

[Supreme Court of Pakistan]

Present: Umar Ata Bandial, C.J., Qazi Faez Isa, Sardar Tariq Masood, Ijaz ul Ahsan, Syed Mansoor Ali Shah, Munib Akhtar, Yahya Afridi, Sayyed Mazahar Ali Akbar Naqvi and Ayesha A. Malik, JJ

CONSTITUTION PETITIONS NOS. 24 TO 26 OF 2023

(Trials of Civilian under the Army Act, 1952 is violative of Constitution)

AND

C.M. APPEAL NO. 80 OF 2023 IN CONST. PETITION NIL OF 2023

(Declaration of trial of civilians under the Army Act, 1952 as unconstitutional, void and of no legal effect]

JAWWAD S. KHAWAJA and others---Petitioners

Versus

FEDERATION OF PAKISTAN and others---Respondents

Constitutional Petitions Nos. 24 to 26 of 2023 and C.M. Appeal No. 80 of 2023 in Constitutional Petition Nil of 2023.

Supreme Court (Practice and Procedure) Act (XVII of 2023)---

---Ss. 2, 3 & 5---Constitution of Pakistan, Art. 184(3)---Pakistan Army Act (XXXIX of 1952), S. 2(1)(d)---Code of Conduct for Judges of the Supreme Court and High Courts (framed by the Supreme Judicial Council under Article 209(8) of the Constitution), Art. IV---Trials of civilians under the Pakistan Army Act, 1952---Constitutionality---Judicial impartiality, principle of---Formation of Bench to hear present petitions---Chief Justice of the Supreme Court not consulting two senior most Judges of the Supreme Court before forming the Bench---Delay in deciding the petitions challenging the Supreme Court (Practice and Procedure) Act, 2023---Pattern in the Supreme Court of constituting Special Benches of some Judges (and not Full Court Bench) in cases of immense public importance---Recusal of a Judge from the Bench due to his relation with one of the petitioners---Observations, objections and notes recorded by certain Members of the Bench on different dates of hearing to the very constitution of the Bench hearing the present petitions provided.

Per Qazi Faez Isa, J

Per Sardar Tariq Masood, J

I was also not consulted by the Chief Justice before putting me on the present Bench. Surprisingly, present petitions in this Bench have been fixed when just a day earlier one of the petitioners himself along with his counsel met the Chief Justice in his Chamber and thereafter on the next day these petitions have been fixed without any consultation or ascertaining my availability. If this practice is allowed then question is whether every petitioners/appellants whose petitions/appeals are lying in the Supreme Court since years can be allowed to meet the Chief Justice in the Chamber for getting fixed their cases on the very next day.

I was awaiting the decision in the petitions through which the Supreme Court (Practice and Procedure) Act, 2023 (the Act') has been challenged and expected that they would be decided soon as interim ex-parte stay order was issued which had suspended the operation of the then bill and the proposed Act. Section 3 of the Act stipulates that "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 1 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 . However, the present matter was not referred to the Committee, of which I am a member. Only by presuming that the Act will be struck down, the mechanism provided in section 3 of the Act has been disregarded.

Surprisingly present nine Members Bench was constituted on the assumption that the Act will be struck down because if it is not, than any party who is not satisfied with its decision, their right to appeal under section 5 of the Act would be made redundant because such an appeal is to be heard by a larger bench of the Supreme Court. Presently, the Supreme Court comprises of fifteen Judges and the Chief Justice, which makes a total of sixteen

Judges. However, if the full court comprising of sixteen judges and the Chief Justice is available i.e. seventeen judges then an appeal would be heard by minimum of ten Judges which is not possible in the present situation, so the appeal if filed by either party would not be heard.

I have not recused from the Bench, hence there was no question to sign the purported order in which it has been mentioned that new Bench will be constituted whereas my point of view was that present petitions be heard after the decision of the petitions which have been filed against the Act.

