P L D 2023 Supreme Court 720

Present: Umar Ata Bandial, C.J., Syed Mansoor Ali Shah, Munib Akhtar, Jamal Khan Mandokhail and Muhammad Ali Mazhar, JJ

ISLAMABAD HIGH COURT, BAR ASSOCIATION, ISLAMABAD through President and others---Petitioners

Versus

ELECTION COMMISSION OF PAKISTAN through Chief Election Commissioner, Islamabad and others---Respondents

Suo Motu Case No. 1, Constitutional Petitions Nos. 1 and 2 of 2023, decided on 27th February, 2023.

(Suo Motu Regarding Holding of General Elections to the Provincial Assemblies of Punjab and Khyber Pakhtunkhwa)

Per Munib Akhtar, J; Umar Ata Bandial, CJ., and Muhammad Ali Mazhar, J. agreeing; Syed Mansoor Ali Shah and Jamal Khan Mandokhail, JJ. dissenting [Majority view]

(a) Constitution of Pakistan---

----Arts. 105(3), 58(2), 107, 112(1), 112(2), 224(1), 224(2) & 184(3)---Elections Act (XXXIII of 2017), S. 57(1)---Constitutional petitions and suo motu proceedings---General Elections to the Provincial Assemblies of Punjab and Khyber Pakhtunkhwa---Constitutional responsibility and authority for appointing the date for the holding of a general election to a Provincial Assembly upon its dissolution in the various situations envisaged by and under the Constitution, and how and when such constitutional responsibility is to be discharged stated.

Given the federal nature of the Constitution each Assembly is for this purpose a separate "unit" which must, even though the substantive and procedural constitutional and statutory requirements are essentially the same, be treated in its own right and in and of itself. Thus, e.g., if in relation of a given election cycle elections to the National Assembly and all the Provincial Assemblies are held on the same day, it must always be kept in mind that, constitutionally speaking, there are in law and fact five separate general elections that are being so held.

The Assemblies in question are those of Punjab and Khyber Pakhtunkhwa ("KPK"), which stood dissolved on 14.01.2023 and 18.01.2023 respectively. In both cases, the then Chief Ministers tendered their advice to their respective Governors under Article 112(1) of the Constitution to dissolve the Assembly. In the case of Punjab Province the Governor choose not to act on the said advice so that the Assembly stood dissolved on the expiry of 48 hours on 14.01.2023. In the case of Khyber Pakhtunkhwa Province, the Governor did act on the advice and made an order dissolving the Assembly, on 18.01.2023. When the Governor dissolves the Assembly in his discretion, in the particular circumstances envisaged by Article 112(2), then Article 105(3) applies and the date for the general election is to be

given by him. The same is the position as regards the dissolution of the National Assembly by the President in his discretion under Article 58(2).

In those situations of dissolution where the Constitution is silent as to which is the authority for appointing the date for the general election, it is Parliament's identification that must prevail and be applied. Therefore, in the present case in the case of the Punjab Assembly the power to appoint the date for the general election lay with the President in terms of section 57(1) of the Elections Act, 2017 ('the Act') and not the Governor. The President, in appointing the date for the general election under section 57(1) and thereby discharging a constitutional obligation and responsibility is empowered to act on his own and is not bound by advice in the constitutional sense. It follows that the Election Commission ('the Commission') fell into error when it sought, and continued to seek, the date for the general election from the Governor of Punjab, and the latter was correct in refusing to give such date. Furthermore, the refusal of the Commission to consult with the President was also legally incorrect. In particular, its refusal to do so by means of its letter when called upon by the President with express reference to section 5(1) was an error that is only excusable on account of the lack of legal clarity. It also follows that the order made by the President appointing the date for the Punjab Assembly was correct and well within his power and constitutional responsibility.

In respect of KPK Assembly, when the Governor did dissolve the Assembly on the Chief Minister's advice he was under a constitutional obligation to give the date for the general election. Here, the Election Commission ('the Commission') was correct in pursuing the Governor for the date, and continuing to do so despite his refusal to act. The failure of the Governor was therefore a breach of constitutional responsibility. Furthermore, the President was in error when he made the order dated 20.02.2023 giving the date for the general election to the KPK Assembly.

(b) Constitution of Pakistan---

----Fourth Sched.---Legislative Lists---Legislative entries, interpretation of---Scope----Legislative entries are fields of legislative power which are to be interpreted and applied in the widest possible terms.

(c) Constitution of Pakistan---

----Arts. 105(3), 107, 112(1), 112(2), 224(1), 224(2) & 184(3)---Elections Act (XXXIII of 2017), S. 57(1)---Constitutional petitions and suo motu proceedings regarding holding of General Elections to the Provincial Assemblies of Punjab and Khyber Pakhtunkhwa---Maintainability---Petitions/appeals on the same subject matter pending before the High Courts---Held, that the matter of holding a general election to an Assembly is constitutionally time bound and moves within a narrow locus in this regard---Holding of the general election is subject to strict temporal constraints---Record of the proceedings of the High Courts showed that while the Single Judge in the Lahore High Court had acted with admirable promptitude the same could not, unfortunately and with all due respect, be said of the Division Bench nor of the Peshawar High Court---Dates of hearing were being given repeatedly and matters were proceeding at what, in the present context, can only be described as a rather relaxed pace---Several weeks had already elapsed---Furthermore, it was almost certain that whatever be the decisions in the High

Courts they would be appealed to the Supreme Court---So, the matter would essentially be back where it already was, the only difference being that out of the constitutional time limit several more days (at the very least) if not weeks would be consumed---To insist on present matters being, in effect, returned to the High Courts would be tantamount in the present circumstances to a denial of justice of a matter of high constitutional importance, involving the fundamental rights of the electorate at large and relatable to one of the salient features of the Constitution---Furthermore, the possibility of a difference of opinion between the two High Courts could not be ruled out, with further attendant confusion and delay---All of these factors satisfied the Supreme Court that present matters were fit matters to be proceeded before the Supreme Court directly under Article 184(3) notwithstanding the proceedings pending in the High Court---For the Supreme Court to hold its hand and allow for the routine litigation process to play out would, in the facts and circumstances of present proceedings, detract from rather than serve the public interest---Present constitutional petitions and suo motu proceedings were maintainable.

Manzoor Elahi v. Federation of Pakistan and others PLD 1975 SC 66 distinguished.

Benazir Bhutto v. Federation of Pakistan and others PLD 1988 SC 416 ref.

(d) Constitution of Pakistan---

----Art. 184(3)---Jurisdiction of the Supreme Court under Article 184(3) of the Constitution---Scope---Proceedings under Article 184(3) of the Constitution are also to be regarded as inquisitorial where, if so warranted, the Court may itself examine disputed factual questions and issues as well.

