

**IN THE SUPREME COURT OF PAKISTAN**

(Original Jurisdiction)

**Present:**

Justice Qazi Faez Isa, CJ  
Justice Sardar Tariq Masood  
Justice Ijaz ul Ahsan  
Justice Syed Mansoor Ali Shah  
Justice Munib Akhtar  
Justice Yahya Afridi  
Justice Amin-ud-Din Khan  
Justice Sayyed Mazahar Ali Akbar Naqvi  
Justice Jamal Khan Mandokhail  
Justice Muhammad Ali Mazhar  
Justice Ayesha A. Malik  
Justice Athar Minallah  
Justice Syed Hasan Azhar Rizvi  
Justice Shahid Waheed  
Justice Musarrat Hilali

**Constitution Petitions No. 6 to 8, 10 to 12, 18 to 20 and 33 of 2023**

*[Challenging the vires of the Supreme Court (Practice and Procedure) Act, 2023]*

Raja Amer Khan and another  
(in Const. P. 6/2023)

Chaudhry Ghulam Hussain and another  
(in Const. P. 7/2023)

Muhammad Shafay Munir, Advocate High Court, Lahore  
(in Const. P. 8/2023)

Zaman Khan Vardag, Advocate Supreme Court, Lahore  
(in Const. P. 10/2023)

Ghulam Mohiuddin  
(in Const. P. 11/2023)

Muhammad Azhar Siddique, ASC  
(in Const. P. 12/2023)

Muhammad Shahid Rana, Advocate  
(in Const. P. 18/2023)

Mudassar Hassan Jura  
(in Const. P. 19/2023)

Niazullah Khan Niazi  
(in Const. P. 20/2023)

Umar Sadiq  
(in Const. P. 33/2023)

... Petitioners

Versus

Federation of Pakistan through the Secretary,  
Law and Justice Division, Ministry of Law and  
Justice, Islamabad and others  
(in all cases).

... Respondents

For the Petitioners:

- (in Const. P. 6/2023): Mr. Imtiaz Rashid Siddiqui, ASC  
Mr. Tariq Aziz, AOR
- (in Const. Ps. 6, 7 & 12/23): Khwaja Tariq A. Rahim, Sr. ASC  
assisted by Mr. Hashim and Mr. Hissam  
Mr. Sabeel, Advocates
- (in Const. P. 8/2023): Mr. Muhammad Hussain Choutya, ASC  
Mrs. Kausar Iqbal Bhatti, AOR.
- (in Const. P. 10/2023): In-person
- (in Const. P. 11/2023): In-person
- (in Const. P. 18/2023): In-person
- (in Const. P. 19/2023): Mr. Hassan Irfan Khan, ASC  
assisted by Mr. Saqib Asghar, Advocate.
- (in Const. P. 20/2023): Mr. Muhammad Ikram Ch., Sr. ASC  
assisted by Messrs Sohail Akhtar, Najmul  
Hassan and Malik Haroon, Advocates.
- (in Const. P. 33/2023): Dr. Adnan Khan, ASC.

On Court Notice:

- For the Federation: Mr. Mansoor Usman Awan,  
Attorney-General for Pakistan and  
Ch. Aamir Rehman, Addl. AGP  
assisted by Ms. Maryam A. Abbasi,  
Maryam Rashid,  
Ahmed-ur-Rehman and  
Saad Javid Satti, Advocates.
- For PML (N): Mr. Salahuddin Ahmed, ASC.
- For PPPP: Nemo
- For PTI: Mr. Uzair Karamat Bhandari, ASC  
Assisted by Mr. Ali Uzair Bhandari and  
Mr. Awais Asif Ali, Advocates.
- For PML(Q): Mr. Zahid F. Ebrahim, ASC.
- For JUI(P): Mr. Kamran Murtaza, Sr. ASC.

For Jamat-e-Islami: Mr. Ghulam Mohyuddin Malik, ASC and Mr. Saifullah Gondal, Member Central Legal Committee, Jamat-e-Islami.

For MQM: Mr. Faisal Siddiqui, ASC assisted by Mr. M. Usman Mumtaz and Ms. Sheza Ahmed, Advocates.

For SCBAP: Mr. Abid S. Zuberi, ASC, Mr. Muqtadir Akhtar Shabbir, ASC, Malik Shakeel-ur-Rehman, ASC Ms. Bushra Qamar, ASC, assisted by Ms. Amna Khalili, Advocate.

For PBC: Mr. Haroon-ur-Rasheed, ASC and Mr. Hassan Raza Pasha, ASC. Syed Rifaqat Hussain Shah, AOR.

Dates of Hearing: 18.9.2023, 3.10.2023, 9.10.2023 10.10.2023 and 11.10.2023.

### **JUDGMENT**

**Qazi Faez Isa, CJ.** These petitions, which were filed directly under Article 184(3) of the Constitution of the Islamic Republic of Pakistan (**‘the Constitution’**), were disposed of on 11 October 2023, as under:

For reasons to be recorded later these petitions are decided as under:

1. Subject to paras 2 and 3 below, by a majority of 10 to 5 (Justice Ijaz ul Ahsan, Justice Munib Akhtar, Justice Sayyed Mazahar Ali Akbar Naqvi, Justice Ayesha A. Malik and Justice Shahid Waheed dissenting) the Supreme Court (Practice and Procedure) Act, 2023 (**‘the Act’**) is sustained as being in accordance with the Constitution of the Islamic Republic of Pakistan (**‘the Constitution’**) and to this extent the petitions are dismissed.