Per Syed Mansoor Ali Shah, J

In the recent past there has been a consistent pattern and reluctance of not constituting the Full Court Bench (but instead Special Benches of some Judges) in cases of immense public importance that have far-reaching impact on the political, social and economic life of the people of Pakistan and their fundamental rights. The non-formation of the Full Court Bench has severely undermined the authority of the Court and the legitimacy of its judgments. The constitutional significance of the matter involved in the present case and its potential ramifications, call for the highest level of judicial scrutiny. Collective deliberations and diverse insights by all the judges in cases of public importance helps the Court arrive at a sound judgment and reinforces public confidence and trust in the Supreme Court.

Additionally until the Supreme Court decides the constitutionality of the Supreme Court (Practice and Procedure) Act, 2023, Section 3 of which prescribes the procedure for invoking the original jurisdiction of the Supreme Court under Article 184(3) of the Constitution, all such matters under this jurisdiction must be heard by the Full Court Bench of the Supreme Court.

Per Yahya Afridi, J

The entire edifice of a credible justice system is based on public trust. What is most serious and cannot be disregarded is that there are objections in writing from within the members of the Bench, to the very constitution of the Bench hearing the present petitions. In this regard, the Senior Puisne Judge has recorded in writing his said objections, and the same are by now in the public domain. Thus, the matter of the present composition of the Bench warrants urgent attention and reconsideration by the Chief Justice, lest it may dampen public trust in the justice system.

As a first step, the appropriate measure, would be that a Full Court Bench of the Supreme Court should be constituted to hear the present petitions. Without taking such a measure, any judgment rendered in present petitions by the present Bench may lead to the diminishing of the deference the decision requires and deserves. It is, therefore, most earnestly urged that the Chief Justice may consider the reconstitution of the present Bench, and refer the present petitions to a Full Court Bench.

Per Syed Mansoor Ali Shah, J

Although in a constitutional court, it is only for the judge concerned to decide according to his own conscience whether to recuse himself from hearing a case or not, he must in so deciding consider that his decision should not undermine the public trust in the impartiality of the court. For the appearance of his partiality would not only demean his reputation but also that of the institution of which he is a part. The insistence on the appearance of impartiality in the dispensation of justice is not some artificial attempt to mask imperfection in the judicial process, but rather an essential means of ensuring the reality of a fair adjudication. Both the appearance and reality of impartial justice are necessary to the public legitimacy of judicial pronouncements and thus to the rule of law itself. Judicial impartiality upholds public trust, engenders predictability in the law, ensures fair trial, upkeeps the rule of law, and safeguards democracy. The principle of judicial impartiality, therefore, is not merely a moral imperative but a practical necessity to ensure justice, uphold democratic values, protect citizens' rights, and maintain societal order.

Williams v. Pennsylvania 579 U.S. 1 (2016) per Justice Anthony Kennedy (Majority view) ref.

Judges should not readily accede to the request for their recusal from hearing a case and decide the matter of their recusal after properly weighing the ground agitated for making such request. Where it is apparent that the perception of impartiality is being created for some ulterior motive without any sound basis, the judge must not yield to such strategy and abdicate performance of his duty. But if such a request is based on some reasonable ground which may genuinely raise doubt in the mind of a common person about the impartiality of the judge,

the safest course for the judge is to accept such request in the larger interest of upholding public trust in the integrity and impartiality of the Court. In the present case, as one of the petitioners is admittedly my relative, a common person may not understand the difference between a petition filed in the public interest and a petition filed for personal interest. I, therefore, in the present case, find it preferable to accept the request and recuse myself from hearing the case. In order to safeguard the public trust in the integrity and impartiality of the Court, I recuse myself from hearing these petitions.

Kh. Ahmad Hosain, Advocate Supreme Court for Petitioners (in Constitutional Petition No. 24 of 2023).
Sardar Muhammad Latif Khan Khosa, Senior Advocate Supreme Court for Petitioners (in Constitutional Petition No. 25 of 2023).
Faisal Siddiqi, Advocate Supreme Court for Petitioners (in Constitutional Petition No. 26 of 2023).
Shoaib Shaheen, Advocate Supreme Court, Ajmal Ghaffar, Advocate Supreme Court and Syed Rifaqat Hussain Shah, Advocate-on-Record for Petitioners (in C.M. Appeal No. 80 of 2023).
Mansoor Usman Awan, Attorney General for Pakistan and Ch. Aamir Rehman, Additional A.G.P. for the Federation.