(e) Supreme Court Rules, 1980---

----O. XI & O. XXV---Constitution of Pakistan, Art. 184(3)---Constitutional petitions and suo motu proceedings regarding holding of General Elections to the Provincial Assemblies of Punjab and Khyber Pakhtunkhwa---Majority and minority opinion---Question as to whether present matters were disposed of by a majority of 3:2 or were dismissed by a majority of 4:3---Held, that the ratio 4:3 claimed in the minority opinion could only have come about by taking two Judges from the initial, validly constituted nine-member Bench and all the other Judges of the subsequent, validly constituted five-member Bench, and melding this number into a seven-member "Bench" that was never constituted, and which never existed in law or in fact---Since there was never ever any such Bench, there could not, ipso facto, be any decision in the ratio "4:3"---By focusing on the number of Judges simpliciter and not the constitution of Benches, the minority opinion has sought to breach the barrier posed by the unanimous judicial order of 27.02.2023, by which the initial nine members of the Bench unanimously referred the matter to the Chief Justice "for reconstitution of the Bench"---Said order of 27.02.2023, was a judicial order, made by the nine-member Bench---Reconstitution of the Bench by the Chief Justice, i.e., the constitution of the present five-member Bench, was in response to this judicial order---Therefore, present matters were disposed of with a majority of

3:2, and the claim that they stood dismissed in the self-computed ratio "4:3" is erroneous.

Causes, appeals and matters in the Supreme Court are heard by Benches, and not Judges. This distinction is real and substantial. A Bench is a body of Judges validly and properly constituted as such; it is not simply an aggregate of a given number of Judges. Benches are constituted by the Chief Justice alone, who is the master of the roster. Benches cannot self-constitute, and once properly constituted cannot self-propagate or self-perpetuate. It is the Bench, as properly constituted, that defines and delineates the Court for the purpose of any matter, appeal or cause and judgment therein, and not simply any agglomeration of Judges.

Suo Motu Case No. 4 of 2021 PLD 2022 SC 306 ref.

If a cause, appeal or matter is not decided unanimously by a Bench but by way of a division among the members thereof, the ratio (and hence the outcome of the matter) is determined only by the Bench as constituted. Putting this more concretely, if a matter is said to be decided by the Bench "split" in the ratio A:B, A plus B must be (and can necessarily only be) the total of the members of the Bench as constituted, and not otherwise. Thus, if the minority opinion of the present matters was correct that these matters were decided 4:3, it must be shown that a seven-member Bench was properly constituted to hear the same, and that such Bench actually did sit, hear and decide them. The fact of the matter is of course that the present matters were decided 3:2 because the Bench constituted by the Chief Justice comprised of five members, who sat as said Bench and heard the matters over two days and then decided the same. At no stage over those two days was any claim made by any person, including any of the counsel who appeared before the Court nor, indeed, by any member of the Bench that the Judges sitting and hearing the matters were not the properly constituted Bench, in that it had two additional members who were absent or missing.

Initially a nine member Bench was constituted by the Chief Justice as master of the roster to hear the present matters. The matters were placed before that Bench on 23.02.2023 and 24.02.2023. It is apparent that the minority opinion does not dispute this, and also accepts that two of the members of that Bench dismissed these matters on the very first day. Thereafter, the nine members of the Bench unanimously made an order, referring the matter to the Chief Justice "for reconstitution of the Bench". This order, of 27.02.2023, was not and could not be an administrative order. It was a judicial order, made by the nine-member Bench. The reconstitution of the Bench by the Chief Justice, i.e., the constitution of the present five-member Bench, was in response to this judicial order. Unfortunately, it appears that this judicial order has not been noticed in the minority opinion. The judicial order constituted a decisive break- indeed, a barrier-between the two validly constituted Benches. On the prior side of it lay the initial, validly constituted nine-member Bench of which alone the two Judges (who dismissed present matters on the very first day) were members. On the latter side lay the subsequent, validly constituted five-member Bench of which, they were not.

The two Judges (who dismissed present matters on the very first day) had themselves accepted that their continued "retention" on the "present bench" may be

of no avail, and had left the matter to the Chief Justice. The Bench to which the said two Judges referred was of course the nine-member Bench. The said two Judges themselves believed that they had, on account of their orders of dismissal, nothing more to contribute to the Bench of which they were actually members. How then could anything said or done by them in such capacity be "counted" or "reckoned" when determining the proceedings before the reconstituted Bench of which they were not members?

The ratio 4:3 claimed in the minority opinion could only have come about by taking two Judges from the initial, validly constituted nine-member Bench and all the other Judges of the subsequent, validly constituted five-member Bench, and melding this number into a seven-member "Bench" that was never constituted, and which never existed in law or in fact. Since there was never ever any such Bench, there could not, ipso facto, be any decision in the ratio "4:3". By focusing on the number of Judges simpliciter and not the constitution of Benches, the minority opinion has sought to breach the barrier posed by the unanimous judicial order of 27.02.2023. That is not possible. Therefore, the claim that present matters stood dismissed in the self-computed ratio "4:3" is erroneous.

Per Syed Mansoor Ali Shah and Jamal Khan Mandokhail, JJ. dissenting [Minority view]

(f) Jurisdiction---

----Jurisdiction of a court is determined by the Constitution and laws, not by caprice or convenience of the judges---It is the nature of the controversy that determines the jurisdiction of a court and not the magnitude of the interests involved.

(g) Constitution of Pakistan---

----Art. 184(3)---Original jurisdiction of the Supreme Court under Article 184(3) of the Constitution---Scope---Original jurisdiction of the Supreme Court under Article 184(3) of the Constitution is not only "discretionary" but also "special" and "extraordinary", which is to be exercised "with circumspection" only in the "exceptional cases" of public importance relating to the enforcement of fundamental rights that are considered "fit" for being dealt with under this jurisdiction by the Court---Said jurisdiction of the Court is special and extraordinary, for in the exercise of it the Court acts as the first and the final arbiter, which leaves a party aggrieved of the determination made by the Court with no remedy of appeal to any higher court---Said jurisdiction must not, therefore, be frequently and incautiously exercised, lest it damages the public image of the Court as an impartial judicial institution.

Akhtar Hassan v. Federation of Pakistan 2012 SCMR 455; Tahir-ul-Qadri v. Federation of Pakistan PLD 2013 SC 413; Ashraf Tiwana v. Federation of Pakistan 2013 SCMR 1159; Manzoor Elahi v. Federation of Pakistan PLD 1975 SC 66; H.R.C No.5818 of 2006 2008 SCMR 531; Manzoor Elahi v. Federation of Pakistan PLD 1975 SC 66; Yasser Kureshi, Seeking Supremacy: The Pursuit of Judicial Power in Pakistan (2022); Asher Asif Qazi, A Government of Judges: A Story of The Pakistani Supreme Court's Strategic Expansion (2018) and Maryam S. Khan,

Genesis and Evolution of Public Interest Litigation in the Supreme Court of Pakistan: Toward A Dynamic Theory of Judicialization (2015) ref.

(h) Constitution of Pakistan---

----Arts. 184(3) & 199---Scope of jurisdiction of the Supreme Court under Article 184(3) during pendency of the same matter before the High Courts stated.

As the jurisdiction of this Court under Article 184(3) is concurrent with that of the High Courts under Article 199, if the jurisdiction of any of the High Courts has already been invoked under Article 199 and the matter is pending adjudication, then the two well-established principles are also to be considered before exercising its jurisdiction under Article 184(3) by this Court: First, where two courts have concurrent jurisdiction and a petitioner elects to invoke the jurisdiction of one of the courts then he is bound by his choice of forum and must pursue his remedy in that court; and second, if one of the courts having such concurrent jurisdiction happens to be a superior court to which an appeal lies from the other court of concurrent jurisdiction then the superior court should not normally entertain such a petition after a similar petition on the same facts has already been filed and is pending adjudication in the lower court, otherwise it would deprive one of the parties, of his right of appeal. Even where no similar petition on the same facts has already been filed in any of the High Courts, this Court can decline to exercise its extraordinary jurisdiction if it finds that sufficient justification has not been shown for bypassing, and not invoking, the concurrent jurisdiction of the High Court concerned.