2. By a majority of 9 to 6 (Justice Ijaz ul Ahsan, Justice Munib Akhtar, Justice Yahya Afridi, Justice Sayyed Mazahar Ali Akbar Naqvi, Justice Ayesha A. Malik and Justice Shahid Waheed dissenting) sub-section (1) of section 5 of the Act (granting a right of appeal prospectively) is declared to be in accordance with the Constitution and to this extent the petitions are dismissed.

3. By a majority of 8 to 7 (Chief Justice Qazi Faez Isa, Justice Sardar Tariq Masood, Justice Syed Mansoor Ali Shah, Justice Amin-ud-Din Khan, Justice Jamal Khan Mandokhail, Justice Athar Minallah and Justice Musarrat Hilali dissenting) sub-section (2) of section 5 of the Act (granting a right of appeal retrospectively) is declared to be *ultra vires* the Constitution and to this extent the petitions are allowed.’

2. Constitution Petition Nos. 6 to 8 of 2023 were filed when a bill was presented in the National Assembly, titled Supreme Court (Practice and Procedure) Bill, 2023 (**the Bill**). A smaller Bench of this Court<sup>1</sup> had heard these and other connected petitions and passed order dated 13 April 2023, which concluded as under:

‘14. This brings us to the question whether it would be appropriate to make any interim order in relation to the present matter. In *Dr. Mobashir Hassan and others v. Federation of Pakistan and others* PLD 2010 SC 265 the Full Court (17 member Bench) observed (at para 164, pg. 451) that “ordinarily the provisions of a law cannot be suspended because this Court can only suspend a particular order, judgment or action, etc....” (emphasis supplied). In our view, the facts and circumstances presented here are extraordinary both in import and effect. Prima facie the contentions raised disclose that there is a substantial, immediate and direct interference with the independence of the judiciary in the form of multiple intrusions, in the guise of regulating the practice and procedure of this Court and conferring upon it a jurisdiction that appears not to be permissible under any constitutional provision. Such intermeddling in the functioning of the Court, even on the most tentative assessment, will commence as soon as the Bill becomes the Act. Accordingly, in our view an interim measure ought to be put in place, in the nature of an anticipatory injunction. The making of such an injunction, to prevent imminent apprehended danger that is irreparable, is an appropriate remedy, recognized in our jurisprudence and other jurisdictions that follow the same legal principles and laws. It is therefore hereby directed and ordered as follows. The moment that the Bill receives the assent of the President or (as the case may be) it is deemed that such assent has been given, then from that very moment onwards and till further orders, the Act that comes into being shall not have, take or be given any effect nor be acted upon in any manner.

15. Notices be issued to the respondents in all three petitions. Notice also to the Attorney General for Pakistan under O. 27A CPC. Notices also to the Supreme Court Bar Association through its President and the Pakistan Bar Council through its Vice Chairman. Notices also be issued to the following political parties who may, if they so desire, appear through duly instructed counsel: Pakistan Muslim League (N) (PML (N)), Pakistan Peoples Party Parliamentarians (PPPP), Pakistan Tehreek e Insaf (PTI), Jamiat Ulema e Islam (JUI), Jamaat e Islami (JI), Awami National Party (ANP), Muttahida Qaumi Movement (MQM), Balochistan Awami Party (BAP) and Pakistan Muslim League (Q) (PML (Q)).

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<sup>1</sup> Comprising of the Chief Justice and seven Judges.

16. To come up on **02.05.2023 at 11:30 a.m.**'

3. Subsequently, the Bill became law on 21 April 2023, that is, the Supreme Court (Practice and Procedure) Act, 2023<sup>2</sup> (**the Act**). On 2 May 2023 it was ordered that the aforesaid, *'injunction continues and shall continue to be in force against the Act till further orders.'* Hearing took place on 8 May 2023, 1 June 2023 and 8 June 2023, and on 8 June 2023 it was ordered that these cases be listed for hearing in July 2023. However, the petitions were not fixed in July nor in August 2023.

4. The Bench which had earlier heard these petitions was headed by the former Chief Justice of Pakistan, Justice Umar Ata Bandial, who retired on 16 September 2023. The senior most Judge of the Supreme Court<sup>3</sup> took oath as Chief Justice of Pakistan on Sunday, 17 September 2023. A number of applications were filed<sup>4</sup> requesting that a Full Court be constituted to hear the petitions. On Monday, 18 September 2023 the Chief Justice and all other Judges of the Supreme Court<sup>5</sup> proceeded to hear the petitions, and passed the following order on this first date of hearing:

'2. The Chief Justice stated that in view of the challenge thrown to the Supreme Court (Practice & Procedure) Act, 2023 and as the matter is pending adjudication he will be consulting with his two senior colleagues, namely, Justice Sardar Tariq Masood and Justice Ijaz ul Ahsan with regard to the constitution of Benches and fixation of cases to which both of them have agreed.'

5. The language of the Bill and the Act is identical. The Act is reproduced hereunder:

THE SUPREME COURT (PRACTICE AND PROCEDURE)  
ACT, 2023  
Act No. XVII of 2023

21st April, 2023

An Act to provide for certain practices and procedures of the Supreme Court.

