COMPANY CONTACTS AND DOCTRINE OF ULTRA VIRES, A COMPARISON OF UK AND PAKISTANI COMPANY LAW

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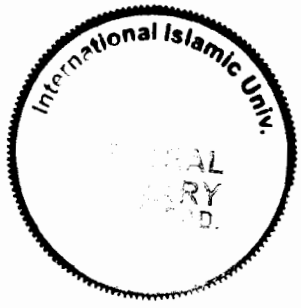

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FINAL APPROVAL

It is certified that we have gone through the thesis submitted by Hasan Raza and we have come to the conclusion that the research work is up to the mark and fulfills all the requirements for the grant of Masters degree in Law by the Faculty of Shariah and Law, International Islamic university, Islamabad.

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LIST OF ABBREVEATIONS

AIR.....All India Reports

All ER .....All England Reports

CJ.....Chief Justice

ClC.....Civil Law Cases

Co.....Company

KB.....King's Bench

QB.....Queen's Bench

Ltd.....Limited

PLD.....All Pakistan Legal Decisions

Pvt.....Private

SC.....Supreme Court

SCMR.....Supreme Court Monthly Review

UK.....United Kingdom

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Preface

The present work is my LL.M thesis submitted to the Faculty of *Shariah* and Law, International Islamic University, Islamabad in 2010. The subject matter of the thesis is doctrine of ultra vires with special reference to protection of third party interest. As a company is bound by its charter i.e., Memorandum and Articles of Association, which effect its incorporation and take its control throughout its life. When company goes outside the domain of the powers endowed to it bu the constitution, that act of the company would be termed as ultra vires. These ultra vires acts of the company produce disastrous effects for those persons, who deal with the company in a bonafide manner.

The Legislature and Judiciary in UK carried out tremendous efforts to reduce the rigors of this doctrine. But, we see no efforts on the part of judiciary and legislatures in Pakistan, which aim to protect the interest of third party dealing with the company in a bona fide manner.

Foreword:

The charter of a modern company consists of two documents namely the memorandum of association and article of association. The purpose of the constitution is to provide regulations for the daily affairs of the company, define and limit the powers of the company's directors, to regulate the distribution of the profit and their control within the company. In particular, it defines the capacity of the company.

The company's total power to do something is determined by its objects clause as specified in memorandum of association. A large part of that power is then delegated in the articles of association to the board of directors who may exercise it themselves, or in certain circumstances may delegate them wholly or partly to the company's agent or employee.

As Company is an artificial personality, and company's dealing with outsiders is conducted by individual officers (manager, director), agents or employees of the company. This raises some questions as to whether those transactions, or dealings and contracts made by the company's officers are legitimate in all aspects or not and whether they are binding on the company. This involves examination of two distinct areas of law, namely the *ultra vires* doctrine and the agency principle.

There are two major questions, with regard to the authorisation of such powers or transactions. First, whether the act or transaction is within the capacity of the company that is specified in objects clause. If yes, then the second question arises that whether the individual who contracted on the company's behalf is authorised to do so? If he is, then the transaction is valid, and if he is not then the transaction is voidable. The result is that this area is full of uncertainty, and causes danger for the third party who contracts with the company in good faith.

In my thesis, I would like to discuss the concept of *ultra vires* doctrine, its impacts in the business world especially on registered companies and the reforms made after the amendment of the U.K. Companies Act, 1985 by the Companies Act 1989. The difficulties of interpretation that have been thrown up by the new provisions introduced by the Companies Act 1989 in the U.K., and the effects of these provisions on corporate capacity. I shall also discuss how the U.K. Courts and legislature responded to deal with these problems. I will also examine the *Turquand rule* and the agency principle, their scope and their impact. The reform proposals made by the Company Law Review Steering Group.

The *ultra vires* doctrine is related to company's capacity, which means that no transaction, which was beyond the company's capacity (not authorised by the company's constitution), could be binding on it. I shall also discuss the reform provisions regarding *ultra vires* act, first enunciated in European Communities Act 1972, which allowed transactions that were beyond a company's capacity to protect the third party interest. These provisions were consolidated in section 35 of Companies Act 1985. But this section was proved to be unsatisfactory and replaced by section 35, 35-A, 35-B and 322-A by the Companies Act 1989, which consolidated these into the 1989 legislation.

Finally, I shall also discuss the concept of *ultra vires* doctrine in Pakistan. The endeavors made by Pakistani Company law to protect the rights of third party contracting with the company in good faith.

The upshot of the above discussion is that I shall comparatively discuss the concept of *ultra vires* doctrine in Pakistan and the U.K. The endeavors made by Pakistani and UK Company law to protect the rights of third party contracting with the company in good faith.

PART I

AN INTRODUCTION OF THE TERM

Chapter No.1 The Term *Ultra Vires*

1.1 Derivation:

Ultra vires is a Latin phrase. It is derived from two distinct words, i.e., '*ultra*' and '*vires*', which means 'beyond' and 'power' respectively[1].

1.2 Meaning:

Ultra vires means unauthorised; beyond the scope of power allowed or granted by a corporate charter or by law[2]. It means an act which is beyond the powers[3].

1.3 Definition:

"The term *ultra vires* simply means beyond powers or lack of power. An act is said to be *ultra vires*, when it is in excess of the power of the person or authority doing it[4]."

1.3.1 As per law dealing with companies:

The term *ultra vires* in connection with law regarding companies is defined in the following way;

"A company incorporated under the Companies Act had legal personality only for the purposes laid down in its object clause. From this it was deduced that an act done by the company outside its object clause (an ultra vires act) was null and void. Neither the

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[1] www.indialaw.com, visited in June 2008
[2] Bryan A. Garner, ed. Black's Law Dictionary, 8th edition, (St. Paul, Minn, 2004), 1559
[3] En.wikipedia.org/wiki/ultra-vires
[4] P. Janardhana and another v. Union of India and others, AIR 1970 Mys. 171 at P.176; Abdul Hameed v. Punjab Bar Council, 2008 ClC 1309 at p.1310 & 1316

company nor the other contracting party (if the ultra vires act was the entering into of a contract) could sue upon the contract, nor could the ultra vires act be ratified by the shareholders, even unanimously."[5]

"*Ultra vires* describes acts attempted by a corporation that are beyond the scope of powers granted by the corporation's Articles of Incorporation or in a clause in its by-laws; in the laws authorizing its formation, or similar founding documents. Acts attempted by a corporation that are beyond the scope of its charter are void or voidable[6]."

"It is an act of a company through which the company goes out of the way to cross its limits as stipulated in the Memorandum of Association or the Article of Association of the Company. The company is not legally bound, nor can it find anyone else, with the provisions or the results of such acts[7]".

"By ultra vires is meant an act or transaction of a company, which, though it may not be illegal, is beyond the company's powers by reason of not being within the objects of memorandum of association[8]".

"An act beyond the objects mentioned in the memorandum is ultra vires and void, and can not be ratified[9]".

The term *ultra vires* has been used here in the context of an act of the company, which is alien to the powers endowed to it by virtue of the charter of the company, i.e., memorandum and articles of association. When an act of the company is away from the object clause of the company it is void and con not be authorized even with the unanimous consent of all the

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[5] Geoffrey Morse and others, *Palmer's Company Law:Annoted Guide to the Companies Act, 2006*, (London: Sweet and Maxwell, 1st ed., Vol.1, 2007) p.2119

[6] http://www.answers.com/topic/ultra-vires, visited in July 2008

[7] Justice Y V Chandrachud ,"Advanced Law Lexicon", Vol.4, 3rd Ed., Reprint on 2009, p.4796

[8] Ashbury Ry. Carriage Company v. Richie, (1875) LR 7 HL 653; Justice Y V Chandrachud, "Ramaiya's Guide to the Companies Act" Part I, Fourteenth Ed., Reprint on 1999, p. 216 & 217.

[9] Dr. Lakshmanaswami Mudaliar v. LIC, (1963) 33 Com Cases 420

directors. The term ultra vires has also been used in relation to acts of directors of the company, which are beyond the powers delegated to them[10]. It is said that-

> "Where a company exceeds its power as conferred on it by the objects clause of its memorandum, it is not bound by it because it lacks legal capacity to incur responsibility for the action, but when the directors of a company have exceeded the powers delegated to them[11]."

1.3.2 *Ultra vires* according to constitutional law:

Constitutional law defines the term *ultra vires* in the following style;

The Constitutions provide the organs of the State with various powers to run day to day affairs of the State. If any organ of the state goes outside the domain of these powers, such acts would be *ultra vires*. Even some of the actions of the legislatures may also be ultra vires but only in the case if it exceeds the powers endowed to it by the Constitution. The same view is observed by Mr. Justice Chandrachud. He says that-

"if a legislative action is *'ultra vires'* it exceeds the power granted to the legislative body[12]".

1.3.3 Administrative law and *ultra vires:*

According to administrative law, *ultra vires* means;

"Administrative law views *ultra vires* in a narrow or broad sense. Narrow *ultra vires* applies if an administrator did not have the substantive power to make a decision or it was wrought with procedural defects. Broad *ultra vires* applies if there is an abuse of power

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[10] Cf. Grower, *"The Principle of modern Company Law"*, p. 78
[11] Ibid & http://lrd.yahooapis.com, visited in July 2008
[12] Justice Y V Chandrachud ,"Advanced Law Lexicon", Vol.4, 3rd Ed., Reprint on 2009, p.4796

e.g., unreasonableness or bad faith or a failure to exercise an administrative discretion e.g., acting at the behest of another or unlawfully applying a government policy[13]."

1.4 Explanation:

"The doctrine of ultra vires wears at first sight an aspect of technicality, but closer examination shows it to be eminently rational, and a necessary complement of the law governing corporations of special importance at the present day[14]".

"A corporation though a persona in law, is not an ordinary persona. It is created and endowed for certain objects, and for certain objects only, and its powers are impliedly restricted to doing what is necessary for the attainment of those objects; in other words those objects define and circumscribe the corporation's sphere of activity. Outside this sphere the corporation is struck with importance and all that it does is 'ultra vires' and wholly void[15]".

"We can say that the term has a broad application and includes not only acts prohibited by the charter, but acts which are in excess of power granted and not prohibited, and generally applied either when a corporation has no power whatever to do an act, or when the corporation has the power but exercises it regularly[16]".

"*Ultra vires* points to the capacity or power of the person to do that act. It is not necessary that an act to be *ultra vires* must also be illegal. It may be but it may as well not be... the essence of doctrine of *ultra vires* is that the act is done in excess of the powers possessed by the person in law. This doctrine proceeds on the basis that the person has limited powers[17]." It simply denotes a concept distinct from illegality[18].

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[13] ibid
[14] Stockport District Waterworks Co. v. Mayor etc., of Manchester, (1863) Jur. N.S.266
[15] Pickering v. Stephenson, (1872), LR Eq. 340
[16] Barrett v. Bank of Peoris, 295 III. App.534 : 15 NE 2d 333, 335
[17] Anand Prakash v. Assistant Registrar Co-operative Societies and others, AIR 1968 All. 22 at p.22, 24 & 25; Abdul Hameed v. Punjab Bar Council, 2008 ClC 1309 at p.1310 & 1316
[18] Anand Prakash v. Assistant Registrar Co-operative Societies and others, AIR 1968 All. 22 at p.22, 24 & 25.

"When it is said that a legislative enactment or any of its provisions is *ultra vires* of the Constitution, it means that the legislature which purported to enact it, exceeded the power conferred on it (the Legislature) under the Constitution. When it is said that a rule is *ultra vires* of the Act, it means that the authority which purported to make the rule exceeded the power conferred on it under the Act[19]."

For example "according to Article 15.2 of the Irish Constitution, the Oireachtas is the sole lawmaking body in Ireland. In the case of *CityView Press v AnCo* however, the Irish Supreme Court held that the Oireachtas may delegate certain powers to subordinate bodies through primary legislation, so long as these delegated powers allow the delegatee only to further the principles and policies laid down by the Oireachtas in primary legislation and not craft new principles or policies themselves. Any piece of primary legislation which grants the power to make public policy to a body other than the Oireachtas is unconstitutional; however, as there is a presumption in Irish constitutional law that the Oireachtas acts within the confines of the Constitution, any legislation passed by the Oireachtas must be interpreted in such a way as to be constitutionally valid where possible[20]."

"Thus, in a number of cases where bodies other than the Oireachtas were found to have used powers granted to them by primary legislation to make public policy, the impugned primary legislation was read in such a way that it would not have the effect of allowing a subordinate body to make public policy. In these cases, the primary legislation was held to be constitutional but the subordinate or secondary legislation, which amounted to creation of public policy, was held to be *ultra vires* the primary legislation and was therefore struck down[21]."

1.4.1 Distinction between ultra vires acts and those acts which could be validated:

"A distinction has to be made between acts which are *ultra vires* and those for the validity of which certain formalities are necessary and have not been gone through. This distinction assumes

[19] P. Janardhana and another v. Union of India and others, AIR 1970 Mys. 171 at P.176
[20] http://www.answers.com/topic/ultra-vires, visited in July, 2008
[21] Ibid

an importance where the rights of third parties have come into existence and those parties are not expected to know the true facts as to the fulfilment of those formalities[22]."

Robert W. Hamilton in his book *The Law of Corporation* has categorized the term *ultra vires* in two types, which corroborated the above-said in the following style;

"Substantive *ultra vires* where a decision has been reached outside the powers conferred on the decision taker; and procedural *ultra vires* where the prescribed procedures have not been properly complied with[23]."

1.4.2 Distinction between ultra vires and illegal acts:

"The *ultra vires* act or transaction is different from an illegal act or transaction, although both are void. An act of a company which is beyond its objects clause is *ultra vires* and, therefore, void, even if it is illegal. Similarly an illegal act will be void even if it falls within the objects clause. Unfortunately, the doctrine of *ultra vires* has often been used in connection with illegal and forbidden act. This use should also be prevented[24]."

1.5 HISTORICAL BACKGROUND

Before 1855, this doctrine was not paid much attention. Companies were considered as enlarged Partnerships. They were regulated by the partnership laws. For companies, there was no concept of limited liability. The interest of creditors and investors was not at risk due to the unlimited liability concept. The principle of limited liability was introduced in 1855. The liability of the members became limited then. After the establishment of doctrine of limited liability, the interest of creditors and investors was then again at stake. So, the doctrine of *ultra vires* came into existence to protect the rights of creditors and investors. Further, it was made mandatory on the companies to prepare the charter of company, which consisted of memorandum and articles

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[22] Dr. H.S. Rikhy and others v. New Dehli Municipal Committee, AIR 1962 SC554 at p. 561

[23] Robert W. Hamilton. *The Law of Corporation* 4th Edition, 1996 West Group & http://www.answers.com/topic/ultra-vires, visited in July, 2008

[24] www.indialaw.com visited in June, 2008

of association[25]. It was, therefore, made obligatory on companies to run their affairs according to their charter. Companies were also bound to conduct only those businesses that were provided in the object clause of MOA[26]. So, we can say that the birth of this doctrine was necessitated for the protection of creditors and investors.

1.5.1 Ashbury Railway Carriage Case:

The doctrine of *ultra vires* could not be established firmly until 1875 when the following case was decided by the House of Lords. Discussed below are the facts of the case, which proved as a milestone in the establishment of doctrine of *ultra vires*;

1.5.1.1 Facts

This *ultra vires* doctrine was laid down by the House of Lords in *Ashbury Railway Carriage & Iron Co v Riche,*[27] "where the company was incorporated 'to make and sell railway carriages and wagons and all kinds of railway plant and rolling-stock and to carry on the business of the mechanical engineers.... The company entered into a contract to finance the building of a railway in Belgium with Riche. Later, the company repudiated the agreement. Riche sued, and the company pleaded the action was *ultra vires*. The company pleaded that the agreement was *ultra vires* to the company's memorandum[28].

1.5.1.2 Judgment by Mr. Blackburn J

"If I thought it was at common law an incident to a corporation that its capacity should be limited by the instrument creating it, I should agree that the capacity of a company incorporated under the Act of 1862 was limited to the object in the memorandum of association. But if I am right in the opinion which I have already expressed, that the general power of contracting is an incident

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[25] Cf. Grower, *"The Principle of modern Company Law"*, p. 80.
[26] ibid
[27] (1875) LR 7 HL 653.
[28] ibid

to a corporation which it requires an indication of intention in the legislature to take away, I see no such indication here[29]."

He further stated,

"If the question was whether the legislature had conferred on a corporation, created under this act, capacity to enter into contracts beyond the provisions of the deed, there could be only one answer. The legislature did not confer such capacity. But if the question be, as I apprehend it is, whether the legislature have indicated an intention to take away the power of contracting which at common law would be incident to a body corporate, and not merely to limit the authority of the managing body and the majority of the shareholders to bind the minority, but also to prohibit and make illegal contracts made by the body corporate, in such a manner that they would be binding on the body if incorporated at common law, I think the answer should be the other way[30]."

1.5.1.3 Decision by House of Lords

The decision, then, given by the House of Lords was in complete contradiction of the judgment delivered by Mr. Justice Blackburn. They declared that the acts of a company outside the charter of the company are ultra vires. Lord Cairns LC said,

"It was the intention of the legislature, not implied, but actually expressed, that the corporations, should not enter, having regard to their memorandum of association, into a contract of this description. The contract in my judgment could not have been ratified by the unanimous assent of the whole corporation[31]."

The view of the House of Lords was that the rule existed both for the protection of the shareholders and the person who might become creditor of the company. But it is difficult to see

[29] Extract from JC Smith, *Smith & Thomas: A Casebook on Contract*, Eleventh Edition, 2000, Chapter 17
[30] Ibid
[31] Andrew Hicks, S.H.Goo, "Cases and Materials on Company Law", 3rd Edition 2001, Chapter 5, at168 & Extract from JC Smith, *Smith & Thomas: A Casebook on Contract*, Eleventh Edition, 2000, Chapter 17

that the rule benefited the latter as individual, because they were at risk of having their transactions impugned.

1.5.2 Test for the determination of a transaction ___ ultra vires or not

In UK, some principles were laid down for determining a transaction to be ultra vires or not in a case in 1932. These principles are laid down below,

- "Is the transaction reasonably incidental to the carrying on the company's business?
- Is the transaction a bona fide one?
- Is it carried out for the benefit and to promote the prosperity of the company[32]?"

The above-mentioned principles were proved as a beacon of light and followed in number of cases in following years[33].

But the aforementioned principles were held no longer good in law in some cases[34].

1.5.3 Long object clause concept and main object rule of construction

After a very short span of the establishment of this rule i.e., *ultra vires,* the deficiencies of it became obvious. This rule caused enormous problems for the directors and a third party, which comes to deal with the company. This doctrine created the problem in the following manner. It is generally presumed that a third person dealing with the company is supposed to have the knowledge of the constitution of the company. And we are also well aware of the fact that a contract made by a third person in regard to a thing, which is not covered by the charter of the company is *ultra vires,* hence void. Now, if the contract is favourable for the third person, and he is desirous of enforcing it, he would not be able to get the same enforced due to the shortcomings of the doctrine of *ultra vires*. And in the same manner, if the shareholders of the company wants to act in an equitable manner and are willing to honour the provisions of contract, they are also

[32] Lee Behrens & Co. Ltd., (1932) 2 Ch 46: (1932) 2 Com Cases 588
[33] Parke v. Daily News Ltd., (1962) 2 All ER 929: Wand M. Roith Ltd., (1967) 1 All ER 427 (Ch D)
[34] Horsley and Weight Ltd., (1982) 3 All ER 1045

unable to honour the same due to lacunas of this doctrine i.e., *ultra vires*. Apart from the aforementioned, this doctrine also created enormous problems for the management of the company. The day-to-day activities of the company's management also came under various limitations. A huge time of the company's management used to be spend on enquiring, before committing anything, that whether that the act comes within the domain of the charter of the company. The frequency of the various business activities, therefore, was decreased. Although the company still had the powers to alter its charter, if it desired to cover that act in its charter, which was not present in its memorandum. But, such an alteration would had been done after following a complex and long procedure and also would had been time consuming. Thus, this doctrine used to create much problems, when the company desired to alter its activities other than those incorporated in its memorandum. The Courts in UK, therefore, developed certain principles to minimize the harmful effects of this rule, the same are discussed below:-

1.5.3.1 Powers implied by statute:

This principle provided that, apart from the powers and acts that a company is authorized to do by virtue of its charter, a company would be empowered to do those acts, which have been bestowed upon the company through Companies Act or any other statute.

1.5.3.2 Main object rule of construction and the principle of implied and incidental powers:

The instant principle stipulates that other than the powers given to a company through memorandum, the company would also be empowered to undertake all those objects and do such acts, which are essential, supplementary and significant for the achievement of the main objects of the company.

This principle, therefore, made it abundantly clear that a company not only enjoys the powers endowed to it by way of charter, but also would exercise those powers, which are essential, supplementary and significant for the achievement of the main objects of the company. For example, if a company is incorporate to commence the business of trading

in coal, it would also have the power to take on rent or buy the trucks, carts or to emply labors etc., because it is essential for the appropriate trade of coal.

An interesting question as to the implied and incidental powers arose in a case, where the basic purpose of a company' incorporation was to carry on the business of manufacturing chemicals. The memorandum of the company also allowed the said company to do everything and enter in to any such business, which is necessary for the fulfillment of the above-said objective of the company through a resolution. Subsequently, a resolution was passed, which authorized the directors of the said company to distribute £100,000 to certain universities in UK for advancement of scientific research and education. The said resolution was brought in the Court on the ground that it was outside the sphere of the memorandum of the company, hence ultra vires of the powers of the company. It was, thereafter, established by the directors of the company that they were facing enormous problems in finding the trained men in the field of science and technology, and the said resolution was meant to encourage and produce scientifically trained men. This resolution would enable the company, subsequently, to recruit the persons, who would be scientifically trained[35].

Judgment: The court held that "the expenditure authorized by the resolution was necessary for the continued progress of the company as chemical manufacturers and thus the resolution was incidental or conductive to the attainment of the main object of the company and consequently it was not *ultra vires*[36]."

The Court in the same case referred another case, which elaborated the concept of 'Incidental or Ancillary acts' which read that-

*"**Acts incidental or ancillary** are those acts, which have a reasonable proximate connection with the objects stated in the objects clause of the memorandum*[37]*."*

[35] Evans v. Brunner Mond & Company, (1921) Ch 359
[36] Ibid
[37] Deuchar v. Gas Lights & Coke Co., (1925) A.C. 691.

1.5.3.3 Long object clause concept: To avoid the effect of the *ultra vires* doctrine, the companies started to adopt long objects clause approach, which authorised a wide range of activities. An incidental powers provision also used to be included in the objects clause. This clause empowered the company to do anything, which in the opinion of the directors is incidental or conductive to the activities. The words of those objects clause will be held only to cover the operation of a nature similar to the business previously mentioned and will not include the wholly fresh business. Companies had another option too, i.e., incorporation with a short form objects clause. It was to the effect that the object of the company was to carry on business as a general commercial company. But they still preferred to rely on more detailed provisions. "The judicial response to this practice was to evolve the main object rule of construction. To avoid the operation of main object rule of construction, the companies started to include wording in their objects clause to the effect that each paragraph of the clause was to be read separately and without limitation by reference to other clauses".[38]

In another case, where a company having multifarious objects in its memorandum underwrote its shares in an oil company. Among other objects, one of the object of the company was to subscribe for shares of other companies. Then there was another clause in the memorandum of the said company, which provided that each object of the company must be supposed to be independent. It was held that the act of subscription of shares of the company was not ultra vires[39].

It was also subsequently suggested that the Registrar of Companies should refuse to register companies, which had objects clause containing multifarious objects. But this suggestion was not adopted by them. Now it is practice for registered companies to conclude that each paragraph of the objects clause is to be interpreted as independently.

1.5.4 The Constructive Notice Doctrine:

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[38] John Birds, Eilis Ferran & Charlottee Villiers, "Boyle & Birds' Company Law", 4th Edition (2000), chapter 5, at page 105.

[39] Cotman v Brougham [1918] AC 514 HL ;

There was then another doctrine, which had disastrous effects for the third party known as Constructive Notice doctrine. It meant that those dealings with the company to have notice of the content of the public documents of the company and contents of objects clause. This resulted in cases such as *Re John Beauforte (London) Ltd,*[40] where a third party was deemed to know that the transaction was beyond the company's objects clause and therefore could not enforce it. This concept is beautifully explained in Palmers' Company Law, which states that-

> "The objects clause defines some of the limits upon the authority of the directors as agents of the company. That authority might, of course, also be limited by provisions in the companies articles of association or by, say, a resolution of the shareholders in general meeting. However, that might be, the objects clause would also operate to define and limit the actual authority of the directors (or the authority of a particular director), because the directors could not be regarded as having actual authority as agents to do something on behalf of the company, which the company did not itself have the capacity to do. Moreover, since the objects clause was contained in the company's registered documents, the doctrine of Constructive Notice would prevent the third party from successfully arguing against the company that the directors had the ostensible or usual authority to enter into the transaction."[41]

Another aspect of the *ultra vires* doctrine is that it cannot be separated from the issue of the authority of the company's officers to enter into the contract on company's behalf. There are two issues of concern to outsiders; whether the company itself has the capacity to enter into the transaction in question and whether the officers have the authority to enter in transaction or whether they have exceeded their authority. The officers can exceed their authority if they enter into a transaction on company's behalf, which is beyond the company's capacity. Such a contract is void and cannot be ratified. But if the excess of authority involves exceeding some other limitation on their authority to enter into an intra vires contract, e.g. borrowing powers in the articles, then that contract is capable of ratification by the company. The doctrine *ultra vires*

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[40] [1953] Ch 131 ;

[41] Geoffrey Morse and others, *Palmer's Company Law:Annoted Guide to the Companies Act, 2006,* (London: Sweet and Maxwell, 1st ed., Vol.1, 2007) p.2119 & 2120.

operates in relation to both of these examples and causes problems for the company. Browne Wilkinson LJ,[42] insisted that "the meaning of the *ultra vires* be confined to the capacity of the company".

In *Bell House* case,[43] clause 3(c) allows directors "...to carry on any other trade or business whatsoever which can in their opinion, be advantageously carried on by the company in connection with or as ancillary to the general business of the company[44]."

The Court further held that, "the clause did give the necessary capacity and the transaction was binding ... providing the directors from their view honestly, and the business is within the company's objects clause[45]."

In England, S. 9(1) of the ***European Communities Act, 1972*** has reduced the harmful impacts of the judgment promulgated by the Court in this case[46]. The third person, which corresponds with the company having good intentions is legally protected and he would be able to enforce the contract that is ultra vires to the companys' constitution provided the third person deals with the company in good faith and the contract has been struck by the directors of the company[47].

"In other words, third person can enforce the *ultra vires* contract against the company if he had no knowledge of the fact that it was *ultra vires* and the contract was decided on by the directors of the company. ***The third party is presumed to have acted in good faith unless the contrary is proved by the company.*** However, the provisions operate in favour of a person dealing with the company in good faith. Consequently the company cannot enforce the *ultra vires* contract against the third party but the third party can plead *ultra vires*[48]."

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[42] *Rolled Steel Products (Holdings) Ltd v. British Steel Corporation,* [1986] Ch 246 at Page 302-303.
[43] *Bell Houses Ltd v City Wall Properties Ltd,* [1966] 2 QB 656.
[44] Ibid at page 690 per Salmon LJ.
[45] Ibid
[46] 68/151/EEC; OBJ L65/81
[47] Ibid
[48] Ibid

PART II

UK COMPANY LAW

Chapter No. 2 The turquand rule and agency principles

The Courts of UK attempted to protect the interest of the outsider, who transact with the company in good faith and was likely to be effected from the rigors of constructive notice doctrine. These efforts resulted in the emergence of another important doctrine of company law, which is famously known as 'Turquand Rule' or the doctrine of 'Indoor Management'.

2.1 What is Turquand Rule?

Turquand rule is also known as the doctrine of indoor management. It is a doctrine of English law that when a third party deals with a company then that party is justified to get an impression that a person nominated by the company has the necessary authority to act for and on behalf of the company.[49]

The *Turquand*[50] rule was expressed by the courts to lessen the effects of the constructive notice doctrine[51]. This rule was designed to protect the outsider who deemed to deal with the authorized agent of the company, from the internal irregularities of internal management of the company. The rule was enumerated in *Royal British Bank v Turquand*,[52] which established that a person dealing with the company was not obliged to investigate the internal affairs of the company, such as to inquire whether the requirements of the constitution of the company have been compiled or not. Though he might be deemed to have knowledge of constitution of the company. If he was unaware of any irregularity in company's constitution he will be protected. The brief facts of the *Turquand* case,[53] are given below;

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[49] http://en.allexperts.com/e/t/tu/turquand_rule.htm & http://en.wikipedia.org/wiki/Royal_British_Bank_v_Turquand visited in August, 2008

[50] Paul L.Davies, " Gower and Davies' Principles of Modern Company Law", 7th Edition (2003), Chapter 7, at page 153.; (1856) 6 E & B 327.

[51] http://en.allexperts.com/e/t/tu/turquand_rule.htm & http://en.wikipedia.org/wiki/Royal_British_Bank_v_Turquand visited in August, 2008

[52] (1856) 6 E&B 327 & ibid

[53] Ibid.

2.1.1 Facts:

"Mr Turquand was the official manager (liquidator) of the insolvent 'Cameron's Coalbrook Steam, Coal, and Swansea and London Railway Company'. It was incorporated under the Joint Stock Companies Act 1844. The company had given a bond for £2000 to the Royal British Bank, which secured the company's drawings on its current account. The bond was under the company's seal, signed by two directors and the secretary. When the company was sued, it alleged that under its registered deed of settlement (the articles of association), directors only had power to borrow what had been authorised by a company resolution. A resolution had been passed but not specifying how much the directors could borrow."[54]

2.1.2 Judgment:

"Jervis CJ, for the Court of Exchequer Chamber affirmed the Queen's Bench and said that it was valid. He said the bank was deemed to be aware that the directors could borrow only up to the amount resolutions allowed. Articles of association were registered in Companies House, so there was constructive notice. But the bank could not be deemed to know about which ordinary resolutions passed, because these were not registrable. The bond was valid, because there was no requirement to look into the company's internal workings. This is the 'indoor management rule', that the company's indoor affairs are the company's problem. Jervis CJ gave the judgment of the Court[55]."