Manzoor Elahi v. Federation of Pakistan PLD 1975 SC 66; Benazir Bhutto v. Federation of Pakistan PLD 1988 SC 416; Farough Siddiqi v. Province of Sindh 1994 SCMR 2111 and Wukala Mahaz v. Federation of Pakistan PLD 1998 SC 1263 ref.

A third principle, i.e., the principle of forum non conveniens (inconvenient forum), can also be usefully considered by the Supreme Court while deciding upon its discretion to exercise or not to exercise its jurisdiction under Article 184(3) in a particular matter. Given this principle, the Supreme Court if, after considering the convenience of the parties and the nature of the matter involved, finds that the case may be heard and decided more suitably by a High Court under Article 199 of the Constitution, it may decline to exercise its jurisdiction under Article 184(3) of the Constitution.

(i) Constitution of Pakistan---

----Arts. 105(3)(a), 107, 112(1), 112(2), 175(2), 184(3), 199(5), 224(1) & 224(2)---Elections Act (XXXIII of 2017), S. 57(1)---Constitutional petitions and suo motu proceedings regarding holding of General Elections to the Provincial Assemblies of Punjab and Khyber Pakhtunkhwa---Maintainability---Petitions/appeals on the same subject matter pending before the High Courts---Present suo motu proceedings and the connected constitution petitions do not constitute a fit case to exercise the extraordinary original jurisdiction of the Supreme Court under Article 184(3) of the

Constitution---Detailed reasons for finding the Constitutional petitions and suo motu proceedings as not maintainable recorded.

The principle of provincial autonomy requires that when a matter which relates only to a Province, and not to the Federation or to more than one Provinces, the High Court of that Province should ordinarily be allowed to exercise its constitutional jurisdiction to decide upon that matter, and the Supreme Court should not normally interfere with and exercise its jurisdiction in such a matter under Article 184(3) of the Constitution, which jurisdiction is primarily federal in character. The federal structure of our Constitution necessitates that the autonomy and independence of the apex provincial constitutional court of a Province, should not be readily interfered with by the High Court but rather be supported to strengthen the provincial autonomy and avoid undermining the autonomy of the provincial constitutional courts.

The writ petitions filed in the Lahore High Court cannot be said to have been filed to "stultify" the exercise of original jurisdiction by the Supreme Court under Article 184(3) nor is there any inordinate delay in the proceedings being conducted in that High Court, which could have justified the exercise of extraordinary jurisdiction by the Supreme Court under Article 184(3). The delay, if any, has in fact been caused by the present proceedings and the Division Bench of the Lahore High Court would have decided the ICAs pending before it and the Peshawar High Court would have decided the writ petition pending before it if the present proceedings had not been taken up by the Supreme Court. Further, the principle of choice of forum, is also applicable to the present case as the writ petitions filed in the Lahore High Court and the constitution petitions, filed in the Supreme Court by the Speaker of the Provincial Assembly of Punjab and others, involve the element of "common interest" of the petitioners. Present suo motu proceedings and the connected constitution petitions do not constitute a fit case to exercise the extraordinary original jurisdiction of the Supreme Court under Article 184(3) of the Constitution.

Manzoor Elahi v. Federation of Pakistan PLD 1975 SC 66 and Benazir Bhutto v. Federation of Pakistan PLD 1988 SC 416 ref.

The question of law involved in the present matter, is: who has the constitutional power and duty to appoint a date for the holding of a general election to a Provincial Assembly that stands dissolved under the second part of clause (1) of Article 112 of the Constitution, at the expiration of forty-eight hours after the Chief Minister has advised the Governor to dissolve the Assembly but the Governor has not made any express order thereon? And, this question has already been decided by a Single Bench of the Lahore High Court in the exercise of its constitutional jurisdiction under Article 199 of the Constitution by its judgment dated 10.02.2023, which judgment having not been set aside or suspended by any higher forum is in the field and is thus fully operative and binding on the parties to the writ petitions wherein the same was passed. In its jurisdiction under Article 184(3) of the Constitution, the Supreme Court is barred from interfering with any judgment, decree or order of a High Court. Neither a High Court nor the Supreme Court can exercise its respective jurisdiction under Articles 199 and 184(3), against a High

Court or the Supreme Court or against any act or proceeding of a High Court or the Supreme Court.

Ikram Chaudhry v. Federation of Pakistan PLD 1998 SC 103; Naresh Mirajkar v. State of Maharashtra AIR 1967 SC 1; Shabbar Raza v. Federation of Pakistan 2018 SCMR 514 and Daryao v. State of U.P. AIR 1961 SC 1457 ref.

Hence, the present suo motu proceedings initiated, and the connected constitution petitions filed, under Article 184(3) of the Constitution are not maintainable in view of the constitutional bar of Article 199(5) read with Article 175(2) of the Constitution, in so far as they relate to the matter already decided by the Single Bench of the Lahore High Court in exercise of its jurisdiction under Article 199 of the Constitution.

The judgment of the Single Bench of the Lahore High Court, if it is not set aside in the ICAs pending before the Division Bench of that High Court or in an appeal filed by any of the parties to the case or any other aggrieved person before the Supreme Court under Article 185 of the Constitution, would remain binding on the Election Commission ('the Commission') and the Governor of Punjab by virtue of the doctrine of res judicata, notwithstanding any decision of the Supreme Court contrary to that of the Single Bench of the Lahore High Court. And such a situation, instead of resolving the question of law, would create more constitutional and legal anomalies. Therefore, on this ground also, present case was not a fit case to exercise the jurisdiction of the Supreme Court under Article 184(3) of the Constitution.

Daryao v. State of U.P. AIR 1961 SC 1457 ref.

Where the political parties and the people subscribing to their views are sharply divided, and their difference of opinion has created a charged political atmosphere in the country, the involvement and interference of the Supreme Court in its discretionary and extraordinary jurisdiction under Article 184(3) of the Constitution into a "political thicket", would be inappropriate and would inevitably invite untoward criticism of a large section of the people. There will always be crucial events in the life of a nation, where the political system may disappoint, but this cannot lead to the conclusion that the judiciary will provide a better recourse. A democratic political process, however that may be, is best suited to resolve such matters.

Presidential Reference No.1 of 2020 PLD 2021 SC 825 ref.

(j) Constitution of Pakistan---

----Arts. 184(3), 185 & 199---Original jurisdiction of the Supreme Court---Scope---Interference in judgments of the High Court---Supreme Court can examine the legality of any judgment, decree or order passed by a High Court and can set it aside, if the same is found to have been passed otherwise than in accordance with law, only in the exercise of its appellate jurisdiction conferred on it under Article 185 of the Constitution or by or under any law and not in the exercise of its original jurisdiction under Article 184(3) of the Constitution---Supreme Court in the exercise of its original jurisdiction under Article 184(3) of the Constitution does not

have the power to make an order of the nature mentioned in Article 199 of the Constitution against a judicial order of a High Court, directly or indirectly.