WHEREAS Article 191 of the Constitution provides that subject to the Constitution and law, the Supreme Court may make rules regulating the practice and procedure of the Supreme Court;

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<sup>2</sup> Gazette of Pakistan, Extraordinary, dated 21 April 2023.

<sup>3</sup> Justice Qazi Faez Isa.

<sup>4</sup> CMAs No. 3166, 3199 and 4207/2023.

<sup>5</sup> Comprising of the Chief Justice and fourteen Judges.

AND WHEREAS Article 10A, of the Constitution mandated right to fair trial and due process, Article 4 of the Constitution guarantees treatment in accordance with law, Articles 25 of the Constitution prohibits discriminatory treatment and right of appeal is a universal fundamental principle of jurisprudence and Islam guarantees right of appeal, therefore, pursuant of Article 175(2) read with Article 191 of the Constitution this law is being enacted;

AND WHEREAS it is expedient to make a law providing for certain practices and procedures of the Supreme Court.

It is hereby enacted as follows:—

**1. Short title and commencement.**—(1) This Act shall be called the Supreme Court (Practice and Procedure) Act, 2023.

(2) It shall come into force at once.

**2. Constitution of Benches.**—(1) Every cause, appeal or matter before the Supreme Court shall be heard and disposed of by a Bench constituted by the Committee comprising the Chief Justice of Pakistan and two next most senior Judges, in order of seniority.

(2) Soon after commencement of this Act, the Committee constituted under sub-section (1) shall hold its first meeting to determine its procedure, including for holding meetings and constitution of Benches etc.:

Provided that, till such time the procedure is determined under this sub-section, the meeting of the Committee for the purposes of sub-section (1) shall be convened by the Chief Justice or other two members of the Committee, as the case may be.

(3) The decisions of the Committee shall be by majority.

**3. Exercise of original jurisdiction by the Supreme Court.**— Any matter invoking exercise of original jurisdiction under clause (3) of Article 184 of the Constitution shall be first placed before the Committee constituted under section 2 for examination and if the Committee is of the view that a question of public importance with reference to enforcement of any of the Fundamental Rights conferred by Chapter I of Part II of the Constitution is involved, it shall constitute a Bench comprising not less than three Judges of the Supreme Court of Pakistan which may also include the members of the Committee, for adjudication of the matter.

**4. Interpretation of the Constitution.**—In the matters where interpretation of the constitutional provision is involved, Committee shall constitute a Bench comprising not less than five Judges of the Supreme Court.

**5. Appeal.**—(1) An appeal shall lie within thirty days from an order of a Bench exercising jurisdiction under clause (3) of Article 184 of the Constitution to a larger Bench of the Supreme Court and such appeal shall, within a period not exceeding fourteen days, be fixed for hearing.

(2) The right of appeal under sub-section (1) shall also be available to an aggrieved person against whom an order has been made under clause (3) of Article 184 of the Constitution, prior to the commencement of this Act:

Provided that the appeal under this sub-section shall be filed within thirty days of the commencement of this Act.

**6. Right to appoint counsel of choice.**—For filing a review application under Article 188 of the Constitution, a party shall have the right to appoint counsel of its choice.

*Explanation:* For the purpose of this section, ‘counsel’ shall mean an Advocate of the Supreme Court.

**7. Application for fixation of urgent matters.**—An application pleading urgency or seeking interim relief, filed in a cause, appeal or matter, shall be fixed for hearing within fourteen days from the date of its filing.

**8. Act to override other laws etc.**—The provisions of this Act shall have effect notwithstanding anything contained in any other law, rules or regulations for the time being in force or judgement of any Court including the Supreme Court and a High Court.’

6. The learned counsel representing the petitioners, and those representing themselves, submitted that:

- (i) The Act had seriously undermined the independence of the judiciary;
- (ii) Article 142(a) empowered the Parliament to make laws with respect to any matter in the Federal Legislative List in the Fourth Schedule to the Constitution, which did not empower Parliament to enact the Act;
- (iii) None of the entries in the Federal Legislative List enable Parliament to make any law pertaining to the *practice* and *procedure* of the Supreme Court;

- (iv) The power to enact the *practice* and *procedure* of the Supreme Court lay within the exclusive domain of the Supreme Court's rule making powers stipulated in Article 191 of the Constitution;
- (v) In addition to the Act enacting the *practice* and *procedure* it also provided for an appeal under Article 184(3) of the Constitution, which was neither a matter of *practice* nor of *procedure*;
- (vi) Whenever the Constitution provides for an appeal or vests appellate/review jurisdiction it is mentioned in the Constitution, as in: Article 63A(5) (against a decision of Election Commission), 185 (appellate jurisdiction), 188 (review jurisdiction), 203F (appeal against the decision of Federal Shariat Court) and 212(3) (appeal against decision of Administrative Court or Tribunal);
- (vii) The Act contravenes Article 4 of the Constitution which mandates that individual rights are to be dealt with in accordance with law;
- (viii) The Act violates the Fundamental Rights prescribed in Articles 4, 9, 10 and 10A of the Constitution;
- (ix) The Act contravenes Article 175(2) of the Constitution therefore Parliament could not enact it;
- (x) The Act micro manages the affairs of the Supreme Court and thus undermines the independence of the judiciary;
- (xi) The Act effectively abolishes the powers hitherto before vesting in the Chief Justice of Pakistan, which adversely effects the independence of the judiciary; and
- (xii) It is long established practice/convention that the Chief Justice of Pakistan is the *Master of the Roster* and the Committee constituted under section 2 of the Act, which includes the next two senior Judges, with regard to fixation of cases has rendered ineffective the *Master of the Roster*.