Date of hearing: 22nd June, 2023.

ORDER

At the start of the hearing today, two of us, Mr. Justice Qazi Faez Isa and Mr. Justice Sardar Tariq Masood, have made statements in the open Court declining to hear these matters. Consequently, the Bench that has to hear these matters is to be reconstituted by the Hon ble Chief Justice.

Sd/-
Umar Ata Bandial, C.J.

Sd/- Qazi Faez Isa, J	Sd/- Sardar Tariq Masood, J
Sd/- Ijaz ul Ahsan, J	Sd/- Syed Mansoor Ali Shah, J (I have attached my separate note)
Sd/- Munib Akhtar, J	Sd/- Yahya Afridi, J
Sd/- Sayyed Mazahar Ali Akbar Naqvi, J	Sd/- Ayesha A. Malik, J

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Regarding Suo Motu Case No. 4 of 2022
Mr. Ishrat Ali

1. Mr. Ishrat Ali, a Federal Government employee, who was sent on deputation to the Supreme Court to work as Registrar, was 'withdrawn' by the Federal Government vide notification dated 3 April 2023¹ and 'directed to report to the Establishment Division, with immediate effect.' But, Mr. Ishrat Ali refuses to abide by the order of the Federal Government.
2. On 4 April 2023, Mr. Ishrat Ali mis-described himself as Registrar , and purported to sign and issue 'Court Roster for Tuesday 4th April, 2023' in Suo Motu Case No. 4/2022 (Case No. 4') and further purported to constitute a 'Larger Bench' at 2:00 p.m.' This was stated to have been done 'By Order of HCJ , that is, Hon'ble Chief Justice.
- The illegal Circular
3. Case No. 4 was fixed before a three-member Bench² on 15 March 2023 and an order was announced on 29 March 2023.³ Rather than complying with the order of the Supreme Court, Mr. Ishrat Ali (when he was still the Registrar) did something out of the ordinary; he issued a Circular,⁴ stating that any observation made in this order of the Supreme Court 'is to be disregarded'. I wrote to Mr. Ishrat Ali that his Circular 'purports to negate,

undo, disobey and violate order dated 29 March 2023 of a three-member Bench of the Supreme Court, passed in *Suo Motu Case No. 4 of 2022*'. He was also informed that, 'The Registrar does not have the power or authority to undo a judicial order, and the Chief Justice cannot issue administrative directions with regard thereto'. The letter was also copied to the Hon'ble Chief Justice. Till date no reply has been received to my letter.

What constitutes the Supreme Court

4, The Constitution of the Islamic Republic of Pakistan (the Constitution) establishes the Supreme Court, and defines it as consisting of the Chief Justice of Pakistan and Judges of the Supreme Court.⁵ Order dated 29 March 2023 which was passed in Case No. 4 had pointed out the constitutional and legal position, and that the Chief Justice could not unilaterally assume all the powers of the Supreme Court. It would be appropriate to reproduce paragraphs 27 and 28 of the order dated 29 March 2023:

27. The Supreme Court is empowered to make makes rules attending to the aforesaid matters. The Supreme Court comprises of the Chief Justice and all Judges. The Constitution does not grant to the Chief Justice unilateral and arbitrary power to decide the above matters. With respect, the Chief Justice cannot substitute his personal wisdom with that of the Constitution. Collective determination by the Chief Justice and the Judges of the Supreme Court can also not be assumed by an individual, albeit the Chief Justice.

28. The interest of citizens therefore will be best served to postpone the hearing of this case, and of all other cases under Article 184(3) of the Constitution, till the matters noted hereinabove are first attended to by making requisite rules in terms of article 191 of the Constitution.'

The purported Larger Bench was presumably constituted when it was realized that the Circular was patently unconstitutional and illegal, and that the Chief Justice could not have given legal instructions to issue it.