Naresh Mirajkar v. State of Maharashtra AIR 1967 SC 1 and Daryao v. State of U.P. AIR 1961 SC 1457 ref.

(k) Supreme Court Rules, 1980---

----O.XI & O.XXV---Constitution of Pakistan, Art. 184(3)---Constitutional petitions and suo motu proceedings regarding holding of General Elections to the Provincial Assemblies of Punjab and Khyber Pakhtunkhwa---Majority and minority opinion---Question as to whether present matters were disposed of by a majority of 3:2 or were dismissed by a majority of 4:3---Held, that dismissal of the present suo motu proceedings and the connected constitutional petitions is the Order of the Court by a majority of 4 to 3 of the seven-member Bench, binding upon all the concerned.

A Judge forming part of a Bench once constituted and seized of the case assigned to it cannot be excluded from that Bench unless he recuses himself from hearing that case or becomes unavailable to sit on the Bench for some unforeseen reason. After having made a final decision on the matter at an early stage of the proceedings of a case, the non-sitting of a Judge in the later proceedings does not amount to his recusal from hearing the case nor does it constitute his exclusion from the Bench. In the present case, the two Judges (part of the initial nine-member Bench) having decided the matter, left the option of their sitting or not sitting on the Bench with the Chief Justice, for further hearing of the case. The exercise of this option by the Chief Justice has no effect on the judicial decision of those two Judges passed in the case. The reconstitution of the Bench was simply an administrative act to facilitate the further hearing of the case by the remaining five members of the Bench and could not nullify or brush aside the judicial decisions given by the two Judges in this case, which have to be counted when the matter is finally concluded. Failure to count the decision of the said two Judges would amount to excluding them from the Bench without their consent, which is not permissible under the law and not within the powers of the Chief Justice. Therefore, the dismissal of the present suo motu proceedings and the connected constitutional petitions is the Order of the Court by a majority of 4 to 3 of the seven-member Bench, binding upon all the concerned.

H.R.C. No. 14959-K of 2018 PLD 2019 SC 183 ref.

(l) Supreme Court Rules, 1980---

----O.XI & O.XXV---Constitution of Pakistan, Arts. 184(3) & 191---Supreme Court---Suo motu cases---Constitution of Benches---Chief Justice of the Supreme Court, powers of---Regulating the exercise of jurisdiction of the Supreme Court under Article 184(3) of the Constitution and the constitution of Benches---Importance of making rules for regulating such jurisdiction and for the constitution of Benches stated.

The Chief Justice of the Supreme Court is conferred with wide discretion in the matter of constituting Benches and assigning cases to them under the present

Supreme Court Rules 1980. It is this unbridled power enjoyed by the Chief Justice in taking up any matter as a suo motu case and in constituting Special Benches after the institution of the cases and assigning cases to them that has brought severe criticism and lowered the honour and prestige of the Supreme Court.

In order to strengthen the Supreme Court and to ensure public trust and public confidence in the Court, it is high time that the power of "one-man show" enjoyed by the office of the Chief Justice of Pakistan is revisited. The Supreme Court cannot be dependent on the solitary decision of one man, the Chief Justice, but must be regulated through a rule-based system approved by all Judges of the Court under Article 191 of the Constitution, in regulating the exercise of its jurisdiction under Article 184(3) including the exercise of suo motu jurisdiction; the constitution of Benches to hear such cases; the constitution of Regular Benches to hear all the other cases instituted in the Supreme Court; and the constitution of Special Benches.

The power of doing a "one-man show" is not only anachronistic, outdated and obsolete but also is antithetical to good governance and incompatible to modern democratic norms. One-man show leads to the concentration of power in the hands of one individual, making the system more susceptible to the abuse of power. In contrast, a collegial system with checks and balances helps prevent the abuse and mistakes in the exercise of power and promotes transparency and accountability.

The solution to the problem of unstructured discretion of one person - the Chief Justice - lies in making rules on the matter by the Supreme Court in the exercise of its rule-making power conferred on it by Article 191 of the Constitution, which can serve the purpose. Such rules may provide that the extraordinary jurisdiction of the Court under Article 184(3) of the Constitution, either on the petition of a person or suo motu by the Court, shall be invoked only if a majority of all the Judges or the first five or seven Judges of the Court, including the Chief Justice, as may be prescribed in the rules, agrees to it while considering the matter on the administrative side. The criterion for selecting cases for being dealt with under this jurisdiction should also be clearly laid down in the rules, to make the practice of the Court in this regard, uniform and transparent.

Wukala Mahaz v. Federation of Pakistan PLD 1998 SC 1263 ref.

So far as the matter of constituting a Bench for hearing a case under Article 184(3) of the Constitution is concerned, there must also be uniformity and transparency, which can be best assured by constituting a regular five or seven-member Bench once at the commencement of every judicial year, or twice a year for each term of six months, by including in that Bench the senior most Judges or the senior most Judges of each Province on the strength of the Supreme Court with the Chief Justice or the Senior Puisne Judge as head of that Bench. Constituting special Benches on case to case basis, after the institution of the cases, is complete

negation of fairness, transparency and impartiality required of a judicial institution to maintain its legitimacy and credibility of its judgments.

Per Yahya Afridi, J.*

(m) Constitution of Pakistan---

----Arts. 105(3)(a), 112(1), 112(2), 184(3), 199 & 224(2)---Elections Act (XXXIII of 2017), S. 57(1)---Constitutional petitions and suo motu proceedings regarding holding of General Elections to the Provincial Assemblies of Punjab and Khyber Pakhtunkhwa---Maintainability---Petitions/appeals on the same subject matter pending before the High Courts---Present suo motu proceedings and the connected constitutional petitions should not be proceeded with at this stage, being premature and not maintainable---Detailed reasons for finding the Constitutional petitions and suo motu proceedings as not maintainable and consequently dismissing the same recorded.

Where the High Court under Article 199 of the Constitution and the Supreme Court under Article 184(3) of the Constitution had concurrent jurisdiction and the matter was pending adjudication before both courts, the later had to show restraint in exercising its jurisdiction, premised on the principle of ensuring that a party is not deprived of his vested right of appeal under the law.

Ch. Manzoor Elahi v. The Federation of Pakistan PLD 1975 SC 66 and Benazir Bhutto v. The Federation of Pakistan and another PLD 1988 SC 461 ref.

Benazir Bhutto v. The Federation of Pakistan and another PLD 1988 SC 461 distinguished.

The principle of restraint in exercising original jurisdiction to safeguard the right of appeal of the parties should be respected and maintained in the present matters, and the three proceedings pending before the Supreme Court should not be proceeded with at this stage, being premature and not maintainable.

Another crucial aspect of the present proceedings is that the matter in dispute, though in essence is constitutional, has developed into being peculiarly charged, with unflinching contested political stances being taken by the parties, which warrant the Supreme Court to show judicial restraint. This would also bolster the principle of propriety and comity, so as to not offend the hierarchal judicial domain of the High Court envisaged under the Constitution, and disturb the judicial propriety that the High Court deserves - lest it may reflect adversely on the Supreme Court's judicial pre-emptive eagerness to decide.