"I am of opinion that the judgment of the Court of Queen's Bench ought to be affirmed. I incline to think that the question which has been principally argued both here and in that Court does not necessarily arise, and need not be determined. My impression is (though I will not state it as a fixed opinion) that the resolution set forth in the replication goes far enough to satisfy the requisites of the deed of settlement. The deed allows the directors to borrow on bond such sum or sums of money as shall from time to time, by a resolution passed at a general meeting of the

[54] ibid
[55] Ibid; Simon Goulding, "Principles of Company Law" Edition (1996). Chapter 6, at page 130 & Paul L.Davies, " Gower and Davies' Principles of Modern Company Law", 7th Edition (2003), Chapter 7, at page 153

Company, be authorized to be borrowed: and the replication shows a resolution, passed at a general meeting, authorizing the directors to borrow on bond such sums for such periods and at such rates of interest as they might deem expedient, in accordance with the deed of settlement and the Act of Parliament; but the resolution does not otherwise define the amount to be borrowed[56]."

He further stated that,

"That seems to me enough. If that be so, the other question does not arise. But whether it be so or not we need not decide; for it seems to us that the plea, whether we consider it as a confession and avoidance or a special Non est factum, does not raise any objection to this advance as against the Company. We may now take for granted that the dealings with these companies are not like dealings with other partnerships, and that the parties dealing with them are bound to read the statute and the deed of settlement. But they are not bound to do more. And the party here, on reading the deed of settlement, would find, not a prohibition from borrowing, but a permission to do so on certain conditions. Finding that the authority might be made complete by a resolution, he would have a right to infer the fact of a resolution authorizing that which on the face of the document appeared to be legitimately done[57]."

This rule was approved in *Mohoney v East Holyford Mining Co.*[58] There is a well known statement of the rule in *Morris v Kanssen*,[59] where Lord Simonds approved a passage from Halsbury's Laws of England which stated:

> "Persons contracting with a company and dealing in good faith may assume that acts within its constitution and powers have been properly and duly performed and are not bound to inquire whether acts of internal management have been regular"[60].

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[56] Ibid
[57] Ibid
[58] (1875) L.R.7 H.L 869.
[59] [1946] AC 459.
[60] Ibid at page 474.

This protection for third party is partially re-affirmed by section 285 of the Companies Act 1985, which states:

> "The acts of a director or manager are valid notwithstanding any defect that may afterwards be discovered in his appointment or qualification".

Section 382 (4) of the Companies Act 1985 also gives an indirect support to this rule while stating:

> "Where the minutes of shareholders of directors' meetings are kept, as the section requires, there is a presumption, until the contrary is proved, that all the meetings would be deemed duly held and convened".

Therefore, the enactment of the section 35 and section 35A has decreased the importance of the *Turquand* rule. "This rule cannot apply upon an outsider who has the knowledge of the true position of the internal management".[61] Some commentators say that in circumstances where the *Turquand* rule overlaps with section 35A, section 35A may give more protection to outsider because actual knowledge of irregularity does not amount to bad faith. But in one situation the section 35A may have no application in regard to decisions improperly made by the directors. Here we apply the *Turquand* rule.

"In some circumstances the director of the company may be treated as an outsider. So if a director has not acted on behalf of the company in connection with the transaction he seeks to enforce, he may invoke the *Turquand* rule in order to bind the company".[62] But a director cannot invoke the *Turquand* rule in a transaction, which is voidable under section 322A. There were some limitations on the implication of the *Turquand* rule, which are as follow:

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[61] *B Liggett (Liverpool) Ltd v Barclays Bank Ltd,* [1928] 1 KB 48; *Morris v Kanssen,* [1946] AC 459.
[62] *Hely-Hutchinson v Brayhead Ltd,* [1968] 1 QB 549.

1. The rule could only operate in favour of a person acting in good faith without notice of any irregularity.[63]
2. The rule could not operate in favour of 'insider' e.g. director, who would be deemed to know of any irregularity in the internal management of the company.[64]
3. The rule does not operate to protect outsiders from the consequences of forgery. Because if a document is found to be forged then it has no legal effect.[65]
4. The rule could not allow a contracting party who dealt with a person who in fact had not been authorized to assume that there had been a delegation of authority to that person under a delegation article.[66]

The constructive notice rule is still in practice; despite of the introduction of new statutory provisions by the Companies Act 1989 for the abolishing of the constructive notice rule, because the new provision has not been brought into force. "The *Turquand* rule will not be ceased to be relevant by the forcing of new provision, because it operates to protect those who have actual knowledge of the company's constitution as well as those who have constructive knowledge".[67]

2.2 Agency Principles

As discussed above, a company unlike humans, cannot operate itself, it acts through agents. Either it authorizes a director or an employee to act on its behalf, or it appoints an outsider to act as an agent of the company. We cannot, therefore, rely on the *Turquand* rule in circumstances when an outsider enters into a contract with a person deeming him as the authorize agent of the company, because the *Turquand* rule only gives protection to an outsider when he is affected by the procedure of indoor management of the company. In this situation, we have to make references to agency principles.

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[63] *B Liggett (Liverpool) Ltd v Barclays Bank Ltd,* [1928] 1 KB 48; *Rolled Steel Products (Holdings) Ltd v British Steel Corp,* [1986] Ch 246.
[64] *Morris v Kanssen,* [1946] AC 459.
[65] *Ruben v Great Fingall Consolidated,* [1906] AC 439.
[66] Simond Goulding, "Principles of Company Law", Edition (1996), Chapter 6, at page 131.
[67] Paul L.Davies, " Gower and Davies' Principles of Modern Company Law", 7th Edition (2003), Chapter 7, at page 157.

It is general principle of agency law that a principal cannot authorise an agent to do something, which the principal is unable to do personally nor can the principal can validly represent that authority, which it does not itself posses, has been delegated to an agent.[68] This is where the problem arises, when the board of directors of a company does something, which is beyond the company's capacity under its objects clause, or when the board of directors could not validity have delegated authority to some act or represent that the director or other officer had such authority. "*Automic Self-Cleaning Filter Syndicate Co Ltd v Cuninghame*[69]" marks a line of case law in this regard which establishes that the board of directors of a company are not the agent of the shareholders in general meeting. This case contains dicta, which suggest that the terminology of principal and agent is inappropriate to describe the relationship between a company and its board. "Despite this, the courts are continued to employ agency terminology when specifically faced with questions on whether a company is bound by the acts of its board",[70] as stated by Buckley LJ in "*Rolled Steel Products (Holdings) Ltd v British Steel Corporation Ltd*[71]",

> "a company can only act by duly authorised agents...directors like any other agents can only bind the company by acts done in accordance with the formal requirements of their agency...acts done otherwise than in accordance with these formal requirements will not be the acts of the company[72]."

This is one of the features of the agency that an agent has the legal authority to enter into contract on behalf of his principal as if the principal has signed the contract personally. According to the agency principles there are two types of authority, actual authority and ostensible authority. Actual authority is an authority, which the principal confers on the agent expressly or impliedly. Like the board of directors of a company has express actual authority to perform certain powers which are laid in the memorandum and articles of association of the company, whereas the ostensible authority is the authority of an agent as it appears to others. It is created by a representation made by the principal to the third party that the agent has authority to perform such act. This authority can exist where there is no actual authority. If the company

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[68] *Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd,* [1964] 2 QB 488.
[69] [1906] 2 Ch 34.
[70] Eillis Ferran, "*The Reform of the Law on Corporate Capacity and Directors' and officers' Authority*" [1992] Co Law 124 at page 125.
[71] [1986] Ch 246 at page 295.
[72] Ibid

restricts the powers of its managing director, he has no actual authority to bind the company in such matters, but an outsider who is dealing with him, unaware of such restriction, may be able to hold the company on the basis of ostensible authority".[73]

The problem arises in respect to ostensible authority of an agent of a company. Ostensible authority can take one of the two forms: either the directors and officers have a 'usual authority' related to their office; or the company may be estopped from denying that it held out its agent as having authority to act in a particular transaction.[74] If the outsider is relied on the representation of a company, then the company will be bound. The leading case in this regard is "*Freeman & Lockyer v Buckhurst Park Properties Ltd.*[75]", where a firm of architects was engaged by a person acting as the Buckhurst's managing director. Buckhurst would not pay the fees as it claimed that the person was not the managing director. The Court of Appeal upheld the architect's claim finding that the board had held out the person as the managing director and he had ostensible authority to bind the company. Sometimes differences also arise between implied actual authority and ostensible authority becomes very clear. In "*Hely-Hutchinson v Brayhead Ltd & Richards*[76]" the Court of Appeal found that Richards who had acted as managing director but had never been formally appointed, had implied actual authority to bind the company rather than ostensible authority.

The *ultra vires* doctrine and the constructive notice rule had complicated the application of the principles of the ostensible authority in relation to companies, but it had largely disappeared either through statutory development or through judicial decisions reassessment of the scope of the constructive notice rule.[77] The central issue in these cases is whether there has been a representation by the board of directors or person who had actual authority, to enter into a contract or not. Diplock LJ's statement in "*Freeman & Lockyer*[78]" case is a good example of principles of ostensible authority, when the principle applied to companies in the form of holding

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[73] John Birds, Eilis Ferran & Charlottee Villiers, "Boyle & Birds' Company Law", 4th Edition (2000), chapter 5 at page 135.
[74] Ibid.
[75] [1964] 2 QB 480.
[76] [1968] 1 QB 549.
[77] John Birds, Eilis Ferran & Charlottee Villiers, "Boyle & Birds' Company Law", 4th Edition (2000), chapter 5 at page 135
[78] *Freeman & Lockyer v Buckhurst Park Properties Ltd,* [1964] 2 QB 480.

out. He pointed out some conditions, which had to be fulfilled for the enforcement of a transaction against a company, which are as follow:[79]

1. There must be a representation that the agent had authority to enter on behalf of the company into a contract.
2. Such representation must be made by a person who had actual authority to manage the business of the company in respect of matters, which relates to such transaction or contract.
3. The third party must be induced by such representation to enter into the contract; and
4. Under the memorandum or articles of association of the company, the company must not be deprived of the capacity to enter into a contract of kind sought to be enforced or to delegate authority to enter a contract of that kind to the agent.

Section 35A adapts conditions (2) and (4), by providing power to the board to make representation of a authority to the third party, but if it exceeds its actual authority under the company's memorandum or articles, the third party is entitled to assume that the board has authority to do so. The point of lack of capacity in condition (4) must be read with section 35, which provides:

> "The validity of an act done by the company shall not be called into question on the ground of lack of capacity by reason of anything under the company's memorandum".

There is now no restriction to bind the company in contracts, which are beyond the limits of its memorandum. A company which holds someone out as a finance director, or a sale manager, or a managing director or a company secretary will be representing to the outside world that that person has the authority vested in them which is usual or normal in the course of business for that type of person.[80]

One problem for agency arose where the company's constitution set out a certain procedure for a transaction. In such situation the doctrine of constructive notice had a severe effect on the

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[79] Ibid, at pages 505-506.

[80] *Panorama Developments (Guildford) Ltd v Fidelis Furnishing Fabric Ltd,* [1971] 2 QB 711.

outsider's knowledge about any internal procedure in the constitution. Sometimes an action is within the capacity of the company but it may be outside the powers of the individual representing the company due to non-compliance of internal procedure. If the doctrine of constructive notice was strictly applied, then the outsider could not complain that the agent has lack of authority in certain transaction. As in *Turquand* case,[81] an action was brought for the return of money borrowed from the company. The company argued that the manager of the company who negotiated the loan had no authority to do so. And there was no resolution of the general meeting of the board of directors in this respect. The court held that the public document only revealed that a resolution was required not whether a resolution had been passed". The outsider is entitled to assume that all the formalities have been fulfilled. This is called as the indoor management rule. This rule only applies where the outsider was acting in good faith or who has no actual notice of their irregularity as discussed above. It has no application where the third party is an insider e.g. a director. There have been a number of statutory provisions for protecting the third party dealing with the board or agent. But it should be note that general agency principles are still significant.

To deal with the situations where internal irregularities might cause problems for third party, the Companies Act 1989 introduced new provisions, to protect them. Section 35A of the Companies Act 1985 gives powers to the board of directors to bind the company in transactions which are made by them or by their authorized agents. It not only covers the directors and agents' acts but also its sets out a standard for bad faith. Section 35A covers insider, which the rule in *Turquand* case does not.

[81] (1856) 6 E & B 327.

Chapter No. 3 Concept of doctrine of ultra vires and protection of third party interest in UK company law

3.1 Statutory Developments in UK for the improvement of the ultra vires doctrine:

It is argued that "there are two possible approaches which could be taken in order to reform the doctrine; the first approach is giving a company the capacity and powers of a natural person and thus making an objects clause redundant. Examples of this can be found in many Commonwealth Countries, like Canada, New Zealand".[82] This is the approach, which is taken in the Prentice Report,[83] "a company shall posses the capacity to do any act whatsoever". Prentice's other recommendations allow the possibility of registering an objects clause and for the abolition of constructive notice of such objects as a protection for third party.

The second approach is that "the reformers can choose to continue to restrict a company's capacity so that the members of the company are protected, whilst ensuring that outsiders dealing with the company are not prejudiced by the company's lack of capacity".[84] This approach was adopted in UK.

When UK joined EEC, it had to give effect to the First Company Law Directive on Harmonization of Company Law.[85] By virtue of it, section 9(1)[86] of the European Communities

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[82] Jill Poole, "*Abolition of the Ultra Vires Doctrine and Agency Principles*" [1991] Co Law 43 p. 43.
[83] DTI Consulative Document : Reform of the *Ultra Vires* Rule, Dr. Prentice 1986, p. 5.
[84] Jill Poole, "*Abolition of the Ultra Vires Doctrine and Agency Principles*" [1991] Co Law 43p. 43.
[85] 68/151/EEC; OBJ L65/81.
[86] S.9: "Acts done by the organs of the company shall be binding upon it even if those acts are not within the objects of the company, unless such acts exceed the powers that the law confers or allows to be conferred on those organs."

Act 1972 was implemented. The Companies Act 1989 is greatly influenced by the need to ensure the compliance with the terms of Section 9. The main change, which this measure introduced into company law was that it restricted the doctrine of ultra vires in favour of the person, who contracted with company in good faith[87].

Prior to the introduction of new provisions in U.K. Companies Act 1985, the Companies Act 1989, section 35 enabled *ultra vires* transactions to be enforced against, but not by companies in certain circumstances. The old section 35 was subject to a number of restrictions, which limited its practical effect. It was the subject of growing dissatisfaction as a method of giving third party protection. "In particular the 'good faith' requirement was in danger of introducing a duty to inquire and thus re-imposed the construction notice which the section was intended to mitigate against".[88]

3.2 The Companies Act, 1989

The Companies Act 1989 of U.K. made substantial amendments to the statutory reforms of *ultra vires* carried out under Section 9(1) of the European Communities Act 1972. It replaced section 35 of the Companies Act 1985 with a new section 35 along with other new provisions.

3.2.1 Company's Capacity under new Section 35

There are very specific comments on section 35(1)[89]. I would like to discuss section 35(1) in different parts, which are as follow:

3.2.1.1 An act done by a company

When is an act done by a company? This simple question becomes difficult to answer in this context. "In contractual matters, English Company law has adopted an organic theory, whereby

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[87] Geoffrey Morse and others, *Palmer's Company Law:Annoted Guide to the Companies Act, 2006*, (London: Sweet and Maxwell, 1st ed., Vol.1, 2007) p.1016.
[88] Jill Poole, "*Abolition of the Ultra Vires Docrtine and Agency Principles*", [1991] Co Law 43 at 44.
[89] S.35(1)of Companies Act 1989: The validity of an act done by a company shall not be called into question on the ground of lack of capacity by reason of anything in the company's memorandum.

the acts of the board and of the general meeting are treated automatically as acts of the company".[90] "An act is done by a company when it is done on its behalf by a duly authorised agent".[91] This part normally determined by reference to agency principles and section 35A of the Companies Act 1989, which I shall discuss latter.

3.2.1.2 Anything in the company's memorandum

Section 35 (1) gives protection in respect of acts, which are beyond a company's capacity under its objects clause. This was so done to protect the third party interest and by the insertion of this clause, it was no more possible for the company to deny an act by reason of lack of capacity[92].

3.2.1.3 Protection for the shareholders

The most controversial aspect of the new provisions of Companies Act 1989 relates to new section 35 (2)[93].

This sub-section may appear to confer significant powers on shareholders but in practice its impact is likely to be insubstantial. It appears that the rights of shareholders are severely restricted by section 35 (2).

This is the real issue of contention because the shareholder will lose his right to bring an action in relation to 'past *ultra vires*', which is said to occur when the legal obligation arises. Knox J stated that 'past ultra vires' was an exception to the rule in *Foss v Harbottle*[94], and it appears to have been removed by section 35(2).

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[90] *Rolled Steel Products (Holdings) Ltd v British Steel Corp Ltd*, [1986] Ch 246 at 295 per Slade LJ.
[91] Ibid at page 304 per Browne-Wilkinson LJ.
[92] *10 Re Ceverland Trust Plc*, [1991] BCC 33
[93] S. 35(2)of Companies Act 1989: A member of a company may act which but for sub-section (1), would be beyond the company's capacity, but no such proceeding shall lie in respect of an act to be done in fulfilment of a legal obligation arising from a previous act of the company.
[94] (1843) 2 Hare 461; Jill Poole, "*Abolition of the Ultra Vires Doctrine and Agency Principles*" [1991] Co Law 43, at page 46.

Section 35 (2) largely codifies a right that had previously been recognized by case law, and it was prudent to include an express statutory provision on this point. The underlying purpose of the reforms made by the Companies Act 1989 is to retain the *ultra vires* rule as an internal control mechanism only. "The foundation on which minority shareholders' personal rights to restrain *ultra vires* transactions have now disappeared and it had not been for section 35 (2)".[95]

3.2.1.4 Directors' Duties

Section 35 (3)[96] imposes a duty on directors to observe any limitation on their powers derive from the company's memorandum. This subsection deals with two things. First, is that the directors should abide by the provisions of the company's memorandum. The second is that this subsection empowers the shareholders to ratify the transaction and bind the company. This seems to confuse the questions of corporate capacity and of directors' authority.

3.2.1.5 Restriction

Section 35 (4)[97] put some restriction on the operation of section 35. By virtue of this subsection, section 35 does not apply on the acts of a company which is incorporated for charitable purposes, except where they entered into a commercial transaction with a person who has no knowledge of lack of authority of the directors of company.

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3.2.2 Powers of directors to bind the company:

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[95] Eilis Ferran, "*The Reform of the Law on Corporate Capacity and Directors' and Officers' Authority:* Part 1" [1992] Co Law 124, at page 127.

[96] S.35(3) of the Companies Act 1989: It remains the duty of directors to observe any limitations on their powers flowing from the company's memorandum; and actions by the directors which but for subsection (1) would be beyond the company's capacity may only be ratified by the company by special resolution.

[97] S.35(4) of the Companies Act, 1989: The operation of section 35 is restricted by section 65 (1) of the Charities Act 1993 and section 112 (3) of the Companies Act 1989 in relation to companies which are charities and section 322A below (invalidity of certain transactions to which directors or their associates are parties) has effect notwithstanding this section.

Section 35-A[98] deals with a situation, where directors have exceeded their authority provided by the company's constitution.

Section 35A is wider than the old section 35. It provides protection to the outsiders against limitations on the authority of the board other than capacity limitations. The main limits on the old section were that:

(i) It only applies in respect of acts done by a company's board and not by individual directors or agents;[99]

(ii) It may only have applied to counter-parties in commercial transactions with company and not to recipient of donations or gratuitous dispositions of the property;[100]

(iii) The person with the company was only entitled to protection if he acted in good faith and it was uncertain whether a person would qualify if he ought reasonably to have appreciated that the transaction was beyond the directors' authority;[101]

(iv) No protection was given against liability on the basis of a constructive trust.[102]

Some of these limitations have now been removed by new section 35A. Some points of difficulty and uncertainty remains in this section, which are as follow:

3.2.2.1 Deals with a Company

Section 35A provides only one-way protection and it does not operate in favour of the company itself. In the case of acts which are beyond a company capacity under its memorandum or in

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[98] S.35-A of the Companies Act, 1989: In favour of a person dealing with a company in good faith, the power of the board of directors to bind the company, or authorize others to do so, shall be deemed to be free of any limitation under the company's constitution.

[99] Eilis Ferran, "*The Reform of the Law on Corporate Capacity and Directors' and Officers' Authority:* Part 2" [1992] Co Law 177, at page 177.

[100] *Re Halt Garage Ltd,* [1982] 3 ALL ER 1016 at page 1040.

[101] *International Sales v Marcus,* (1992) 13 Co Law 124.

[102] Ibid; Eilis Ferran, "*The Reform of the Law on Corporate Capacity and Directors' and Officers' Authority:* Part 2" [1992] Co Law 177 at page 177.

which the company is not itself a party, then those acts can only be enforced by special resolution of the company.

The word 'other acts', which are used in section 35A (2) (a)[103] has meaning wider than the word 'transaction'. There is a difficulty with this subsection, if the directors of a company purport to commit the company in a transaction, which is beyond their authority under the company constitution, on agency principles, the company is not a party to that transaction. This literal construction would deprive section 35A of effect and it would probably not be followed.[104] Ferran suggested,[105] that this subsection (2) may be interpreted as meaning any transaction or other act to which the company purports to be a party. If this interpretation is adopted then the protection will be available to any person who acts in good faith by believing that he is dealing with a company through its directors or agents. It would seem that 'any other acts' include all things like charitable gifts and gratuitous dispositions of a company's assets. Shareholders are also protected under section 35A, "but it is doubtful whether that section could be invoked in connection with a claim arising from the contract of membership under section 14 of the Companies Act 1985".[106]

3.2.2.2Dealing in Good Faith

Regarding section 35A (2) (b)[107]and section 35A (2) (c)[108],commentators suggest that the question of good faith or bad faith will be developed by case law. "It may be that the courts will look for evidence that the person dealing with the company was personally involved in some dishonest or fraudulent scheme on the part of the directors".[109]

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[103] S.35A(2)(a)of Companies Act 1985: A person deals with a company if he is a party to any transaction or other act, which the company is the party.
[104] Eilis Ferran, "*The Reform of the Law on Corporate Capacity and Directors' and Officers' Authority:* Part 2" [1992] Co Law 177 at page 177.
[105] Ibid.
[106] John Birds, Eilis Ferran & Charlottee Villiers, "Boyle & Birds' Company Law", 4th Edition (2000), chapter 5, at page 129.
[107] S.35A(2)(b)of Companies Act 1985:A person shall not be regarded as acting in bad faith by reason only of his knowing that an act is beyond the powers of the directors under the company's constitution.
[108] S.35A(2)(c)of Companies Act 1985:A person shall be presumed to have acted in good faith unless the contrary is proved.
[109] *Belmont Finance Corp Ltd v William Furniture Ltd,* [1979] Ch 250.

It seems from the perusal of this section that a person with actual knowledge would still be protected under this section if he acts in good faith. But some commentators like Lord Fraser,[110] emphasized that where an outsider knows about some additional wrongdoing, he would not be in good faith. Lord Fraser left the question of deciding bad faith to the courts, which would have to examine the surrounding circumstances.

3.2.2.3 Power of the Board of Directors

Section 35A has the effect of extending the powers of the board of directors in favour of the third party. But it does not operate to extend the powers of anyone else nor does it extend the powers of a body, which purports to be the board of directors.[111]

3.2.2.4 Internal Effect of Lack of Authority

The section 35A makes it clear that the purpose of it is to protect third party dealing with the company in good faith. Section 35A (4)[112] allows a member to seek existing unauthorized transaction be completed, but it restrains him from future unauthorized transaction.

Some commentators say that the effect of section 35A (4) is likely to be limited because shareholders will rarely discover the directors' plans at a time before a legal obligation has been incurred.[113]

So where directors breach their fiduciary duty by acting beyond their powers, they will be liable for this, as provided by section 35A (5)[114], but their breach may be ratified by ordinary, or in situation they exceed the limits of memorandum, by special resolution.

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[110] Official Report, 1989, Col 1245.
[111] Eilis Ferran, "*The Reform of the Law on Corporate Capacity and Directors' and Officers' Authority:* Part 2" [1992] Co Law 177 at 178.
[112] S.35A(4)of Companies Act 1989: Subsection (1) does not effect any right of a member of the company to bring proceedings to restrain the doing of an act which is beyond the powers of the directors; but no such proceedings shall lie in respect of an act to be done in fulfillment of a legal obligation arising from a previous act of the company
[113] John Birds, Eilis Ferran & Charlottee Villiers, "Boyle & Birds' Company Law", 4th Edition (2000), chapter 5 at page 132.
[114] S.35(A)5of the Companies Act, 1989: Nor does that subsection affect any liability incurred by the directors, or any other person, by reason of the directors' exceeding powers

The upshot of the above discussion is this that the UK Company law regarding the concept of ultra vires and for the protection of third party interest is under a process of constant reform. Sections 35 and 35A, as discussed above, increase the security for third party dealing with the company's directors or officers by limiting the authority of the board described in the objects clause.

3.3 The Companies Act, 2006

Subsequent to the Companies Act, 1989, the Companies Act, 2006 was enacted, which introduced certain amendments regarding capacity of the company and the powers of directors to bind the Company. A brief overview of those provisions is given below;

3.3.1 S.39 of Companies Act 2006

Section 39[115] of the Companies Act, gives protection in respect of acts, which are beyond a company's capacity under its constitution. This section imports wider meaning then the section 35 of the Companies Act, 1989, because of insertion of the word 'constitution' instead of 'memorandum'.

3.3.2 S.40 of the Companies Act 2006

Section 40[116] of the Companies Act, 2006 is the replication of Section 35-A of the Companies Act, 2006. It seems that it has not imposed on the powers of the directors to bind a company in favour of the persons who transact with the company in good faith.

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[115] Section 39 of the Companies Act, 2006. (1) The validity of an act done by a company shall not be called into question on the ground of lack of capacity by reason of anything in the company's constitution.

[116] Section 40 of the Companies Act, 2006. (1) In favour of a person dealing with a company in good faith, the power of the directors to bind the company, or authorise others to do so, is deemed to be free of any limitation under the company's constitution.
(2) For this purpose—
(a) a person "deals with" a company if he is a party to any transaction or other act to which the company is a party,
(b) a person dealing with a company—
(i) is not bound to enquire as to any limitation on the powers of the directors to bind the company or authorise others to do so,

Chapter No. 4 Elimination of object clause

The object clause of a company generally defines the purpose for which the company is formed and what it shall in fact do in the way of its business. This statement effectively determines that what shall be the powers of the company because the objects stated will confer on the company all the necessary and incidental powers for carrying out those objects[117].

One of the negative aspects of the objects clause is that it limits and restricts the powers of the company from doing things, which are not authorized by the objects clause. Normally, the objects clause includes authorizations for the company to carry on a particular business which it is proposed to carry on and also to carry on various other businesses which it may probably or possibly desire to carry on[118]. The legislature in UK, as we know, is constantly trying to simplify the procedures for incorporation and working of the company. Companies Act, 2006, therefore, in an attempt to fulfill its said designs has introduced certain amendments which aim to eliminate

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(ii) is presumed to have acted in good faith unless the contrary is proved, and
(iii) is not to be regarded as acting in bad faith by reason only of his knowing that an act is beyond the powers of the directors under
the company's constitution.
(3) The references above to limitations on the directors' powers under the company's constitution include limitations deriving—
(a) from a resolution of the company or of any class of shareholders, or
(b) from any agreement between the members of the company or of any class of shareholders.
(4) This section does not affect any right of a member of the company to bring proceedings to restrain the doing of an action that is beyond the powers of the directors. But no such proceedings lie in respect of an act to be done in fulfilment of a legal obligation arising from a previous act of the company.
(5) This section does not affect any liability incurred by the directors, or any other person, by reason of the directors' exceeding their powers.
(6) This section has effect subject to—
section 41 (transactions with directors or their associates), and
section 42 (companies that are charities).

[117] www.bycpa.com.hk/hk/biz/ma_content.html, visited in June, 2010
[118] www.solicitor.net/company_and_commercial.asp; visited in August 2010

the object clause. The purpose of these amendments is to lift any sort of restriction on company's power to commence any sort of business.

4.1 Companies Act, 2006 & elimination of object clause:

Memorandum and Articles of Association of a company contains the company constitution and the rules governing its administration. The Companies Act, 2006 has introduced certain amendments to the content of these documents, i.e., Memorandum and Articles of Association of a company. These amendments are in full force since 1st October, 2009. The Memorandum of Association has, therefore, acquired a new shape. The new memorandum will contain relatively limited information regarding the company as compared the memorandum prior to 1st October, 2009[119]. Following is the procedure to incorporate a company in UK as provided by Part II of the Companies Act, 2006,

4.1.1 Step 1:

For the registration of company in UK, an application should be made to the registrar, in prescribed form, having the following information;

a) the name of the company;
b) whether the company is a private company or a public company should also be specified;
c) the full name, residential address, and postal address of every director of the proposed company;
d) the full name of every shareholder of the proposed company;
e) the number of shares to be issued to every shareholder;
f) the registered office of the proposed company;
g) the postal address of the company, which may be the registered office or any other postal address.

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[119] www.simply-docs.co.uk/CustomPage.aspx?customPageID=78, visited in August 2010

The consent form from each director, specifying the consent of such director to act as the director of the proposed company must be appended with the application for registration[120].

