of Pakistan concerning the Federation, not concerning any Province other than All-Pakistan Service which is a service common to the Federation and the Provinces. Likewise, the constitutional limitation on the power of the Parliament to enact a law under Article 242 is that it can enact a law for the establishment of a Public Service Commission and prescribing its functions, in relation to the affairs of the Federation, not of any Province. I find that the said aspect of the provisions of Articles 240 and 242 of the Constitution was not presented by the parties before the Court, and the same thus escaped notice of the Court in applying the said Articles of the Constitution to judge the constitutional vires of the Reinstatement Act, in the judgment under review. The contention of the petitioners in this regard, therefore, sustains.

(vi) Employees reinstated under the Reinstatement Act, whether belong to a distinct class and their reinstatement does not offend Article 25 of the Constitution

31. Next comes one of the main contentions of the petitioners, that the Court overlooked the important aspect of the case that the employees reinstated under the Reinstatement Act belonged to a distinct class of employees who suffered "political victimization", in the matter of their dismissal, removal or termination during the relevant period, and that the Parliament (Legislature) had enacted the Reinstatement Act for the benefit of this distinct class of employees, therefore, the said Act did not offend Article 25 of the Constitution.

32. The Preamble to the Re-instatement Act simply states that the Act is enacted "for the purpose of providing relief to persons who were appointed in a corporation service or autonomous or semi autonomous bodies or in Government service during the period from the 1st day of November, 1993 to the 30th day of November, 1996 (both days inclusive) and were dismissed, removed or terminated from service during the period from the 1st day of November, 1996 to the 12th day of October, 1999 (both days inclusive)." It does not specifically mention that the said persons have suffered "political victimization" in the matter of their dismissal, removal or termination from service. Nor any statement of objects and reasons for enactment of the Re-instatement Act has been presented by any of the petitioners before us; we, therefore, assume that there is no such statement. To show that the said persons had suffered "political victimization" and the Re-instatement Act was enacted by the Parliament for the purpose of providing relief to them, learned counsel for some of the petitioners have referred to certain parliamentary debates made by the parliamentarians who had presented the Bill for enactment of the Re-instatement Act in two Houses (National Assembly and Senate) of the Parliament and who had supported the same.

33. It hardly needs reiterating that the parliamentary debates, especially the speech made by the mover of the Bill or by the chairman or member(s) of the Standing Committee that considered the Bill, explaining the reason for introducing the Bill can be referred to for ascertaining the mischief sought to be remedied by the legislation and the object and purpose for which the legislation was enacted.³³ Therefore, it would be expedient to quote here some parts from the parliamentary debates relating to the objects and reasons of the enactment of the Reinstatement Act, made by the parliamentarians who were member(s) of the Standing Committee that had considered and approved the Bill as well as by the other parliamentarians who had supported the same:

Debates in the National Assembly of Pakistan (25th Session) dated 7 October 2010³⁴

Syed Khurshid Ahmad Shah:

English Translation: This was our commitment that we would reinstate the persons who had suffered victimization..... If the Opposition thinks that it was their Government that sacked these persons, therefore, they have to oppose it, then it is unjust..... It is the problem of nine thousand families of persons who had been sacked. They do not belong only to Sindh, Punjab, Pakhtunkhwa or Balochistan; they belong to whole Pakistan. They all do not belong to Peoples Party I say it with great regret that these persons were sacked in the regime of Mian Nawaz Sharif.... You are adamant to oppose it as these nine thousand persons reinstated by us were sacked by the Government of Mian Nawaz Sharif...They are not just nine thousand persons, they are ninety thousand families: Nine families are linked with one family.

Iqbal Muhammd Ali Khan:

English Translation: Those who had been given gold medals and performance certificates in banking, were given letter [of their termination] one morning; it was a victimization at that time.

Riaz Fatiana:

English Translation: It has been a culture in this country that when one Government comes and other goes, all persons recruited [in one Government] are sacked.

Mian Riaz Hussain Pirzada:

English Translation: There have been traditions of sacking the persons employed in a Government, at the end of term of that Government.