Present three proceedings pending before the Supreme Court, being premature are not maintainable to be adjudicated at this stage by the Supreme Court in its original jurisdiction envisaged under Article 184(3) of the Constitution, and thus are dismissed.

His Lordship observed that his continuing to sit on the bench and hear the present matters would not be appropriate, as any findings passed or remarks made during the hearing of the present matters may prejudice the contested claims of the parties in the petitions/appeal pending before the respective High Courts; that it is

left to Chief Justice to decide my retention in the present bench hearing the said petitions.

Per Athar Minallah, J.*

(n) Constitution of Pakistan---

----Arts. 105(3)(a), 112(1), 112(2), 184(3), 199 & 224(2)---Elections Act (XXXIII of 2017), S. 57(1)---Constitutional petitions and suo motu proceedings regarding holding of General Elections to the Provincial Assemblies of Punjab and Khyber Pakhtunkhwa---Maintainability---Petitions/appeals on the same subject matter pending before the High Courts---Held, that by entertaining the present petitions and suo motu proceedings, the Supreme Court would be unjustifiably undermining the independence of two provincial High Courts -- Indulgence at present stage would be premature and it would unnecessarily prejudice public trust in the independence and impartiality of the Supreme Court---Manner and mode in which present proceedings were initiated have unnecessarily exposed the Court to political controversies---This could have been avoided if a Full Court was to take up present cases; it would have ensured the legitimacy of the proceedings---Furthermore conduct of political stakeholders does not entitle them to invoke the jurisdiction of the Supreme Court under Article 184(3) of the Constitution in case it is seen or appears to facilitate or promote undemocratic values and strategies---Detailed reasons for dismissing the Constitutional petitions and suo motu proceedings recorded.

The power conferred on the Supreme Court under Article 184(3) of the Constitution must always be exercised with circumspection and utmost caution. If the conditions stipulated under Article 184(3) are satisfied, even then the Supreme Court may not exercise such jurisdiction if sufficient justification has not been shown for failing to invoke the wider concurrent jurisdiction vested in a High Court under Article 199 of the Constitution. The jurisdiction vested in the Supreme Court and the High Courts under Article 184(3) and Article 199, respectively, is coterminous and concurrent. The deference shown by the Supreme Court is premised on the established principle that the lowest court or tribunal must be approached in the first instance when the jurisdictions are concurrent. The High Courts have extensive jurisdiction and powers under Article 199 of the Constitution and a High Court is as competent as the Supreme Court to deal with matters of public importance involving interpretation of the Constitution and the enforcement of fundamental rights. Moreover, when two courts have concurrent jurisdiction and one of them happens to be a superior court, to which a remedy of appeal lies, then normally the latter will not entertain a similar matter pending before the lower court. No party can be deprived of its vested right of appeal to the Supreme Court provided under Article 185 of the Constitution.

Manzoor Elahi v. Federation of Pakistan PLD 1975 SC 66; Benazir Bhutto v. Federation of Pakistan PLD 1988 SC 416 and Suo Motu Case No. 7 of 2017 PLD 2019 SC 318 ref.

In the case in hand, one of the High Courts has already adjudicated the matter while the other is competently seized with it. The independence and competence of

the High Courts is likely to be undermined by assuming that the questions raised before the Supreme Court cannot be resolved or answered by them.

It is not disputed that the Lahore High Court has already allowed the constitutional petitions filed before it and rendered an authoritative judgment and its competence to have it implemented cannot be doubted. The Peshawar High Court is also seized of the matter. In the light of the binding 'salutary principles' the present petitions and the suo motu jurisdiction must not be entertained lest it may interfere with the implementation of the judgment of the Lahore High Court and the proceedings pending before the Peshawar High Court. The premature and pre-emptive proceedings before the Supreme Court at this stage is likely to delay the enforcement of the judgment of the Lahore High Court, leading to infringement of the Constitution by exceeding the time frame prescribed therein. Moreover, any person who would be aggrieved from the judgments of the High Courts will have the option to exercise the right to invoke the Supreme Court's jurisdiction under Article 185 of the Constitution.

By entertaining the present petitions and suo motu jurisdiction, the Court would be unjustifiably undermining the independence of two provincial High Courts. The indulgence at this stage would be premature and it would unnecessarily prejudice public trust in the independence and impartiality of the Supreme Court. The Supreme Court has no reason to apprehend that the High Courts are less competent to defend, protect and preserve the Constitution.

The manner and mode in which present proceedings were initiated have unnecessarily exposed the Court to political controversies. It has invited objections from political stakeholders in an already polarised political environment. The objections have also been submitted in writing. This obviously has consequences for the trust the people ought to repose in the impartiality of the Court. The Court, by proceeding in a premature matter, will be stepping into already murky waters of the domain of politics. It is likely to erode public confidence. The assumption of suo motu jurisdiction in itself may raise concerns in the mind of an informed outside observer. In the circumstances, the rights of litigants whose cases are pending before us would be prejudiced, besides eroding public trust in the independence and impartiality of the Court. This could have been avoided if a Full Court was constituted to take up present cases. It would have ensured the legitimacy of the proceedings.

There is another crucial aspect which cannot be ignored; the conduct of the political stakeholders. The dissolution of the provincial legislature as part of the political strategy of the stakeholders raises questions. Is such conduct in consonance with the scheme of constitutional democracy? Is it not in itself a violation of the Constitution? Should the Supreme Court allow its forum to be exploited for advancing political strategies or appear to be encouraging undemocratic conduct? Should the Supreme Court not take notice of forum shopping by political stakeholders by invoking the jurisdictions of High Courts and the Supreme Court simultaneously? The Supreme Court cannot and must not appear or be seen as advancing the political strategies of political stakeholders. The public trust will be eroded in the independence and impartiality of the Court if it appears or is seen to

encourage undemocratic norms and values. The Court would be unwittingly weakening the Majlis-e-Shoora (Parliament) and the forums created under the Constitution by encouraging political stakeholders to add their disputes to the court's dockets. The political stakeholders must establish their bona fides before their petitions could be entertained. The conduct of the stakeholders has created an unprecedented political instability by resorting to conduct that is devoid of the democratic values of tolerance, dialogue and debate. The conduct of the stakeholders does not entitle them to invoke the jurisdiction of the Supreme Court under Article 184(3) of the Constitution in case it is seen or appears to facilitate or promote undemocratic values and strategies.

(o) Constitution of Pakistan---

----Art. 184(3)---Public trust in the judicial system, importance of---Political questions brought before the Supreme Court---Judicial restraint, exercise of---Duty of the Supreme Court to preserve public trust when exercising powers conferred under Article 184(3) of the Constitution in relation to cases brought by political stakeholders stated.

It is public trust which enables the courts to effectively discharge their functions. Even unpopular decisions are respected when people have faith in the independence, fairness and impartiality of the adjudicatory process. Supreme Court does not refuse to exercise judicial review if a question raised has political content, provided that it involves a legal or constitutional issue. But in doing so, the Court will always be mindful of its duty to ensure that it is not only an apolitical, independent, fair and impartial arbiter but also appears to be so. This duty becomes far more challenging when the controversy brought before the Court involves the interests of the political stakeholders. Each one must believe that the court and judges hearing the lis are fair, independent and impartial. The institutional processes and procedures, whether administrative or judicial, must appear to be transparent and based on decisions which are an outcome of the exercise of structured discretion. No political stakeholder should have the remotest doubt regarding the impartiality, integrity and fairness of the adjudicatory process. Public trust can only be preserved when utmost restraint is exercised in entertaining questions and issues which involve political content. Public trust is eroded when the Court is perceived as politically partisan and the judges as 'politicians in robes'.