Jurisdiction of the Supreme Court

5. The Constitution 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.'⁶ The Constitution does not bestow unlimited jurisdiction on the Supreme Court, let alone on its Chief Justice. The Constitution confers only the following jurisdictions on the Supreme Court: (1) original jurisdiction,⁷ (2) appellate jurisdiction,⁸ (3) advisory jurisdiction,⁹ (4) power to transfer cases jurisdiction,¹⁰ (5) review jurisdiction,¹¹ (6) contempt jurisdiction¹² and (7) appellate jurisdiction with regard to decisions of administrative courts and tribunals.¹³

Clarifying further the constitutional position

6. To further clarify the above vital point about jurisdiction, let it be assumed that the Supreme Court conducts a murder trial, and then convicts or acquits the accused. This would be of no legal effect, because neither the Constitution nor any law bestows jurisdiction on the Supreme Court to conduct a criminal trial. However, such a trial could be conducted by a Sessions Judge, who is two-steps below Judges of the Supreme Court. And, to cite a civil law example, a Family Judge presiding over a Family Court, can decide family law matters, a jurisdiction which does not vest in the Supreme Court.

Larger Bench and order dated 4 April 2023

7. The Constitution does not confer jurisdiction on a bench or on Judges of the Supreme Court (no matter how many in number) to sit in appeal over an order of the Supreme Court. Therefore, the so called Larger Bench was wrongly constituted purportedly to hear Case No. 4. The Larger Bench did not constitute a (constitutional) court; it did not possess any of the abovementioned jurisdictions, and could not pass an order. The purported 'order' dated 4 April 2023 cannot be categorized as an order of the Supreme Court; it is of no constitutional or legal effect. It would be legally incorrect to refer to it as an order; therefore, it shall be referred to as the 4 April Note .

Could the order dated 29 March 2023 be reviewed?

8. Can then the 4 April Note be construed as an order reviewing order dated 29 March 2023? The answer is that the said Larger Bench could not do so. If the review jurisdiction was to be invoked then Case No. 4 would have to be listed for hearing before the same Judges who had earlier heard it on 15 March 2023¹⁴ but this was not done.

Procedural Irregularities

9. In addition to disregarding the abovementioned constitutional provisions the following procedural irregularities were also committed:

- (1) The roster was issued for the same day, which is only done when there is an extraordinary emergency, but in the instant matter there was none;
- (2) The very day the case roster was issued the matter was also listed, and after court-time;
- (3) No prior notice of the listing of the matter was issued;
- (4) Notice was not issued to the Attorney-General for Pakistan as per Order XXVIA of the Code of Civil Procedure, 1908;
- (5) Notice to the Attorney-General had not been issued, yet the April 4 Note records that the Additional Attorney-General was 'On Court's Notice'; and
- (6) The counsel of PMDC¹⁵ was in attendance (without prior notice), which meant he was verbally or telephonically sent for, contrary to usual practice.

Responsibility of senior Judges

10. Six Judges were hurriedly assembled. The learned Judge heading the bench and the next senior Judge¹⁶ concluded the matter within a few minutes. Immediately, on the very same day, the 4 April Note, comprising of 8 pages, was issued. If the matter had been listed for hearing in the ordinary course as per normal procedure, sufficient notice had been given, and it was properly deliberated upon, then the four Hon'ble junior Judges may have realized that what their seniors were doing did not accord with the Constitution and the law. The Note relies on yet another earlier note

11. Paragraph 7 of the 4 April Note refers to what three of the same Judges had earlier done in a similar situation.¹⁷ Then, I had written a 15 page note¹⁸ trying to explain to my distinguished colleagues the different jurisdictions of the Supreme Court and that the Constitution did not grant them unlimited jurisdiction. However, and unfortunately, the 4 April Note overlooks what was pointed out earlier and the very same mistake was again committed. We learn from each other, but the authors of the 4 April Note disregarded a 15 page explanatory note that would have been helpful. Despite practicing law (as an advocate and Judge) for 40 years I still consider myself a student of law. Hubris destroys institutions.