An application for incorporation of a company must specify; the name of the company, which must comply with section 10[121].

The application for incorporation must contain information regarding the rules of company if the same differ from the model rules provided in Schedule 2[122] **(Annexure 'A' at P. No.)** or Schedule 4[123]**(Annexure 'B' at P. No.)** of the Companies Act, 2006.

4.1.2 Step 2:

The Registrar after receiving an application for incorporation of the company, which is in consonance with section 6 of the Companies Act, 2006, will enter the company on the Niue register; and issue a certificate of incorporation in respect of the company[124].

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[120] **Section 6 of Companies Act,2006; Application for incorporation**
(1) An application for incorporation of a company must be made to the Registrar in the prescribed form.
(2) An application for incorporation of a company must specify—
(a) the name of the company, which must comply with section 10; and
(b) whether the company is a private company or a public company; and
(c) whether the rules of the company differ from the model rules set out in Schedule 2 (in the case of a private company) or Schedule 4 (in the case of a public company); and
(d) the full name, residential address, and postal address of every director of the proposed company; and
(e) the full name of every shareholder of the proposed company, and the number of shares to be issued to every shareholder; and
(f) the registered office of the proposed company; and
(g) the postal address of the company, which may be the registered office or any other postal address.
(3) An application for incorporation must be accompanied by—
(a) a consent by each person named as a director to act as a director of the company, in the prescribed form; and
(b) a copy of the rules of the company, if they differ from the model rules; and
(c) the prescribed fee.

[121] S.**10 Name of company**
(1) The name of a company must end with the word "Limited".
(2) The Registrar must not register a company with a name—
(a) that is identical or almost identical to the name of another company; or
(b) the use of which would contravene any enactment in relation to the use of names; or
(c) that contravenes regulations made under this Act in relation to company names; or
(d) that the Registrar considers to be offensive.
(3) If an application for incorporation of a company specifies a name that does not meet the requirements of this section, the Registrar must incorporate the company with a name in the form "Company number x Limited", where "x" is a unique number assigned to the company by the Registrar for this purpose.

[122] Schedule 2 is appended herewith as Annexure 'A'

[123] Schedule 4 is annexed with this thesis as Annexure 'B'

[124] **Section 7 of Companies Act, 2006; Certificate of incorporation**
As soon as the Registrar receives an application for incorporation that complies with section 6, the Registrar must—

4.2 Rights, privileges and restrictions on the newly incorporated companies:

The Companies Act, 2006, has made it optional for the companies to adopt model rules or other rules which it wish to adopt[125]. A company may subject to reasonable restriction, if any, in the rules may alter its rules by passing a special resolution in that behalf. The rules provided in schedule 2[126] shall have the impact of rules of private company, and the rules enumerated in schedule 4[127] shall cause an effect of a public company[128].

The rules, which the company would adopt will have an impact of a contract between the company and its shareholders, the company and each director. These rules would govern the rights, powers, duties, and obligations. The rules of a company shall have no legal effect to the extent these are in conflict with the Companies Act, 2006[129].

(a) enter the company on the Niue register; and
(b) issue a certificate of incorporation in respect of the company.

[125] **Section 14 of Companies Act, 2006; Adoption and alteration of rules**
(1) A company may adopt rules at the time of its incorporation by—
(a) filing those rules with its application for incorporation; or
(b) in the case of model rules set out in Schedules 2, 3, or 4, indicating in its application for incorporation that it wishes to adopt those model rules as its rules.
(2) Subject to any restrictions in its rules, a company may, by special resolution, adopt new rules or alter its rules.
(3) Within 10 working days of the adoption of new rules by a company, or the alteration of the rules of a company, as the case may be, the company must deliver a notice in the prescribed form to the Registrar for registration.
(4) If a company fails to comply with subsection (3), every director of the company commits an offence and is liable on conviction to a fine not exceeding 50 penalty units.

[126] supra

[127] supra

[128] **Section 15 of Companies Act, 2006; Model rules**
(1) The model rules set out in Schedule 2 have effect as the rules of a private company except to the extent that the company has—
(a) adopted the model rules set out in another schedule as its rules; or
(b) adopted rules that exclude, or modify, or are inconsistent with, the model rules.
(2) The model rules set out in Schedule 4 have effect as the rules of a public company except to the extent that the company has—
(a) adopted the model rules set out in another schedule as its rules; or
(b) adopted rules that exclude, or modify, or are inconsistent with, the model rules.
(3) A company may resolve to adopt the model rules in Schedules 2, 3, or 4 as its rules in accordance with section 14(2).

[129] **Section 16 of Companies Act, 2006; Contents and effect of rules**
(1) The rules of a company may contain—
(a) matters contemplated by this Act for inclusion in the rules of a company:
(b) any other matters that the company wishes to include in its rules.
(2) Subject to subsection (3),—

The changes to the memorandum of association bring in two important relaxations, namely the abolition of the ultra vires doctrine and the removal of the authorized share capital[130].

i) the abolition of the ultra vires doctrine[131], and
ii) the removal of the authorised share capital[132]

Now, I would endeavor to discuss the abovementioned impact due to changes brought forward in the Memorandum of Association.

4.2.1 The abolition of *ultra vires* doctrine:

"Companies incorporated on and after 1 October 2009 have unrestricted objects because the memorandum of association no longer contains the object clause. The ultra vires doctrine is therefore abolished. For existing companies to take advantage of the changes introduced by the 2006 Act in relation to the abolition of the ultra vires doctrine, they must pass a special resolution prior to, but with effect from, 1 October 2009 in order to change their memorandum of association and delete those provisions that otherwise are to be treated as forming part of their articles. Otherwise, since provisions in the memorandum of existing companies that no longer are part of the new memorandum from 1 October 2009 are treated as provisions of the articles, from that date existing companies that want to benefit from the

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(a) the rules of a company have effect and may be enforced as if they constituted a contract—
(i) between the company and its shareholders; and
(ii) between the company and each director; and
(b) the shareholders and directors of a company have the rights, powers, duties, and obligations set out in the rules of the company.
(3) The rules of a company are of no effect to the extent that they are inconsistent with this Act.

[130] www.withersworldwide.com, visited in September, 2010
[131] www.mallesons.com/publications/2009/Sep/10065454w.htm, visited in September, 2010
[132] www.simply-docs.co.uk/CustomPage.aspx?customPageID=78; www.withersworldwide.com & ibid, visited in August, 2010

abolition of the ultra vires doctrine can pass a special resolution in order to amend their articles or adopt new articles of association[133]."

4.2.2 The removal of authorized share capital:

"Another change introduced by the Companies Act 2006 is the abolition of the concept of authorised share capital[134]."

"The authorised share capital is the maximum amount of shares that a company can issue. From 1 October 2009 there is no restriction on the amount of shares a company can allot unless otherwise restricted by the articles of association. Traditionally, the authorised share capital is contained in the memorandum of association thus existing companies, if they want to take advantage of the changes introduces on the 1 October 2009, should pass a special resolution in order to change the memorandum of association (before 1 October 2009 but with effect from that date). Alternatively, since the provisions in the memorandum of association that are no longer present in the new memorandum will be treated as provisions of the articles, existing companies could, from 1 October 2009, pass a special resolution in order to amend their articles or in order to adopt new articles[135]."

4.3 Criticism on the elimination of objects clause:

As it has been briefly discussed in the preceding chapters that the memorandum of the company is the charter through which a company is regulated. The charter of the company transpires that its objectives are two-fold. As far as the first objective is concerned, it discloses to the share holder the field and scope of the company and then by looking in to it, the share holder decides the appropriateness of his investment in the company. The second dimension involves

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[133] www.simply-docs.co.uk/CustomPage.aspx?customPageID=78; www.withersworldwide.com; www.mallesons.com/publications/2009/Sep/10065454w.htm & www.ashfords.co.uk/.../**companies+act+2006**+new+law+articles+of+association, visited in August, September, 2010

[134] Ibid

[135] Ibid

any stakeholder of the company. The Memorandum tells these companies whether the objectives that the respective stakeholder aims to accomplish with the help of the company are within the realm of the company's objectives or not. The critics on the elimination of the object clause are of the view that the elimination of the object clause would be a cause of growing dissatisfaction among the share holders and stakeholders. It might would be a cause of creation of uncertain situation in the corporate world. They also view that the shareholders could be reluctant in investing in such companies (having no object clause)[136].

[136] www.blurtit.com/q536578.html, visited in September, 2010

PART III

PAKISTANI LAW OF ULTRA VIRES

Chapter No. 5 Concept of doctrine of *ultra vires* and protection of third party interest in Pakistan company law

The Constitution of Islamic Republic of Pakistan, 1973 (hereinafter referred to as "the Constitution") reveals and lays emphasis on the trichotomy of powers amongst the three basic organs of the State i.e., the legislature, executive and the judiciary. The legislature has been given the powers of law making in accordance with the growing needs of the State, the executive to ensure the enforcement of laws made by the legislature and the judiciary to explain and interpret the laws made by legislature. None of the organs, of the State can encroach upon the field of the others[137]. If any organ of the state exceeds its limits provided by the Constitution, the act of exceeding would be declared ultra vires. The Courts in Pakistan even recognizes some of the actions of the legislature ultra vires, but only in the case if it exceeds the powers of endowed to it by the Constitution[138]. It was held by the Supreme Court in a case that,

> "Court cannot strike down a statute on the ground of mala fides, but the same can be struck down on the ground that it is violative of a constitutional provision[139]."

The Honourable Courts in Pakistan also declare those acts of organs, functionaries, administrators etc., of the state ultra vires, which are taken and are,

a) Violative of constitutional provisions;
b) without having substantive power; or
c) having obvious procedural defects, or

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[137] State v. Ziaur Rahman (PLD 1973 SC 49), Federation of Pakistan v. Saeed Ahmad Khan (PLD 1974 SC 151), Government of Balochistan v. Azizullah Memon (PLD 1993 SC 341), Mahmood Khan Achakzai v. Federation of Pakistan (PLD 1997 SC 426), Liaquat Hussain v. Federation of Pakistan (PLD 1999 SC 504), Syed Zafar Ali Shah v. General Pervez Musharraf (PLD 2000 SC 869), Nazar Abbas Jaffri v. Secy: Government of the Punjab (2006 SCMR 606), Sindh High Court Bar Association's case (PLD 2009 SC 879), Smt. Indra Nehru Ghandi v. Raj Narain (AIR 1975 SC 2299) and Minerva Mills Ltd. v. Union of India (AIR 1980 SC 1789)

[138] ibid

[139] Liaqat Hussain v. Federation of Pakistan (PLD 1999 SC 504)

d) with a view to abuse the power,

e) without exercising proper administrative discretion[140].

The doctrine of ultra vires is famously known with special reference to constitutional and administrative law in Pakistan.

5.1 Ultra vires and Constitutional Law:

I would endeavor to discuss here the famous judgments of NRO by the August Supreme Court of Pakistan to elaborate the concept of ultra vires with reference to constitutional law;

5.1.1 The judgment on examination of vires of National Reconciliation Ordinance, 2007[141]:

5.1.1.2 Facts:

The President of Pakistan promulgated an Ordinance, which is known as National Reconciliation Ordinance, 2007 (hereinafter referred to as "NRO")[142], on 5th October 2007 in exercise of his powers under Article 89[143] of the Constitution. The NRO brought forward substantial amendments in various statutes. Section 494[144] of Code of Criminal Procedure, 1898, was

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[140] Supra 125

[141] Dr. Mobashir Hassan and others Vs. Federation of Pakistan and others (P L D 2010 Supreme Court 265)

[142] www.forumpakistan.com/national-reconciliation-ordinance-nro-details-t37932.html -, visited in September 2010

[143] **Article 89. Power of President to promulgate Ordinances.**
(1) The President may, except when the National Assembly is in session, if satisfied that circumstances exist which render it necessary to take immediate action, make and promulgate an Ordinance, as the circumstances may require.
(2) An Ordinance promulgated under this Article shall have the same force and effect as an Act of [Majlis-e-Shoora (Parliament)] and shall be subject to like restrictions as the power of [Majlis-e-Shoora (Parliament)] to make law, but every such Ordinance-
(a) shall be laid-
(i) before the National Assembly if it [contains provisions dealing with all or any of the matters specified in clause (2) of Article 73], and shall stand repealed at the expiration of four months from its promulgation or, if before the expiration of that period -a resolution disapproving it is passed by the Assembly, upon the passing of that resolution;
(ii) before both Houses if it [does not contain provisions dealing with any of the matters referred to in sub-paragraph (i)], and shall stand repealed at the expiration of four months from its promulgation or, if before the expiration of that period a resolution disapproving it is passed by either House, upon the passing of that resolution; and
(b) may be withdrawn at any time by the President.
(3) Without prejudice to the provisions of clause (2) an Ordinance laid before the National Assembly, shall be deemed to be a Bill introduced in the National Assembly.

[144] **Section 494 of Criminal Procedure Code, 1898. Effect of withdrawal from prosecution:**

amended; sections; sections 18[145], 24[146] and 31-A[147] of National Accountability Ordinance, 1999, were also amended; and section 39[148] of Representation of People Act, 1976, was also changed.

Any Public Prosecutor may, with the consent of the Court, before the judgment is pronounced, withdraw from the prosecution of any person either generally or in respect of any one or more of the offences for which he is tried; and upon such withdrawal,--
(a) if it is made before a charge has been framed, the accused shall be discharged in respect of such offence or offences;
(b) if it is made after a charge has been framed, or when under this Code no charge is required, he shall be acquitted in respect of such offence or offences:

[145] **S.18 OF NAO, 1999. Cognizance of Offences;**

a) The Accountability Court shall not take cognizance of any offence under this Ordinance except on a reference made by or on behalf of the Chairman National Accountability Bureau.

b) A reference under this Order shall be initiated by the Chairman National Accountability Bureau on;

i) a reference received from the appropriate government; or

ii) receipt of a complaint; or

iii) his own accord.

c) Where the Chairman National Accountability Bureau is of the opinion that it is or may be necessary and appropriate to initiate proceedings against any person on receipt of a reference or complaint or on his own accord, as the case may be, he shall refer the matter to theDeputy Chairman National Accountability Bureau or to any other officer for inquiry and investigation.

d) The responsibility for inquiry into and investigation of an offence alleged to have been committed under this Ordinance shall rest on the NAB to the exclusion of any other agency or authority, unless any such agency or authority is required to do so by the Chairman or/and Deputy Chairman NAB.

e) the Chairman NAB and such members, officers and/or servants of the NAB shall have and exercise, for the purposes of an inquiry and/or investigation the power to arrest any person, and all the powers of an officer-in-charge of a Police Station under the Code, and for that purpose may cause the attendance of any person, and when and if the assistance of any agency, police officer or any other official or agency, as the case may be, is sought by the NAB such official or agency shall render such assistance provided that no person shall be arrested without the permission of the Chairman or any officer duly authorized by the Chairman NAB.

f) Any Inquiry and Investigation under this Order shall be completed expeditiously but not exceeding a period of 75 days, or earlier as soon as may be practical and feasible.
g) The Chairman NAB, shall appraise the material and the evidence placed before him during the inquiry and the investigation, and if he decides that it would be proper and just to proceed further, he shall refer the matter to an Accountability Court.
h) If a complaint is inquired into and investigated by the NAB and it is concluded that the complaint received was prima facie frivolous or has been filed with intent to malign or defame any person, the Chairman or Deputy Chairman NAB or the prescribed law officer, may refer the matter to the Court, and if the complainant is found guilty he shall be punishable with imprisonment for a term which may extend to one year, or with fine or with both.

[146] **Section 24 of NAO, 1999**

(a)The Chairman NAB shall have the power, at any stage of the investigation under this Ordinance, to direct that the accused, if not already arrested, shall be arrested.
(b)If the Chairman, NAB decides to refer the case to a Court, such reference shall contain the substance of the offence/offences alleged to have been committed by the accused and a copy of such reference shall be forwarded to the Registrar of the Court to which the case has been sent to try the accused, and another copy shall be delivered to the accused.

The purpose underlying the promulgation of NRO appeared to be the promotion of national

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(c)The provisions of sub-section (a) shall also apply to cases, which have already been referred to the Court.
(d)Notwithstanding anything contained in the code, where the holder of the public office or any other person accused of an offence is arrested by NAB under this Ordinance, NAB shall, as soon as may be, inform him of the grounds and substance on the basis of which he has been arrested and produce him before the court established under this Ordinance within a period of twenty four hours of arrest excluding the time necessary for the journey from the place of arrest to the court and such person shall, having regard to the facts and circumstances of the case, be liable to be detained in the custody of NAB for the purpose of inquiry and investigation for a period not exceeding ninety days provided that no accused arrested under this Ordinance shall be released without the written order of the Chairman NAB or the order of the Court.
(e)All persons presently in custody shall immediately upon coming into force of this sub-section, unless previously produced before an Accountability Court, be produced before such court as provided in sub-section (d) and the Order authorizing retention of custody by NAB shall be deemed to relate to the date of arrest.
(f)The Chairman, NAB may declare and notify any place as a police station or a sub-jail at his discretion.
[147] **31-A, Absconding to avoid service of warrants:**
Whoever absconds in order to avoid being served with any process issued by any Court or any other authority or officer under this Ordinance or in any manner prevents, avoids or evades the service on himself of such process or conceals himself to screen himself from the proceedings or punishment under this Ordinance shall be guilty of an offence punishable with imprisonment which may extend to three years notwithstanding the provisions of section 87 and 88 of Code of Criminal Procedure, 1898, or any other law for the time being in force.

[148] **S.39 of Representation of People Act, 1976. Consolidation of results.–**

(I)The Returning Officer shall give the contesting candidates and their election agents a notice in writing of the day, time and place fixed for the consolidation of the results, and, in the presence of such of the contesting candidates and election agents as may be present consolidate in the prescribed manner the results of the count furnished by the Presiding Officers, including therein the postal ballots received by him before the time aforesaid.

(2) The consolidation proceedings shall be held without any avoidable delay as soon as possible after the polling day.

(3) Before consolidating the results of the count, the Returning Officer shall examine the ballot papers excluded from the count by the Presiding Officer and, if he finds that any such ballot paper should not have been so excluded, count it as a ballot paper cast in favour of the contesting candidate for whom the vote has been cast thereby.

(4) The Returning Officer shall also count the ballot papers received by him by post in such manner as may be prescribed and include the votes cast in favour of each contesting candidate in the consolidated statement except those which he may reject on any of the grounds mentioned in sub-section (4)of section 38.

(5) The ballot papers rejected by the Returning Officer under sub-section (4) shall be shown separately in the consolidated statement.

(6)The Returning Officer may recount the ballot papers-

(a) upon the request of, or challenge in writing made by, a contesting candidate or his election agent, if the Returning Officer is satisfied that the request or the challenge is reasonable; or

(b) if so directed by the Commission, in which case the recount shall be held in such manner and at such place as may be directed by the Commission.

reconciliation[149]. The withdrawal and amnesty of all the cases and punishments, against all Politicians and Bureaucrats, by the President, since 1988 till 17th November 1999, was the likely outcome of NRO[150]. To challenge the vires of NRO, various petitions were filed under Article 184(3) of the Constitution[151]. Similarly different appeals under Article 185 of the Constitution[152] were also filed against the judgment of the Honourable Sindh High Court whereby the benefit of the NRO, 2007 was declined to the appellant. Section 2[153], 3[154], 4[155], 5[156], 6[157] and 7[158] of the

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[149] www.pakspectator.com/national-reconciliation-ordinance-is-it-a-potential-catalyst/ , visited in October, 2010

[150] pkpolitics.com/2007/.../national-reconciliation-ordinance/ - visited in October, 2010

[151] **Article 184. Original Jurisdiction of Supreme Court.**

(1) The Supreme Court shall, to the exclusion of every other court, have original jurisdiction in any dispute between any two or more Governments.

Explanation.-In this clause, "Governments" means the Federal Government and the Provincial Governments.

(2) In the exercise of the jurisdiction conferred on it by clause (1), the Supreme Court shall pronounce declaratory judgments only.

(3) Without prejudice to the provisions of Article 199, the Supreme Court shall, if it considers that a question of public importance with reference to the enforcement of any of the Fundamental Rights conferred by Chapter I of Part II is involved have the power to make an order of the nature mentioned in the said Article.

[152] **185. Appellate Jurisdiction of Supreme Court.**

(1) Subject to this Article, the Supreme Court shall have jurisdiction to hear and determine appeals from judgments, decrees, final orders or sentences.

(2) An appeal shall lie to the Supreme Court from any judgment, decree, final order or sentence

(a) if the High Court has on appeal reversed an order of acquittal of an accused person and sentenced him to death or to transportation for life or imprisonment for life; or, on revision, has enhanced a sentence to a sentence as aforesaid; or

(b) if the High Court has withdrawn for trial before itself any case from any court subordinate to it and has in such trial convicted the accused person and sentenced him as aforesaid; or

(c) if the High Court has imposed any punishment on any person for contempt of the High Court; or

(d) if the amount or value of the subject matter of the dispute in the court of first instance was, and also in dispute in appeal is, not less than fifty thousand rupees or such other sum as may be specified in that behalf by Act of [Majlis-e-Shoora(Parliament)] and the judgment, decree or final order appealed from has varied or set aside the judgment, decree or final order of the court immediately below; or

(e) if the judgment, decree or final order involves directly or indirectly some claim or question respecting property of the like amount or value and the judgment, decree or final order appealed from has varied or set aside the judgment, decree or final order of the court immediately below; or

(f) if the High Court certifies that the case involves a substantial question of law as to the interpretation of the Constitution.

(3) An appeal to the Supreme Court from a judgment, decree, order or sentence of a High Court in a case to which clause (2) does not apply shall lie only if the Supreme Court grants leave to appeal.

[153] **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 sub-section (1) thereof and after sub-section (1) renumbered as aforesaid, the following sub-section (2) and (3) shall be added, namely:

"(2) Notwithstanding anything to the contrary in sub-section(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 and upon such withdrawal clause (a) and clause (b) of sub-section (1) shall apply.

(3) For the purposes of exercise of powers under sub-section (2) the federal government and the provincial

government may each constitute a review board to review the entire record of the case and furnish recommendations as to their withdrawal or otherwise.

(4) The review board in case of Federal Government shall be headed by a retired judge of the Supreme Court with Attorney-General and Federal Law Secretary as its members and in case of Provincial Government it shall be headed by a retired judge of the high court with Advocate-General and/or Prosecutor-General and Provincial Law Secretary as its members.

(5) A review board undertaking review of a case may direct the public prosecutor or any other authority concerned to furnish to it the record of the case."

[154] **3. Amendment of section 39, Act LXXXV of 1976.-**

(1) In the Representation of the People Act, 1976 (LXXXV of 1976), in section 39, after sub-section (6), the following new sub-section (7) shall be added, namely:

"(7) After consolidation of results the Returning Officer shall give to such contesting candidates and their election agents as are present during the consolidation proceedings, a copy of the result of the count notified to the commission immediately against proper receipt and shall also post a copy thereof to the other candidates and election agents".

[155] **4. Amendment of section 18, Ordinance XVIII of 1999.**

In the National Accountability Ordinance, 1999 (XVHI of 1999), hereinafter referred to as the said Ordinance, in section 18, in clause (e), for the full stop at the end a colon shall be substituted and thereafter the following proviso shall be added, namely:

"Provided that no sitting member of Parliament or a Provincial Assembly shall be arrested without taking into consideration the recommendations of the Special Parliamentary Committee on Ethics referred to in clause (aa) or Special Committee of the Provincial Assembly on Ethics referred to in clause (aaa) of section 24, respectively."

[156] **5. Amendment of section 24, Ordinance XVIII of 1999.**

In the said ordinance, in section 24, (i) in clause (a) for the full stop at the end a colon shall be substituted and thereafter the following proviso shall be inserted, namely.

"Provided that no sitting member of Parliament or a Provincial Assembly shall be arrested without taking into consideration the recommendations of Special Parliamentary Committee on Ethics or Special Committee of the Provincial Assembly on Ethics referred to in clause (aa) and (aaa), respectively, before which the entire material and evidence shall be placed by the chairman, NAB."; and (ii) after clause (a), amended as aforesaid, the following new clauses (aa) and (aaa) shall be inserted, namely;

(aa) The Special Parliamentary Committee on Ethics referred to in the proviso to clause (a) above shall consist of a chairman who shall be a member of either House of Parliament and eight members each from the National Assembly and Senate to be selected by the Speaker, National Assembly and Chairman Senate, respectively, on the recommendations of Leader of the House and Leader of the Opposition of their respective houses, with equal representation from both sides.

(aaa) The Special Committee of the Provincial Assembly on Ethics shall consist of a chairman and eight members to be selected by the Speaker of the Provincial Assembly on the recommendation of Leader of the House and Leader of the Opposition, with equal representation from both sides."

[157] **6. Amendment of section 31A, Ordinance XVIII of 1999.**

In the said Ordinance, in section 31A, in clause (a), for the full stop at the end a colon shall be substituted and thereafter the following new clause (aa) shall be inserted, namely:

"(aa) An order or judgment passed by the Court in absentia against an accused is void ab initio and shall not be acted upon."

[158] **7. Insertion of new section, Ordinance, XVIII of 1999.**

In the said Ordinance, after section 33, the following new section shall be inserted, namely:

"33A. Withdrawal and termination of prolonged pending proceedings initiated prior to 12th October, 1999.

(1) Notwithstanding anything contained in this Ordinance or any other law for the time being in force, proceedings under investigation or pending in any court including a high court and the Supreme Court of Pakistan initiated by or on a reference by the National Accountability Bureau inside or outside Pakistan, including proceedings continued under section 33, requests for mutual assistance and civil party to proceedings initiated by the Federal Government before the 12th day of October, 1999 against holders of public office stand withdrawn and terminated with immediate effect and such holders of public office shall also not be liable to any action in future as well under this Ordinance for acts having been done in good faith before the said date;

NRO came under the furious attack of the Petitioners. The vires of the NRO was challenged on the grounds being violative of the Article 62[159] and 63[160] of the Constitution. The vires of the

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Provided that those proceedings shall not be withdrawn and terminated which relate to cases registered in connection with the cooperative societies and other financial and investment companies or in which no appeal, revision or constitutional petition has been filed against final judgment and order of the Court or in which an appellate or revisional order or an order in constitutional petition has become final or in which voluntary return or plea bargain has been accepted by the Chairman, National Accountability Bureau under section 25 or recommendations of the Conciliation Committee have been accepted by the Governor, State bank of Pakistan under section 25A.

(2) No action or claim by way of suit, prosecution, complaint or other civil or criminal proceeding shall lie against the Federal, Provincial or Local Gover ment, the National Accountability Bureau or any of their officers and functionaries for any act or thing done or intended to be done in good faith pursuant to the withdrawal and termination of cases under sub-section (1) unless they have deliberately misused authority in violation of law."

[159] **Article 62 of the Constitution qualifications for membership of Majlis-e-Shoora (Parliament).**A person shall not be qualified to be elected or chosen as a member of Majlis-e-Shoora (Parliament) unless :-

(a) he is a citizen of Pakistan

(b) he is, in the case of the National Assembly, not less than twenty -five years of age and is enrolled as a voter in any electoral roll in-
   i) any part of Pakistan, for election to a general seat or a seat reserved for non-Muslims; and
   ii) any area in a Province from which he seeks membership for election to a seat reserved for women

(c) he is, in the case of Senate, not less than thirty years of age and is enrolled as a voter in any area in a Province or, as the case may be, the Federal Capital or the Federally Administered Tribal Areas, from where he seeks membership;

(d) he is of good character and is not commonly known as one who violates Islamic Injunctions;

(e) he has adequate knowledge of Islamic teachings and practises obligatory duties prescribed by Islam as well as abstains from major sins ;

(f) he is sagacious, righteous and non-profligate and honest and ameen;

(g) he has not been convicted for a crime involving moral turpitude or for giving false evidence;

(h) he has not, after the establishment of Pakistan, worked against the integrity of the country or opposed the Ideology of Pakistan.