Begum Nusrat Bhutto v. Chief of Army Staff and Federation of Pakistan PLD 1977 SC 657; Zulfigar Ali Bhutto v. The State PLD 1978 SC 125; Zafar Ali Shah v. General Pervez Musharraf PLD 2000 SC 869; Miss Asma Jilani v. The Government of the Punjab and another PLD 1972 SC 139; Tika Iqbal Muhammad Khan v. Pervez Musharraf PLD 2008 SC 178; Muhammad Azhar Siddiqui v. Federation of Pakistan PLD 2012 SC 774 and Imran Ahmed Khan v. Muhammad Nawaz Sharif PLD 2017 SC 692 ref.

The Court must always show extreme restraint in matters which involve the political stakeholders. The Court must not allow any stakeholder to use its forum for advancing its political strategy or gaining advantage over other competitors. It is the duty of the Court to ensure that political stakeholders are not encouraged to bring their disputes to the courts for judicial settlement by bypassing the

institutions and forums created under the Constitution. It weakens the Majlise-Shoora (Parliament) and the forums meant for political dialogue and, simultaneously, harms the judicial branch of the State by prejudicing public trust in its independence and impartiality. It also encourages the political stakeholders to shun the democratic values of tolerance, dialogue and settlement through political means. The Supreme Court owes a duty to more than fifty thousand litigants whose cases on the docket of the Supreme Court are awaiting to be heard and decided. They ought to be given priority over the political stakeholders who are under an obligation to resolve their disputes in the political forums through democratic means. The Supreme Court has a duty to preserve public trust and confidence and not to appear politically partisan. This is what the Constitution contemplates.

(p) Supreme Court Rules, 1980---

----O.XI & O.XXV---Constitution of Pakistan, Arts. 184(3) & 191---Supreme Court---Suo motu cases---Constitution of Benches---Chief Justice of the Supreme Court---Powers and duties---Scope of discretionary powers of the Chief Justice and his duties under the Supreme Court Rules, 1980 in relation to constitution of benches and allocation of cases stated.

The Chief Justice enjoys the status of the Master of the Roster by virtue of the powers conferred under the Supreme Court Rules, 1980 ('Rules of 1980'). The jurisdiction under Article 184(3) exclusively vests in the "Supreme Court", which collectively means the Chief Justice and the Judges of the Court. The Chief Justice is first among equals. The Rules of 1980 have been made by the Supreme Court i.e., the Chief Justice and the Judges for administrative convenience. The power under Article 184(3) is inherent and exclusively vests in the Supreme Court. The Chief Justice exercises the powers conferred under the Rules of 1980 as a delegatee, trustee or an agent. The Master of the Roster, therefore, owes a fiduciary duty of care towards the Supreme Court. As a fiduciary it is the duty of the Master of the Roster to preserve good faith and exercise the discretion with utmost care and in the best interest of the Supreme Court. The discretion under the Rules of 1980 is not unfettered nor can it be exercised arbitrarily. Powers conferring discretion, no matter how widely worded, must always be exercised reasonably and subject to the existence of the essential conditions required for the exercise of such powers within the scope of the law. The discretion ought to be structured by organising it and producing order in it. The seven instruments of structuring of discretionary power - open plans, open policy statements, open rules, open findings, open reasons, open precedents and fair informal procedures - are by now embedded in our jurisprudence. These principles are binding in discharging the functions and exercising jurisdiction under the Rules of 1980. The discretionary powers of the Master of the Roster are, therefore, not unfettered nor can be exercised arbitrarily or capriciously. As a corollary, it is the duty of the Master of the Roster to exercise discretion in a manner that preserves and promotes public trust and confidence. It is also an onerous duty of the Chief Justice to act in the best interest of the Supreme Court. Moreover, the Chief Justice and Judges are jointly and severally responsible to ensure that the jurisdiction under Article 184(3) is exercised to promote and preserve public trust. In case of breach of this duty the responsibility would rest with the Chief Justice and all the Judges, because they

collectively constitute the Supreme Court. The Court is accountable to the Constitution, the law and the people of the country, who are the sole stakeholders. No one is above the law and every public office holder is accountable for the authority exercised under the Constitution and the law. A review of the Rules of 1980 is required in order to protect judicial integrity and impartiality in relation to constitution of the benches and allocation of cases.

The invocation of jurisdiction under Article 184(3) and the exercise of discretion relating to the constitution of benches and fixation of cases are crucial in the

context of preserving public trust and confidence. The process of constitution of benches and allocation of cases must be transparent, fair and impartial.

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Assisted by:

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For the Petitioner:

Syed Ali Zafar, Sarfraz Ahmad Cheema, Zahid Nawaz Cheema, Ch. Faisal Fareed, Safdar Shaheen Pirzada, Ashfaq Ahmed Kharal and Amir Saeed Rawn, Advocates Supreme Court (in Const. P. No. 2 of 2023).

On Court's Notice

For Federation of Pakistation:

Shehzad Ata Elahi, Attorney General for Pakistan, Ch. Aamir Rehman, Addl. AGP and Malik Javaid Iqbal Wains, Addl. A.G.

Assisted by:

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For President of Pakistation:

Salman Akram Raja, Advocate Supreme Court and Amir Malik, Advocate-on-Record.

Assisted by:

Malik Ghulam Sabir, M. Shakeel Mughal, Maqbool Ahmed and Sameen Qureshi, Advocates.

For Governor Khyber Pakhtunkhwa:

Khalid Ishaq, Advocate Supreme Court.

For Governor Punjab:

Mustafa Ramday, Jahanzeb Awan and Rashid Hafeez, Advocates Supreme Court.

Assisted by:

Ms. Zoe K. Khan, Ahmed Junaid, Akbar Khan, Uzair Shafi, Barrister Maria Haq

and Barrister Salman Ahmed, Advocates.

For ECP:

Sajeel Shehryar Swati, Advocate Supreme Court.

Assisted by:

Barrister Saman Mamoon, Ms. Kiran Khadijah, Advocates, Zafar Iqbal, Special Secy. Muhammad Arshad, DG Law, Khurram Shehzad, Addl. DG Law, Ms. Saima

Tariq Janjua, DD (Law), Ms. Bushra Rasheed, Law Officer and Zaighum Anees, Law Officer.

For Government of Punjab:

Muhammad Shan Gul, AG, Malik Waseem Mumtaz, Addl. AG and Sana Ullah Zahid, Addl. AG.

Assisted by:

Khurram Chughtai, Usman Ghani, Raza Rehman, Advocates and Ahmed Raza Sarwar, Addl. Chief Sec. Law (Pb).

For Government of Khyber Pakhtunkhwa:

Aamir Javaid, AG, Sardar Ali Raza, Addl. AG and Mian Shafaqat Jan, Addl. AG.