The learned Mr. Adnan Khan, who represents the petitioner in CP No. 33/2023, states that the petitioner does not challenge the Act to the extent it allows a change of counsel when a review petition is filed.

7. Notices had been issued to political parties. The learned Mr. Zahid Ebrahim represented the Pakistan Muslim League-Quaid (**PML-Q**), and filed a concise statement<sup>6</sup> supporting the Act and submitted that:

- (i) Parliament has the right to legislate matters pertaining to the *practice* and *procedure* of the Supreme Court under Article 191 of the Constitution, reproduced hereunder:

‘Subject to the Constitution and law, the Supreme Court may make rules regulating the practice and procedure of the Court.’

- (ii) Consolidation of power in the hands of one fallible individual, as opposed to three, under section 2(1) of the Act, undermines the independence of the judiciary and the rule of law and the enforcement of Fundamental Rights of *fair trial* and *due process* as provided in Article 10A of the Constitution;
- (iii) The Act harnesses the unstructured discretion hitherto before exercised by Chief Justices in exercising jurisdiction under Article 184(3) of the Constitution, and particularly when the pre-requisites thereof – *question of public importance with reference to the enforcement of any of the Fundamental Rights* – were disregarded;
- (iv) Section 4 of the Act which mandates that a minimum of five Judges of the Supreme Court shall hear cases requiring *interpretation of the Constitution* lends greater legitimacy and credibility to the decisions of the Supreme Court;
- (v) If by a decision of the Supreme Court in the exercise of jurisdiction under Article 184(3) of the Constitution a person is aggrieved, section 5 of the Act grants an appeal to *an aggrieved person against whom an order has been made* to a larger Bench

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<sup>6</sup> CMA No. 3991/2023.

of the Supreme Court, which adheres to Article 10A of the Constitution and to the basic concepts of justice the world over, and to the injunctions of Islam;

- (vi) To seek the review of a judgment of the Supreme Court is a right granted by the Constitution in Article 188, which does not restrict its filing by the same counsel, which restriction the Supreme Court Rules, 1980 (**'the Rules'**) had imposed and section 6 of the Act redresses this and brings the Rules to conform to the Constitution;
- (vii) To have an *application pleading urgency fixed within fourteen days*, which is what section 7 of the Act prescribes, accords with the principles of good administration of justice; and
- (viii) Parliament was constitutionally competent to enact the Act in exercise of its constitutional power under Article 142(a) of the Constitution read with entries 55 and 58 and Article 191 of the Constitution.

8. The Pakistan Muslim League-Nawaz (**'PML-N'**) was represented by the learned Mr. Salahuddin Ahmed who adopted the submissions of learned Mr. Zahid Ebrahim and added that:

- (i) The Act neither challenges nor undermines the authority or power of the Supreme Court, instead it confirms and strengthens it;
- (ii) The Act checks/controls the arbitrary powers exercised by Chief Justices which now better adheres to Article 176 of the Constitution which prescribes that the Chief Justice alone does not constitute the Supreme Court, but that it consists of the *Chief Justice... and so many other Judges as may be determined by Act of Parliament*; and
- (iii) The Constitution in Article 67 does not permit *law* to regulate the practice/procedure but specifically permits laws to be made with regard to *practice and procedure* of the Supreme Court in Article 191 of the Constitution, just as Article 202 of the

Constitution permits the *practice* and *procedure* of a High Court to be regulated by law.

9. The Muttahida Qaumi Movement (**'MQM'**) was represented by the learned Mr. Faisal Siddiqui, who while adopting the submissions of learned Messrs Ibrahim and Ahmed elaborated thereon most skillfully and comprehensively. He added that Order XI of the Rules specifically recognizes that the constitution of Benches may be regulated *by law*.

10. The learned Attorney-General for Pakistan (**'AG'**) filed concise statements<sup>7</sup> on behalf of the Federation of Pakistan and in addition to reiterating the submissions of learned Messrs Zahid Ebrahim, Salahuddin Ahmed and Faisal Siddiqui, stated that:

- (i) The petitions filed under Article 184(3) of the Constitution, challenging the Bill/Act, are not maintainable because they are not in respect of a *question of public importance with reference to the enforcement of any of the Fundamental Rights*;
- (ii) The *Master of the Roster* concept is alien to the Constitution, and if it is considered to be a convention it cannot prevail over the text of the Constitution;
- (iii) Article 8(1) of the Constitution only recognizes (and endorses) abiding by *any law or any custom or usage having the force of law*, and conventions are not included therein;
- (iv) The Supreme Court has complete power to interpret laws, and its decisions are *binding on all other courts in Pakistan* as per Article 189, but it cannot undermine Parliament's power to legislate, unless the law made by Parliament is unconstitutional or violates any of the Fundamental Rights which is not the case in enacting the Act;
- (v) Jurisdiction is conferred on courts *by the Constitution or by or under any law*, as stipulated under Article 175(2) of the Constitution, therefore, if Parliament grants a right of appeal by section 5 of the Act against judgments of the Supreme Court

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<sup>7</sup> CMAs No. 3160, 7936 and 8303/2023.

passed under Article 184(3), it is in conformity with the Constitution; and

- (vi) Granting a right of appeal to a larger Bench of the Supreme Court does not diminish or impair the power, authority or jurisdiction of the Supreme Court.