Provided that the disqualifications specified in paragraphs (d) and (e) shall not apply to a person who is a non-Muslim, but such a person shall have good moral reputation; and he possesses such other qualifications as may be prescribed by Act of Majlis-e-Shoora (Parliament)

[160] **Article 63 of the Constitution. Disqualifications for membership of Majlis-e-Shoora (Parliament).**

(1) A person shall be disqualified from being elected or chosen as, and from being, a member of the Majlis-e-Shoora (Parliament), if:-

(a) he is of unsound mind and has been so declared by a competent court; or

(b) he is an undischarged insolvent; or

(c) he ceases to be a citizen of Pakistan, or acquires the citizenship of a foreign State; or

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

(e) he is in the service of any statutory body of any body which is owned or controlled by the Government or in which the Government has a controlling share or interest; or

(f) being a citizen of Pakistan by virtue of section 14B of the Pakistan Citizenship Act, 1951 (II of 1951), he is for the time being disqualified under any law in force in Azad Jammu and Kashmir from being elected as a member of the Legislative Assembly of Azad Jammu and Kashmir; or

(g) he is propagating any opinion, or acting in any manner, prejudicial to the Ideology of Pakistan, or the sovereignty, integrity or security of Pakistan, or morality, or the maintenance of public order, or the integrity or independence of the judiciary of Pakistan, or which defames or brings into ridicule the judiciary or the Armed Forces of Pakistan; or

(h) he has been convicted by a court of competent jurisdiction on a charge of corrupt practice, moral turpitude or misuse of power or authority under any law for the time being in force; or
(i) he has been dismissed from the service of Pakistan or service of a corporation or office set up or controlled by the Federal Government, Provincial Government or a Local Government on the grounds of misconduct or moral turpitude; or
(j) he has been removed or compulsorily retired from the service of Pakistan or service of a corporation or office set up or controlled by the Federal Government, Provincial Government or a Local Government on the grounds of misconduct or moral turpitude; or]
(k) he has been in the service of Pakistan or of any statutory body or any body which is owned or controlled by the Government or in which the Government has a controlling share or interest, unless a period of two years has elapsed since he ceased to be in such service; or
(l) he is found guilty of a corrupt or illegal practice under any law for the time being in force, unless a period of five years has elapsed from the date on which that order takes effect; or
(m) he has been convicted under section 7 of the Political Parties Act, 1962 (III of 1962), unless a period of five years has elapsed from the date of such conviction; or
(n) he, whether by himself or by any person or body of persons in trust for him or for his benefit or on his account or as a member of a Hindu undivided family, has any share or interest in a contract, not being a contract between a cooperative society and Government, for the supply of goods to, or for the execution of any contract or for the performance of any service undertaken by, Government:
Provided that the disqualification under this paragraph shall not apply to a person-
(i) where the share or interest in the contract devolves on him by inheritance or succession or as a legatee, executor or administrator, until the expiration of six months after it has so devolved on him;
(ii) where the contract has been entered into by or on behalf of a public company as defined in the Companies Ordinance, 1984 (XLVII of 1984), of which he is a share-holder but is not a director holding an office of profit under the company; or
(iii) where he is a member of a Hindu undivided family and the contract has been entered into by any other member of that family in the course of carrying on a separate business in which he has no share or interest; or
Explanation.- In this Article "goods" does not include agricultural produce or commodity grown or produced by him or such goods as he is, under any directive of Government or any law for the time being in force, under a duty or obligation to supply.
(o) he holds any office of profit in the service of Pakistan other than the following offices, namely :-
(i) an office which is not whole time office remunerated either by salary or by fee;
(ii) the office of Lumbardar, whether called by this or any other title;
(iii) the Qaumi Razakars;
(iv) any office the holder whereof, by virtue of such office, is liable to be called up for military training or military service under any law providing for the constitution or raising of a Force; or
(p) he has been convicted and sentenced to imprisonment for having absconded by a competent court under any law for the time being in force; or
(q) he has obtained a loan for an amount of two million rupees or more, from any bank, financial institution, cooperative society or cooperative body in his own name or in the name of his spouse or any of his dependents, which remains unpaid for more than one year from the due date, or has got such loan written off; or
(r) he or his spouse or any of his dependents has defaulted in payment of government dues and utility expenses, including telephone, electricity, gas and water charges in excess of ten thousand rupees, for over six months, at the time of filing his nomination papers; or
(s) he is for the time being disqualified from being elected or chosen as a member of the Majlis-e-Shoora (Parliament)or of a Provincial Assembly under any law for the time being in force.
2) If any question arises whether a member of Majlis-e-Shoora (Parliament) has become disqualified from being a member, the Speaker or, as the case may be, the Chairman shall, within thirty days from raising of such question refer the question to the Chief Election Commissioner.
3) here a question is referred to the Chief Election Commissioner under clause (2), he shall lay such question before the Election Commission which shall give its decision thereon not later than three months from its receipt by he Chief Election Commissioner.

NRO was also contested on the basis of its being against the fundamental rights as provided by the Articles 4[161], 8[162], 12[163], 13[164] and 25[165] of the Constitution. NRO was also prayed to be

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[161] **Article 4 of the Constitution. Right of individuals to be dealt with in accordance with law, etc.**
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.

1) In particular
   a) no action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with law.
   b) no person shall be prevented from or be hindered in doing that which is not prohibited by law; and
   c) no person shall be compelled to do that which the law does not require him to do.

[162] **Article 8 of the Constitution. 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.
2. The State shall not make any law which takes away or abridges the rights so conferred and any law made in contravention of this clause shall, to the extent of such contravention, be void.
3. The provisions of this Article shall not apply to
   a) any law relating to members of the Armed Forces, or of the police or of such other forces as are charged with the maintenance of public order, for the purpose of ensuring the proper discharge of their duties or the maintenance of discipline among them; or
   b) any of the
      i) laws specified in the First Schedule,as in force immediately before the commencing day or as amended by any of the laws specified in that Schedule;
      ii) other laws specified in Part I of the First Schedule;

   and no such law nor any provision thereof shall be void on the ground that such law or provision is inconsistent with, or repugnant to, any provision of this Chapter.
4. Notwithstanding anything contained in paragraph (b) of clause (3), within a period of two years from the commencing day, the appropriate Legislature shall bring the laws specified in [Part II of the First Schedule] into conformity with the rights conferred by this Chapter:
   Provided that the appropriate Legislature may by resolution extend the said period of two years by a period not exceeding six months.
   Explanation :- If in respect of any law [Majlis-e-Shoora (Parliament)] is the appropriate Legislature, such resolution shall be a resolution of the National Assembly.
5. The rights conferred by this Chapter shall not be suspended except as expressly provided by the Constitution.

[163] **Article 12 of the Constitution.. Protection against retrospective punishment**

1. No law shall authorize the punishment of a person:
   a) for an act or omission that was not punishable by law at the time of the act or omission; or
   b) for an offence by a penalty greater than, or of a kind different from, the penalty prescribed by law for that offence at the time the offence was committed.
2. Nothing in clause (1) or in Article 270 shall apply to any law making acts of abrogation or subversion of a Constitution in force in Pakistan at any time since the twenty-third day of March, one thousand nine hundred and fifty-six, an offence

[164] **Article 13 of the Constitution.. Protection against double punishment and self incrimination.**
No person

a) shall be prosecuted or punished for the same offence more than once; or
b) shall, when accused of an offence, be compelled to be a witness against himself.

struck down on the basis of it being against Article 145[166] of the Constitution and the concept of equality of Islamic Injunction, provided under Articles 2A[167] and 227[168] of the Constitution. Some contentions of the counsels, who were desirous of the declaration of the NRO being ultra vires to the constitution are reproduced below,

> "Section 7 of the impugned Ordinance being self-executory in nature amounts to legislative judgment, which is impermissible intrusion into the exercise of judicial powers of the State and thus falls foul of Article 175 of the Constitution which envisages separation and independence of the judiciary from other organs of the State[169]."

> "By promulgating Section 7 of the impugned Ordinance, Article 63(1)(h) and 63(1)(1) of the Constitution have been made ineffective, as regards chosen category of people, therefore, it is ultra vires the Constitution as it amounts to defeat the constitutional mandates[170]."

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[165] **Article 25 of the Constitution. Equality of citizens:**
1.All citizens are equal before law and are entitled to equal protection of law.
2.There shall be no discrimination on the basis of sex alone.
3.Nothing in this Article shall prevent the State from making any special provision for the protection of women and children.

[166] **Article 145 of the Constitution.Establishment and Jurisdiction of Courts**
1.There shall be a Supreme Court of Pakistan, a High Court for each Province and such other courts as may be established by law.
2.No court shall have any jurisdiction save as is or may be conferred on it by the Constitution or by or under any law.
3.The Judiciary shall be separated progressively from the Executive within fourteen years from the commencing day.

[167] **Article 2-A of the Constitution. The Objective Resolution to form part of substantive provisions.**
The principles and provisions set out in the objectives Resolution reproduced in the Annex are hereby made substantive part of the Constitution and shall have effect accordingly.

[168] **Article 227 of the Constitution. Provisions relating to the Holy Qur'an and Sunnah**
1. All existing laws shall be brought in conformity with the Injunctions of Islam as laid down in the Holy Quran and Sunnah, in this Part referred to as the Injunctions of Islam, and no law shall be enacted which is repugnant to such Injunctions.
   Explanation:- In the application of this clause to the personal law of any Muslim sect, the expression "Quran and Sunnah" shall mean the Quran and Sunnah as interpreted by that sect.]
2. Effect shall be given to the provisions of clause (1) only in the manner provided in this Part.
3. Nothing in this Part shall affect the personal laws of non- Muslim citizens or their status as citizens.

[169] Arguments by Mr. Salman Akram Raja reported in Dr. Mobashir Hassan and others Vs. Federation of Pakistan and others (P L D 2010 Supreme Court 265)

[170] ibid

"The impugned Ordinance violates the provisions of Article 25 of the Constitution because it is not based on intelligible differentia, relatable to lawful objects, therefore, deserves to be struck down[171]."

"Sub-sections, (2) and (3) of Section 494 of Cr.P.C. added by means of impugned Ordinance are contrary to provisions of subsection (1) of Section 494 of Cr.P.C., where it has been provided that cases can only be withdrawn with the consent of the Court, whereas, in newly added subsections, powers of the **Court** have been conferred upon the Review Boards of the Executive Bodies, therefore, these subsections are also contrary to Article 175 of the Constitution[172]."

"Section 6 of the impugned Ordinance is contrary to the basic principles relating to annulment of judgments, even if passed in absentia, in accordance with existing law, according to which unless the basis for the judgment, in favour of a party, is not removed, it could not affect the rights of the parties, in whose favour the same was passed but when the Legislature promulgated the impugned Ordinance, in order to remove the basis on which the judgment was founded, such judgment shall have no bearing on the cases. **Facto Belarus Tractor Ltd. v. Government of Pakistan; PLD 2005 SC 605**. Hence, provisions of the impugned Ordinance as a whole are against the concept of equality of Islamic Injunction, provided under Article 2A of the Constitution, therefore, on this score as well, deserves to be struck down being ultra vires the Constitution[173]."

"Under the Constitution, no indemnity or amnesty can at all be given to any one, except granting pardon in terms of Article 45[174] of the Constitution[175]."

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[171] ibid
[172] ibid
[173] ibid
[174] **Article 45 of the Constitution. President's power to grant pardon, etc.**
The President shall have power to grant pardon, reprieve and respite, and to remit, suspend or commute any sentence passed by any court, tribunal or other authority.
[175] Arguments by Dr. Farooq Hassan reported in Dr. Mobashir Hassan and others Vs. Federation of Pakistan and others (P L D 2010 Supreme Court 265)

"Sections 2, 4, 5 and 6 of the impugned Ordinance are violative of the doctrine of trichotomy of powers[176]."

"The impugned Ordinance has also violated the principles of political justice and fundamental rights because it allows plundering of national wealth and to -get away with it. More so, it tried to condone dishonesty of magnitude which is unconscientious and shocking to the conscience of mankind[177]."

"The impugned Ordinance is purpose specific and period specific, therefore, violates Article 25 of the Constitution[178]."

The Honourable Supreme Court of Pakistan immediately after first hearing the preliminary arguments of the counsels passed the following short order,

"These petitions have been filed under Article 184(3) of the Constitution of Islamic Republic of Pakistan, 1973 [hereinafter referred to as "the Constitution"] challenging the National Reconciliation Ordinance, 2007 (No. LX of 2007) [hereinafter referred to as "the impugned Ordinance[179]"].

The judgment on the vires was pending, when the then President of Pakistan proclaimed emergency in Pakistan and the judiciary was sacked. These Petition were again taken by the judiciary after its revival. The Honourable Supreme Court of Pakistan, in its Short Order dated July 31, 2009, gave 120 days to the Federal Government, to place before the Parliament, the National Reconciliation Ordinance (NRO) and other Ordinances, promulgated by the President before November 3, 2007[180].

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[176] ibid
[177] ibid
[178] Arguments by Mr. Muhammad Ikram Chaudhry reported in Dr. Mobashir Hassan and others Vs. Federation of Pakistan and others (P L D 2010 Supreme Court 265)
[179] Dr. Mobashir Hassan and others Vs. Federation of Pakistan and others (P L D 2010 Supreme Court 265)
[180] www.pakspectator.com/national-reconciliation-ordinance-is-it-a-potential-catalyst/ - visited in October, 2010

The said order of the Honourable Supreme Court lead an impression in some circles that the NRO was to be deemed to be a valid law between February 5, 2008, and July 31, 2009[181]. For instance, a Petition was filed by one Fazal Ahmed Jat in the Honourable Supreme Court with a prayer of extending benefit of NRO to him[182]. This was the time when NRO had been laid before the National Assembly and after going through the Standing Committee of the National Assembly on Law & Justice and the National Assembly, it had been withdrawn[183]. The full bench of the August Supreme Court, therefore, proceeded to decide on the status/vires of the NRO and decided the matter in the following terms,

> "We have examined the respective contentions of the learned counsel for the parties as well as the vires of the NRO, 2007 on the touchstone of various Articles of the Constitution, and 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 Jaw and resultantly of no legal effect[184]."

The Honourable Supreme Court, therefore, ordered to revive all the cases, which were terminated in pursuance of NRO, and eliminated every benefit which was or to be granted in pursuance of NRO. Judicial Monitoring Cells was ordered to be established to monitor the progress and the proceedings in respect of those Court cases in which the benefit of NRO was awarded in any manner whatsoever[185].

5.1.2 Abstract of some other judgments with respect to ultra vires and constitutional law:

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[181] ibid
[182] Dr. Mobashir Hassan and others Vs. Federation of Pakistan and others (P L D 2010 Supreme Court 265)
[183] ibid
[184] ibid
[185] ibid

"The Parliament in England is sovereign in the real sense and it is not subject to any constraints as in England there is no written Constitution, whereas in Pakistan the Parliament is subject to constraints contemplated by the Constitution in accordance with the procedure provided therein, but so long as it is not amended the Parliament has to act within its four corners; so a statute or any of its provisions can be struck down on the ground of being ultra vires of the Constitution[186]."

"This Court struck down the imposition of preshipment inspection service charge under the Customs Act, 1969 as unconstitutional, which of course was not based on any fundamental rights. Relevant para reads as under:[187]"

> "Considering the case from all angles, although the Federal Legislature is competent to legislate for the imposition of fees within the meaning of Entry 54, in the Federal Legislative List, Fourth Schedule to the Constitution, but again as already discussed hereinbefore, one has to see what is the nature of the legislation and whether the same could have been legislated within the ambit of the powers of the Federal Legislature. No doubt, legislation can be made to impose fee in respect of any of the matters in the Federal Legislative List, but definitely not for pre-inspection, the benefit of which has to go to the companies appointed to carry out the inspection and not to the payees of the fees. The imposition of such fee is not in lieu of services to be rendered for the benefit of its payees.....[188]"

"For the foregoing reasons, we are of the view that the imposition of service charge as imposed under section 18-B of the Act towards the pre-shipment inspection is ultra vires of the powers of the Federal Legislature[189]."

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[186] Messrs Electric Lamp Manufacturers of Pakistan Ltd. v. The Government of Pakistan (1989 PTD 42)
[187] Collector of Customs and others v. Sheikh Spinning Mills (1999 SCMR 1402)
[188] Ibid
[189] Ibid

5.2 Ultra vires with respect to Administrative and Constitutional Law:

There could be some acts of the functionaries of state, which are both violative of provisions of the Constitution and also in excess of the authority vested in them by the law at the same time. The glaring example in this regard is the act of imposition of emergency by Mr. General Pervez Musharraf on 03-11-2007, which was declared by the Honourable Supreme Court of Pakistan null & void, ultra vires to the Constitution and beyond the power endowed to him by the law.

5.2.1 Judgment examining the constitutionality/vires of act of imposition of emergency (alongwith other consequential acts) by General Pervez Musharraf[190]:

5.2.1.1 Facts:

The former President/Chief executive of Pakistan, General Pervez Musharraf, (Rtd.), in his capacity as Chief of Army Staff declared emergency. It is believed that he declared emergency to remove Chief Justice of Pakistan, who was hearing a Petition against him that questioned his eligibility to contest the election as President of Pakistan and had just passed a short order restraining him from imposition of emergency. His act was /is considered to be an attack on the independence of Judiciary[191]. He also suspended the Constitution, and issued a Provisional Constitution Order No.1 of 2007 followed by the Oath of Office (Judges) Order, 2007. It is pertinently highlighted that due to the said orders sixty one (61) Judges of superior judiciary including Chief Justice of Pakistan and Chief Justices of three Provinces became dysfunctional because they refused to take or were not given the oath. The said removed judges, thereafter, were put under house arrest. It is also worth mentioning that one Mr. Abdul Hameed Dogar was made the Chief Justice of Pakistan and a number of other judges were also appointed without any consultation from the de jure Chief Justice of Pakistan. It is also worth pin-pointing that the number of judges was also increased without any consultation with parliament. Consequently, Constitutional Petitions under Article 184(3)[192]

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[190] Sindh High Court Bar Association Vs. Federation of Pakistan (PLD 2009 Supreme Court 879)
[191] pakistanpolicy.com/.../musharraf-declares-state-of-emergency/ - visited in October, 2010
[192] Supra 136

of the Constitution were filed to declare the above mentioned orders and other orders of the General Pervez Musharaf such as the Islamabad High Court (Establishment) Order 2007, dated 14th December 2007 being the President's Order No.7 of 2007; the High Court Judges (Pensionary Benefits) Order, 2007 being. President's Order No.8 of 2007; the Supreme Court Judges (Pensionary Benefits) Order, 2007 being President's Order No.9 of 2007 dated 14th December, 2007 etc., to be un-constitutional and ultra vires of the Constitution. These writs were also filed against the unlawful removal of judges of Higher and Superior Judiciary and in addition also sought for the appointment of the respondents Nos. 3 and 4 as permanent Judges of the High Court of Sindh under Article 193[193] of the Constitution of the Islamic Republic of Pakistan.

5.2.1.2 Stance advanced by the Lawyers:

The Counsels for the Petitioners vehemently opposed the actions of General Pervez Musharraf. The relevant pieces of their arguments are reproduced below;

> "General Pervez Musharraf imposed an unconstitutional and illegal emergency, unconstitutionally and illegally held in abeyance the Constitution in abeyance and in its place imposed a new constitutional Order, called PCO No. 1 of 2007 and Oath

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[193] **Article 193 of the Constitution. Appointment of High Court Judges.**
(1) A Judge of a High Court shall be appointed by the President after consultation-
(a) with the Chief Justice of Pakistan;
(b) with the Governor concerned; and
except where the appointment is that of Chief Justice, with the Chief Justice of the High Court.
(2) A person shall not be appointed a Judge of a High Court unless he is a citizen of Pakistan, is not less than [forty-five years] of age, and-
(a) he has for a period of, or for periods aggregating, not less than ten years been an advocate of a High Court (including a High Court which existed in Pakistan at any time before the commencing day); or
(b) he is, and has for a period of not less than ten years been, a member of a civil service prescribed by law for the purposes of this paragraph, and has, for a period of not less than three years, served as or exercised the functions of a District Judge in Pakistan; or
(c) he has, for a period of not less than ten years, held a judicial office in Pakistan.
[Explanation.-In computing the period during which a person has been an advocate of a High Court or held judicial office, there shall be included any period during which he has held judicial office after he became an advocate or, as the case may be, the period during which he has been an advocate after having held judicial office.]
(3) In this Article, "District Judge" means Judge of a principal civil court of original jurisdiction.

Order, 2007. Therefore, the acts/actions and instruments brought about by him from 3rd November, 2007 till 15th December, 2007 (both days inclusive) were unconstitutional, ultra vires and void and were liable to be so declared."[194]

"Two of the instruments, namely, Proclamation of Emergency and PCO No. 1 of 2007 were issued by General Pervez Musharraf in his capacity as the Chief of Army Staff, while the third instrument, namely, Oath Order, 2007 was issued by him in his capacity as President of Pakistan. Neither the Constitution nor any law permitted him to promulgate any of the said instruments in any of his capacities. Therefore, the actions of 3rd November, 2007 were patently unconstitutional, illegal and invalid. The unconstitutional and illegal assumption of power as described in the aforesaid instruments made him a usurper and he was liable to be so declared."[195]

"Oath Order, 2007 was issued by General Pervez Musharraf in his capacity as the President of Pakistan as a delegatee of the Chief of Army Staff, which was against the scheme of the Constitution and the law, inasmuch as neither any subordinate authority could delegate its functions to a superior authority nor the President was empowered under the Constitution to issue such an Order."[196]

"The instruments of 3rd November, 2007 were purported to be laws of permanent and perpetual character. On the other hand, under Article 89[197] of the Constitution the President was empowered to promulgate Ordinances for a period of four mouths. The Chief of Army Staff did not have any power or authority under any law to promulgate any of the aforesaid unconstitutional measures. As such, the same were issued neither under any provision of the Constitution nor under any law on the statute book."[198]

"The actions of 3rd November 2007 up to 15th December 2007 (both days inclusive) were the creation and for the benefit of one individual alone, namely, General Pervez Musharraf. Any reference he made to other institutions in any of the instruments of that date and onward was incorrect in the course of history and an attempt to involve

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[194] Arguments by Mr. Hamid Khan reported in Sindh High Court Bar Association Vs. Federation of Pakistan (PLD 2009 Supreme Court 879)
[195] ibid
[196] ibid
[197] Supra 128
[198] Supra 176

other institutions and persons with the sole object 'of his own personal aggrandizement and political benefit. The Pakistan Army was dragged into it and confronted with the people. Earlier, as a result of agreement with the Muttahida Majlis-e-Amal (MMA), he got inserted into Article 41[199] of the Constitution clause (7) his assumption of the office of President in pursuance of the Referendum held in April 2002 for a term of five years; clause (8) - for a vote of confidence for further ' affirmation of his being in office; and clause (9) for regulating the proceedings for the vote of confidence by the Chief Election Commissioner in accordance with such procedure and the counting of votes in such manner as may be prescribed by the rules framed by the Federal Government - all notwithstanding any provision of the Constitution or any other law for the time being in force. All these were special provisions made for one person."[200]

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[199] **Article 41 of the Constitution. The President.**

(1) There shall be a President of Pakistan who shall be the Head of State and shall represent the unity of the Republic.

(2) A person shall not be qualified for election as President unless he is a Muslim of not less than forty-five years of age and is qualified to be elected as member of the National Assembly.

(3) The President to be elected after the expiration of the term specified in clause (7) shall be elected in accordance with the provisions of the Second Schedule by the members of an electoral college consisting of:

(a) the members of both Houses; and

(b) the members of the Provincial Assemblies.

(4) Election to the office of President shall be held not earlier than sixty days and not later than thirty days before the expiration of the term of the President in office;

Provided that, if the election cannot be held within the period aforesaid because the National Assembly is dissolved, it shall be held within thirty days of the general election to the Assembly.

(5) An election to fill a vacancy in the office of President shall be held not later than thirty days from the occurrence of the vacancy:

Provided that, if the election cannot be held within the period aforesaid because the National Assembly is dissolved, it shall be held within thirty days of the general election to the Assembly.

(6) The validity of the election of the President shall not be called in question by or before any court or other authority.

(7) The Chief Executive of the Islamic Republic of Pakistan-

(a) shall relinquish the office of Chief Executive on such day as he may determine in accordance with the judgement of the Supreme Court of Pakistan of the 12th May, 2000; and

(b) having received the democratic mandate to serve the nation as President of Pakistan for a period of five years shall, on relinquishing the office of the Chief Executive, notwithstanding anything contained in this Article or Article 43 or any other provision of the Constitution or any other law for the time being in force, assume the office of President of Pakistan forthwith and shall hold office for a term of five years under the Constitution, and Article 44 and other provisions of the Constitution shall apply accordingly.

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

[200] Supra 176

"General Pervez Musharraf could not have introduced his own amendments into the Constitution for self service and benefit during the so-called emergency. The surreptitious validation, affirmation and adoption made by him through insertion of Article 270AAA were invalid and thus had no legal effect in the absence of a parliamentary validation in accordance with Articles 238[201] and 239[202] of the Constitution. The unconstitutional acts of General Pervez Musharraf were never extended constitutional protection by the Parliament through a constitutional amendment. The said amendments were unconstitutionally and illegally validated by the so-called judgments in Tikka Iqbal Muhammad Khan's case. Therefore, the constitutional amendments along with the judgments were required to be done away with."[203]

"All the consequential acts based upon or flowing from those actions would also be ineffective, that is to say, all the actions of 3rd November, 2007 up to 15th December, 2007 would have to be declared invalid and ineffective."[204]

"Under Article 190[205] of the Constitution, all authorities including General Pervez Musharraf were obligated to act in aid of the Supreme Court. Since the Order dated

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[201] **Article 238 of the Constitution. Amendment of Constitution**
Subject to this Part, the Constitution may be amended by Act of Majlis-e-Shoora (Parliament).

[202] **Article 239 of the Constitution. Constitution Amendment Bill**
(1) A Bill to amend the Constitution may originate in either House and, when the Bill has been passed by the votes of not less than two-thirds of the total membership of the House, it shall be transmitted to the other House.
(2) If the Bill is passed without amendment by the votes of not less than two-thirds of the total membership of the House to which it is transmitted under clause (1), it shall, subject to the provisions of clause (4), be presented to the President for assent.
(3) If the Bill is passed with amendment by the votes of not less than two-thirds of the total membership of the House to which it is transmitted under clause (1), it shall be reconsidered by the House in which it had originated, and if the Bill as amended by the former House is passed by the latter by the votes of not less than two-thirds of its total membership it shall, subject to the provisions of clause (4), be presented to the President for assent.
(4) A Bill to amend the Constitution which would have the effect of altering the limits of a Province shall not be presented to the President for assent unless it has been passed by the Provincial Assembly of that Province by the votes of not less than two-thirds of its total membership.
(5) No amendment of the Constitution shall be called in question in any court on any ground whatsoever.
(6) For the removal of doubt, it is hereby declared that there is no limitation whatever on the power of the Majlis-e-Shoora (Parliament) to amend any of the provisions of the Constitution.

[203] Supra 176

[204] ibid

[205] **Article190 of the Constitution. Action in aid of Supreme Court.**
All executive and judicial authorities through out Pakistan shall act in aid of the Supreme Court.

3rd November, 2007 passed by a seven - member Bench of this Court in Wajihuddin Ahmed's cage was in force, therefore, the acts of General Pervez Musharraf, besides being unconstitutional and illegal, also violated the Order of the Supreme Court, hence, the same were void. There was a judicial order restraining General Pervez Musharraf from imposing emhrgency, or doing anything against the independence of judiciary and requiring the Judges not to take oath. Despite that, General Pervez Musharraf took the action of 3rd November 2007 and certain Judges took oath under PCO No. 1 of 2007 read with Oath Order, 2007. This aspect was different from the earlier cases."[206]

"All the actions taken by General Pervez Musharraf on 3rd November, 2007 and thereafter holding the Constitution in abeyance, deposing and putting under arrest the Judges of the Superior Courts and appointing strangers as such Judges and getting his all such acts validated by those strangers were patently illegal. General Pervez Musharraf, being a member of the Armed Forces of Pakistan and bound by his oath under the Constitution the illegality was more blatant."[207]

"It was laid down in Al-Jehad Trust case that the consultation referred to in Articles 177[208] and 193[209] of the Constitution was to be meaningful and would be binding upon the Executive/ President and a consultation with an. Acting Chief Justice did not meet the criteria laid down in the aforesaid Articles. The possibility of arbitrary judicial appointments by the executive stands overruled."[210]

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[206] Supra 176

[207] Arguments by Mr. Muhammad Akram Sheikh reported in Sindh High Court Bar Association Vs. Federation of Pakistan (PLD 2009 Supreme Court 879)

[208] **177. Appointment of Supreme Court Judges.**
(1) The Chief Justice of Pakistan shall be appointed by the President, and each of the other Judges shall be appointed by the President after consultation with the Chief Justice.
(2) A person shall not be appointed a Judge of the Supreme Court unless he is a citizen of Pakistan and-
(a) has for a period of, or for periods aggregating, not less than five years been a judge of a High Court (including a High Court which existed in Pakistan at any time before the commencing day); or
(b) has for a period of, or for periods aggregating not less than fifteen years been an advocate of a High Court (including a High Court which existed in Pakistan at any time before the commencing day).

[209] Supra 175

[210] Supra 189

"Ever since the 30th of June, 2005, the date of his taking oath, Mr. Justice Iftikhar Muhammad Chaudhry continued to be the Chief Justice of Pakistan without any interruption of a single day. The office of the Chief Justice of Pakistan never fell vacant in terms of Article 180[211] of the Constitution. Therefore, Abdul Hameed Dogar, J, could not, in law, be said to be an Acting Chief Justice, nor could he be treated as entitled to perform the constitutional function of being consulted for appointment of new Judges of the Supreme Court and the High Courts and the consultation made with him for such appointments did not meet the requirement of Articles 177[212] and 193[213] of the Constitution."[214]

"General Pervez Musharraf, without any regard to merit, competence or repute, and without any consultation with the Hon'ble Chief Justice of Pakistan, `packed the courts' with dozens of persons on and after 3rd November, 2007. The persons so brought into the Supreme Court and the High Courts were not duly appointed Judges under the Constitution"[215]

"Such forum illegally reversed the Order dated 3rd November, 2007 passed by a seven-member Bench of this Court in Wajihuddin Ahmed's case and illegally upheld all the illegal actions of General Pervez Musharraf taken by him on and after 3rd November, 2007"[216]

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[211] **Article 180 of the Constitution. Acting Chief Justice.**
At any time when-
(a) the office of Chief Justice of Pakistan is vacant; or
(b) the Chief Justice of Pakistan is absent or is unable to perform the functions of his office due to any other cause,
the President shall appoint the most senior of the other Judges of the Supreme Court] to act as Chief Justice of Pakistan.

[212] Supra 190
[213] Supra 175
[214] Supra 189
[215] ibid
[216] ibid

"A government servant, such as General Pervez Musharraf, who is bound by his Constitutional oath[217] to defend the Constitution, could not hold the Constitution in abeyance, dismiss and arrest the Judges of superior Courts of Pakistan, appoint strangers as Judges of superior Courts and get his illegal acts validated by those strangers. Even the Executive organ of State or any executive officer could not dismiss or restrain any Judge of superior courts or stop him from performing his judicial functions because Judges of superior Courts could be removed from their offices by no process other than the one provided in Article 209[218] of the Constitution."[219]

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[217] **Article 244 of the Constitution. Oath of Armed Forces.**
Every member of the Armed Forces shall make oath in the form set out in the Third Schedule.
The text of oath by members of Armed forces enumerated in Third Schedule of the Constitution. (In the name of Allah, the most Beneficent, the most Merciful.)
I, _____, do solemnly swear that I will bear true faith and allegiance to Pakistan and uphold the Constitution of the Islamic Republic of Pakistan which embodies the will of the people, that I will not engage myself in any political activities whatsoever and that I will honestly and faithfully serve Pakistan in the Pakistan Army (or Navy or Air Force) as required by and under the law.
May Allah Almighty help and guide me (A'meen).