For Government of Balochistan:

Asif Reki, AG and M. Ayaz Swati, Addl. AG.

For Government of Sindh:

Hassan Akbar, AG, Saifullah, AAG (through V.L. Karachi) Fauzi Zafar, Addl. AG and Zeeshan Edhi, Addl. AG.

For ICT:

Jehangir Khan Jadoon, AG.

For Pakistan Bar Council:

Haroon-ur-Rasheed, Advocate Supreme Court, Vice Chairman, PBC, Hassan Raza Pasha, Advocate Supreme Court, Chairman, Executive Council.

For Supreme Court Bar Association:

Abid S. Zuberi, Advocate Supreme Court, President SCBA Muqtadir Akhtar Shabbir, Advocate Supreme Court/Secretary SCBA and Malik Shakeel-ur-Rehman, Advocate Supreme Court/Addl. Secretary.

For PTI:

Syed Ali Zafar, Ch. Faisal Fareed, Safdar Shaheen Pirzada and Ashfaq Kharal, Advocates Supreme Court.

For PPPP:

Farooq H. Naek, Senior Advocate Supreme Court.

Assisted by:

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For PML(N):

Mansoor Usman Awan, Advocate Supreme Court and Anees Shehzad, Advocate-

on-Record.

For JUIP:

Kamran Murtaza, Senior Advocate Supreme Court.

For Jamat-e-Islami:

Ghulam Mohyuddin Malik, Advocate Supreme Court and Syed Rifaqat Hussain Shah, Advocate-on-Record.

For PML (Awami):

Azhar Siddiqui, Advocate Supreme Court.

Dates of hearing: 27th and 28th February, 2023.

ORDER

MUNIB AKHTAR, J.---On 01.03.2023 these matters were disposed of majority, by means of a short order that was in the following terms:

"By a majority of 3:2 (Mr. Justice Syed Mansoor Ali Shah and Mr. Justice Jamal Khan Mandokhail dissenting) and for detailed reasons to be recorded later and subject to what is set out therein by way of amplification or otherwise, these matters are disposed of in the following terms:

1. Parliamentary democracy is one of the salient features of the Constitution. There can be no parliamentary democracy without Parliament or the Provincial Assemblies. And there can be neither Parliament nor Provincial Assemblies without the holding of general elections as envisaged, required and mandated by and under the Constitution and in accordance therewith. Elections, and the periodic holding of elections, therefore underpin the very fabric of the Constitution. They are a sine qua non for parliamentary democracy, and ensure that the sacred trust of sovereignty entrusted to the people of Pakistan is always in the hands of their chosen representatives.

2. While the holding of general elections has different aspects and requirements, one that is absolutely crucial is the timeframe or period in which such elections are to be held. The Constitution envisages two such periods, being of sixty and ninety days respectively. In relation to a Provincial Assembly, the first period applies when the Assembly dissolves on the expiration of its term under Article 107 and the second period is prescribed when it is sooner dissolved under Article 112. The time periods so set down in Article 224(1) and (2) respectively are constitutional imperatives that command complete fidelity. We are here concerned with the dissolution of two Provincial Assemblies before the expiry of their terms and therefore to the holding of general elections in relation to each within 90 days.

3. It is in the foregoing context that three questions have to be considered by the Court. The Assemblies in question are those of the Punjab and Khyber Pakhtunkhwa Provinces, which dissolved on 14.01.2023 and 18.01.2023 respectively. In both cases, the then Chief Ministers tendered advice to their respective Governors under Article 112(1) of the Constitution to dissolve the

Assembly. In the case of the Punjab Province the Governor chose not to act on the said advice so that the Assembly stood dissolved on the expiry of 48 hours, on the date just mentioned. In the case of the KPK Province, the Governor did act on the advice and made an order dissolving the Assembly, on 18.01.2023. The questions which have been considered with the assistance of learned counsel for the various parties and the Law Officers are as follows:

1. Who has the constitutional responsibility and authority for appointing the date for the holding of a general election to a Provincial Assembly, upon its dissolution in the various situations envisaged by and under the Constitution?

2. How and when is this constitutional responsibility to be discharged?

3. What are the constitutional responsibilities and duties of the Federation and the Province with regard to the holding of the general election?

4. The Constitution envisages three situations for the dissolution of a Provincial Assembly. These, in the context of the role of the Governor, are as follows.

5. The first situation is set out in clause (2) of Article 112. This envisages the dissolution of the Assembly by an order made by the Governor at his discretion, subject to the previous approval of the President and fulfillment of the conditions set out therein. In this situation, the Assembly cannot, and does not, dissolve without an order being made by the Governor, and dissolves immediately on the making of the order.

6. The second situation is set out in clause (1) of Article 112, when the Chief Minister advises dissolution. This situation can be divided into two sub-categories, which are as follows:

a. The first is where the Governor acts on the advice tendered and makes an order dissolving the Assembly. Here, the Assembly dissolves immediately on the making of the order.

b. The second sub-category is where the Governor does not make an order of dissolution on the advice tendered. Here, the Assembly stands dissolved on the expiry of forty-eight hours from the tendering of the advice by the Chief Minister (i.e., by the efflux of time), and that does not require an order of the Governor.

7. The third situation is set out in Article 107. This provides that unless an Assembly is sooner dissolved (i.e., in terms of either of the two preceding situations), it stands dissolved after a term of five years. Here, the Governor has no role at all; the Assembly dissolves by the efflux of time.

8. Article 105(3)(a) provides that where the Governor dissolves the Assembly he shall appoint a date for the holding of a general election thereto, being a date not later than 90 days from the date of the dissolution.

9. The Elections Act, 2017 ("2017 Act") has been enacted by Parliament in exercise of its legislative competence under the Constitution. That includes,

in addition to Entry 41 of the Fourth Schedule, a specific provision in the body of the Constitution, being Article 222, that expressly articulates a list of matters relating to elections which are within the Federal domain. The 2017 Act applies, inter alia, to both the National and the Provincial Assemblies. Section 57(1) thereof provides that the President shall "announce the date or dates of the general elections after consultation with the Commission".

10. On a conjoint reading of the foregoing provisions we conclude and hold as follows:

a. In situations where the Assembly is dissolved by an order of the Governor, the constitutional responsibility of appointing a date for the general election that must follow is to be discharged by the Governor as provided in terms of Article 105(3)(a). These are the situations described in paras 5 and 6(a) above.

b. In situations where the Assembly is not dissolved by an order of the Governor, the constitutional responsibility of appointing a date for the general election that must follow is to be discharged by the President as provided in terms of section 57(1) of the 2017 Act. These are the situations described in paras 6(b) and 7 above.

11. Since the general election on a dissolution of a Provincial Assembly has to be held within a time period stipulated by the Constitution itself, which is a constitutional imperative, the President or, as the case may be, the Governor must discharge the constitutional responsibility of appointing a date for the said election swiftly and without any delay and within the shortest time possible. The Election Commission must proactively be available to the President or the Governor, and be prepared for such consultation as required for a date for the holding of general elections.

12. It follows from the foregoing that in relation to the dissolution of the Punjab Assembly, to which the situation described in para 6(b) above applied, the constitutional responsibility for appointing a date for the general election that must follow was to be discharged by the President. However, in relation to the dissolution of the KPK Assembly, to which the situation described in para 6(a) above applied, the constitutional responsibility for appointing a date for the general election that must follow was to be discharged by the Governor.