The reasoning applied in the 4 April Note

12. The Note designates the Chief Justice of Pakistan as the 'Master of Rolls',¹⁹ a term not found in the Constitution, in any law or even in the Supreme Court Rules, 1980. And, on the pretext that the Chief Justice is the Master of Rolls and empowered to do as he pleases the 4 April Note proceeds to rely on an earlier note (authored by Munib Akhtar, J), stating that it 'clearly and categorically lays down the rule that the suo motu jurisdiction of this Court can only and solely be invoked by the HCJP. The majority order also appears to be in violation of the well settled rule of law, which is axiomatic, that Chief Justice is the master of the roster.' With respect, the Hon'ble Justice Munib Akhtar's earlier note was not a legal precedent. In any event the said reasoning is without a constitutional or legal foundation. The stated rule of law was not enacted pursuant to a law nor can it by its own self-serve itself to be categorized as rule of law, particularly when it contravenes the Constitution, which does not grant to the Chief Justice such powers.

13. The reasoning, with respect, is otherwise flawed too. The order dated 29 March 2023 had noted the lack of procedural rules with regard to cases filed or taken notice of under article 184(3) of the Constitution. However, in Case No. 4 notice under Article 184(3) of the Constitution had already been taken (with regard to the matter of grant of additional marks). Ironically, in a matter in which the so called Larger Bench had wrongly assumed jurisdiction the 4 April Note stated that order dated 29 March 2023 'was therefore both without and beyond jurisdiction'. The 4 April Note has no constitutional or legal validity as it seeks to supplant the Constitution.

The Constitution

14. The Constitution was unanimously passed with the votes of 196 members out of 200 of the National Assembly fifty years ago, on 10 April 1973.²⁰ Not a single vote was cast against it.²¹ The Constitution's credibility and longevity rests on its democratic foundations, and it is the document which holds the Federation together.

The Judicature

15. The Constitution establishes the Judicature.²² The Constitution also established the trichotomy of powers; the Legislature, Executive and Judiciary. The Judiciary is given the responsibility to decide cases in accordance with the Constitution and the law²³ and by applying due process²⁴ requirements. Every Judge before entering office takes oath: '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.' Judges also swear to 'preserve, protect and defend the Constitution'. The Constitution alone grants jurisdiction and empowers courts to decide cases, therefore, if non-existing jurisdiction is assumed then the oath to act in accordance with the Constitution is violated.

Islamic Injunctions

16. The Chief Justice is deserving of respect but he is not a master; such servitude is also alien to Islam, and the Constitution stipulates that all laws must be brought in conformity with the Injunctions of Islam,²⁵ the State religion of Pakistan.²⁶ The Constitution opens with two of the most beautiful names of the Almighty Allah (Ar-Rahman, the most Beneficent, and Ar-Rahim, the most Merciful) and stipulates that, 'sovereignty over the entire Universe belongs to Almighty Allah alone' and the exercise of authority is a sacred trust.²⁷ Order dated 29 March 2023 required that rules in respect of the stated matters be made by Supreme Court through consultation. The Holy Qur'an also mandates consultation, 'Do that which is in agreement amongst the people'.²⁸ Qur'anic exegetes²⁹ down the ages 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 that one deems oneself to be more intelligent, both of which are morally evil and (c) deciding an issue that pertains to the people is a serious thing and one should fear Allah. They derive the following principles from this 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.

17. That even Almighty Allah's prophet, Muhammad (peace and blessings be upon him), was ordained to consult the people in their affairs.³⁰ And, it is reported by his companion, 'None was more apt to seek council of his companions than the Messenger of Allah'.³¹

Absolute Power

18. The world has also been moving away from the days when monarchs and dictators wielded absolute power. The Kingdom of Bhutan, until recently, was one of the few remaining countries ruled by a monarchy having absolute power. However, the enlightened King Wangchuk voluntarily gave up his powers, saying, 'I do not believe that a system of absolute monarchy, wholly dependent on one individual is a good system for the people in the long run... the destiny of the nation lies in the hands of the people, we cannot leave the future of the country in the hands of one person.'³² Bhutan now is governed by a constitution.³³ History witnesses, that when in an individual power is concentrated, disastrous consequences invariably follow.