Rahmat Ullah Kakar:

English Translation: All the coalition partners were committed on this that the persons who had been deprived of their livelihood on political victimization [were to be reinstated]... for this purpose a Committee had been constituted, which had fulfilled the promise of reinstatement of such employees by its hard work day and night in nine months on merits.

Debates in the Senate of Pakistan (65th Session) dated 10 November 2010³⁵

Senator Mian Raza Rabbani:

English Translation: During that period for which this bill has been introduced, all orders [of termination] without exception were made without issuing show cause notice to those persons, nor were any explanation called from them. A blanket order was handed over to them on one morning [stating] that because your appointment have been made in the period of Pakistan Peoples party, you are therefore being terminated; because you have been appointed on political grounds, and this is a matter of record.

Senator Colonel (R) Syed Tahir Hussain Mash'hidi:

English Translation: Their only fault was that they had unfortunately been employed during the period of Pakistan Peoples Party. It is not my party; therefore, I am making statement with all honesty. It was their only fault that they had got jobs during the period of Pakistan Peoples Party. And when the Government of Pakistan Muslim League (N) came in power, they were sacked without investigating whether who had political affiliation, who had got job on reference or not, whether they got the job on merit. They were sacked on because they had got job during the period of Pakistan Peoples Party. You can say, it was a political victimization.

Senator Molana Gul Naseeb Khan:

English Translation: We have lived in such period in the history of Pakistan when political parties used to pursue vindictive politics, and for this reason they used to indulge in activities against each other and also against each other's Government... The employees sacked in the year 1997 were also sacked because of that vindictiveness ... Earlier to that period some individual incident [of this kind] had happened, and had been happening; but if any general action had been taken that is only this which is before us.

Senator Syed Nayyer Hussain Bokhari:

English Translation: The basic thing is that there was victimization in this, and I think which irritates somebody is probably the period, which is specific, during which the persons sacked from their employments were politically victimized.

The above extracts from the parliamentary debates that took place on the floor of the two Houses of the Parliament provide a valuable insights into the objects and reasons for which the Bill for enactment of the Re instatement Act was introduced. A plain reading of the extracts of the debates supports the contention of the petitioners and makes it clear that the reason for choosing the persons appointed in and dismissed from service during the specified period, for the beneficial treatment of reinstatement and regularization in service notwithstanding any other law on the subject, was that they had suffered "political victimization" in the matter of their dismissal, removal or termination from service, at the hands of the Government (Executive) during that period, and the object of the enactment of the Re-instatement Act was that the Parliament (Legislature) intended to provide relief to such persons, statedly nine thousands.

34. I fully recognize that there is a distinction between the fact that a particular statement was made by a parliamentarian, which narrates certain objects and reasons for enactment of an Act of the Parliament, and the

truth of any matter of fact stated in that statement. The former is itself a fact relevant for ascertaining the objects and reasons for enactment of an Act of the Parliament and need no further proof other than the authentic record of such statement; while the latter, if disputed, is to be proved aliunde, that is, by evidence apart from the fact that a statement about it was made in the parliamentary debates.³⁶ In the present case, it is a question of fact whether or not the persons going to be reinstated under the Re-instatement Act had suffered "political victimization", in the matter of their dismissal, removal or termination from service; the correctness of which, if disputed, is to be proved by evidence other than the above quoted statements of the parliamentarians. However, nobody has disputed, before us, the correctness of that factual statement made by the parliamentarians, nor does that statement of fact appear to be inherently improbable; it is, rather, supported by the circumstance that a large number of employees, not a few, were sacked during the specified period. Therefore, the Court is to proceed on assuming that undisputed statement of fact to be correct.