[218] **Article 209 of the Constitution. Supreme Judicial Council.**
(1) There shall be a Supreme Judicial Council of Pakistan, in this Chapter referred to as the Council.
(2) The Council shall consist of,
(a) the Chief Justice of Pakistan;
(b) the two next most senior Judges of the Supreme Court; and
(c) the two most senior Chief Justices of High Courts.
Explanation:- For the purpose of this clause, the inter se seniority of the Chief Justices of the High Courts shall be determined with reference to their dates of appointment as Chief Justice otherwise than as acting Chief Justice, and in case the dates of such appointment are the same, with reference to their dates of appointment as Judges of any of the High Courts.
(3) If at any time the Council is inquiring into the capacity or conduct of a Judge who is a member of the Council, or a member of the Council is absent or is unable to act due to illness or any other cause, then
(a) if such member is a Judge of the Supreme Court, the Judge of the Supreme Court who is next in seniority below the Judges referred to in paragraph (b) of clause (2), and
(b) if such member is the Chief Justice of a High Court; the Chief Justice of another High Court who is next in seniority amongst the Chief Justices of the remaining High Courts, shall act as a member of the Council in his place.
(4) If, upon any matter inquired into by the Council, there is a difference of opinion amongst its members, the opinion of the majority shall prevail, and the report of the Council to the President shall be expressed in terms of the view of the majority.
(5) If, on information from any source, the Council or the President is of the opinion that a Judge of the Supreme Court or of a High Court,
(a) may be incapable of properly performing the duties of his office by reason of physical or mental incapacity; or
(b) may have been guilty of misconduct,
the President shall direct the Council to, or the Council may, on its own motion,] inquire into the matter.
(6) If, after inquiring into the matter, the Council reports to the President that it is of the opinion,
(a) that the Judge is incapable of performing the duties of his office or has been guilty of misconduct, and
(b) that he should be removed from office,
the President may remove the Judge from office.

5.2.1.3 Decision of the Honourable Supreme Court of Pakistan:

The Honourable Supreme Court heard the above-mentioned petitions and decided the same, vide a short order, in the following terms-

> "(i) the Chief Justice of Pakistan; the Judges of the Supreme Court of Pakistan; any Chief Justice of any of the High Courts and the Judges of the High Courts who were declared to have ceased to hold their respective offices in pursuance of the afore-mentioned alleged judgments or any other such judgment and on account of the instruments mentioned in Para 21 above, shall be deemed never to have ceased to be such Judges, irrespective of any notification issued regarding their reappointment or restoration[220]."

> "(ii) it is declared that the office of the Chief Justice of Pakistan never fell vacant on November 3, 2007 'and as a consequence thereof it is further declared that the appointment of Mr. Justice Abdul Hameed Dogar as the Chief Justice of Pakistan was unconstitutional; void ab initio and of no legal effect[221]."

> "Provided that subject to whatever is contained hereinafter, the said un-constitutional appointment of Mr. Justice Abdul Hameed Dogar as the Chief Justice of Pakistan shall not affect the validity of any administrative or financial acts performed by him or of any oath made before him in the ordinary course of the affairs of the said office[222]."

> "(iii) since Mr. Justice Abdul Hameed Dogar was never a constitutional Chief Justice of Pakistan, therefore, all appointments of Judges of the Supreme Court of Pakistan, of the Chief Justices of the High Courts and of the Judges of the High Courts made, in

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(7) A Judge of the Supreme Court or of a High Court shall not be removed from office except as provided by this Article.
(8) The Council shall issue a code of conduct to be observed by Judges of the Supreme Court and of the High Courts.

[219] Supra 189
[220] Supra 173
[221] Ibid
[222] Ibid

consultation with him, during the period that he, unconstitutionally, held the said office from 3.11.2007 to 22.3.2009 (both days inclusive) are hereby declared to be un constitutional, void ab initio and of no legal effect and such appointees shall cease to hold office forthwith[223]."

"Provided that the Judges so un-constitutionally appointed to the Supreme Court while holding the offices as Judges of any of the High Courts shall revert back as Judges of the respective High Courts subject to their age of superannuation and like-wise, the Judges of the High Courts, who were District and Sessions Judges before their said un-constitutional elevation to the High Courts shall revert back as District and Sessions Judge subject to limitation of superannuation[224]."

"(iv) the Judges of the Supreme Court of Pakistan, if any, the Chief Justices of the High Court, if any, and the Judges of any of the High Courts, if any, who stood appointed to the said offices prior to 3.11.2007 but who made oath or took oath of their respective offices in disobedience to the order passed by a Seven Member Bench of the Supreme Court of Pakistan on 3.11.2007 in C.M.A.No.2869 of 2007 in Constitution Petition No.73 of 2007, shall be proceeded against under Article 209[225] of the Constitution. The Secretary of the Law Division of the Government of Pakistan shall take steps in the matter accordingly[226]."

"Provided that nothing hereinabove shall affect those Judges who though had been appointed as Judges/Chief Justices of any of the High Courts between 3.11.2007 to' 22.3.2009 but had subsequently been appointed afresh to other offices in consultation with or with the approval of or with the consent of the Constitutional Chief Justice of Pakistan[227]."

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[223] Ibid
[224] Ibid
[225] Supra 199
[226] Supra 173
[227] Ibid

"(v) any judgments delivered or orders made or any decrees passed by any Bench of the Supreme Court or of any of the High Courts which comprised of or which included the afore-described Judges whose appointments had been declared void ab initio, are protected on the principle laid down in MALIK ASAD ALI'S CASE (PLD 1998 SC 161)[228]."

"(vi) Since the Constitution (Amendment) Order, 2007 being the President's Order No.5 of 2007 and the Islamabad High Court (Establishment) Order being President's Order No.7 of 2007 establishing Islamabad High Court for the Federal Capital Territory, have been declared to be un-constitutional and of no legal effect, therefore, the said Islamabad High Court shall cease to exist forthwith. All judicial matters pending before the said High Court before the passing of this order shall revert/stand transferred to the courts which had jurisdiction in the said matters before the promulgation of afore-mentioned President's Order No.5 of 2007 and President's Order No.7 of 2007 promulgated on 14th December, 2007[229]."

"The Judges of the said Court shall, as a consequence thereof, cease to be Judges except such Judges or the Chief Justice of the said court, who prior to their appointments in the said Islamabad High Court, were Judges of some other High Court who shall revert to the court of which they were originally the Judges, subject to their age of superannuation. The officers and employees of the said Court shall also cease to hold their respective appointments and shall become part of the Federal Government Surplus Pool for their further appointments. However, if any such officer or employee was an officer or an employee of some other court or department or office, such officers or employees shall revert to their respective courts, departments or offices to which they belonged before joining the service in the Islamabad High Court, subject again to their age of superannuation[230]."

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[228] Ibid
[229] Ibid
[230] Ibid

"We would like to mention here that establishment of a High Court or a Federal Court for the Federal Capital Territory might be a desirable act but it is unfortunate that such a step was taken in an un-constitutional and a highly objectionable manner. We may, therefore, add that notwithstanding what has been declared and ordered above, the relevant and competent authorities may take steps to establish such a court in accordance with the Constitution/the law[231]."

"(vii) the Ordinances promulgated by the President or a Governor of a Province before 3.11.2007 which were given permanence by the Provisional Constitution Order No.1 of 2007 as also the Ordinances issued by the President or a Governor between 3.11.2007 and 15.12.2007 (both days inclusive) which were also, like-wise given permanence through the same instrument and which legislative measures along with the said Provisional Constitution Order had been validated by the afore-mentioned judgment delivered in TIKKA IQBAL MUHAMMAD KHAN'S CASE, stand shorn of their purported permanence on account of our afore-mentioned declarations. Since on account of the said judgment in TIKKA IQBAL MUHAMMAD KHAN'S CASE purporting to be a judgment of this Court, the presumption that the said Ordinances were valid laws not requiring approval of the Parliament or the respective Provincial Assemblies in terms of Article 89[232] or 128[233] of the Constitution and since it is today that this Court has attributed invalidity to the said legislative instruments, therefore, the period of 120 days and 90 days mentioned respectively in the said Article 89[234]

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[231] Ibid

[232] Supra 128

[233] **Article 128 of the Constitution. Power of Governor to promulgate Ordinances.**

(1) The Governor may, except when the Provincial Assembly is in session, if satisfied that circumstances exist which render it necessary to take immediate action, make and promulgate an Ordinance as the circumstances may require.

(2) An Ordinance promulgated under this Article shall have the same force and effect as an Act of the Provincial Assembly and shall be subject to like restrictions as the power of the Provincial Assembly to make laws, but every such Ordinance:

(a) shall be laid before the Provincial Assembly and shall stand repealed at the expiration of three months from its promulgation or, if before the expiration of that period a resolution disapproving it is passed by the Assembly, upon the passing of that resolution; and

(b) may be withdrawn at any time by the Governor.

(3) Without prejudice to the provisions of clause (2), an Ordinance laid before the Provincial Assembly shall be deemed to be a Bill introduced in the Provincial Assembly.

[234] Supra 128

and the said Article 128[235] of the Constitution, would be deemed to commence to run from today and steps may be taken to place, the said Ordinances before the Parliament or the respective Provincial Assemblies in accordance with law[236]."

"(viii) since the Constitution, through its Article 176[237], authorises only the Parliament to determine the number of Judges of the Supreme Court of Pakistan and since the Parliament had so done through the Supreme Court (Number of Judges) Act XXXIII of 1997, therefore, the increase in the strength of the Judges through the Finance Act of 2008 which Act was not passed by the Parliament but was passed only by the National Assembly would be deemed to be valid only for financial purposes and not for the purposes of Article 176[238] of the Constitution. It is resultantly declared that the number of Judges of the Supreme Court for purposes of the said Article 176[239] shall continue to remain, sixteen[240]."

"(ix) in the Code of Conduct prescribed for the Judges of the Superior Courts in terms of Article 209(8)[241] of the Constitution, a new clause shall be added commanding that no such Judge shall, hereinafter, offer any support in whatever manner to any unconstitutional functionary who acquires power otherwise than through the modes envisaged by the Constitution and that any violation of the said clause would be deemed to be misconduct in terms of the said Article 209[242] of the Constitution[243]."

"(x) in view of our findings above regarding Mr. Justice Abdul Hameed Dogar not being a constitutional and a valid consultee, the notification dated 26.8.2008 and the notification dated 15.9.2008 extending the term of office of Mr. Justice Abdur

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[235] Supra 203
[236] Supra 173
[237] **Article 176 of the Constitution. Constitution of Supreme Court.**
The Supreme Court shall consist of a Chief Justice to be known as the Chief Justice of Pakistan and so many other Judges as may be determined by Act of Majlis-e-Shoora(Parliament) or, until so determined, as may be fixed by the President.
[238] Ibid
[239] Ibid
[240] Supra 173
[241] Supra 199
[242] Ibid
[243] Supra 173

Rasheed Kalwar and of Mr. Justice Zafar Ahmed Khan Sherwani as Additional Judges of the High Court of Sindh are declared to be unconstitutional and of no legal effect[244]."

"(xi) that the court acknowledges and respects the mandate given by the sovereign authority i.e. electorate to the democratically elected Government on 18th February, 2008 and would continue to jealously guard the principle of trichotomy of powers enshrined in the Constitution, which is the essence of the rule of law. Any declaration made in this judgment shall not in any manner affect the General Elections held and the Government formed as a result thereof i.e. the President, the Prime Minister, the Parliament, the Provincial Governments, anything done by these institutions in the discharge of their functions. These acts are fully protected in terms of the age old of principle of Salus populi est supremo lex reflected in PLD 1972 SC 139[245]."

"(xii) Before parting with the judgment, we would like to reiterate that to defend, protect and uphold the Constitution is the sacred function of the Supreme Court. The Constitution in its preamble, inter alia, mandates that there shall be democratic governance in the country, wherein the principles of democracy, freedom, equality, tolerance and social justice as enunciated by Islam shall be fully observed; ..... wherein the independence of judiciary shall be fully secured. While rendering this judgment, these abiding values have weighed with us. We are sanguine that the current democratic dispensation comprising of the President, Prime Minister and the Parliament shall equally uphold these values and the mandate of their oaths[246]."

The August Supreme Court of Pakistan, while disposing of the matter adequately defined the domain of functions of members of armed forces, and also identified the limitations over them. It was expressed by the Supreme Court that-

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[244] Ibid
[245] Ibid
[246] Supra 173

"On a plain reading of the provisions of Article 245(1)[247], the functions of the Armed Forces can be bifurcated into two categories, namely, they shall (1) defend Pakistan against external aggression or threat of war, and (2) subject to law, act in aid of civil power when called upon to do so. Under clause (1) of Article 243[248], the control and command of the Armed Forces is vested in the Federal Government, therefore, in the performance of both the categories of functions, the Armed Forces act under the directions of the Federal Government. Thus, the provisions of clause (1A) of Article 243 under which the supreme command of the Armed Forces vests in the President, does not, in any manner, derogate from the power of the Federal Government to require the Armed Forces to defend Pakistan against external aggression or threat of war, or to act in aid of civil power in accordance with law. The Constitution does not envisage any situation where the Armed Forces may act without any direction by the Federal Government."[249]

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[247] **Article 245 of the Constitution. Functions of Armed Forces.**
(1) The Armed Forces shall, under the directions of the Federal Government, defend Pakistan against external aggression or threat of war, and, subject to law, act in aid of civil power when called upon to do so.
(2) The validity of any direction issued by the Federal Government under clause (1) shall not be called in question in any court.
(3) A High Court shall not exercise any jurisdiction under Article 199 in relation to any area in which the Armed Forces of Pakistan are, for the time being, acting in aid of civil power in pursuance of Article 245:
Provided that this clause shall not be deemed to affect the jurisdiction of the High Court in respect of any proceeding pending immediately before the day on which the Armed Forces start acting in aid of civil power.
(4) Any proceeding in relation to an area referred to in clause (3) instituted on or after the day the Armed Forces start acting in aid of civil power and pending in any High Court shall remain suspended for the period during which the Armed Forces are so acting.

[248] **243. Command of Armed Forces.**
(1) The Federal Government shall have control and command of the Armed Forces.
(1A) Without prejudice to the generality of the foregoing provision, the Supreme Command of the Armed Forces shall vest in the President.
(2) The President shall, subject to law, have power-
(a) to raise and maintain the Military, Naval and Air Forces of Pakistan; and the Reserves of such Forces; and
(b) to grant Commissions in such Force.
(3)The President shall, in consultation with the Prime Minister, appoint-
(a) the Chairman, Joint Chiefs of Staff Committee;
(b) the Chief of the Army Staff;
(c) the Chief of the Naval Staff; and
(d) the Chief of the Air Staff
and shall also determine their salaries and allowances.

[249] Supra 173

The Honourable Supreme Court of Pakistan declared the act of imposition of emergency and Provisional Constitutional Order, 2007 null and void on the basis of principles of ultra vires, non-conformity with the Constitution or violation of the Fundamental Rights.

5.3 Ultra vires and Judicial/quasi-judicial actions:

In another case[250], the Honourable High Court declared the act of Land Acquisition Collector ultra vires and illegal. The details of the case are mentioned below.

5.3.1 Facts:

The property of the minor Petitioners was acquired, and an award was announced in pursuance of section 11[251] of the Land Acquisition Act, 1894. Aggrieved of the order of Land Acquisition Collector, the Petitioners filed a reference, which was also rejected by the Land Acquisition Collector, vide short order. The Petitioners, thereafter, filed a writ petition under Article 199[252]

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[250] Nadia Shabnum and others Vs. Land Acquisiton Collector and others (2009 C L C 1055)

[251] **Section 11 of Land Acquisition Act, 1894. Enquiry and award by Collector.—**

On the day so fixed, or on any other day to which the enquiry has been adjourned, the Collector shall proceed to enquire into the objections (if any) which any person interested and a Department of Government, a local authority, or a Company, as the case may be], has stated pursuant to a notice given under section 9 to the measurements made under section 8, and into the value of the land at the date of the publication of the notification under section 4, sub-section (1), and into the respective interests of the persons claiming the compensation and shall make an award under his hand of—

(i) the true area of the land;

(ii) the compensation which in his opinion should be allowed for the land; and

(iii) the apportionment of the said compensation among all the persons known or believed to be interested in the land, of whom, or of whose claims, he has information, whether or not they have respectively appeared before him.

[252] **Article 199 of the Constitution. Jurisdiction of High Court.**

(1) Subject to the Constitution, a High Court may, if it is satisfied that no other adequate remedy is provided by law,-

(a) on the application of any aggrieved party, make an order-

(i) directing a person performing, within the territorial jurisdiction of the Court, functions in connection with the affairs of the Federation, a Province or a local authority, to refrain from doing anything he is not permitted by law to do, or to do anything he is required by law to do; or

(ii) declaring that any act done or proceeding taken within the territorial jurisdiction of the Court by a person performing functions in connection with the affairs of the Federation, a Province or a local authority has been done or taken without lawful authority and is of no legal effect; or

(b) on the application of any person, make an order-

(i) directing that a person in custody within the territorial jurisdiction of the Court be brought before it so that the Court may satisfy itself that he is not being held in custody without lawful authority or in an unlawful manner; or

(ii) requiring a person within the territorial jurisdiction of the Court holding or purporting to hold a public office to show under what authority of law he claims to hold that office; or

(c) on the application of any aggrieved person, make an order giving such directions to any person or authority, including any Government exercising any power or performing any function in, or in relation to, any territory within the jurisdiction of that Court as may be appropriate for the enforcement of any of the Fundamental Rights conferred by Chapter 1 of Part 11.

of the Constitution against the order of Land Acquisition Collector alleging therein that the Petitioners are minors and in the notice under section 9[253] of Land Acquisition Act, 1894, they were described as majors but in fact they were minors.

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(2) Subject to the Constitution, the right to move a High Court for the enforcement of any of the Fundamental Rights conferred by Chapter 1 of Part II shall not be abridged.

(3) An order shall not be made under clause (1) on application made by or in relation to a person who is a member of the Armed Forces of Pakistan, or who is for the time being subject to any law relating to any of those Forces, in respect of his terms and conditions of service, in respect of any matter arising out of his service, or in respect of any action taken in relation to him as a member of the Armed Forces of Pakistan or as a person subject to such law.

(4) Where-
(a) an application is made to a High Court for an order under paragraph (a) or paragraph (c) of clause (1), and
(b) the making of an interim order would have the effect of prejudicing or interfering with the carrying out of a public work or of otherwise being harmful to public interest or State property or of impeding the assessment or collection of public revenues,
the Court shall not make an interim order unless the prescribed law officer has been given notice of the application and he or any person authorised by him in that behalf has had an opportunity of being heard and the Court, for reasons to be recorded in writing, is satisfied that the interim order-
(i) would not have such effect as aforesaid;or
(ii) would have the effect of suspending an order or proceeding which on the face of the record is without jurisdiction.
(4A) An interim order made by a High Court on an application made to it to question the validity or legal effect of any order made, proceeding taken or act done by any authority or person, which has been made, taken or done or purports to have been made, taken or done under any law which is specified in part I of the First Schedule or relates to, or is connected with, State Property or assessment or collection of public revenues shall cease to have effect on the expiration of a period of six months following the day on which it is made,
provided that the matter shall be finally decided by the High Court within six months from the date on which the interim order is made.
(5) In this Article, unless the context otherwise requires, - "person" includes any body politic or corporate, any authority of or under the control of the Federal Government or of a Provincial Government, and any Court or tribunal, other than the Supreme Court, a High Court or a Court or tribunal established under a law relating to the Armed Forces of Pakistan; and "prescribed law officer" means
(a) in relation to an application affecting the Federal Government or an authority of or under the control of the Federal Government, the Attorney-General, and
(b) in any other case, the Advocate-General for the Province in which the application is made.

[253] **Section 9 of Land Acquisition Act, 1894. Notice to persons interested.—**

(1) The Collector shall then cause public notice to be given at convenient places on or near the land to be taken, stating that the Government intends to take possession of the land, and that claims to compensation for all interests in such land may be made to him.

(2) Such notice shall state the particulars of the land so needed, and shall require all persons interested in the land to appear personally or by agent before the Collector at a time and place therein mentioned (such time not being earlier than fifteen days after the date of publication of the notice), and to state the nature of their respective interests in the land and the amount and particulars of their claims to compensation for such interests and their objections (if any) to the measurements made under section 8. The Collector may in any case require such statement to be made in writing and signed by the party or his agent.

(3) The Collector shall also serve notice to the same effect on the occupier (if any) of such land and on all such persons known or believed to be interested therein, or to be entitled to act for persons so interested, as reside or have agents authorised to receive service on their behalf, within the revenue district in which the land is situate.

5.3.2 Judgment:

The Honourable High Court declared the aforementioned order of the Land Acquisition Collector non-speaking and not in accordance with law. The Honourable Court also ordered the award to be struck down under Article 199[254] of the Constitution and the same was also declared as illegal, ultra vires and without lawful authority on the grounds agitated by the Petitioner.

5.4 *Ultra vires* and Company law with reference to protection of third party:

In Pakistan, there is no legislation like the European Communities Act and U.K. Companies Act, 1985 & 1989. Consequently, the principles laid down in "Ashbury Railway Carriage and Iron Company Ltd v. Riche[255]" are applicable without any sort of amendments. The ultra vires act is, therefore, considered void and its voidability cannot be rectified even by the unanimous assent of all the shareholders. The ultra vires act or transaction neither can be enforced by the company against the third party nor by the third party against the company. In addition section 496[256] of the Companies Ordinance, 1984, entails punishment on those directors or members of the company, who are responsible for carrying on any business ultra vires to the company's charter.

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(4) In case any person so interested resides elsewhere, and has no such agent , the notice shall be sent to him by post in a letter addressed to him at his last known residence, address or place of business and registered under Part III of the Indian Post Office Act, 1866.

(5) The Collector shall also serve notice of the enquiry to be held under section 11 (such notice not being less than fifteen days prior to the date fixed under sub-section (2) for determination of claims and objections) on the Department of Government, local authority or Company, as the case may be, for which land is being acquired, and require it to depute a duly authorised representative to attend the enquiry on its behalf for the purpose of making objections (if any) to the measurement of the land, claims to any interest in the land or the amount of any compensation. Such authorised representative shall be a party to the proceedings.

[254] Supra 172

[255] (1875) LR 7 HL 653

[256] **S. 496 of the Companies Ordinance, 1984. Penalty for carrying on ultra vires business.—**

If any business or part of business carried on or any transaction made, by a company is ultra vires of the company, every person who acted as a director or officer of the company and is responsible for carrying on such business shall be liable to a fine not exceeding five thousand rupees and shall also be personally liable for the liabilities and obligations arising out of such business or transaction.

The Honourable High Court while elaborating the ultra vires doctrine in "The City of Winnipeg v. Canadian Pacific Railway Company[257]" gave the following comments,

> "this doctrine ought to be reasonably, understood and applied, and whatever may fairly be regarded as incidental to, or consequential upon, those things which the legislature has authorized, ought not (unless expressly prohibited) to be held, by judicial construction, to be ultra vires[258]."

There are certain provisions in the Companies Ordinance, 1984, which provides protection to the third party, the same are discussed in detail below-

5.4.1 Protection of third party:

Section 210[259] of the Companies Ordinance, 1984, deals with the form of contracts. In "National Engineering Services Pakistan (Pvt.) Ltd. v. Steel Mill Corporation[260]", it was held that,

> "the object of section 210 of the Companies Ordinance appears to protect third party / outsider, dealing with a corporate entity as, such person cannot be expected to be aware of the internal arrangement of a corporate management[261]".

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[257] PLD 1953 Privy Council 93
[258] Ibid
[259] **S.210 of Companies Ordinance, 1984. of Pakistan. –**

(1) Contracts on behalf of a company may be made as follows, that is to say,

(i) any contract which, if made between private persons, would be by law required to be in writing, signed by the parties to be charged therewith, may be made on behalf of the company in writing signed by any person acting under its authority, express or implied, and may in the same manner be varied or discharged;

(ii) any contract which, if made between private persons, would by law be valid although made by parol only, and not reduced into writing, may be made by parol on behalf of the company by any person acting under its authority, express or implied, and may in the same manner be varied or discharged.

(2) All contracts made according to sub-section (1) shall be effectual in law and shall bind the company and its successors and all other parties thereto, their heirs, or legal representatives, as the case may be.
[260] 2004 YLR 1696
[261] Ibid

In the same case, it was also held, "that the third party or stranger dealing with a company has to demonstrate:

(i) that the relationship of a person action on behalf of the Company, prima facie, is so proximate that one may tend to believe that he possesses due authority either under the Charter of the Company or by way of delegation to transact such business.

(ii) Transaction must be bona fide, in good faith and in usual course of Company's business.

(iii) Transaction must be in relation to or incidental to the object/business of the corporate entity.

(iv) Company despite being aware of the transaction did not repudiate it or disputed authority of its agents[262]".

5.4.2 Protection of members and creditors:

Section 290[263]of the Companies Ordinance, 1984, however, provides ample protection to the members and creditors. Under this section, if members holding not less than twenty percent of the shareholding or the creditors having an equal interest in amount to not less than twenty percent feel that the affairs of the company are conducted in a manner not provided in its memorandum, they can file a petition before the Court[264]. If the Court comes at the conclusion

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[262] Ibid

[263] **S. 290(2) of the Companies Ordinance, 1984 of Pakistan. –**

If, on any such petition, the Court is of opinion-

(a) that the company's affairs are being conducted, or are likely to be conducted, as aforesaid; and

(b) that to wind-up the company would unfairly prejudice the members or creditors; the Court may, with a view to bringing to an end the matters complained of, make such order as it think fit, whether for regulating the conduct of the company's affairs in future, or for the purchase of the shares of any members of the company by other members of the company or by the company and, in the case of purchase by the company, for, the reduction accordingly of the company's capital, or otherwise.

[264] S. 290(1) of the Companies Ordinance, 1984 of Pakistan. - (1) If any member or members holding not less than twenty per cent of the issued share capital of a company, or a creditor or creditors having interest equivalent in amount to not less than twenty per cent of the paid up capital of the company, complains, or complain, or the registrar is of the opinion, that the affairs of the company are being conducted, or are likely to be conducted, in an unlawful or fraudulent manner, or in a manner not provided for in its memorandum, or in a manner oppressive to the

that the affairs of the company are conducted in a like manner as mentioned above, it can pass an order as it think fit.

CONCLUSION:

The upshot of the above discussion is that any act, which is beyond the powers of the company, would be termed as ultra vires. This doctrine proved to be disastrous for the outsiders dealing with the company in good faith. The Legislature and the judiciary in UK tried to minimize the harmful effects of this doctrine. The option provided to the companies, to have object clause or not vide Companies Act, 2009, is a glorious example of it. Now, the companies in UK (which opt not to have any object clause) would be at liberty to commence whatever the business they may deem fit. There will be no restriction on the companies to remain within the boundaries of object clause. The outsider will be given full protection in respect of any act, which the company would undertake, and the company would not be in a position to take the advantage of ultra vires doctrine.

Whereas, in Pakistan, the law is static and we cannot see endeavors on the part of legislature to protect the interest of third party dealing with the company, apart from the provisions, which are discussed above. The legislature should also make suitable amendments in the Company Law of Pakistan to protect the right of third party acting bona fidely and also in some cases to the company, where the acts of the company are based on good faith. There would be no harm if such an amendment be made in the company law, which may make the object clause redundant. This amendment would have two-fold advantages. Firstly, the commercial activity would be increased. Secondly, the third party dealing with company would become safe from the injurious effects of the doctrine of ultra vires.

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members or any of the members or the creditors or any of the creditors or are being conducted in a manner prejudicial to the public interest, such member or members or, the creditor or creditors, as the case may be, the registrar may make an application to the Court by petition for an order under this section.

RECOMMENDATIONS FOR PAKISTANI COMPANY LAW:

1. Like the changes/amendments in the corporate structure of various jurisdiction such as Canada, Srilanka, UK, etc., in respect of elimination of object clause, Section 16(iii)[265] of the Companies Ordinance, 1984, which requires elaboration of the object in the memorandum of association of the company and all other provisions regarding objects of the company should be omitted from the said ordinance.

2. If it is not possible to omit the clauses regarding object clause from the memorandum of association then such sort of clauses should be inserted in the Companies Ordinance, 1984, which expressly provide for the protection of third party interest contracting with the company even if the act of the company is ultra vires or not.

By observance of any one of the above-mentioned recommendation, the third party contracting with the company would be protected from the horrible effects of the ultra vires doctrine.

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[265] **Section16. Memorandum of company limited by shares:**-In the case of a company limited by shares:-
(a) the memorandum shall state:-
(i) the name of the company with the word "limited" as the last word of the name in the case of a public limited company, and the parenthesis and words "(Private) Limited" as the last words of the name in the case of private limited company;
(ii) the Province or the part of Pakistan not forming part of a Province, as the case may be, in which the registered office of the company is to be situate;
(iii) the objects of the company, and except in the case of a trading corporation, the territories to which they extend;
(iv) that the liability of the members is limited; and
(v) the amount of share capital with which the company proposes to be registered, and the division thereof into shares of a fixed amount;
(b) no subscriber of the memorandum shall take less than one share; and
(c) each subscriber of the memorandum shall write opposite to his name the number of shares he takes.

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SCHEDULE II

Part 1
General provisions

1 Name of company

(1) The name of the company at the time of registration under the Act appears on the application for registration or for re-registration, as the case may be.

(2) The name of the company may be changed in accordance with section 11 of the Act only with the prior approval of all shareholders.