11. The Jamaat-e-Ulema Islam (**JUI-F**) represented by the learned Mr. Kamran Murtaza endorsed the Act and stated that it accords fully with the Constitution and adopted the submissions made by learned Messrs Zahid Ebrahim, Salahuddin Ahmed, Faisal Siddiqui and the AG.

12. The Pakistan Bar Council had filed an application<sup>8</sup> seeking constitution of a full court and placed on record a number of press releases issued by it expressing concerns regarding the conduct and demeanour of some Judges who appeared not to have come across as being neutral and impartial, and that Judges should not be perceived as *favouring any political party*. The representatives of the Pakistan Bar Council stated that the Act was in accordance with the Constitution, and unless an act of Parliament is demonstrably unconstitutional it should not be interfered with.

13. The learned counsel for both sides also referred to a very large number of precedents which for the sake of brevity are not mentioned, however, quite a few find mention hereunder.

14. These petitions were filed under Article 184(3) of the Constitution, which stipulates that, *'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 1 of Part II is involved, have the power to make an order of the nature mentioned in the said Article.'* The referred to *said Article* is Article 199 of the Constitution.

15. The first petition (CP No. 6 of 2023) was filed by two Lahore-based lawyers who were represented by learned Messrs Khawaja Ahmad Tariq Rahim and Imtiaz Rashid Siddiqui. The Office of the Supreme Court had noted five legal objections on the filing of the petition in the Supreme Court, the first two of which are reproduced hereunder:

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<sup>8</sup> CMA No. 4207/2023.

‘a. That the petitioners have not pointed out as to what questions of public importance in the instant case are involved with reference to enforcement of any of the Fundamental Rights guaranteed under the Constitution, so as to directly invoke jurisdiction of the Supreme Court under Article 184(3) of the Constitution.’

‘b. That ingredients for invoking extra ordinary jurisdiction of this Court under Article 184(3) of the Constitution have not been satisfied.’

An eight-member Bench of this Court proceeded to hear these petitions, but did not attend to the office objections, nor whether the petitions were maintainable under Article 184(3) of the Constitution. Another three petitions (Constitutional Petitions No. 10 to 12 of 2023) were filed, seeking the same relief, and when all six petitions came up for hearing on 2 May 2023, it was ordered ‘*That injunction continues and shall continue to be enforced against the Act till further orders*’.

16. On 21 April 2023 the Bill became the Act. Section 2(1) of the Act requires that cases *be heard and disposed of by a bench constituted by the Committee comprising the Chief Justice of Pakistan and two most senior judges, in order of seniority*, however, this provision was disregarded.

17. The Act comprises of only eight sections as under:

- Section 1 states its name and that *it shall come into force at once*.
- Section 2 constitutes a *Committee comprising of the Chief Justice of Pakistan and two next most senior Judges (**the Committee**)* which shall decide *by majority* the constitution of Benches for hearing of cases.
- Section 3 stipulates that when the original Jurisdiction of the Supreme Court, under Article 184(3) of the Constitution, is involved the Committee will first ascertain if it is a matter of public importance requiring enforcement of Fundamental Rights.
- Section 4 stipulates that wherever the interpretation of a constitutional provision is involved the case shall be heard by not less than five judges of the Supreme Court.
- Section 5 provides an appeal to a person *aggrieved* by the Supreme Court’s decision under Article 184(3).

- Section 6 provides the party *the right to appoint counsel of its choice* when seeking review under Article 188 of the Constitution, of a decision.
- Section 7 requires that urgent applications *shall be fixed for hearing within fourteen days from the date of its filing.*
- Section 8 is in the nature of a *non obstante* clause.

18. There appears to be nothing unconstitutional, illegal or objectionable in the Act on a plain reading of these provisions. The matter could have been decided in the first hearing. However, on the very first day of hearing stay was granted, while the proposed law was at the bill stage, and thereafter the stay was extended. The learned counsel spent many hours propositioning that the independence of the Judiciary had come under imminent collapse, and that the constitutional structure as it exists would develop fissures and furthermore the position of the Chief Justice as the *Master of the Roster* would become redundant. The matter was heard by us at great length. Therefore, let us begin by examining the scheme of the Constitution with regard to the Judicature and its jurisdiction.

19. The Constitution establishes the Judicature.<sup>9</sup> It stipulates that, ‘*No court shall have any jurisdiction save as is or may be conferred on it by the Constitution or by or under any law.*’<sup>10</sup> The Constitution does not bestow unlimited jurisdiction on the Supreme Court, let alone on its Chief Justice. The Constitution confers the following jurisdictions on the Supreme Court: (1) *original jurisdiction*,<sup>11</sup> (2) *appellate jurisdiction*,<sup>12</sup> (3) *advisory jurisdiction*,<sup>13</sup> (4) *power to transfer cases jurisdiction*,<sup>14</sup> (5) *review jurisdiction*,<sup>15</sup> (6) *contempt jurisdiction*<sup>16</sup> and (7) *appellate jurisdiction with regard to decisions of administrative courts and tribunals*.<sup>17</sup> The Judiciary has the responsibility to decide cases in accordance with the Constitution and the law,<sup>18</sup> by applying due process and providing a *fair trial*<sup>19</sup>. Every Judge before entering office is required to take an oath which also provides

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<sup>9</sup> Constitution of the Islamic Republic of Pakistan, Part VII, Articles 175 to 212.