35. Needless to mention that Article 25(1) of the Constitution which declares, and guarantees as a fundamental right, that all citizens are equal before law and are entitled to equal protection of law, does not prohibit reasonable classification for equal treatment, that is, "equality among equals", which is based on intelligible differentia, distinguishing persons or things that are grouped together from those who are left out, and has a rational nexus to the object sought to be achieved by law.³⁷ And a classification having a reasonable basis does not offend against fundamental right to equality, merely because it is not made with mathematical nicety or because in practice it results in some inequality. Further, when the classification made by a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed, and the one who assails the classification must carry the burden of showing that it does not rest upon any reasonable basis but is essentially arbitrary.³⁸

36. In the present case, after accepting the undisputed statement of fact that the persons going to be reinstated under the Re instatement Act had suffered "political victimization", in the matter of their dismissal, removal or termination from service, there remains no difficulty to hold that they formed a distinct class, and their classification was based on intelligible differentia, distinguishing them from those who had been left out, and had a rational nexus to the object sought to be achieved by the Re-instatement Act. Therefore, only their reinstatement and regularization under the Re-instatement Act as such did not offend the fundamental right to equal treatment, guaranteed by Article 25(1) of the Constitution, of other employees sacked in other durations as well as of regular employees appointed under the general laws relating to the appointments to and terms of conditions of the service concerned.³⁹ This aspect of the Re-instatement Act, it appears, escaped notice of the Court at the time of passing the judgment under review. The contention of the petitioners in this regard, therefore, sustains.

(vii) Application of the principles of reading out and reading down, to uphold the constitutionality of the Re-instatement Act

37. The next main contention of the petitioners is that instead of declaring the whole Reinstatement Act to be ultra vires the Constitution, the Court may have declared only those provisions of the Reinstatement Act which had infringed the fundamental right to 'status' of the regular employees, guaranteed under Article 9 of the Constitution, by applying the rules of severance (reading out) and reading down.

38. To begin with on this contention of the petitioners, I would cite here the two cardinal principles of construction of statutes: (i) that there is always a presumption in favour of the constitutionality of a legislative enactment (a law); and (ii) that a law enacted by a competent legislature is to be construed in such a manner that its constitutional validity may be saved rather than destroyed.⁴⁰ It is because of these principles that the courts lean in favour of upholding the constitutionality of laws and are reluctant to strike them down by declaring them as unconstitutional. The one who challenges the constitutionality of a law bears the burden to show that the law is violative of any of the constitutional provisions, and when two opinions as to the construction of a law are possible, the courts prefer to adopt that which upholds the constitutionality of the law, over that which does not. The courts, therefore, construe a law in such a manner that saves the law than destroys it, and declare it unconstitutional only when it clearly contravenes any constitutional provision and cannot be read as constitution compliant by applying any of the methods, techniques or tools of rule of constitution

complaint construction, e.g., reading out or reading down. Declaring the law unconstitutional is thus one of the last resorts taken by the courts.

39. The primary purpose of applying these techniques, methods or tools, like, reading out or reading down, is to endeavor for saving the constitutional validity of the statute, to a possible extent, and the main reason for applying them in preference to declaring the law unconstitutional is that their application makes the process of judicial review of legislative actions less intrusive than invalidating the whole law, as "the court should not strive officiously to kill [a law] to any extent greater than it is compelled to do"⁴¹. The principle of constitutional compliant construction of laws has been recognized by our Constitution itself in its Article 268(6), and this Court has been applying the methods of "reading out" (severance)⁴² and "reading down"⁴³, with certain conditions, for the purpose of construing the provisions of a law as constitution compliant and to save it, as much as possible, from being declared ultra vires the Constitution. The primary condition for applying these methods for a constitution compliant construction is to see whether the Legislature would have enacted the law in the form that remains or turns out to be after application of any of the said methods. Further, in case of applying the method of reading out (severance) the court is to see whether after reading out (severing) the invalid part, the remaining provisions of law would remain operative within the scope of the object of the law.⁴⁴ Therefore, when confronting a constitutional flaw in a statute, court should try to limit the solution to the problem - severing the flawed portion while leaving the remainder intact. Because the unconstitutionality of a part of a statute does not necessarily defeat or affect the validity of its remaining provisions. If after severing the flawed part, the remaining provisions of law would remain fully operative, court must sustain those provisions unless it is evident that the Legislature would not have enacted those provisions independently of that which is invalid.

40. In the light of the above principles of statutory interpretation, I proceed to examine the contention of the petitioners as to declaring the Re-instatement Act invalid partially, instead of as a whole.