2 Private company

(1) The company is a private company.

(2) The company must not offer any of its shares or other securities to the public.

(3) The company must not have more than 100 shareholders.

(4) If a share transfer is presented to the company for entry on the share register that would result in a breach of this restriction, the directors must decline to register the transfer.

3 Rules

(1) The company may adopt new rules in place of these rules by special resolution, in accordance with section 14(2) of the Act.

(2) Subject to the Act,—

(a) these rules have effect and may be enforced as if they constituted a contract—

(i) between the company and its shareholders; and

(ii) between the company and each director; and

(b) the shareholders and directors of the company have the rights, powers, duties, and obligations set out in these rules.

Part 2
Shares and shareholders

General provisions

4 Number of shares

(1) At the time of registration under the Act, the company has the number of shares specified in the application for registration or re-registration, as the case may be.

(2) If the company was first registered under Part 2 of the Act, the company must immediately after its registration issue to any person named in the application for registration as a shareholder the number of shares specified in the application asbeing the number of shares to be issued to that person or those persons.

5 Rights attaching to shares

Subject to clause 7(2), each share carries the following rights:

(a) the right to 1 vote on a poll at a meeting of the company on any resolution, including any resolution to—

(i) appoint or remove a director or auditor:

(ii) adopt new rules:

(iii) alter the company's rules:

(iv) approve a major transaction:
(v) approve an amalgamation of the company:
(vi) approve reregistration of the company as a public company:
(vii) put the company into liquidation:
(viii) approve the transfer of registration of the company to another country:
(b) the right to an equal share in dividends paid by the company:
(c) the right to an equal share in the distribution of the surplus assets of the company in a liquidation.

6 Issue of shares

The directors may issue shares—
(a) in accordance with clause 7; or
(b) to shareholders or any other persons on any other basis, with the prior approval of all shareholders.

7 Process for issuing shares

(1) The directors may issue shares in accordance with the following process:
(a) the shares must first be offered to all shareholders proportionally, on such terms as the directors think fit, pursuant to an offer that, if accepted by all shareholders, would not affect relative voting or distribution rights. The shareholders must have a reasonable opportunity to consider and respond to the offer:
(b) any shares not accepted by the shareholders to whom they were offered under paragraph (a) must then be offered to those shareholders who did accept the shares offered to them under paragraph (a), on a fair and equitable basis determined by the directors and on the same terms and conditions as the offer made under paragraph (a):
(c) any shares offered under paragraph (b), but not taken up by shareholders may then be offered by the directors to shareholders or any other persons in such manner as the directors think fit, on the same terms and conditions as the offer made under paragraph (a).
(2) With the prior approval of all shareholders, the company may issue more than 1 class of shares. In particular, shares may be issued that—
(a) are redeemable; or
(b) confer preferential rights to distributions of capital or income; or
(c) confer special, limited, or conditional voting rights; or
(d) do not confer voting rights.
(3) If the company issues shares, it must give the prescribed notice to the Registrar under section 26(2) of the Act within 10 working days of the issue of any shares.
(4) If the rights attached to the shares differ from those set out in clause 5, the notice must be accompanied by a document setting out the terms of issue of the shares.

8 Transferability of shares

The shares of the company are, subject to clauses 12(1) and 21(4) and their terms of issue, transferable by entry in the share register in accordance with subclauses 21(1) to (3).

Share register

9 Company to keep share register

(1) The company must maintain a share register that records the shares issued by the company and states—
(a) the names, alphabetically arranged, and the last known address of each

person who is, or has within the last 7 years been, a shareholder; and
(b) the number of shares of each class held by each shareholder within the last 7 years; and
(c) the date of any—
(i) issue of shares to; or
(ii) repurchase or redemption of shares from; or
(iii) transfer of shares by or to—
each shareholder within the last 7 years, and in relation to the transfer, the name of the person to or from whom the shares were transferred.
(2) No notice of a trust, whether express, implied, or constructive, may be entered on the share register.
(3) The company may appoint an agent to maintain the share register.

10 Form and location of share register

The share register must be kept—
(a) in a form that complies with clause 65; and
(b) at the company's registered office, or at any other place in Niue notice of which has been given to the Registrar under section 119 of the Act.

11 Status of registered shareholder

(1) The company must treat the registered holder of a share as the only person entitled to—
(a) exercise the right to vote attaching to the share; and
(b) receive notices; and
(c) receive a distribution in respect of the share; and
(d) exercise the other rights and powers attaching to the share.
(2) If a joint holder of a share dies, the remaining holders must be treated by the company as the holders of that share.
(3) If the sole holder of a share dies, that shareholder's legal representative is the only person recognised by the company as having any title to, or interest in, the share.
(4) Any person who becomes entitled to a share as a consequence of the death, bankruptcy or insolvency, or incapacity of a shareholder may be registered as the holder of that shareholder's shares on making a request in writing to the company to be so registered, accompanied by proof satisfactory to the directors of that entitlement.

Pre-emptive rights

12 Restriction on selling shares

(1) A shareholder is not entitled to sell or otherwise dispose of his or her shares in the company without first offering to sell them to the other holders of shares of the same class in accordance with the procedure set out in clauses 13 to 20, unless all the other shareholders agree otherwise.
(2) Any share transfer delivered to the company by a shareholder who has not complied with subclause (1) is of no effect, and the transfer must not be entered on the share register.

13 Selling shareholder to give written notice to company

A shareholder who wishes to dispose of some or all of his or her shares (**selling shareholder**) must give written notice to the company of—
(a) the number of shares to be sold; and

(b) the price at which the selling shareholder is willing to sell the shares.

14 Company to give written notice to shareholders

The company must, within 10 working days, give a copy of the written notice referred to in clause 13 to each shareholder, together with a notice advising each holder of shares of the same class—

(a) that that shareholder is entitled to purchase a proportional number of the shares that the selling shareholder wishes to sell (rounded in an appropriate manner determined by the directors); and

(b) that, if that shareholder wishes to purchase those shares, he or she must give written notice to that effect to the company within 10 working days of the date of the notice.

15 Written notice is offer by selling shareholder

The notice referred to in clause 14 is deemed to be an offer by the selling shareholder to the recipient to sell the number of shares referred to in the notice at the price specified by the selling shareholder in the notice given under clause 13, on the terms set out in these rules.

16 Notice agreeing to purchase shares given within specified time

Subject to clause 19, if a notice is given by a shareholder within the specified time agreeing to purchase the shares offered to that shareholder in a notice given under clause 14,—

(a) there is deemed to be a contract between that shareholder and the selling shareholder for the sale and purchase of the relevant number of shares; and

(b) the company must immediately advise the selling shareholder of the acceptance, and send him or her a copy of—

(i) the notice given under clause 14 by the company; and

(ii) the notice of acceptance given by the shareholder in question.

17 Notice agreeing to purchase shares not given within specified time

(1) If any shareholder does not give notice agreeing to purchase the shares offered to that shareholder within the specified time, the shares that were offered to that shareholder must be offered to those shareholders who did accept the shares offered to them, on a fair and equitable basis determined by the directors.

(2) Clauses 15 and 16 apply to any notice given to a shareholder, and to any notice of acceptance given by a shareholder, under this clause.

18 No shareholder wishes to purchase selling shareholder's shares

If no shareholder wishes to purchase the selling shareholder's shares at the specified price, the selling shareholder may, at any time in the 12 months following the giving of notice by the selling shareholder, sell some or all of those shares to any other person at a price not less than the specified price.

19 Selling shareholder not obliged to sell some shares

(1) The selling shareholder is not obliged to sell all of the shares that he or she wishes to dispose of.

(2) In the event that the selling shareholder has not been notified under clause 16 of acceptances by other shareholders in respect of all the shares referred to in the notice given under clause 13 within 40 working days of the date on which that notice was given to the company, the selling shareholder may, at his or her option, give written notice to the company terminating the offer to sell the shares to the

other shareholders.
(3) If such a notice is given, clause 18 applies as if no shareholder had wished to purchase the selling shareholder's shares.

20 Directors may require evidence of terms

The directors may require reasonable evidence of the terms (including price) on which the shares were sold to accompany any share transfer in respect of those shares.

Transfer of shares

21 Transfer of shares

(1) If shares are to be transferred, a form of transfer signed by the holder or by his or her agent or attorney must be delivered to the company.
(2) The personal representative of a deceased shareholder may transfer a share even though the personal representative is not a shareholder at the time of transfer.
(3) Subject to clause 12 and subclause (4), the company must immediately on receipt of a properly executed share transfer enter the name of the transferee in the share register as holder of the shares transferred.
(4) If any amount payable to the company by the shareholder is due but unpaid, the directors may resolve to refuse to register a transfer of a share within 30 working days of receipt of the transfer.
(5) If the directors resolve to refuse to register a transfer for this reason, they must give notice of the refusal to the shareholder within 5 working days of the date of the resolution.

22 Share certificates

(1) A shareholder may apply to the company for a share certificate relating to some or all of the shareholder's shares in the company.
(2) On receipt of an application for a share certificate under subclause (1), the company must, within 20 working days after receiving the application,—
(a) if the application relates to some but not all of the shares, separate the shares shown in the register as owned by the applicant into separate parcels; 1 parcel being the shares to which the share certificate relates, and the other parcel being any remaining shares; and
(b) in all cases send to the shareholder a certificate stating—
(i) the name of the company; and
(ii) the class of shares held by the shareholder; and
(iii) the number of shares held by the shareholder to which the certificate relates.
(3) If a share certificate has been issued, a transfer of the shares to which it relates must not be registered by the company unless the form of transfer required by that section is accompanied by—
(a) the share certificate relating to the share; or
(b) evidence as to its loss or destruction and, if required, an indemnity in a form determined by the directors.
(4) If shares to which a share certificate relates are to be transferred, and the share certificate is sent to the company to enable the registration of the transfer, the share certificate must be cancelled and no further share certificate issued except at the request of the transferee.

Meetings of shareholders

23 Meetings of shareholders

(1) Clauses 24 to 32 set out the procedure to be followed at, and in relation to, meetings of shareholders.

(2) A meeting of shareholders may determine its own procedure to the extent that it is not governed by these rules.

24 Notice of meetings

(1) Written notice of the time and place of a meeting of shareholders must be given to every shareholder entitled to receive notice of the meeting and to every director and any auditor of the company not less than 10 working days before the meeting.

(2) The notice must set out—

(a) the nature of the business to be transacted at the meeting in enough detail to enable a shareholder to form a reasoned judgment in relation to it; and

(b) the text of any special resolution to be submitted to the meeting.

(3) An irregularity in a notice of a meeting is waived if all the shareholders entitled to attend and vote at the meeting attend the meeting without protest as to the irregularity, or if all such shareholders agree to the waiver.

(4) An accidental omission to give notice of a meeting to, or the failure to receive notice of a meeting by, a shareholder does not invalidate the proceedings at that meeting.

(5) If a meeting of shareholders is adjourned for less than 30 working days, it is not necessary to give notice of the time and place of the adjourned meeting other than by announcement at the meeting that is adjourned.

25 Methods of holding meetings

A meeting of shareholders may be held either—

(a) by a number of shareholders, who constitute a quorum, being assembled together at the place, date, and time appointed for the meeting; or

(b) by means of audio, or audio and visual, communication by which all shareholders participating and constituting a quorum, may simultaneously hear each other throughout the meeting.

26 Quorum

(1) Subject to subclause (3), no business may be transacted at a meeting of shareholders if a quorum is not present.

(2) A quorum for a meeting of shareholders is present if shareholders or their proxies are present who are between them able to exercise a majority of the votes to be cast on the business to be transacted by the meeting.

(3) If a quorum is not present within 30 minutes after the time appointed for the meeting, the meeting is adjourned to the same day in the following week at the same time and place, or to such other date, time and place as the directors may appoint.

(4) If, at the adjourned meeting, a quorum is not present within 30 minutes after the time appointed for the meeting, the shareholders present or their proxies are a quorum.

27 Chairperson

(1) If the directors have elected a chairperson of the directors, and the chairperson of the directors is present at a meeting of shareholders, he or she must chair the

meeting.
(2) If no chairperson of the directors has been elected or if, at any meeting of shareholders, the chairperson of the directors is not present within 15 minutes of the time appointed for the commencement of the meeting, the shareholders present may choose 1 of their number to be the chairperson of the meeting.

28 Voting

(1) In the case of a meeting of shareholders held under clause 25(a), unless a poll is demanded, voting at the meeting must take place by whichever of the following methods is determined by the chairperson of the meeting—
(a) voting by voice; or
(b) voting by show of hands.
(2) In the case of a meeting of shareholders held under clause 25(b), unless a poll is demanded, voting at the meeting must take place by shareholders signifying individually their assent or dissent by voice.
(3) A declaration by the chairperson of the meeting that a resolution is carried by the requisite majority is conclusive evidence of that fact unless a poll is demanded in accordance with subclause (4).
(4) At a meeting of shareholders a poll may be demanded by—
(a) not fewer than 5 shareholders having the right to vote on the question at the meeting; or
(b) a shareholder or shareholders representing not less than 10% of the total voting rights of all shareholders having the right to vote on the question at the meeting.
(5) A poll may be demanded either before or after a vote is taken on a resolution.
(6) If a poll is taken, votes must be counted according to the votes attached to the shares of each shareholder present and voting.
(7) The chairperson of a shareholders' meeting is not entitled to a casting vote.

29 Votes of joint shareholders

If 2 or more persons are registered as the holder of a share, the vote of the person named first in the share register and voting on a matter must be accepted to the exclusion of the votes of the other joint holders.

30 Proxies

(1) A shareholder may exercise the right to vote either by being present in person or by proxy.
(2) A proxy for a shareholder is entitled to attend and participate in a meeting of shareholders as if the proxy were the shareholder.
(3) A proxy must be appointed by notice in writing signed by the shareholder.
(4) The notice must state whether the appointment is for a particular meeting, or for a specified term.
(5) No proxy is effective in relation to a meeting unless a copy of the notice of appointment is given to the company at least 24 hours before the start of the meeting.

31 Corporations may act by representatives

(1) A corporation that is a shareholder may appoint a representative to attend a meeting of shareholders on its behalf by notice in writing signed by a director or secretary of the corporation.

(2) The notice must state whether the appointment is for a particular meeting, or for a specified term.

32 Minutes

(1) The directors must ensure that minutes are kept of all proceedings at meetings of shareholders.

(2) Minutes that have been signed correct by the chairperson of the meeting are prima facie evidence of the proceedings at the meeting.

Miscellaneous

33 Annual meetings and special meetings of shareholders

(1) Subject to subclause (3) and clause 34(3), the directors must call an annual meeting of the company to be held—

(a) once in each calendar year; and

(b) not later than 5 months after the balance date of the company (or, if the time for completing the financial statements of the company has been extended under clause 70(1)(a), not later than 20 working days after the financial statements are required to be completed); and

(c) not later than 15 months after the previous annual meeting.

(2) The meeting must be held on the date on which it is called to be held.

(3) The company need not hold its first annual meeting in the calendar year of its incorporation, but must hold that meeting within 18 months of its incorporation.

(4) A special meeting of shareholders entitled to vote on an issue—

(a) may be called at any time by a director; and

(b) must be called by the directors on the written request of shareholders holding shares carrying together not less than 5% of the votes that may be cast on that issue.

34 Written resolutions of shareholders

(1) A resolution in writing signed by shareholders, who together hold not less than 75% of the votes entitled to be cast on that resolution at a meeting of shareholders, is as valid as if it had been passed at a meeting of those shareholders.

(2) Any such resolution may consist of several documents (including fax or other similar means of communication) in like form each signed or assented to by 1 or more shareholders.

(3) The company need not hold an annual meeting if everything required to be done at that meeting (by resolution or otherwise) is done by resolution in accordance with subclause (1).

(4) Within 5 working days of a resolution being passed under subclause (1), the company must send a copy of the resolution to every shareholder who did not sign it.

(5) A resolution may be signed under subclause (1) without any prior notice being given to shareholders.

35 Voting in interest groups

If the company proposes to take action that affects the rights attached to shares within the meaning of section 54 of the Act, the action may not be taken unless it is approved by a special resolution of each interest group, as defined in section 54(3) of the Act.

36 Shareholders entitled to receive distributions

(1) The shareholders who are entitled to receive distributions are,—

(a) if the directors fix a date for this purpose, those shareholders whose names are registered in the share register on that date:

(b) if the directors do not fix a date for this purpose, those shareholders whose names are registered in the share register on the day on which the distribution is approved.

(2) A date fixed under subclause (1) must not precede by more than 20 working days the date on which the proposed action will be taken.

37 Shareholders entitled to exercise pre-emptive rights

The shareholders who are entitled to pre-emptive rights to acquire shares in accordance with clause 12 are those shareholders whose names are registered in the share register on the day on which notice is given to the company by the selling shareholder under clause 13.

38 Shareholders entitled to attend and vote at meetings

(1) The shareholders who are entitled to receive notice of a meeting of shareholders are,—

(a) if the directors fix a date for this purpose, those shareholders whose names are registered in the share register on that date:

(b) if the directors do not fix a date for this purpose, those shareholders whose names are registered in the share register at the close of business on the day immediately preceding the day on which the notice is given.

(2) A date fixed under subclause (1)(a) must not precede by more than 30 working days the date on which the meeting is to be held.

(3) Before a meeting of shareholders, the company may prepare a list of shareholders entitled to receive notice of the meeting, arranged in alphabetical order, and showing the number of shares held by each shareholder,—

(a) if a date has been fixed under subclause (1)(a), as at that date; or

(b) if no such date has been fixed, as at the close of business on the day immediately preceding the day on which the notice is given.

(4) A person named in a list prepared under subclause (3) is entitled to attend the meeting and vote in respect of the shares shown opposite his or her name in person or by proxy, except to the extent that—

(a) that person has, since the date on which the shareholders entitled to receive notice of the meeting were determined, transferred any of his or her shares to some other person; and

(b) the transferee of those shares has been registered as the holder of those shares, and has requested before the commencement of the meeting that his or her name be entered on the list prepared under subclause (3).

(5) A shareholder may, on 2 working days' notice, examine any list prepared under subclause (3) during normal business hours at the registered office of the company.

39 Distributions to shareholders

(1) The company must not pay a dividend or make any other distribution to shareholders unless there are reasonable grounds for believing that, after that distribution is made,—

(a) the company will be able to pay its debts as they become due in the normal course of business; and
(b) the value of the company's assets will not be less than the value of its liabilities.
(2) Subject to subclause (1) and to the terms of issue of any shares, the company may pay a dividend to shareholders—
(a) of the same amount in respect of each share of the same class, if the payment of the dividend is authorised by the directors; or
(b) on any other basis, with the prior approval of all shareholders.
(3) A distribution made in breach of subclauses (1) or (2) may be recovered by the company from the recipients or from the persons approving the distribution, in accordance with section 29 of the Act.

40 Company may acquire its own shares and provide financial assistance

(1) The company may agree to acquire its own shares from a shareholder—
(a) with the prior approval of all shareholders; and
(b) subject to the solvency test in clause 39(1).
(2) If the company acquires its own shares, those shares are deemed to be cancelled immediately on acquisition.
(3) The company may give financial assistance to a person for the purpose of, or in connection with, the purchase of a share issued or to be issued by the company, whether directly or indirectly, only if—
(a) after providing the assistance, the company will satisfy the solvency test in clause 39(1); and
(b) all shareholders have approved the giving of the assistance.

41 Annual report to shareholders

(1) Subject to subclause (2), the directors of the company must, within 20 working days after the date on which the company is required to complete its financial statements under section 130 of the Act,—
(a) prepare an annual report on the affairs of the company during the accounting period ending on that date; and
(b) send a copy of that report to each shareholder.
(2) The directors are only required to prepare an annual report in respect of an accounting period if a shareholder has given written notice to the company before the end of that accounting period requiring such a report to be prepared.
(3) If the directors are not required to prepare an annual report in respect of an accounting period, they must send a notice to each shareholder to that effect within the period referred to in subclause (1).
(4) Every annual report for the company must—
(a) be in writing and be dated; and
(b) include financial statements for the accounting period that comply with section 130 of the Act; and
(c) if an auditor's report is required in relation to the financial statements included in the report, include that auditor's report; and
(d) state the names of the persons holding office as directors of the company as at the end of the accounting period and the names of any persons who ceased to hold office as directors of the company during the accounting

period; and
(e) contain any other information that may be required by regulations made under the Act; and
(f) be signed on behalf of the directors by 2 directors of the company or, if the company has only 1 director, by that director.

42 Deemed approval by all shareholders for certain purposes

For the purposes of clauses 6, 7(2), and 40(1) and (3), a decision is deemed to have been approved by all shareholders if—
(a) notice of the proposed decision has been given to all shareholders in accordance with clause 75; and
(b) no shareholder has responded within 10 working days objecting to that decision; and
(c) shareholders entitled to cast not less than 75% of the votes in relation to a resolution to alter these rules have responded within 10 working days approving that decision.

Part 3
Directors

43 Appointment and removal of directors

(1) The shareholders may by ordinary resolution fix the number of directors of the company.
(2) A director may be appointed or removed by ordinary resolution passed at a meeting called for the purpose, or by a written resolution in accordance with clause 34(1).
(3) A director vacates office if he or she—
(a) is removed from office in accordance with subclause (2); or
(b) resigns in accordance with clause 44; or
(c) becomes disqualified from being a director under section 85 of the Act; or
(d) dies.

44 Resignation of director

(1) A director may resign by delivering a signed written notice of resignation to the registered office of the company.
(2) Subject to subclauses (3) and (4), a notice of resignation is effective when it is received at the registered office, or at any later time specified in the notice.
(3) If the company has only 1 director, that director may not resign—
(a) until that director has called a meeting of shareholders to receive notice of the resignation; or
(b) if the company has only 1 shareholder, until that director has given not less than 10 working days' notice of the resignation to that shareholder.
(4) A notice of resignation given by the sole director of the company does not take effect, despite its terms, until the earlier of the appointment of another director of the company or—
(a) the time and date for which the meeting of shareholders is called under subclause (3)(a); or
(b) if the company has only 1 shareholder, 10 working days after notice of the resignation has been given to that shareholder.

45 Notice of change in directors

(1) The company must ensure that notice in the prescribed form of the following is delivered to the Registrar:
(a) a change in the directors of the company, whether as the result of a director ceasing to hold office or the appointment of a new director, or both:
(b) a change in the name or the residential address of a director of the company.
(2) In the case of the appointment of a new director, a consent by that person to act as a director, in the prescribed form, must also be delivered to the Registrar.

46 Powers and duties of directors

(1) Subject to section 50 of the Act (which relates to major transactions), the business and affairs of the company must be managed by, or under the direction or supervision of, the directors.
(2) The directors have all the powers necessary for managing, and for directing and supervising the management of, the business and affairs of the company.
(3) The directors may delegate any of their powers to a committee of directors, or to a director or employee.
(4) The directors must monitor, by means of reasonable methods properly used, the exercise of powers by any delegate.
(5) The provisions of these rules relating to proceedings of the directors also apply to proceedings of any committee of directors, except to the extent the directors determine otherwise.
(6) The directors have the duties set out in the Act, and, in particular,—
(a) each director must act in good faith and in a manner that the director believes to be in the interests of the company; and
(b) a director must not act, or agree to the company acting, in a manner that contravenes the Act or these rules.

47 Standard of care of directors

A director of the company, when exercising powers or performing duties as a director, must exercise the care, diligence, and skill that a reasonable person would exercise in the same circumstances taking into account, but without limitation,—
(a) the nature of the company; and
(b) the nature of the decision; and
(c) the position of the director and the nature of the responsibilities undertaken by him or her.

48 Obligations of directors in connection with insolvency

(1) A director of the company must call a meeting of directors within 10 working days to consider whether the directors should appoint an administrator or liquidator, in accordance with section 71 of the Act, if the director—
(a) believes that the company is unable to pay its debts as they fall due; or
(b) is aware of matters that would put any reasonable person on inquiry as to whether the company is unable to pay its debts as they fall due.
(2) At a meeting called under section 71 of the Act, the directors must consider whether to—
(a) appoint an administrator or liquidator; or

(b) continue to carry on the business of the company.

49 Interested directors

(1) A director must not exercise any power as a director in circumstances where that director is directly or indirectly materially interested in the exercise of that power ,unless—

(a) the Act expressly authorises the director to exercise the relevant power despite such an interest; or

(b) the director has reasonable grounds for believing that the company will satisfy the solvency test after that power is exercised, and either—

(i) these rules expressly authorise the director to exercise the relevant power despite such an interest; or

(ii) the matter in question has been approved by shareholders under section 51 of the Act, following disclosure of the nature and extent of the director's interest to all shareholders who are not otherwise aware of those matters.

(2) A director who is directly or indirectly materially interested in any transaction or proposed transaction must, within 10 working days of becoming aware of that interest, disclose the nature and extent of that interest in writing,—

(a) if there is at least 1 other director who is not directly or indirectly materially interested in the transaction or proposed transaction, to the directors of the company; or

(b) if paragraph (a) does not apply, to all shareholders other than the director.

(3) A director may give a general disclosure in writing to all other shareholders that the director is a director or employee or shareholder of another company, or is otherwise associated with another company or another person. That general disclosure is a sufficient disclosure of the director's interest in any transaction entered into with that other company or person for the purposes of subclause (2).

(4) A transaction entered into by the company in which a director is directly or indirectly materially interested is voidable at the election of the company in accordance with section 111 of the Act.

(5) A transaction entered into by the company as the result of action taken by a director in breach of sections 65, 66, or 67 of the Act is voidable at the option of the company in accordance with section 112 of the Act.

50 Use and disclosure of company information

(1) A director of the company who has information in his or her capacity as a director or employee of the company, being information that would not otherwise be available to him or her, must not disclose that information to any person, or make use of or act on the information, except—

(a) in the interests of the company; or

(b) as required by law; or

(c) if there are reasonable grounds for believing that the company will satisfy the solvency test after the director takes that action, and that action—

(i) is approved by all shareholders under section 51 of the Act; or

(ii) is authorised by any contract of employment entered into between that director and the company, the relevant terms of which have been approved by shareholders by ordinary resolution.

(2) No director may vote on a resolution to approve such terms in relation to himself or herself.

51 Indemnities and insurance for directors or employees

(1) Subject to section 74 of the Act, the company may provide an indemnity or purchase insurance for a director of the company or of a related company with the approval of—

(a) shareholders by ordinary resolution.; or

(b) all shareholders under section 51 of the Act.

(2) No director may vote on a resolution concerning an indemnity or insurance to be provided for the director.

(3) In this clause,—

director includes—

(a) a person who is liable under any of sections 65 to 67 of the Act by virtue of section 73 of the Act; and

(b) a former director

indemnify includes relieve or excuse from liability, whether before or after the liability arises; and **indemnity** has a corresponding meaning.

52 Remuneration of directors

(1) Directors may receive remuneration and other benefits from the company with the approval of—

(a) shareholders by ordinary resolution.; or

(b) all shareholders under section 51 of the Act.

(2) No director may vote on a resolution concerning remuneration or benefits to be received by the director.

53 Procedure at meetings of directors

(1) Clauses 54 to 60 set out the procedure to be followed at meetings of directors.

(2) A meeting of directors may determine its own procedure to the extent that it is not governed by these rules.

54 Chairperson

(1) The directors may elect 1 of their number as chairperson of directors and may determine the period for which the chairperson is to hold office.

(2) If no chairperson is elected, or if at a meeting of the directors the chairperson is not present within 5 minutes after the time appointed for the commencement of the meeting, the directors present may choose 1 of their number to be the chairperson of the meeting.

55 Notice of meeting

(1) A director or, if requested by a director to do so, an employee of the company, may convene a meeting of directors by giving notice in accordance with this clause.

(2) Not less than 24 hours notice of a meeting of directors must be given to every director who is in Niue, or who can readily be contacted outside Niue.

(3) An irregularity in the notice of a meeting is waived if all directors entitled to receive notice of the meeting attend the meeting without protest as to the irregularity, or if all directors entitled to receive notice of the meeting agree to the waiver.

56 Methods of holding meetings

A meeting of directors may be held either—
(a) by a number of the directors who constitute a quorum, being assembled together at the place, date, and time appointed for the meeting; or
(b) by means of audio, or audio and visual, communication by which all directors participating and constituting a quorum, may simultaneously hear each other throughout the meeting.

57 Quorum

(1) A quorum for a meeting of directors is a majority of the directors.
(2) No business may be transacted at a meeting of directors if a quorum is not present.

58 Voting

(1) Every director has 1 vote.
(2) The chairperson has a casting vote.
(3) A resolution of the directors is passed if it is agreed to by all directors present without dissent, or if a majority of the votes cast on it are in favour of it.
(4) A director present at a meeting of directors is presumed to have agreed to, and to have voted in favour of, a resolution of the directors unless he or she expressly dissents from, or votes against, the resolution at the meeting.

59 Minutes

The directors must ensure that minutes are kept of all proceedings at meetings of the directors.

60 Unanimous resolution

(1) A resolution in writing, signed or assented to by all directors, is as valid and effective as if it had been passed at a meeting of the directors duly convened and held.
(2) Any such resolution may consist of several documents (including fax or other similar means of communication) in like form each signed or assented to by 1 or more directors.
(3) A copy of any such resolution must be entered in the minute book of the directors' proceedings.

61 Managing director and other executive directors

(1) The directors may, from time to time, appoint a director as managing director for such period and on such terms as they think fit.
(2) Subject to the terms of a managing director's appointment, the directors may at any time cancel the appointment of a director as managing director.
(3) A director who holds office as managing director ceases to hold office as managing director if he or she ceases to be a director of the company.

62 Delegation to managing director

(1) The directors may delegate to the managing director, subject to any conditions or restrictions that they consider appropriate, any of their powers that may be lawfully delegated.
(2) Any such delegation may at any time be withdrawn or varied by the directors.
(3) The delegation of a power of the directors to the managing director does not prevent the exercise of the power by the directors, unless the terms of the delegation expressly provide otherwise.