Dangers and pitfalls

19. Irreparable damage will be caused to the Judiciary and to the people of Pakistan if the legitimacy, integrity and credibility of the Judiciary is undermined, because without it the people (who it serves) will lose their trust. The surest way for this to happen is when cases are not decided in accordance with the Constitution. Pakistan was first ravaged when a bureaucrat Governor-General unconstitutionally dismissed the Constituent Assembly and the unanimous judgment of the Chief Court of Sindh³⁴ was set aside by the Federal Court.³⁵ The Federal Court's decision enabled future dictators to overthrow civilian governments. Regretfully more than once Chief Justice and Judges of the Supreme Court facilitated dictators. The country with the largest Muslim population broke apart because constitutional deviations were justified.

Conclusion

20. Since the gathering in a court of six distinguished judges was not permissible under the Constitution or under any law, the Supreme Court's order dated 29 March 2023 passed in Case No. 4 could not have been set aside by the 4 April Note. Decisions emanating from a courtroom overcast with the shadow of autocracy cannot displace the Constitution.

Islamabad, Dated: 8 April 2023.	Sd/- Senior Puisne Judge
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1. A note has been put up to me by the 'Registrar' dated 16 May 2023 which states that the Hon'ble Chief Justice has enquired how long I would 'like to remain on Chamber work'. This is a question which is better answered by the Hon'ble Chief Justice. Let me proceed to state why.
 2. Constitutional Petitions Nos. 6 to 8 of 2023, filed on 12 April 2023, sought to set aside the Supreme Court (Practice and Procedure) Bill, 2023 (the Bill'). The 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' (199 of the Constitution).
 3. The first petition (C.P. No. 6 of 2023) was filed by two Lahore based lawyers represented by Messrs Khawaja Ahmad Tariq Rahim and Imtiaz Rashid Siddiqui. The Office of the Supreme Court had noted five legal objections. The first two are reproduced hereunder:
 - 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 proceeded to hear these petitions. However, none of the three orders passed till date (Orders dated 13 April 2023, 2 May 2023 and 8 May 2023) attend to the office objections, nor state that the petitions are maintainable under Article 184(3) of the Constitution,
 4. The order dated 13 April 2023, which is an ad-interim ex-parte order, reads as a final decision. With respect, it is most unusual, if not unprecedented, to give categorical findings on legislation which does not exist, and to do so without hearing the other side. The seven-page order holds:

'Prima facie, this approach is a serious encroachment upon, interference with and intrusion into the independence of the judiciary'.

'Any intrusion in the practice and procedure of the Court, even on the most tentative of assessments, would appear to be inimical to the independence of the judiciary, no matter how innocuous, benign or even desirable the regulation may facially appear to be.'

'Prima facie therefore, when the Bill and the Act that is soon to come into being, is examined on the anvil of the most fundamental principles that underpin the Constitution, it can be regarded as seriously wanting in constitutional competence.'

...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.'

Notice under Order XXVIIA of the Code of Civil Procedure, 1908, was issued to the Attorney-General but notices were not issued to the Advocates-General of the Provinces, even though the law under challenge applies throughout Pakistan. However, notices were issued to eight political parties despite the Bill not affecting any of their rights/privileges.
 5. On 21 April 2023 the Bill became the Supreme Court (Practice and Procedure) Act, 2023 (the Act'). Section 2 of the Act stipulates that:
 - (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 most senior judges, in order of seniority.
 - (2) The decisions of the Committee shall be by majority.'

Section 3 of the Act attends to the original Jurisdiction of the Supreme Court under Article 184(3) of the Constitution. Section 4 stipulates that wherever the interpretation of a constitutional provision is involved, the case should be heard by not less than five judges of the Supreme Court. Section 5 provides for an appeal against a decision of the Supreme Court under Article 184(3). Section 6 enables any Advocate of the Supreme Court to file a review petition (under Article 188 of the Constitution). Section 7 requires that urgent cases should be fixed no later than 14 days from the date of filing. And, section 8 is in the nature of a non obstante clause.

6. Another three petitions (Constitutional Petitions Nos. 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'. On 8 May 2023, the petitions were adjourned to 1 June 2023, that is, after 24 days.