<sup>10</sup> *Ibid.*, Article 175(2).

<sup>11</sup> *Ibid.*, Article 184.

<sup>12</sup> *Ibid.*, Article 185.

<sup>13</sup> *Ibid.*, Article 186.

<sup>14</sup> *Ibid.*, Article 186A.

<sup>15</sup> *Ibid.*, Article 188.

<sup>16</sup> *Ibid.*, Article 204.

<sup>17</sup> *Ibid.*, Article 212(3).

<sup>18</sup> *Ibid.*, Article 4(1).

<sup>19</sup> *Ibid.*, Article 10A.

that: ‘I will discharge my duties, and perform my functions, honestly, to the best of my ability, faithfully in accordance with the Constitution of the Islamic Republic of Pakistan and the **law**’ (emphasis added), and also swears an oath to ‘preserve, protect and defend the Constitution’.

20. The Supreme Court comprises of the Chief Justice and all the Judges of the Supreme Court. The Constitution does not grant to the Chief Justice power to decide cases unilaterally and arbitrarily. The Chief Justice cannot substitute his wisdom with that of the Constitution. Nor can the Chief Justice’s opinion prevail over that of the Judges of the Supreme Court. And, the term ‘*Master of the Roster*’ is not mentioned in the Constitution, in any law or even in the Rules, let alone stating therein that the Chief Justice, is the *Master of the Roster* and empowered to act completely in his discretion.

21. The word *master* is offensive in a constitutional dispensation founded on democracy. *Master* also connotes servitude, the extreme form of which is slavery which is prohibited by the Constitution.<sup>20</sup> Islam establishes the principle of equality, and the Constitution does not permit transgressing the Injunctions of Islam,<sup>21</sup> the State religion of Pakistan.<sup>22</sup> The opening words of the Constitution are the most beautiful names of the Creator, *Ar-Rahman* (the most Beneficent) and *Ar-Rahim* (the most Merciful). It proceeds by recognising that, ‘*sovereignty over the entire Universe belongs to Almighty Allah alone*’ and that the exercise of authority is a *sacred trust*.<sup>23</sup> The only servitude the Constitution (and Islam) envisages is to the Creator.

22. Servitude also negates consultation. The Holy Qur’an mandates, ‘*Do that which is in agreement amongst the people*’.<sup>24</sup> Qur’anic exegetes<sup>25</sup> are unanimous in the interpretation of this verse, and say that consultation is obligatory in respect of all matters pertaining to more than one person. Because: (a) no one should impose their will on others, (b) imposing one’s will on others either means that one does not give importance to others or

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<sup>20</sup> *Ibid.*, Article 11(1).

<sup>21</sup> *Ibid.*, Article 227.

<sup>22</sup> *Ibid.*, Article 2.

<sup>23</sup> *Ibid.*, Preamble/Objectives Resolution, which is now a, ‘*substantive part of the Constitution and shall have effect accordingly*’ as stipulated in Article 2A.

<sup>24</sup> Al Qur’an, surah *Ash-Shura* (42) verse 38.

<sup>25</sup> To cite just two examples, the Pakistani Islamic scholar Abul A’la Maududi (1903-1979) in his *Tafhim Al-Qur’an* (vol. 4, pp. 508-510) and the great Qur’anic exegete and hadith scholar (*muhaddith*) of Cordoba, Spain Abu Abdullah Muhammad bin Ahmad al-Qurtabi (1214-1273) in his *Al-Jami li-Ahkam Al-Qur’an* (vol. 18, pp. 586-588).

that one deems oneself to be more intelligent, both of which are morally reprehensible and (c) deciding an issue that pertains to the people is a serious thing and one should fear Allah. And the following principles may be derived from the said verse: (1) all requisite information be provided, (2) appointments should not be made on the basis of fear or favour, (3) leaders should seek advice from advisors, (4) advisors must give their honest and well considered opinion and (5) matters should preferably be resolved consensually, failing which through majority opinion.

23. History stands witness to the fact that when power is concentrated in an individual, disastrous consequences invariably follow. Irreparable damage is caused to the Judiciary and to the people of Pakistan when the legitimacy, integrity and credibility of the Judiciary is undermined. If the people lose their trust in the Judiciary, it will render decisions made by it mere words on paper, without credibility and moral authority. The surest way for this to happen is when cases are not decided in accordance with the Constitution.

24. On behalf of the petitioners it was contended that to discard the *Master of the Roster* concept would negate *stare decisis* (Latin for 'to stand by things decided'), a concept that requires judicial precedents be followed. The House of Lords of the United Kingdom summed up the principle of *stare decisis* thus:

*'... a decision of this House once given upon a point of law is conclusive upon this House afterwards, and that it is impossible to raise that question again as if it was res integra and could be reargued, and so the House be asked to reverse its own decision. That is a principle which has been, I believe, without any real decision to the contrary, established now for some centuries'*

*'Under these circumstances it appears to me that your Lordships would do well to act upon that which has been universally assumed in the profession, so far as I know, to be the principle, namely, that a decision of this House upon a question of law is conclusive, and that nothing but an Act of Parliament can set right that which is alleged to be wrong in a judgment of this House.'*<sup>26</sup>

However, even the originators of the principle of *stare decisis*, in the country without a written constitution, maintained that an Act of Parliament would prevail over a decision of the House of Lords. However,

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<sup>26</sup> *London St. Tramways Co. v. London County Council* [1898], A.C. 375.