63 Remuneration of managing director and director

(1) Subject to shareholder approval in accordance with clause 52, the managing director, or a director (other than the managing director) who is employed by the company, may be paid such remuneration as he or she may agree with the directors.
(2) The remuneration may be by way of salary, commission, participation in profits, or any combination of these methods, or any other method of fixing remuneration.

Part 4
Company records

64 Company records

(1) The company must keep all the following documents at its registered office or at some other place notice of which has been given to the Registrar in accordance with section 119 of the Act:
(a) the rules of the company:
(b) minutes of all meetings and resolutions of shareholders within the last 7 years:
(c) minutes of all meetings and resolutions of directors and directors' committees within the last 7 years:
(d) the full names and residential and postal addresses of the current directors:
(e) copies of all written communications to all shareholders or all holders of the same class of shares during the last 7 years, including annual reports made under section 56 of the Act:
(f) copies of all financial statements required to be completed under section 130 of the Act for the last 7 completed accounting periods of the company:
(g) the accounting records required by section 129 of the Act for the current accounting period and for the last 7 completed accounting periods of the company:
(h) the share register.
(2) The references in subclause (1)(b), (c), and (e) to 7 years and the references in subclause (1)(f) and (g) to 7 completed accounting periods include such lesser periods as the Registrar may approve by notice in writing to the company, in accordance with section 117(2) of the Act.

65 Form of records

(1) The records of the company must be kept—
(a) in written form; or
(b) in a form or in a manner that allows the documents and information that comprise the records to be readily accessible so as to be usable for subsequent reference, and convertible into written form.
(2) The directors must ensure that adequate measures exist to—
(a) prevent the records being falsified; and
(b) detect any falsification of them.

66 Access to records

(1) The directors of the company are entitled to access to the company's records in accordance with section 120 of the Act.
(2) A shareholder of the company is entitled—
(a) to inspect the documents referred to in section 121 of the Act, in the

manner specified in section 123 of the Act; and
(b) to require copies of, or extracts from, any document that he or she may inspect within 5 working days of making a request in writing for the copy or extract, on payment of any reasonable copying and administration fee prescribed by the company.
(3) The fee may be determined by any director, subject to any directions from the directors.

67 Documents to be sent to Registrar

In addition to any annual return required under section 124 of the Act, the company must send all the following documents to the Registrar under the Act:
(a) notice of the adoption of new rules by the company, or the alteration of the rules of the company, under section 14 of the Act:
(b) notice of a change in the registered office or postal address of the company under section 18 of the Act:
(c) notice of the issue of shares by the company, under section 26 of the Act:
(d) notice of the acquisition by the company of its own shares, under section 31 of the Act:
(e) notice of the redemption of a share, under section 35 of the Act:
(f) notice of a change in the directors of the company, or of a change in the name or residential address or postal address of a director, under section 88 of the Act:
(g) notice of the making of an order under section 102 of the Act altering or adding to the rules of a company:
(h) notice of any place other than the registered office of the company where records are kept, or of any change in the place where records are kept, under section 119 of the Act:
(i) documents requested by the Registrar under section 311 of the Act.

68 Documents to be sent to shareholders

In addition to any annual report required under section 56 of the Act, the company must send all the following documents to shareholders under the Act:
(a) notice of any repurchase of shares to which section 31(4) of the Act applies:
(b) notice of a written resolution approved under section 52 of the Act:
(c) financial statements required to be sent under section 130 of the Act:
(d) any written statement by an auditor under section 136 of the Act:
(e) any report by an auditor under section 138 of the Act.

Part 5

Accounts and audit

69 Accounting records to be kept

(1) The directors of the company must cause accounting records to be kept that—
(a) correctly record and explain the transactions of the company; and
(b) will at any time enable the financial position of the company to be determined with reasonable accuracy; and
(c) will enable the directors to ensure that the financial statements of the company comply with section 130 of the Act; and
(d) will enable the financial statements of the company to be readily and

properly audited.
(2) Without limiting clause 68, the accounting records must contain—
(a) entries of money received and spent each day and the matters to which it relates; and
(b) a record of the assets and liabilities of the company; and
(c) if the company's business involves dealing in goods,—
(i) a record of goods bought and sold, and relevant invoices:
(ii) a record of stock held at the end of the financial year together with records of any stocktakings during the year; and
(d) if the company's business involves providing services, a record of services provided and relevant invoices.
(3) If the company sells goods or provides services for cash in the ordinary course of carrying on a retail business,—
(a) invoices need not be kept in respect of each retail transaction for the purposes of subclause (2); and
(b) a record of the total money received each day in respect of the sale of goods or provision of services, as the case may be, is sufficient to comply with subclause (2) in respect of those transactions.
(4) The accounting records must be kept—
(a) in a form permitted under clause 65; and
(b) at the registered office of the company, or any other place permitted under section 119 of the Act.

70 Financial statements to be prepared

(1) The directors must ensure that,—
(a) within 4 months after the balance date of the company, or with the approval of shareholders by special resolution, within an extended period not exceeding 7 months after the balance date of the company, financial statements that comply with subclause (2) are completed in relation to the company and that balance date; and
(b) within 20 working days of the date on which the financial statements must be completed under paragraph (a), those financial statements are sent to all shareholders. This requirement may be satisfied by sending the financial statements to shareholders in an annual report, in accordance with section 56 of the Act.
(2) The financial statements of the company must—
(a) give a true and fair view of the matters to which they relate; and
(b) comply with any applicable regulations made under the Act; and
(c) be dated and signed on behalf of the directors by 2 directors of the company, or, if the company has only 1 director, by that director.
(3) The following periods must not exceed 15 months:
(a) the period between the date of incorporation of the company and its first balance date:
(b) the period between any 2 balance dates of the company.
(4) In this clause, **financial statements**, in relation to the company and a balance date, means—
(a) a statement of financial position for the entity as at the balance date; and

(b) in the case of—
(i) a company trading for profit, a statement of financial performance for the company in relation to the accounting period ending at the balance date; and
(ii) a company not trading for profit, an income and expenditure statement for the company in relation to the accounting period ending at the balance date; and
(c) if required by regulations made under the Act, a statement of cash flows for the company in relation to the accounting period ending on the balance date; and
(d) such other financial statements in relation to the company or any group of companies of which it is the holding company as may be required by regulations made under the Act; and
(e) any notes or documents giving information relating to the statement of financial position and other statements.

71 Appointment of auditor

(1) If required to do so under subclause (2), the company must appoint an auditor who is qualified to hold that office under section 135 of the Act to—
(a) audit the financial statements of the company in respect of an accounting period; and
(b) hold office until those financial statements have been audited in accordance with the Act or until he or she ceases to hold office under subclause (3).
(2) The company must appoint an auditor within 30 working days if—
(a) a shareholder or shareholders holding shares that together carry the right to receive more than 20% of distributions made by the company give written notice to the company before the end of an accounting period requiring the financial statements of the company for that period to be audited; or
(b) a vacancy in the office of auditor arises before the financial statements in respect of a period for which an audit is required have been audited.
(3) An auditor ceases to hold office if he or she—
(a) resigns by delivering a written notice of resignation to the registered office of the company not less than 20 working days before the date on which the notice is expressed to be effective; or
(b) is replaced as auditor by an ordinary resolution appointing another person as auditor in his or her place, following notice to the auditor in accordance with section 133 of the Act; or
(c) becomes disqualified from being the auditor of the company under section 135 of the Act; or
(d) dies; or
(e) becomes subject to a trustee order under section 501 of the Niue Act 1966, or an order of medical custody under section 602 of that Act; or
(f) ceases to hold office under subclause (5); or
(g) is removed by all shareholders in accordance with subclause (6).
(4) An auditor may be appointed—

(a) by ordinary resolution; or
(b) if the office of auditor is vacant, by the directors. If an auditor is appointed by the directors, the directors must, within 10 working days, give notice of the appointment to all shareholders.
(5) If the company is required to appoint an auditor in respect of an accounting period but is not required to do so in respect of a subsequent accounting period,—
(a) the audit of the financial statements of the company for the accounting period in respect of which an audit is required must be completed in accordance with this section; and
(b) the directors may give notice to all shareholders within 4 months of the commencement of a subsequent accounting period that the company is no longer required to appoint an auditor, and that the auditor will cease to hold office unless a notice is given by shareholders under subclause (2)(a) by a date specified in the notice, which must be not less than 30 working days from the date on which the notice is given; and
(c) if a notice has been given under paragraph (b), and no notice under subclause (2)(a) is received by the company by the date specified in that notice, the auditor ceases to hold office on the later of—
(i) the date specified in the notice; or
(ii) the date on which the audit of the financial statements of the company for the previous accounting period is completed.
(6) Despite the other provisions of this clause, all shareholders may agree, in writing,—
(a) to dispense with an audit for any accounting period; and
(b) to remove the auditor of the company.
(7) The fees payable to the auditor must be agreed between the auditor and the directors.

72 Auditor's attendance at shareholders' meeting

The directors must ensure that an auditor of the company—
(a) is permitted to attend a meeting of shareholders of the company; and
(b) receives the notices and communications that a shareholder is entitled to receive relating to meetings and resolutions of shareholders; and
(c) may be heard at a meeting of shareholders that he or she attends on any part of the business of the meeting that concerns him or her as auditor.

Part 6
Liquidation and removal from register

73 Resolution to appoint liquidator

(1) The shareholders may resolve to liquidate the company by special resolution.
(2) The directors may resolve to liquidate the company at a meeting called under section 71 of the Act, if they consider that the company is unable to meet its debts as they become due in the normal course of business.

74 Distribution of surplus assets

(1) The surplus assets of the company available for distribution to shareholders after all creditors of the company have been paid must be distributed in proportion to the number of shares held by each shareholder, subject to the terms of issue of any shares.

(2) The liquidator may, with the approval of a special resolution, distribute the surplus assets of the company among the shareholders in kind. For this purpose, the liquidator may set such value as he or she considers fair on any property to be divided, and may determine how the division will be carried out as between the shareholders or different classes of shareholders.

Part 7

Miscellaneous

75 Service of documents on shareholders

(1) A notice, statement, report, accounts, or other document to be sent to a shareholder who is a natural person may be—

(a) delivered to that person; or

(b) posted to that person's postal address; or

(c) faxed to a fax number used by that person.

(2) A notice, statement, report, accounts, or other document to be sent to a shareholder that is a company or an overseas company may be sent by any of the methods of serving documents referred to in sections 342 or 344 of the Act, as the case may be.

76 Interpretation

(1) In these rules, **Act** means the Companies Act 2005.

(2) Unless the context otherwise requires, any term or expression that is defined in the Act or any regulations made under the Act and used, but not defined, in these rules has the same meaning as in the Act or the regulations.

Annexure 'B'

SCHEDULE IV

Part 1

General provisions

1 Name of company

(1) The name of the company at the time of registration under the Act appears on the application for registration or for reregistration, as the case may be.

(2) The name of the company may be changed in accordance with section 10 of the Act with the prior approval of the directors.

2 Public company

The company is a public company.

3 Rules

(1) The company may adopt new rules in place of these rules by special resolution, in accordance with section 14(2) of the Act.

(2) Subject to the Act,—

(a) these rules have effect and may be enforced as if they constituted a contract—

(i) between the company and its shareholders; and

(ii) between the company and each director; and

(b) the shareholders and directors of the company have the rights, powers, duties, and obligations set out in these rules.

Part 2

Shares and shareholders

General provisions

4 Number of shares

At the time of registration under the Act the company has the number of shares specified in the application for registration or re-registration, as the case may be.

5 Rights attaching to shares

Subject to clause 7(4), each share carries all the following rights:

(a) the right to 1 vote on a poll at a meeting of the company on any resolution, including any resolution to—

(i) appoint or remove a director or auditor:

(ii) adopt new rules:

(iii) alter the company's rules:

(iv) approve a major transaction:

(v) approve an amalgamation of the company:

(vi) approve reregistration of a public company as a private company, or of a private company as a public company:

(vii) put the company into liquidation:

(viii) approve the transfer of registration of the company to another country; and

(b) the right to an equal share in dividends paid by the company; and

(c) the right to an equal share in the distribution of the surplus assets of the company in a liquidation.

6 Initial issue of shares

If the company was first registered under Part 2 of the Act, the company must immediately after its registration issue to any person named in the application for registration as a shareholder the number of shares specified in the application as being the number of shares to be issued to that person or those persons.

7 Process for issuing shares

(1) The directors may issue shares—

(a) pursuant to an offer made to all shareholders proportionally, that, if accepted by all shareholders, would not affect relative voting or distribution rights, on such terms as the directors think fit (including issuing shares without consideration, or instead of dividends). The shareholders must have a reasonable opportunity to consider and respond to the offer; or

(b) to shareholders or any other persons for a consideration determined by the directors. The directors must use reasonable endeavours to obtain the best price reasonably obtainable for those shares.

(2) The directors may issue more than 1 class of shares. In particular, shares may be issued that—

(a) are redeemable; or

(b) confer preferential rights to distributions of capital or income; or

(c) confer special, limited, or conditional voting rights; or

(d) do not confer voting rights.

(3) If the company issues shares, it must give the prescribed notice to the Registrar under section 26(2) of the Act within 10 working days of the issue of any shares.

(4) If the rights attached to the shares differ from those set out in clause 5, the notice must be accompanied by a document setting out the terms of issue of the shares.

8 Transferability of shares

The shares of the company are, subject to clause 7(4) and their terms of issue, transferable by entry in the share register in accordance with clauses 12(1) to (3).

Share register

9 Company to keep share register

(1) The company must maintain a share register that records the shares issued by the company and states—

(a) the names, alphabetically arranged, and the last known address of each person who is, or has within the last 7 years been, a shareholder; and

(b) the number of shares of each class held by each shareholder within the last 7 years; and

(c) the date of any—

(i) issue of shares to; or

(ii) repurchase or redemption of shares from; or

(iii) transfer of shares by or to— each shareholder within the last 7 years, and in relation to the transfer, the name of the person to or from whom the shares were transferred.

(2) No notice of a trust, whether express, implied, or constructive, may be entered on the share register.

(3) The company may appoint an agent to maintain the share register.

10 Form and location of share register

The share register must be kept—

(a) in a form that complies with clause 76; and

(b) at the company's registered office, or at any other place in Niue notice of which has been given to the Registrar under section 119 of the Act.

11 Status of registered shareholders

(1) The company must treat the registered holder of a share as the only person entitled to—

(a) exercise the right to vote attaching to the share; and

(b) receive notices; and

(c) receive a distribution in respect of the share; and

(d) exercise the other rights and powers attaching to the share.

(2) If a joint holder of a share dies, the remaining holders must be treated by the company as the holders of that share.

(3) If the sole holder of a share dies, that shareholder's legal representative is the only person recognised by the company as having any title to or interest in the share.

(4) Any person who becomes entitled to a share as a consequence of the death, bankruptcy or insolvency or incapacity of a shareholder may be registered as the holder of that shareholder's shares on making a request in writing to the company to be so registered, accompanied by proof satisfactory to the directors of that entitlement.

Transfer of shares and share certificates

12 Transfer of shares

(1) If shares are to be transferred, a form of transfer signed by the holder or by his or her agent or attorney must be delivered to the company.

(2) The personal representative of a deceased shareholder may transfer a share even though the personal representative is not a shareholder at the time of transfer.

(3) Subject to subclause (4), the company must, immediately on receipt of a properly executed share transfer, enter the name of the transferee in the share register as holder of the shares transferred.

(4) The directors may resolve to refuse to register a transfer of a share within 30 working days of receipt of the transfer, if any amount payable to the company by the shareholder is due but unpaid.

(5) If the directors resolve to refuse to register a transfer for this reason, they must give notice of the refusal to the shareholder within 5 working days of the date of the resolution.

13 Share certificates

(1) A shareholder may apply to the company for a share certificate relating to some or all of the shareholder's shares in the company.

(2) On receipt of an application for a share certificate under subclause (1), the company must, within 20 working days after receiving the application,—

(a) if the application relates to some but not all of the shares, separate the shares shown in the register as owned by the applicant into separate parcels: 1 parcel being the shares to which the share certificate relates, and the other parcel being any remaining shares; and

(b) in all cases send to the shareholder a certificate stating—

(i) the name of the company; and

(ii) the class of shares held by the shareholder; and

(iii) the number of shares held by the shareholder to which the certificate relates.

(3) If a share certificate has been issued, a transfer of the shares to which it relates must not be registered by the company unless the form of transfer required by that section is accompanied by—

(a) the share certificate relating to the share; or

(b) evidence as to its loss or destruction and, if required, an indemnity in a form determined by the directors.

(4) If shares to which a share certificate relates are to be transferred, and the share certificate is sent to the company to enable the registration of the transfer, the share certificate must be cancelled and no further share certificate issued except at the request of the transferee.

Meetings of shareholders

14 Meetings of shareholders

(1) Clauses 15 to 27 set out the procedure to be followed at, and in relation to, meetings of shareholders.

(2) A meeting of shareholders may determine its own procedure to the extent that it is not governed by these rules.

15 Notice of meetings

(1) Written notice of the time and place of a meeting of shareholders must be given to every shareholder entitled to receive notice of the meeting and to every director and any auditor of the company not less than 15 working days before the meeting.

(2) The notice must set out—

(a) the nature of the business to be transacted at the meeting in sufficient detail to enable a shareholder to form a reasoned judgment in relation to it; and

(b) the text of any special resolution to be submitted to the meeting.

(3) An irregularity in a notice of a meeting is waived if all the shareholders entitled to attend and vote at the meeting attend the meeting without protest as to the irregularity, or if all such shareholders agree to the waiver.

(4) An accidental omission to give notice of a meeting to, or the failure to receive notice of a meeting by, a shareholder does not invalidate the proceedings at that meeting.

(5) If a meeting of shareholders is adjourned for less than 30 working days, it is not necessary to give notice of the time and place of the adjourned meeting other than by announcement at the meeting that is adjourned.

16 Methods of holding meetings

A meeting of shareholders may be held either—

(a) by a number of shareholders, who constitute a quorum, being assembled together at the place, date, and time appointed for the meeting; or

(b) by means of audio, or audio and visual, communication by which all shareholders participating and constituting a quorum, may simultaneously hear each other throughout the meeting.

17 Quorum

(1) Subject to subclause (3), no business may be transacted at a meeting of shareholders if a quorum is not present.

(2) A quorum for a meeting of shareholders is present if 5 or more shareholders or their proxies are present who are between them able to exercise a majority of the votes to be cast on the business to be transacted by the meeting.

(3) If a quorum is not present within 30 minutes after the time appointed for the meeting, the meeting is adjourned to the same day in the following week at the same time and place, or to such other date, time and place as the directors may appoint.

(4) If, at the adjourned meeting, a quorum is not present within 30 minutes after the time appointed for the meeting, the shareholders present or their proxies are aquorum.

18 Chairperson

(1) If the directors have elected a chairperson of the directors, and the chairperson of the directors is present at a meeting of shareholders, he or she must chair the meeting.
(2) If no chairperson of the directors has been elected or if, at any meeting of shareholders, the chairperson of the directors is not present within 15 minutes of the time appointed for the commencement of the meeting, the shareholders present may choose 1 of their number to be the chairperson of the meeting.

19 Voting

(1) In the case of a meeting of shareholders held under clause 16(a), unless a poll is demanded, voting at the meeting will take place by whichever of the following methods is determined by the chairperson of the meeting:
(a) voting by voice:
(b) voting by show of hands.
(2) In the case of a meeting of shareholders held under clause 16(b), unless a poll is demanded, voting at the meeting will take place by shareholders signifying individually their assent or dissent by voice.
(3) A declaration by the chairperson of the meeting that a resolution is carried by the requisite majority is conclusive evidence of that fact unless a poll is demanded in accordance with subclause (4).
(4) At a meeting of shareholders a poll may be demanded by—
(a) not fewer than 5 shareholders having the right to vote on the question at the meeting; or
(b) a shareholder or shareholders representing not less than 10% of the total voting rights of all shareholders having the right to vote on the question at the meeting.
(5) A poll may be demanded either before or after a vote is taken on a resolution.
(6) If a poll is taken, votes must be counted according to the votes attached to the shares of each shareholder present and voting.
(7) The chairperson of a shareholders' meeting is not entitled to a casting vote.

20 Votes of joint shareholders

If 2 or more persons are registered as the holder of a share, the vote of the person named first in the share register and voting on a matter must be accepted to the exclusion of the votes of the other joint holders.

21 Proxies

(1) A shareholder may exercise the right to vote either by being present in person or by proxy.
(2) A proxy for a shareholder is entitled to attend and participate in a meeting of shareholders as if the proxy were the shareholder.
(3) A proxy must be appointed by notice in writing signed by the shareholder. The notice must state whether the appointment is for a particular meeting, or for a specified term.
(4) No proxy is effective in relation to a meeting unless a copy of the notice of appointment is given to the company at least 24 hours before the start of the meeting.

22 Corporations may act by representatives

(1) A corporation that is a shareholder may appoint a representative to attend a meeting of shareholders on its behalf by notice in writing signed by a director or secretary of the corporation.
(2) The notice must state whether the appointment is for a particular meeting, or for a specified term.

23 Postal votes

(1) A shareholder may exercise the right to vote at a meeting by casting a postal vote in accordance with this clause.
(2) The notice of a meeting at which shareholders are entitled to cast a postal vote must state the name of the person authorised by the directors to receive and count postal votes at that meeting.
(3) A shareholder may cast a postal vote on all or any of the matters to be voted on at the meeting by sending a notice of the manner in which his or her shares are to be voted to a person authorised to receive and count postal votes at that meeting. The notice must reach that person not less than 48 hours before the start of the meeting.
(4) A shareholder who has submitted a postal vote on any resolution—
(a) may attend and speak at the meeting; and
(b) must not vote on that resolution in person at the meeting.

24 Duty of person authorised to receive and count postal votes

(1) If no person has been authorised to receive and count postal votes at a meeting, or if no person is named as being so authorised in the notice of the meeting, every director is deemed to be so authorised.
(2) It is the duty of a person authorised to receive and count postal votes at a meeting—
(a) to collect together all postal votes received by him or her or by the company; and
(b) in relation to each resolution to be voted on at the meeting, to count—
(i) the number of shareholders voting in favour of the resolution and the number of votes cast by each shareholder in favour of the resolution; and
(ii) the number of shareholders voting against the resolution, and the number of votes cast by each shareholder against the resolution; and
(c) to sign a certificate that he or she has carried out the duties set out in paragraphs (a) and (b) and that sets out the results of the counts required by paragraph (b); and
(d) to ensure that the certificate required by paragraph (c) is presented to the chairperson of the meeting.

25 Duty of chairperson concerning postal votes

(1) If a vote is taken at a meeting on a resolution on which postal votes have been cast, the chairperson of the meeting must,—
(a) on a vote by show of hands, count each shareholder who has submitted a postal vote for or against the resolution; and
(b) on a poll, count the votes cast by each shareholder who has submitted a postal vote for or against the resolution.
(2) The chairperson of a meeting must call for a poll on a resolution on which he or she holds sufficient postal votes, that he or she believes, that if a poll is taken, the result may differ from that obtained on a show of hands.
(3) The chairperson of a meeting must ensure that a certificate of postal votes held by him or her is annexed to the minutes of the meeting.

26 Minutes

(1) The directors must ensure that minutes are kept of all proceedings at meetings of shareholders.
(2) Minutes that have been signed correct by the chairperson of the meeting are prima facie evidence of the proceedings at the meeting.

Miscellaneous

27 Annual meetings and special meetings of shareholders

(1) Subject to subclause (3) and clause 28(3), the directors must call an annual meeting of the company to be held—
(a) once in each calendar year; and
(b) not later than 5 months after the balance date of the company; and
(c) not later than 15 months after the previous annual meeting.
(2) The meeting must be held on the date on which it is called to be held.
(3) The company need not hold its first annual meeting in the calendar year of its incorporation, but must hold that meeting within 18 months of its incorporation.
(4) A special meeting of shareholders entitled to vote on an issue—
(a) may be called at any time by a director; and
(b) must be called by the directors on the written request of shareholders holding shares carrying together not less than 5% of the votes that may be cast on that issue.

28 Written resolutions of shareholders

(1) A resolution in writing signed by shareholders, who together hold not less than 75% of the votes entitled to be cast on that resolution at a meeting of shareholders, is as valid as if it had been passed at a meeting of those shareholders.
(2) Any such resolution may consist of several documents (including fax or other similar means of communication) in like form, each signed or assented to by 1 or more shareholders.
(3) The company need not hold an annual meeting if everything required to be done at that meeting (by resolution or otherwise) is done by resolution in accordance with subclause (1).
(4) Within 5 working days of a resolution being passed under subclause (1), the company must send a copy of the resolution to every shareholder who did not sign it.
(5) A resolution may be signed under subclause (1) without any prior notice being given to shareholders.

29 Voting in interest groups

If the company proposes to take action that affects the rights attached to shares within the meaning of section 54 of the Act, the action may not be taken unless it is approved by a special resolution of each interest group, as defined in section 54(3) of the Act.

30 Shareholders entitled to receive dividends

(1) The shareholders who are entitled to receive dividends are,—
(a) if the directors fix a date for this purpose, those shareholders whose names are registered in the share register on that date:
(b) if the directors do not fix a date for this purpose, those shareholders whose names are registered in the share register on the day on which the dividend is approved.
(2) A date fixed under subclause (1)(a) must not precede by more than 20 working days the date on which the proposed action will be taken.

31 Notice of meetings and voting

(1) The shareholders who are entitled to receive notice of a meeting of shareholders are,—
(a) if the directors fix a date for this purpose, those shareholders whose names are registered in the share register on that date:
(b) if the directors do not fix a date for this purpose, those shareholders whose names are registered in the share register at the close of business on the day immediately preceding the day on which the notice is given.
(2) A date fixed under subclause (1)(a) must not precede by more than 30 working days the date on which the meeting is to be held.

(3) Before a meeting of shareholders, the company may prepare a list of shareholders entitled to receive notice of the meeting, arranged in alphabetical order, and showing the number of shares held by each shareholder,—

(a) if a date has been fixed under subclause (1)(a), as at that date; or

(b) if no such date has been fixed, as at the close of business on the day immediately preceding the day on which the notice is given.

(4) A person named in a list prepared under subclause (3) is entitled to attend the meeting and vote in respect of the shares shown opposite his or her name in person or by proxy, except to the extent that—

(a) that person has, since the date on which the shareholders entitled to receive notice of the meeting were determined, transferred any of his or her shares to some other person; and

(b) the transferee of those shares has been registered as the holder of those shares, and has requested, before the commencement of the meeting, that his or her name be entered on the list prepared under subclause (3).

(5) A shareholder may on 2 working days' notice examine any list prepared under subclause (3) during normal business hours at the registered office of the company.

32 Distributions to shareholders

(1) The company must not pay a dividend or make any other distribution to shareholders unless there are reasonable grounds for believing that, after that distribution is made,—

(a) the company will be able to pay its debts as they become due in the normal course of business; and

(b) the value of the company's assets will not be less than the value of its liabilities.

(2) Subject to subclause (1) and to the terms of issue of any shares, the company may pay a dividend to shareholders—

(a) of the same amount in respect of each share of the same class, if the payment of the dividend is authorised by the directors; or

(b) on any other basis, with the prior approval of all shareholders.

(3) A distribution made in breach of subclauses (1) or (2) may be recovered by the company from the recipients or from the persons approving the distribution, in accordance with section 29 of the Act.

(4) No dividend or other distribution bears interest against the company unless the applicable terms of issue of a share expressly provide otherwise.

(5) All dividends and other distributions unclaimed for 1 year after the due date for payment may be invested or otherwise made use of by the directors for the benefit of the company until claimed.

(6) The company is entitled to mingle the unclaimed distribution with other money of the company and is not required to hold it or to regard it as being impressed with any trust but, subject to compliance with the solvency test, must pay the distribution to the person producing evidence of entitlement to receive it.

33 Company may acquire its own shares and provide financial assistance

(1) Subject to the solvency test, the company may agree to acquire its own shares from a shareholder—

(a) pursuant to an offer to acquire shares made to all holders of shares of the same class that would, if accepted by all persons to whom the offer is made, leave unaffected relative voting and distribution rights; or

(b) on any other basis, with the prior approval of shareholders by special resolution.

(2) If the company acquires its own shares, those shares are deemed to be cancelled immediately on acquisition.
(3) The company may give financial assistance to a person for the purpose of, or in connection with, the purchase of a share issued or to be issued by the company, whether directly or indirectly, only if—
(a) the company gives the assistance in the normal course of its business and on usual terms and conditions; or
(b) the giving of the assistance is authorised by the directors or by all shareholders under section 51 of the Act, and there are reasonable grounds for believing that, after providing the assistance, the company will satisfy the solvency test.

34 Annual report to shareholders

(1) The directors of the company must, within 5 months after the balance date of the company—
(a) prepare an annual report on the affairs of the company during the accounting period ending on that date; and
(b) send a copy of that report to each shareholder.
(2) Every annual report for the company must—
(a) be in writing and be dated; and
(b) include financial statements for the accounting period that comply with section 130 of the Act; and
(c) include the auditor's report required under section 138 of the Act; and
(d) state the names of the persons holding office as directors of the company as at the end of the accounting period and the names of any persons who ceased to hold office as directors of the company during the accounting period; and
(e) contain such other information as may be required by regulations made under the Act; and
(f) be signed on behalf of the directors by 2 directors of the company or, if the company has only 1 director, by that director.

Compulsory acquisitions

35 Compulsory acquisition of minority holdings below 10%

(1) A shareholder who holds 90% of the voting shares of the company (**majority shareholder**) may give a notice to the other holders of voting shares (**minorityshareholders**) in accordance with this clause, requiring the minority shareholders to sell their voting shares to the majority shareholder.
(2) The majority shareholder must also give the notice to the company, and give public notice of the fact that such a notice has been given.
(3) A notice may be given under subclause (1) by a majority shareholder at any time within 6 months after that majority shareholder first becomes interested in not less than 90% of the voting shares of the company.