41. In the judgment under review,⁴⁶ the Court formulated the proposition for decision on the question of constitutional vires of the Re instatement Act, thus:

Whether the law [i.e., the Re-instatement Act] has placed the regular employees, who remained in service, at a disadvantageous position in terms of seniority and other benefits to reinstated employees. If so, then the [re-instatement] Act of 2010 would be violative of right enshrined under Article 9 and Article 25 of the Constitution, of the regular employees.

And for answering the question in affirmative, the Court reasoned:⁴⁷

The legislature has, through the operation of The [Re-instatement] Act of 2010, attempted to extend undue benefit to a limited class of employees. This legislation has a direct correlation to the right enshrined under Article 9 of the Constitution for employees currently serving in the departments falling under section 2(d) of The [Re-instatement] Act of 2010. Under Article 9 of the Constitution, a civil servant has been extended the right to 'status' and 'reputation'. The right to 'status' and 'reputation' are not mutually exclusive and are encompassed by the wider umbrella of Article 9 of the Constitution. Upon the 'reinstatement' of the 'sacked employees', the 'status' of the employees currently in service is violated as the reinstated employees are granted seniority over them. This is an absurd proposition to consider as the legislature has, through legal fiction, deemed that employees from a certain time period are reinstated and regularized without due consideration to how the fundamental rights of the people currently serving would be affected.

(Underlined for emphasis)

A careful reading of the above quoted observations of the Court shows that the Court declared the Re-instatement Act to be violative of the right to 'status' enshrined in fundamental 'right to life', guaranteed under Article 9 of the Constitution, of the regular employees serving in the relevant departments at the time of promulgation of the Re-instatement Act, for the only reason that "Upon the 'reinstatement'... the reinstated employees are granted seniority over them." While the Court did not specify the relevant provisions of the Re-instatement Act, in the judgment under review, which grants the seniority to the reinstated employees over the then working regular employees, those provisions are that of sections 4(a) and 10 which provide for reinstatement of certain categories of sacked employees and their regularization on "one scale higher" than the

scale, grade, cadre, group, post or designation from which they were dismissed, removed or terminated. Both these Sections are reproduced here for ready reference:

Section 4(a): a sacked employee appointed on permanent or temporary basis or regular or ad hoc basis or otherwise in any corporation or Government service against a regular or temporary post shall be reinstated and regularized in regular service of the employer on one scale higher to his substantive scale, grade, cadre, group, post or designation, whatever the case may be, held by the sacked employee at the time of his dismissal, removal or termination from service or at the time forced golden hand shake was given to the sacked employee;

Section 10: In cases where any change in structure of any scale, grade, cadre, group, post or designation, whatever the case may be, has been made by the competent authority or employer after the 1st day of November, 1996, the sacked employee on re-instatement shall be placed in service of the employer on one scale higher than the scale, grade, cadre, group or designation, whatever the case may be, from which he was dismissed, removed or terminated from service or given forced golden hand shake.

It is very pertinent to mention here that only the above two categories of the sacked employees were to be reinstatement and regularized on "one scale higher", while all the rest of the categories of the sacked employees, i.e., contract employees [section 4(b)], employees found not guilty in enquiry [section 4(c)], trainee employees [section 4(d)] and employees given forced golden hand shake [section 4(e)], were to be reinstated and regularized against a regular post of the same scale, grade, cadre, group, post or designation, whatever the case may be, from which they had been dismissed, removed or terminated from service or given forced golden hand shake. And as per section 4(f), all the employees Re-instated under the Re-instatement Act were to be regularized from the day of enactment of the Re-instatement Act (not from the date of their initial appointment) and were to be placed at the bottom of the seniority list effective on the date of enactment of the Re-instatement Act. Section 4(f) is also reproduced here for ease of reference:

Section 4(f): a sacked employee re-instated under this Act shall be regularized in the service of the employer in post, scale, grade, cadre, group or designation, whatever the case may be, on which he is re instated under the Act, as a permanent and a regular employee, with effect from the day of enactment of this Act, at par with other regular employees of the employer concerned and shall be placed at bottom of the seniority list, effective as on the date of enactment of this Act, for scale, grade, cadre, post, group or designation, whatever the case may be, in which the sacked employee is re-instated in accordance with the provisions of this Act;