Pakistan has a written Constitution and the Constitution stipulates that the decisions of the Supreme Court are binding on all *other courts*,<sup>27</sup> but not on the Supreme Court itself, however, decisions of larger Benches prevail over those of smaller ones.

25. A *Practice Statement* was issued by the House of Lords, on behalf of all the Judges, justifying deviation from past precedent when the interest of justice requires it:

*'Their lordships regard the use of precedent as an indispensable foundation upon which to decide what is the law and its application to individual cases. It provides at least some degree of certainty upon which individuals can rely in the conduct of their affairs, as well as a basis for orderly development of legal rules.*

*Their lordships nevertheless recognise that too rigid adherence to precedent may lead to injustice in a particular case and also unduly restrict the proper development of the law. They propose therefore to modify their present practice and, while treating formal decisions of this House as normally binding, to depart from a previous decision when it appears right to do so.'*<sup>28</sup>

26. It was also contended on behalf of the petitioners that the *Master of the Roster* is an established convention and has to be given effect to. Therefore, we should first understand what constitutes legal *conventions* in the land of their birth, that is, in England. A. V. Dicey in the *Law of the Constitution*<sup>29</sup> made a distinction between laws and conventions and their enforceability and unenforceability by the courts. And, O. Hood Philips in his *Constitutional and Administrative Law* explained that 'conventions' 'refers to rules of political practice which are regarded as binding by those whom they concern especially the sovereign and statesmen – but which would not be enforced by the courts if the matter came before them'. In the United Kingdom, conventions are not judicially enforceable. Geoffrey Marshall in his *The Theory of Convention since Dicey*<sup>30</sup> says, that the separation of law and conventions distinction by Dicey 'is clear enough and worth maintaining'. Colin R Munro in *Laws and Conventions Distinguished*<sup>31</sup> stated that, 'The validity of conventions cannot be the subject of proceedings

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<sup>27</sup> Constitution of the Islamic Republic of Pakistan, Article 189.

<sup>28</sup> *Practice Statement*, [1966] 3 All E.R. 77 (H.L.) (U.K.).

<sup>29</sup> 1885.

<sup>30</sup> Marshall, Geoffrey, 'The Theory of Convention Since Dicey', *Constitutional Conventions: The Rules and Forms of Political Accountability* (Oxford, 1987; online edn, Oxford Academic, 22 Mar. 2012).

<sup>31</sup> 1975 LQR 218, 228.

*in a court of law. Reparation for breach of such rules will not be effected by any legal sanction. There are no cases which contradict these propositions. In fact, the idea of a court enforcing a mere convention is so strange that the question hardly arises.'*

27. The Privy Council of England held that conventions cannot be given effect to by a court of law because they '*are considerations of policy and propriety, they are not legal restrictions which a court of law, interpreting the relevant provisions of the Constitution, can import into the written document and make it his legal duty to observe*'.<sup>32</sup> In Canada, a commonwealth country, it was observed that there is '*no instance of an explicit recognition of a convention as having matured into a rule of law*'.<sup>33</sup> The Court further held that conventions are not enforced by the courts and if there is a conflict between conventions and law, the courts must enforce the law. '*The very nature of a convention, as political in inception and as depending on a persistent course of political recognition by those for whose benefit and to whose detriment (if any) the convention developed over a considerable period of time is inconsistent with its legal enforcement*'.

28. Significantly Article 8(1) of the Constitution states, '*any law or any custom or usage **having** the force of law*' (emphasis added). It does not state that custom and usage *has* the force of law. A custom or usage *having the force of law* is section 5 of the Punjab Laws Act, 1972, which provides that in any question regarding succession '*the rule of administration shall be any custom applicable to the parties concerned*' and its section 7 states that '*all local customs and mercantile usages shall be regarded as valid unless they are contrary to justice, equity or good conscience*.' The Customs and usages mentioned in the Punjab Laws Act, 1972 had the force of law, because the law stated so, and not because on its own it had the force of law.

29. The Supreme Court in *Federation of Pakistan v United Sugar Mills Limited*<sup>34</sup> held that *law* is '*a formal pronouncement of the will of a competent lawgiver and did not include what are mere legal percepts and theories*'. One may however add that many British constitutional conventions are incorporated into the Constitution and these the courts are bound to

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<sup>32</sup> *Adegbenro v. Akintola* (1963) 3 All ER 544.

<sup>33</sup> (1982) 125 DLR (3d) 1.

<sup>34</sup> PLD 1977 Supreme Court 397.

recognize and enforce because they are part of the Constitution, and not because they are conventions.

30. We are aware that conventions have in a few cases been given extraordinary importance, which phenomena is best explained by Justice Fazal Karim in his essential reading book *Judicial Review of Public Actions* thus:<sup>35</sup>

‘Al-Jehad Trust case (PLD 1996 SC 324) and Malik Asad Ali<sup>36</sup> case were the product of a period of unfortunate tension between the political organs and the judicial organ of the State of Pakistan. That period evokes painful memories, and it is better to forget it. Even the Judges of the Supreme Court could not remain unaffected so much so that at the time of Malik Asad Ali case, the Supreme Court itself was a divided house. In such a polarized setting the venerable principle of the comity of Judges is naturally the major casualty. In our humble opinion therefore the decisions in those cases should be confined to them only.’