36 Price for voting share

(1) The majority shareholder must pay a price for each voting share that is—
(a) equal to the highest price paid for a voting share by that majority shareholder in an arms length sale and purchase of such shares during the 6-month period ending on the date on which the majority shareholder first became interested in not less than 90% of the voting shares; or
(b) if the majority shareholder so elects, a price to be fixed by an independent arbitrator.
(2) The majority shareholder must ask the directors of the company to nominate an independent arbitrator for this purpose.

(3) If the directors fail to do so within 10 working days of receiving such a request, the majority shareholder may nominate the arbitrator.

37 Notice under clause 35: general requirements

(1) A notice given under clause 35 must specify—

(a) the name of the majority shareholder; and

(b) the date on which the majority shareholder first became interested in not less than 90% of the voting shares of the company; and

(c) if the price to be paid for each voting share has been determined under clause 36(1)(a), that price, which must be certified by the majority shareholder as meeting the requirements of clause 36(1)(a); and

(d) if the price to be paid for each voting share is to be fixed by an arbitrator under clause 36(1)(b), the name of the arbitrator and the date on which and place at which the arbitration is to be held; and

(e) the rights of minority shareholders under clause 39.

(2) The date referred to in subclause (1)(d) must not be less than 60 working days from the date on which the notice is given to minority shareholders.

38 Requirements for price for voting share determined under clause 36(1)(a)

If the price to be paid for each voting share has been determined under clause 36(1)(a), a notice given under clause 35 must also—

(a) specify a date not less than 20 working days from the date of the notice on which the price will be paid, and the shares will be acquired by the majority shareholder (**transfer date**); and

(b) advise the shareholder that no payment will be received by the shareholder until any share certificate that has been issued in respect of the voting shares has been delivered to the company; and

(c) require the shareholder to specify the manner in which payment for the voting shares is to be made to that shareholder; and

(d) advise shareholders that payment may be made by cheque to be collected from the company at a specified address, or posted to a postal address specified by the shareholder, and may provide for other payment options.

39 Requirements for price for voting share determined under clause 36(1)(b)

(1) If the price to be paid for each voting share is to be determined under clause 36(1)(b) and, if any minority shareholder considers that the arbitrator is not suitably qualified to value the shares, or is not independent, the minority shareholder may give notice to the company within 10 working days requiring the company to apply to the Court for appointment of another person as arbitrator.

(2) If a notice under subclause (1) is received, the company must immediately apply to the Court for the appointment of an arbitrator.

(3) If a notice is given under subclause (1), or if for any other reason the arbitration does not proceed on the date and at the place specified in the notice, not less than 40 working days' notice of the altered date and place must be given to each minority shareholder.

(4) Each minority shareholder is entitled to attend the arbitration and to be heard, in person or by a representative (who may, but need not, be a lawyer or a public accountant).

(5) The arbitrator must expeditiously determine a fair and reasonable price per share for the shares to be acquired.

(6) The price must not include any discount or premium to reflect the size of the parcels of shares to be acquired, or the circumstances of the acquisition.

(7) The costs of the arbitration must be paid by the majority shareholder.

40 Notice of determination of price by arbitrator

Within 10 working days of the determination by the arbitrator, the company must give a notice to each minority shareholder that—

(a) advises the shareholder of the price that has been determined by the arbitrator; and

(b) specifies a date not less than 10 working days and not more than 20 working days from the date of the notice on which the price will be paid, and the shares will be acquired by the majority shareholder (**transfer date**); and

(c) advises the shareholder that no payment will be received by the shareholder until any share certificate that has been issued in respect of the voting shares has been delivered to the company; and

(d) requires the shareholder to specify the manner in which payment for the voting shares is to be made to that shareholder; and

(e) advises the shareholders that payment may be made by cheque to be collected from the company at a specified address, or posted to a postal address specified by the shareholder, and may provide for other payment options.

41 Requirements on transfer date

(1) On the transfer date,—

(a) the majority shareholder must pay the full amount of the price for all voting shares held by minority shareholders to the company, to be held on trust by the company for the benefit of those shareholders. The payment must be made in cleared funds; and

(b) all voting shares held by minority shareholders are deemed to be transferred to the majority shareholder on payment to the company in accordance with paragraph (a), and the company must register the majority shareholder as the holder of those shares despite any outstanding share certificates in respect of those shares.

(2) Subject to subclause (5), within 3 working days of the transfer date the company must pay each minority shareholder the price for that shareholder's voting shares, in the manner specified by that shareholder.

(3) If the shareholder has specified that a cheque will be collected from the company by that shareholder, the cheque must be held ready for collection from that date.

(4) If the company fails to make a payment, or to make it available for collection, the company must pay interest to the shareholder from the due date to the date on which the payment is made, or is made available for collection, at the rate of 15% per annum, accruing daily and compounding monthly.

(5) If a share certificate has been issued in respect of voting shares held by a minority shareholder, no payment may be made to that minority shareholder until the minority shareholder delivers to the company—

(a) the share certificate; or

(b) evidence as to its loss or destruction and, if required, an indemnity in a form determined by the directors.

Exit rights

42 Application of exit rights

(1) Subject to subclause (2), this clause and clauses 43 to 48 apply to a shareholder (**acquirer**) who—

(a) acquires shares in the company or otherwise becomes interested in shares in the company (**acquisition**); and

(b) before the acquisition, was interested in less than 50% of the voting shares of the company; and
(c) following the acquisition, is interested in 50% or more of the voting shares of the company.
(2) A person may be exempted from the application of this clause and clauses 43 to 48, either with or without conditions, by a special resolution of holders of voting shares other than—
(a) voting shares in which that person is interested; and
(b) voting shares in which any other person is interested, where that other person is interested in not less than 50% of the company's voting shares.

43 Acquirer to give notice to company

An acquirer must, within 10 working days of first becoming a shareholder to whom this clause applies, give notice to the company—
(a) advising the company that the acquirer is a shareholder to whom this clause applies; and
(b) identifying the names of the holders of all voting shares in which the acquirer is interested, and the number of shares held by each of them in which the acquirer is interested; and
(c) offering to purchase all voting shares in which the acquirer is not interested (**remaining shares**) on the terms set out in clause 44.

44 Consideration for remaining shares

A notice given under clause 43 must be signed by the acquirer or, if the acquirer is a corporation, by a director of that corporation, and must—
(a) specify the highest price paid for any voting share in the company by the acquirer, or by any person holding shares in which the acquirer is interested, from the date 6 months before the date on which the acquirer first became a person to whom this clause applies up to the date of the notice; and
(b) if any shares in which the acquirer is interested were acquired during this period for a non-cash consideration, describe that consideration and state an assessment of the cash value to which that consideration corresponds; and
(c) specify the consideration offered by the acquirer for each remaining share, which may, but need not, be a cash consideration (**consideration**); and
(d) specify the date on which the acquirer will provide the consideration for any remaining shares in respect of which the offer is accepted, which must be not less than 20 working days nor more than 40 working days from the date on which the notice is given to the company (**transfer date**); and
(e) specify the rights of the holders of remaining shares under clause 47.

45 Independent report

A notice given under clause 43 must be accompanied by a report from an independent, appropriately qualified person previously approved by the company, confirming that the consideration offered is a fair and reasonable consideration for a share, without any discount or premium to reflect the size of the parcels of shares to be acquired or the circumstances of the acquisition.

46 Notice to holders of remaining shares

(1) Within 10 working days of receiving a notice under clause 43, the company must forward the notice to all holders of remaining shares.
(2) The notice under subclause (1) may, but need not, be accompanied by—
(a) additional information provided by the directors in relation to the offer:
(b) a recommendation by the directors as to whether or not the offer should be accepted.
(3) The company must also immediately give public notice of the notice given to shareholders.

47 Rights of holders of remaining shares

(1) A shareholder to whom a notice is given under clause 46—

(a) is not required to accept the offer:

(b) may accept the offer by notice in writing to the company within 20 working days of the date on which the notice was given to the shareholder.

(2) If a shareholder gives notice accepting an offer in accordance with subclause (1)(b), there is deemed to be a contract between the acquirer and the shareholder for the purchase by the acquirer of the remaining shares held by that shareholder—

(a) on the transfer date; and

(b) for the consideration.

48 When voting rights not to be exercised

(1) If a shareholder to whom this clause applies fails to give the notice required under clause 43 within the time specified in that clause, no voting rights may be exercised in respect of any shares in which that acquirer is interested until that notice has been given.

(2) If a person who is not a shareholder becomes interested in 40% or more of the voting shares of the company, no voting rights may be exercised in respect of any voting shares in which that person is interested unless that person—

(a) is exempted by a special resolution under clause 42(2); or

(b) undertakes to the company to make an offer as if that person were an acquirer, and complies with that undertaking.

Part 3
Directors

49 Number of directors

(1) The minimum number of directors is 2.

(2) The maximum number of directors is 10.

(3) The shareholders may, by ordinary resolution, vary the minimum or maximum number of directors of the company.

50 Appointment and removal of directors

A director may be appointed or removed by ordinary resolution passed at a meeting called for the purpose, or by a written resolution in accordance with clause 28(1).

51 Term of office

(1) The resolution appointing a director may specify the period for which the director is to hold office.

(2) On the expiry of any period specified in this manner, the director ceases to hold office unless reappointed.

52 When director vacates office

A director vacates office if he or she—

(a) is removed from office in accordance with clause 50; or

(b) ceases to hold office in accordance with clause 51; or

(c) resigns in accordance with clause 53; or

(d) becomes disqualified from being a director under section 85 of the Act; or

(e) dies; or

(f) is absent from 3 consecutive meetings of the directors without leave being granted by a resolution of the directors, and the directors resolve that that director has vacated office.

53 Resignation of director

(1) A director may resign by delivering a signed written notice of resignation to the registered office of the company.
(2) Subject to subclauses (3) and (4), the notice is effective when it is received at the registered office, or at any later time specified in the notice.
(3) If the company has only 1 director, that director may not resign—
(a) until that director has called a meeting of shareholders to receive notice of the resignation; or
(b) if the company has only 1 shareholder, until that director has given not less than 10 working days' notice of the resignation to that shareholder.
(4) A notice of resignation given by the sole director of the company does not take effect, despite its terms, until the earlier of the appointment of another director of the company or—
(a) the time and date for which the meeting of shareholders is called under subclause (3)(a); or
(b) if the company has only 1 shareholder, 10 working days after notice of the resignation has been given to that shareholder.

54 Casual vacancies

The directors may appoint any person to be a director to fill a casual vacancy until the next annual meeting of the company.

55 Notice of changes in directors

(1) The company must ensure that notice in the prescribed form of the following is delivered to the Registrar:
(a) a change in the directors of the company, whether as the result of a director ceasing to hold office or the appointment of a new director, or both:
(b) a change in the name or the residential address of a director of the company.
(2) In the case of the appointment of a new director, a consent by that person to act as a director, in the prescribed form, must also be delivered to the Registrar.

56 Powers and duties of directors

(1) Subject to section 50 of the Act (which relates to major transactions) the business and affairs of the company must be managed by, or under the direction or supervision of, the directors.
(2) The directors have all the powers necessary for managing, and for directing and supervising the management of, the business and affairs of the company.
(3) The directors may delegate any of their powers to a committee of directors, or to a director or employee.
(4) The directors must monitor, by means of reasonable methods properly used, the exercise of powers by any delegate.
(5) The provisions of these rules relating to proceedings of the directors also apply to proceedings of any committee of directors, except to the extent the directors determine otherwise.
(6) The directors have the duties set out in the Act, and, in particular,—
(a) each director must act in good faith and in a manner that the director believes to be in the interests of the company; and
(b) a director must not act, or agree to the company acting, in a manner that contravenes the Act or these rules.

57 Standard of care of directors

A director of the company, when exercising powers or performing duties as a director, must exercise the care, diligence, and skill that a reasonable person would exercise in the same circumstances, taking into account, but without limitation,—
(a) the nature of the company; and

(b) the nature of the decision; and
(c) the position of the director and the nature of the responsibilities undertaken by him or her.

58 Obligations of directors in connection with insolvency

(1) A director of the company must call a meeting of directors within 10 working days to consider whether the directors should appoint an administrator or liquidator, in accordance with section 71 of the Act, if the director—
(a) believes that the company is unable to pay its debts as they fall due; or
(b) is aware of matters that would put any reasonable person on inquiry as to whether the company is unable to pay its debts as they fall due.
(2) At a meeting called under section 71 of the Act the directors must consider whether to appoint an administrator or liquidator, or to continue to carry on the business of the company.

59 Interested directors

(1) A director must not exercise any power as a director in circumstances where that director is directly or indirectly materially interested in the exercise of that power unless—
(a) the Act expressly authorises the director to exercise the relevant power despite such an interest; or
(b) the director has reasonable grounds for believing that the company will satisfy the solvency test after that power is exercised, and either—
(i) these rules expressly authorise the director to exercise the relevant power despite such an interest, and the interest has been disclosed in accordance with clause 63(4); or
(ii) the matter in question has been approved by shareholders under section 51 of the Act, following disclosure of the nature and extent of the director's interest to all shareholders who are not otherwise aware of those matters.
(2) A transaction entered into by the company in which a director is directly or indirectly materially interested is voidable at the election of the company in accordance with section 111 of the Act.
(3) A transaction entered into by the company as the result of action taken by a director in breach of sections 65, 66, or 67 of the Act is voidable at the option of the company in accordance with section 112 of the Act.

60 Use and disclosure of company information

A director of the company who has information in his or her capacity as a director or employee of the company, being information that would not otherwise be available to him or her, must not disclose that information to any person, or make use of or act on the information, except—
(a) in the interests of the company; or
(b) as required by law; or
(c) if there are reasonable grounds for believing that the company will satisfy the solvency test after the director takes that action, and that action—
(i) is approved by all shareholders under section 51 of the Act; or
(ii) is authorised by any contract of employment entered into between that director and the company, the relevant terms of which have been disclosed in the interests register referred to in clause 63.

61 Indemnities and insurance for directors or employees

(1) Subject to section 74 of the Act, the company may provide an indemnity or purchase insurance for a director of the company or of a related company with the approval of—
(a) the directors; but no director may vote on a resolution concerning an indemnity or insurance to be provided for him or her; or

(b) shareholders by ordinary resolution; but no director may vote on a resolution concerning an indemnity or insurance to be provided for him or her; or
(c) all shareholders under section 51 of the Act.
(2) In subclause (1),—
director includes—
(a) a person who is liable under any of sections 65 to 71 of the Act by virtue of section 73 of the Act; and
(b) a former director
indemnify includes relieve or excuse from liability, whether before or after the liability arises; and **indemnity** has a corresponding meaning.

62 Remuneration of directors

Directors may receive remuneration and other benefits from the company with the approval of—
(a) the directors; but no director may vote on a resolution concerning remuneration or other benefits to be provided for him or her; or
(b) shareholders by ordinary resolution; but no director may vote on a resolution concerning remuneration or benefits to be received by him or her; or
(c) all shareholders under section 51 of the Act.

63 Disclosure of interests by directors

(1) The company must—
(a) maintain an interests register; and
(b) permit any director or shareholder to inspect the interests register as if sections 120 and 121 of the Act applied to the interests register.
(2) The annual report of the company under section 56 of the Act in respect of any accounting period must contain all entries made in the interests register in the course of that accounting period.
(3) The directors must enter in the interests register details of any—
(a) contract of employment to which clause 60(c) applies; and
(b) indemnity or insurance provided for a director under clause 61; and
(c) details of any remuneration or other benefits provided to directors under clause 62; and
(d) disclosure by a director under subclauses (4) or (5).
(4) A director who is in any way directly or indirectly materially interested in a transaction or proposed transaction with the company must, within 10 working days of becoming aware of that interest,—
(a) disclose that interest in writing to the directors; and
(b) ensure that details of that disclosure are entered in the interests register.
(5) A director may disclose to the other directors, and enter in the interests register, a general disclosure that the director is a director or employee or shareholder of another company, or is otherwise associated with another company or another person.
(6) Disclosure under subclause (5) is disclosure of the director's interest in any transaction entered into with that other company or person for the purposes of subclause (4).

64 Procedure at meetings of directors

(1) Clauses 65 to 74 set out the procedure to be followed at meetings of directors.
(2) A meeting of directors may determine its own procedure, to the extent that it is not governed by these rules.

65 Chairperson

(1) The directors may elect 1 of their number as chairperson of directors and may determine the period for which the chairperson is to hold office.
(2) If no chairperson is elected, or if at a meeting of the directors the chairperson is not present within 5 minutes after the time appointed for the commencement of the meeting, the directors present may choose 1 of their number to be the chairperson of the meeting.

66 Notice of meeting

(1) A director or, if requested by a director to do so, an employee of the company, may convene a meeting of directors by giving notice in accordance with this clause.
(2) Not less than 24 hours' notice of a meeting of directors must be given to every director who is in Niue, or who may readily be contacted outside Niue.
(3) An irregularity in the notice of a meeting is waived if all directors entitled to receive notice of the meeting attend the meeting without protest as to the irregularity, or if all directors entitled to receive notice of the meeting agree to the waiver.

67 Methods of holding meetings

A meeting of directors may be held either—
(a) by a number of the directors who constitute a quorum, being assembled together at the place, date, and time appointed for the meeting; or
(b) by means of audio, or audio and visual, communication by which all directors participating and constituting a quorum, may simultaneously hear each other throughout the meeting.

68 Quorum

(1) A quorum for a meeting of directors is a majority of the directors.
(2) No business may be transacted at a meeting of directors if a quorum is not present.

69 Voting

(1) Every director has 1 vote.
(2) The chairperson has a casting vote.
(3) A resolution of the directors is passed if it is agreed to by all directors present without dissent, or if a majority of the votes cast on it are in favour of it.
(4) A director present at a meeting of directors is presumed to have agreed to, and to have voted in favour of, a resolution of the directors unless he or she expressly dissents from or votes against the resolution at the meeting.

70 Minutes

The directors must ensure that minutes are kept of all proceedings at meetings of the directors.

71 Unanimous resolution

(1) A resolution in writing signed or assented to by all directors is as valid and effective as if it had been passed at a meeting of the directors duly convened and held.
(2) Any such resolution may consist of several documents (including fax or other similar means of communication) in like form, each signed or assented to by 1 or more directors.
(3) A copy of any such resolution must be entered in the minute book of the directors' proceedings.

72 Managing director and other executive directors

(1) The directors may, from time to time, appoint a director as managing director for such period and on such terms as they think fit.
(2) Subject to the terms of a managing director's appointment, the directors may, at any time, cancel the appointment of a director as managing director.
(3) A director who holds office as managing director ceases to hold office as managing director if he or she ceases to be a director of the company.

73 Delegation to managing director

(1) The directors may delegate to the managing director, subject to any conditions or restrictions that they consider appropriate, any of their powers that may be lawfully delegated.

(2) Any such delegation may at any time be withdrawn or varied by the directors.

(3) The delegation of a power of the directors to the managing director does not prevent the exercise of the power by the directors, unless the terms of the delegation expressly provide otherwise.

74 Remuneration of managing director and executive directors

(1) The managing director may be paid such remuneration as he or she may agree with the directors.

(2) A director (other than the managing director) who is employed by the company may be paid such remuneration as may be agreed between that director and the other directors.

(3) The remuneration referred to in subclauses (1) and (2) may be by way of salary, commission, participation in profits or any combination of these methods, or any other method of fixing remuneration.

Part 4

Company records

75 Company records

(1) The company must keep all the following documents at its registered office or at some other place notice of which has been given to the Registrar in accordance with section 119 of the Act:

(a) the rules of the company:

(b) minutes of all meetings and resolutions of shareholders within the last 7 years:

(c) minutes of all meetings and resolutions of directors and directors'committees within the last 7 years:

(d) the full names and residential and postal addresses of the current directors:

(e) copies of all written communications to all shareholders or all holders of the same class of shares during the last 7 years, including annual reports made under section 56 of the Act:

(f) copies of all financial statements required to be completed under section 130 of the Act for the last 7 completed accounting periods of the company:

(g) the accounting records required by section 129 of the Act for the current accounting period and for the last 7 completed accounting periods of the company:

(h) the share register.

(2) The references in subclause (1)(b), (c), and (e) to 7 years and the references in subclause (1)(f) and (g) to 7 completed accounting periods include any lesser periods that the Registrar may approve by notice in writing to the company, in accordance with section 117(2) of the Act.

(3) The interests register required to be kept under clause 63 must be—

(a) kept at the same place as the written communications to shareholders referred to in clause 75(1)(e); and

(b) kept in a form that complies with clause 76; and

(c) made available to shareholders in the same manner as records to which clause 76(2) applies.

76 Form of records

(1) The records of the company must be kept—

(a) in written form; or

(b) in a form or in a manner that allows the documents and information that comprise the records to be readily accessible so as to be usable for subsequent reference, and convertible into written form.

(2) The directors must ensure that adequate measures exist to—
(a) prevent the records being falsified; and
(b) detect any falsification of them.

77 Access to records

(1) The directors of the company are entitled to access to the company's records in accordance with section 120 of the Act.
(2) A shareholder of the company is entitled—
(a) to inspect the documents referred to in section 121 of the Act, in the manner specified in section 123 of the Act; and
(b) to require copies of or extracts from any document that he or she may inspect within 5 working days of making a request in writing for the copy or extract, on payment of any reasonable copying and administration fee prescribed by the company.
(3) The fee may be determined by any director, subject to any directions from the directors.

78 Documents to be sent to Registrar

In addition to the annual return required under section 124 of the Act, the company must send all the following documents to the Registrar under the Act:
(a) notice of the adoption of new rules by the company, or the alteration of the rules of the company, under section 14:
(b) notice of a change in the registered office of the company, under section 17 of the Act
(c) notice of the issue of shares by the company, under section 26 of the Act:
(d) notice of the acquisition by the company of its own shares, under section 31 of the Act:
(e) notice of the redemption of a share, under section 35 of the Act:
(f) notice of a change in the directors of the company, or of a change in the name or residential address or postal address of a director, under section 88 of the Act:
(g) notice of the making of an order under section 103 of the Act altering or adding to the rules of a company:
(h) notice of any place other than the registered office of the company where records are kept, or of any change in the place where records are kept, under section 119 of the Act:
(i) documents requested by the Registrar under the Act.

79 Documents to be sent to shareholders

In addition to the annual report required under section 56 of the Act, the company must send all the following documents to shareholders under the Act:
(a) notice of any repurchase of shares to which section 31(4) of the Act applies:
(b) notice of a written resolution approved under section 53 of the Act:
(c) financial statements required to be sent under section 130 of the Act:
(d) any written statement by an auditor under section 136 of the Act
(e) the report by the auditor under section 138 of the Act.

Part 5

Accounts and audit

80 Accounting records to be kept

(1) The directors of the company must cause accounting records to be kept that—
(a) correctly record and explain the transactions of the company; and
(b) will at any time enable the financial position of the company to be determined with reasonable accuracy; and
(c) will enable the directors to ensure that the financial statements of the company comply with section 130 of the Act; and

(d) will enable the financial statements of the company to be readily and properly audited.
(2) Without limiting subclause (1), the accounting records must contain—
(a) entries of money received and spent each day and the matters to which it relates; and
(b) a record of the assets and liabilities of the company; and
(c) if the company's business involves dealing in goods,—
(i) a record of goods bought and sold, and relevant invoices; and
(ii) a record of stock held at the end of the financial year together with records of any stock takings during the year; and
(d) if the company's business involves providing services, a record of services provided and relevant invoices.
(3) If the company sells goods or provides services for cash in the ordinary course of carrying on a retail business,—
(a) invoices need not be kept in respect of each retail transaction for the purposes of subclause (2); and
(b) a record of the total money received each day in respect of the sale of goods or provision of services, as the case may be, is sufficient to comply with subclause (2) in respect of those transactions.
(4) The accounting records must be kept—
(a) in a form permitted under clause 76; and
(b) at the registered office of the company, or any other place permitted under section 119 of the Act.

81 Financial statements to be prepared

(1) The directors must ensure that—
(a) within 4 months after the balance date of the company, financial statements that comply with subclause (2) are completed in relation to the company and that balance date; and (b) within 20 working days of the date on which the financial statements must be completed under paragraph (a), those financial statements are sent to all shareholders. This requirement may be satisfied by sending the financial statements to shareholders in an annual report, in accordance with section 56 of the Act.
(2) The financial statements of the company must—
(a) give a true and fair view of the matters to which they relate; and
(b) comply with any applicable regulations made under the Act; and
(c) be dated and signed on behalf of the directors by 2 directors of the company, or, if the company has only 1 director, by that director.
(3) The period between—
(a) the date of incorporation of the company and its first balance date; or
(b) any 2 balance dates of the company,— must not exceed 15 months.
(4) In this clause, **financial statements**, in relation to the company and a balance date, means—
(a) a statement of financial position for the entity as at the balance date; and
(b) in the case of—
(i) a company trading for profit, a statement of financial performance for the company in relation to the accounting period ending at the balance date; and
(ii) a company not trading for profit, an income and expenditure statement for the company in relation to the accounting period ending at the balance date; and
(c) if required by regulations made under the Act, a statement of cash flows for the company in relation to the accounting period ending on the balance date; and

(d) such other financial statements in relation to the company or any group of companies of which it is the holding company as may be required by regulations made under the Act; and
(e) any notes or documents giving information relating to the statement of financial position and other statements.

82 Appointment of auditor

(1) The company must appoint an auditor who is qualified to hold that office under section 135 of the Act to—
(a) audit the financial statements of the company in respect of an accounting period; and
(b) hold office until those financial statements have been audited in accordance with the Act or until he or she ceases to hold office.
(2) The company must appoint an auditor within 30 working days in the event of a vacancy in the office of auditor.
(3) An auditor ceases to hold office if he or she—
(a) resigns by delivering a written notice of resignation to the registered office of the company not less than 20 working days before the date on which the notice is expressed to be effective; or
(b) is replaced as auditor by an ordinary resolution appointing another person as auditor in his or her place, following notice to the auditor in accordance with section 133 of the Act; or
(c) becomes disqualified from being the auditor of the company; or
(d) becomes subject to a trustee order under section 501 of the Niue Act 1966, or an order of medical custody under section 602 of that Act; or
(e) dies.
(4) An auditor may be appointed—
(a) by ordinary resolution; or
(b) if the office of auditor is vacant, by the directors. If an auditor is appointed by the directors, the directors must, within 10 working days, give notice of the appointment to all shareholders.
(5) The fees payable to the auditor must be agreed between the auditor and the directors.

83 Auditor's attendance at shareholders' meeting

The directors must ensure that an auditor of the company—
(a) is permitted to attend a meeting of shareholders of the company; and
(b) receives the notices and communications that a shareholder is entitled to receive relating to meetings or resolutions of shareholders; and
(c) may be heard at a meeting of shareholders that he or she attends on any part of the business of the meeting that concerns him or her as auditor.

Part 6

Liquidation and removal from register

84 Resolution to appoint liquidator

(1) The shareholders may resolve to liquidate the company by special resolution.
(2) The directors may resolve to liquidate the company at a meeting called under section 71 of the Act, if they consider that the company is unable to meet its debts as they become due in the normal course of business.

85 Distribution of surplus assets

(1) The surplus assets of the company available for distribution to shareholders after all creditors of the company have been paid must be distributed in proportion to the number of shares held by each shareholder, subject to the terms of issue of any shares.
(2) The liquidator may, with the approval of a special resolution, distribute the surplus assets of the company among the shareholders in kind.

(3) For the purposes of subclause (2), the liquidator may—
(a) set such value as he or she considers fair on any property to be divided; and
(b) determine how the division will be carried out as between the shareholders or different classes of shareholders.

Part 7
Miscellaneous

86 Service of documents on shareholders

(1) A notice, statement, report, accounts, or other document to be sent to a shareholder who is a natural person may be—
(a) delivered to that person; or
(b) posted to that person's postal address; or
(c) faxed to a fax number used by that person for the transmission of documents.
(2) A notice, statement, report, accounts, or other document to be sent to a shareholder that is a company or an overseas company may be sent by any of the methods of serving documents referred to in section 342 or section 344 of the Act, as the case may be.

87 Interpretation

(1) In these rules, **Act** means the Companies Act 2005.
(2) Unless the context otherwise requires, any term or expression that is defined in the Act or any regulations made under the Act and used, but not defined, in these rules has the same meaning as in the Act or the regulations.
(3) For the purposes of these rules,—
(a) **voting share** means a share that confers on its holder the right to vote on a resolution to amend the rules;
(b) the percentage of voting shares held by any person is treated as equal to the percentage of votes that that person is entitled to cast on such a resolution.
(4) For the purposes of these rules, a person is **interested in a voting share** if that person—
(a) is a beneficial owner of the share; or
(b) has the power to exercise any right to vote attached to the share; or
(c) has the power to control the exercise of any right to vote attached to the share; or
(d) has the power to acquire or dispose of the share; or
(e) has the power to control the acquisition or disposition of the share by another person; or
(f) under, or by virtue of, any trust, agreement, arrangement or understanding relating to the share (whether or not that person is a party to it, and whether or not it is legally enforceable) may, at any time, have the power to—
(i) exercise any right to vote attached to the share; or
(ii) control the exercise of any right to vote attached to the share; or
(iii) acquire or dispose of, the share; or
(iv) control the acquisition or disposition of the share by another person.
(5) A person who has, or may have, a power referred to in subclause (4)(b) to (f) is interested in a share, regardless of whether the power is—
(a) express or implied:
(b) direct or indirect:
(c) legally enforceable or not:
(d) related to a particular share or not:
(e) subject to restraint or restriction or is capable of being made subject to restraint or restriction:
(f) exercisable presently or in the future:

(g) exercisable only on the fulfilment of a condition:
(h) exercisable alone or jointly with another person or persons.