It is thus evident that the issue of seniority that affected the right to 'status' enshrined in fundamental 'right to life' of the regular employees serving in the relevant departments, had arisen only in cases of employees reinstated and regularized on "one scale higher", under sections 4(a) and 10. Their reinstatement and regularization on "one scale higher" had made them senior to those regular employees who were senior to them even as per their date of initial appointments and were serving in the same grade and post in which they had been appointed prior to the initial appointment of the reinstated employees, because of the slow channel of promotion.⁴⁸ Therefore, to the extent of reinstatement and regularization of some sacked employees, under sections 4(a) and 10, on "one scale higher", I fully agree with, and reaffirm, the observation made in the judgment under review that such reinstatement and regularization was violative of the right to 'status' enshrined in fundamental 'right to life' of the regular employees serving in the relevant departments at the time of promulgation of the Re-instatement Act, and add that it was also violative of the fundamental 'right to dignity' guaranteed under Article 14 and fundamental 'right to equality before law' guaranteed by Article 25 of the Constitution as it gave an undue advantage to the reinstated employees to the disadvantage of the rights of the already working regular employees.

42. The proper course, however, in my humble view was that the Court should have declared only that part of the provisions of sections 4(a) and 10 of the Re-instatement Act that had the said offending effect, i.e., the reinstatement and regularization on "one scale higher". And this could have easily been done by reading out (severing) the words "one scale higher to" from the provisions of section 4(f) and the words "one scale higher than" from the provisions of section 10 of the Re instatement Act, and reading down those provisions to mean that the sacked employees mentioned in those Sections were to be reinstated and regularized in the same or restructured, as the case may be, scale, grade, cadre, group, post or designation from which they had been

dismissed, removed or terminated from service, for the purpose of saving the constitutional validity of those provisions and construing them as constitution compliant. Because from the reasons and objects of the enactment of the Re-instatement Act, it is more than clear: (i) that the Legislature would have enacted the law, i.e., sections 4(a) and 10, in the form that remains or turns out to be after application of methods of reading out and reading down, (ii) that it cannot be said that the Legislature would not have enacted those provisions independently of the part that is invalid, and (iii) that after reading out (severing) the invalid part, the remaining provisions of the law, i.e., sections 4(a) and 10, remains operative within the scope of the object of the law, i.e., providing relief to persons who had suffered "political victimization".

43. The next reason that prevailed with the Court, in the judgment under review,⁴⁹ for declaring the Re-instatement Act ultra vires the Constitution was that the sacked employees had not opted for remedy available to them under the law upon their termination from service within the limitation-period provided therefor, thus, they had forgone their right to be reinstated by availing the due process of law. I am afraid, this reason was not plausible. It escaped the notice of the Court that the sacked employees were seeking their reinstatement, under a new law, i.e. the Re-instatement Act, enacted by a competent Legislature, and not under the laws that were in force at the time of their termination from service. Therefore, the question of forgoing the right to be reinstated by not availing the remedy under the laws in force at the time of orders of their termination from service and of expiry of limitation-period under those laws, was not relevant.

44. It could also not be appreciated in the judgment under review that the administrative orders of termination from service passed without any charge of misconduct, inefficiency or unfitness and the judicial orders passed on such a charge, under the relevant law, have different bearing on the legislative power of the Legislature: the former can be undone by the Legislature by any means, but the effect of the latter can only be neutralized by changing the relevant law, with retrospective effect, on the basis of which they have been passed⁵⁰. Thus, only those provisions of the Re-instatement Act that have the effect of nullifying, or give the power to the Executive to nullify, the judicial orders passed on charge of misconduct, inefficiency or unfitness that had attained finality by being unchallenged or unsuccessfully challenged, and that too without changing the law under which those orders had been passed, would have the effect of interference into the functioning and independence of the judicial organ of the State, and thus be violative of the provisions of Articles 175 and 212 of the Constitution. A careful reading of the Re-instatement Act identifies that sections 2 (f) (vi), 11, 12 and 13, which deal with and provide for reinstatement and regularization of such sacked employees who had been dismissed, removed or terminated from service on account of absence from duty, misconduct, mis-appropriation of Government money or stock, or unfitness on medical grounds, and the determination of their guilt or medical unfitness had attained finality by being unchallenged or unsuccessfully challenged, have such effect. Such employees, even, do not fall within the class of the sacked employees who had suffered "political victimization," envisaged by the Act for a beneficial treatment. The said Sections of the Re-instatement Act are, therefore, ultra vires the Constitution.