31. We take heed from the wise words of Justice Fazal Karim. The Constitution has erected the legislature and the judicature and sets out their respective jurisdictions, boundaries and powers, which each must respect. In *Jackson v Her Majesty’s Attorney General*<sup>37</sup>, the House of Lords observed that, ‘*the delicate balance between the various institutions whose sound and lasting quality Dicey in his “The Law of the Constitution”, likened to the work of bees when construing a honeycomb is maintained to a larger degree by the mutual respect which each institution has for the other.*’ Mutual respect requires that the Supreme Court should not substitute its own opinion for that of Parliament, no matter how correct it considers it to be. Interventions should be restricted to only when Parliament enacts legislation which is demonstrably unconstitutional. In respect of the Act this has not been demonstrated.

32. We have very carefully considered each and every provision of the Act, and are of the view that it has facilitated access to justice, instilled transparency, made the realization of Fundamental Rights more effective,

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<sup>35</sup> Second edition, Vol. 1, p. 96.

<sup>36</sup> *Malik Asad Ali v Federation of Pakistan*, PLD 1998 SC 161.

<sup>37</sup> (2005) UKHL 56.

and the Supreme Court more independent. The office of the Chief Justice has also been strengthened as there is an element of continuity when consultation takes place with the two most senior Judges. The measures taken in the Act ensure judicial independence, and the Supreme Court has been made to better serve the people; we endorse the following definition of judicial independence:

‘Judicial independence refers to the existence of judges who are not manipulated for political gain, who are impartial towards the parties of a dispute, and who form a judicial branch which has the power as an institution to regulate the legality of government behavior, enact ‘neutral’ justice, and determine significant constitutional and legal values.’<sup>38</sup>

33. The Constitution empowers Parliament to legislate with regard to making the practice and procedure of the Supreme Court as it specifically stipulated in Article 191. Parliament enacted the Act which does not in any manner infringe any of the Fundamental Rights, rather facilitates their enforcement. The Act also grants an appeal to one who is aggrieved by a decision of the Supreme Court which is passed in exercise of the original jurisdiction of the Supreme Court under Article 184(3) of the Constitution. A standard good worldwide practice and the Injunctions of Islam,<sup>39</sup> require that an appeal be provided and when two interpretations are possible, the one that conforms with the Injunctions of Islam shall be adopted.<sup>40</sup> Article 175(2) of the Constitution envisages the conferment of jurisdiction. A larger Bench of the Supreme Court has been conferred with this additional jurisdiction of appeal which fully accords with the Constitution. The Act does not in any manner violate the Constitution, it does not undermine the Supreme Court, nor does it compromise the independence of the judiciary. In effect it does the very opposite in ensuring the enforcement of

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<sup>38</sup> Christopher M. Larkins, ‘Judicial Independence and Democratization: A Theoretical and Conceptual Analysis.’ *The American Journal of Comparative Law*, vol. 44, no. 4, 1996, pp. 605–26.

<sup>39</sup> Generally, surah *an-Nisa*’ (4), verse 59 is cited for the right to appeal. Moreover, there are several Qur’anic verses and Prophetic traditions which emphasize that human beings could commit error and that whenever an error in a judgment becomes apparent, it needs to be corrected. ‘*Every son of Adam commits error; and among those who commit error those who repent are the best*’ (Sunan al-Tirmidhi, Abwab Sifat al-Qiyamah, Hadith No. 2499). The Shariat Appellate Bench of the Supreme Court declared that the Islamic Injunctions mandate at least one right to appeal in *Federation of Pakistan v General Public*, PLD 1988 Supreme Court 202 and in *Pakistan v General Public*, PLD 1989 Supreme Court 6.

<sup>40</sup> Section 4 of the Enforcement of the Shariah Act, 1991 stipulates: ‘*For the purpose of this Act (a) while interpreting the statute law, if more than one interpretation is possible, the one consistent with the Islamic principles and jurisprudence shall be adopted by the Court; and (b) where two or more interpretations are equally possible, the interpretation which advances the Principles of Policy and Islamic provisions in the Constitution shall be adopted by the Court.*’

Fundamental Rights, strengthening the Judiciary and creating greater independence therein.

34. Having found the Act to be fully compliant with the Constitution there is no need to consider the other points raised by the petitioners because the same will have no bearing on the outcome, and this Court does not generally dilate upon academic propositions.

35. Therefore, for the aforesaid reasons these petitions are dismissed and the constitutionality of the Act is upheld.

Qazi Faez Isa, CJ

Sardar Tariq Masood, J

Ijaz ul Ahsan, J

Syed Mansoor Ali Shah, J

Munib Akhtar, J

Yahya Afridi, J

Amin-ud-Din Khan, J

Sayyed Mazahar Ali Akbar Naqvi, J

Jamal Khan Mandokhail, J

Muhammad Ali Mazhar, J

Ayesha A. Malik, J

Athar Minallah, J

Syed Hasan Azhar Rizvi, J

Shahid Waheed, J

Musarrat Hilali, J

Islamabad  
15 December 2023.  
(*Farrukh/Hassan K.W.*)

Approved for Reporting