7. Leaving aside:

- (1) Whether the said petitions seek the enforcement of any Fundamental Right (none has been mentioned in any order);
- (2) Whether a law not yet enacted, can be suspended under Article 184(3), and it be further ordered that when the Bill becomes the Act it too shall stand suspended;
- (3) Whether at the very outset (through an ad-interim ex-parte order) the operation of a law can be suspended;
- (4) Whether independence of the judiciary was threatened merely because the burden of responsibility on the Honourable Chief Justice was henceforth to be shared with two other senior judges;
- (5) Why the petitions, which were taken to be of such utmost importance and urgency, and which necessitated the passing of an ad interim ex-parte order were then not listed for day-to-day hearing, but with a delay of 24 days;
- (6) Whether it was appropriate for the Hon'ble Chief Justice to hear cases pertaining to his own powers;
- (7) Whether Article IV of the Judges Code of Conduct - 'A Judge must decline resolutely to act in a case involving his own interest', was attracted; and
- (8) If the petitions were to be dismissed, what will happen in the interregnum when section 2 of the Act was not complied with.

8. In paragraph 11 of the order dated 13 April 2023, Article 191 of the Constitution was 'explained by adopting for present purposes a dictum from one of the most famous cases of American constitutional law (*McCulloch v Maryland* 17 US 316 (1119)): the power to regulate involves the power to destroy'. However, the actual quote is - 'That the power to tax involves the power to destroy'. The power to tax is altogether different from the power to regulate. In any event the US Supreme Court in that case was concerned with clashing sovereignty of the legislative powers of Congress with that of a state legislature, and it held that the state legislature by taxing could not 'pull down what there is an acknowledged right in another [Federal Congress] to build up'. The US Supreme Court confirmed the supremacy of Congress:

The result is a conviction that the states have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the central government. This is, we think, the unavoidable consequence of that supremacy which the constitution has declared.'

9. The oath of office of a Chief Justice and of every Judge requires them to discharge their duties and perform their functions 'in accordance with the Constitution of the Islamic Republic of Pakistan and the law' [emphasis added]. And, Article 189 of the Constitution stipulates that the decisions of the Supreme Court are 'binding on all other courts of Pakistan' [emphasis added]. The Constitution does not give pre eminence to an ad-interim order of the Supreme Court over the oath of office, and as noted Article 189 stipulates that decisions of the Supreme Court are only binding on other courts.

10. On the one hand section 2 of the Act requires compliance, but on the other hand this Court has suspended the operation of the Act. The petitions will either be allowed or dismissed. If the petitions were to be dismissed wouldn't conducting court in the interregnum be a violation of section 2 of the Act?

11. The Hon'ble Chief Justice and my distinguished colleagues have placed me in a quandary, which can now only be resolved when the said six petitions are decided. It is prudent to await the Court's decision. It is not for

me to decide, let alone 'like' whether to continue with Chamber work. The Hon'ble Chief Justice is much better placed to answer the question he has posed to me, since he knows better when the petitions will be decided.

12. Lest it be misconstrued, throughout the period of Chamber work I have been working; writing judgments in Civil Appeal No. 2015/2022, in Civil Appeal No. 1139-L/2019 and in 41 Customs cases being Civil Appeals No. 565/2011, etc. I have also decided Suo Motu Review Petition No. 3203/2017. I now only have one case to write a judgment in (CPLA No. 3203/2017) and in another to consider whether I agree with Hon'ble Syed Mansoor Ali Shah, J. I have also attended to the meetings concerning appointments with regard to the Federal Shariat Court, have worked from morning till night to attend to the hundreds of long pending applications of advocates seeking enrolment as ASCs, and attended to all other matters assigned to me.

13. In conclusion, let me categorically state that how my distinguished colleagues decide the pending petitions is their discretion. All that I look for, and which the country undoubtedly expects, is the earliest possible determination of the matter. I have been compelled to write this note in response to the aforesaid query of the Hon'ble Chief Justice. Since a number of my colleagues have enquired why I am not sitting in Court, I shall also be sharing this note with them.

17 May 2023	Sd/- Qazi Faez Isa, J
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