45. The Court, in the judgment under review, has inadvertently relied upon Article 4 of the Constitution also to declare the Re instatement Act to be ultra vires the Constitution, as the attention of the Court was not invited to its previous judgments in the cases of *Fauji Foundation v. Shamimur Rehman*⁵¹ and *LDA v. Imrana Tiwana*⁵², wherein it has been held of Article 4 of the Constitution, which provides for a right to be dealt with in accordance with law, that this Article does not provide any criterion, and thus cannot be a touchstone, to test the vires of a law.

46. The Court, in the judgment under review,⁵³ has declared the Re-instatement Act to be ultra vires the Constitution mainly on the touchstone of Articles 4, 9 and 25 of the Constitution, as discussed above, and quoted⁵⁴ those Articles of the Constitution and discussed⁵⁵ the rights guaranteed thereunder, but neither cited nor discussed the specific provisions of the Re-instatement Act which had, in view of the Court, violated those rights. The attention of the Court was not invited, nor did it adhere, to the principle, as based upon in *LDA v. Imrana Tiwana*,⁵⁶ that a Court examining the constitutional vires of a law is to put down the provisions of the law under examination next to the fundamental rights guaranteed by the Constitution and state why the two cannot be reconciled, before striking them down. I find that the attention

of the Court was not invited to the methods of "reading out" and "reading down" for construing the ex facie invalid provisions of the Re-instatement Act as constitution complaint, and the same thus escaped notice of the Court. I am sure that had this aspect been considered by the Court, the decision would have been otherwise.

47. The contention of the petitioner as to upholding the constitutionality of the Re-instatement Act by applying the methods of constitution complaint construction, i.e., reading out (severance) and reading down, to the ex facie unconstitutional provisions of that Act is therefore accepted as a valid ground for making review of the judgment under review. For misconstruction of law,⁵⁷ and non-consideration of an important aspect of the matter which if had been considered the decision would have been otherwise,⁵⁸ amount to errors apparent on the face of the record and are thus well-established grounds for making review of a judgment or order.

48. These are my reasons for the above-cited short order.

Providing equal opportunity to all citizens and ensuring transparency in the process for appointment to the public employment

49. However, before parting with the judgment, I think it appropriate to underline that I have taken the above view on the premise that there was no violation of Articles 25 and 27 of the Constitution, in the process of initial appointments of the sacked employees, as no one has alleged before us, and produced any evidence, of such violation, nor was the initial appointment of the sacked employees was under challenge before the Court in the cases decided by the judgment under review.

50. Article 25 of the Constitution, which commands for ensuring equality of all citizens before law and their entitlement to equal protection of law, by necessary implication forbids the State, its organs and instrumentalities, to deny to any citizen such equality and equal protection. This constitutional guarantee is of very wide import and amplitude, encompassing within its comprehensive scope different shades, facets and implications as 'equality' is a dynamic concept with many aspects and dimensions. Equality is antithetic to discrimination and arbitrariness. Article 27 of the Constitution, which safeguards against discrimination in appointments in the 'service of Pakistan', also guarantees 'equality' to all citizens in respect of such appointments; it is therefore an instance of the application of 'equality' commanded by Article 25, in respect of appointments in the 'service of Pakistan'. The appointments to the posts or services in any organ or instrumentality of the State (such as, corporations, organizations, or bodies established under law or controlled by Government) that do not fall within the 'service of Pakistan', as defined in Article 260 of the Constitution, are covered under the wide import and amplitude of 'equality' guaranteed under Article 25 of the Constitution. Therefore, such appointments are also to be made by providing equal opportunity to all citizens by public advertisement and ensuring maximum transparency in the selection process to dispel any impression of favouritism and nepotism.

Sd/- **Syed Mansoor Ali Shah, J**

MWA/H-4/SC Order accordingly.