13. It further follows that the order of the President dated 20.02.2023 is constitutionally competent and subject to what is observed below, it is hereby affirmed insofar as it applies to the Punjab Assembly; but the same is constitutionally invalid insofar as it applies to the KPK Assembly and is therefore hereby set aside. It also follows that the Governor of KPK Province, inasmuch as he has not appointed a date for the holding of the

general election to the Assembly of that Province is in breach of his constitutional responsibility.

14. It is further declared and directed as follows in relation to the matters before the Court:

a. In ordinary circumstances the general election to the Punjab Assembly ought to be held on 09.04.2023, the date announced by the President in terms of his order of 20.02.2023. However, we are informed that on account of the delay in the emergence of the date for the holding of the general election, it may not be possible to meet the 90 day deadline stipulated by the Constitution. It is also the case that (possibly on account of a misunderstanding of the law) the Election Commission did not make itself available for consultation as required under section 57(1) of the 2017 Act. The Election Commission is therefore directed to use its utmost efforts to immediately propose, keeping in mind sections 57 and 58 of the 2017 Act, a date to the President that is compliant with the aforesaid deadline. If such a course is not available, then the Election Commission shall in like manner propose a date for the holding of the poll that deviates to the barest minimum from the aforesaid deadline. After consultation with the Election Commission the President shall announce a date for the holding of the general election to the Punjab Assembly.

b. The Governor of the KPK Province must after consultation with the Election Commission forthwith appoint a date for the holding of the general election to the KPK Assembly and the preceding clause (a) shall, mutatis mutandis, apply in relation thereto.

15. It is the constitutional duty of the Federation, in terms of clause (3) of Article 148, "to ensure that the Government of every Province is carried on in accordance with the provisions of the Constitution". There can be no doubt that this duty includes ensuring that a general election to the Assembly of every Province is held, and enabled to be held, in a timely manner within the period set out in the Constitution. This duty is in addition to, and applies independently of, the duty cast under Article 220 on "all executive authorities in the Federation and in the Provinces to assist the Commissioner and the Election Commission in the discharge of his or their functions". It follows that the Federation, and in particular the Federal Government, is, inter alia, obligated, on an immediate and urgent basis, to forthwith provide the Election Commission with all such facilities, personnel and security as it may require for the holding of the general elections. In like manner, it is the duty of the Provincial Governments, acting under the Caretaker Cabinets, to proactively provide all aid and assistance as may be required by the Election

Commission. The duty cast upon the authorities as set out in section 50 of the 2017 Act must also be discharged forthwith and proactively.

16. The three matters before the Court are found maintainable and stand disposed of as above."

We may note that all five members of the Bench signed the above order. The two learned members in dissent respectively wrote in manuscript above their signatures as follows: "I have appended my separate order" (Syed Mansoor Ali Shah, J); and "I have appended my note along with the main order" (Jamal Khan Mandokhail, J). The learned Judges in minority released a joint short order, which was signed by (and only by) the two of them.

2. The following are the reasons for the short order of the majority. We may note that our two learned colleagues in dissent released their (joint) detailed reasons on 27.03.2023.

3. We begin, for reasons that will later become apparent, by briefly setting out the chronology of the proceedings of these matters. Initially, the Hon'ble Chief Justice, as master of the roster, constituted a nine-member Bench, before which these matters were placed on 23.02.2023. That Bench comprised of the following Judges: the Hon'ble Chief Justice, Mr. Justice Ijaz ul Ahsan, Mr. Justice Syed Mansoor Ali Shah, Mr. Justice Munib Akhtar, Mr. Justice Yahya Afridi, Mr. Justice Sayyed Mazahar Ali Akbar Naqvi, Mr. Justice Jamal Khan Mandokhail, Mr. Justice Muhammad Ali Mazhar and Mr. Justice Athar Minallah. On 23.02.2023 no substantive hearing took place and the matters were not taken up on the merits. The order of the Court for that day was made by majority, with four of the learned Judges (Syed Mansoor Ali Shah, Yahya Afridi, Jamal Khan Mandokhail and Athar Minallah, JJ) making their own orders. These orders are, for purposes of the record, appended to this judgment as Annex A. It is pertinent to note that through his order Yahya Afridi, J, for "detailed reasons to be recorded later", dismissed all three matters. It was also observed as follows (emphasis supplied): " I find that my continuing to hear the said petitions is of no avail. However, I leave it to the Worthy Chief Justice to decide my retention in the present bench hearing the said petitions". Athar Minallah, J in his order expressed his concurrence "with the articulate opinion recorded by my learned brother Justice Yahya Afridi". In the event, Yahya Afridi, J released his detailed reasons on 31.03.2023. Athar Minallah, J also released reasons on 07.04.2023.

4. The matters were, as ordered on 23.02.2023, listed before the nine-member Bench on the following day and thereafter adjourned to 27.02.2023. In between, the members of the Bench had an internal meeting in the ante-room of the Court and subsequent thereto a unanimous order signed by all nine members was made, and released on 27.02.2023. That order is annexed to this judgment as Annex B. For convenience, the order is reproduced below:

"Keeping in view the order dated 23.02.2023 and the additional notes attached thereto by four of us (Justice Syed Mansoor Ali Shah, Justice Yahya Afridi, Justice Jamal Khan Mandokhail and Justice Athar Minallah) as well as the discussion/deliberations made by us in the ante-Room of this Court the

matter is referred to the Hon'ble Chief Justice for reconstitution of the Bench."

5. After the above order the Hon'ble Chief Justice, as the master of the roster, constituted a five-member Bench to hear these matters, i.e., the present Bench. That was the Bench that actually sat and heard the matters on 27.02.2023 and 28.02.2023 and thereafter decided the same in terms as noted above. Thus, (and, again, the relevance of this will emerge later in the judgment) these matters were placed before only two Benches: initially a nine-member Bench and then a five-member Bench. At no time was any other Bench of a different strength/composition ever constituted by the Hon'ble Chief Justice, nor did any other Bench ever exist or sit in relation to these matters.

6. We now turn to the submissions made by learned counsel for the parties. Mr. Ali Zafar, learned counsel appearing in C.P. 2/2023, submitted that on 12.01.2023 the then Chief Minister of Punjab advised the Governor to dissolve the Punjab Assembly in exercise of powers conferred by Article 112(1) of the Constitution. Since the Governor chose not to act on that advice, the Assembly stood dissolved by efflux of time 48 hours later, on 14.01.2023. On 17.01.2023, the then Chief Minister of Khyber Paakhtunkhwa advised the Governor to dissolve the KPK Assembly in exercise of the aforesaid powers. In this case, the Governor chose to act on the advice and dissolved the Assembly on 18.01.2023. Subsequent thereto the Speaker of the Punjab Assembly wrote to the Governor on 20.01.2023 asking him to appoint the date for the general election to that Assembly in exercise of powers conferred on the Governor by Article 105(3). Learned counsel submitted that thereafter, on 24.01.2023, the Election Commission of Pakistan ("Commission") wrote separately to both the Governors of Punjab and KPK Provinces, asking them to appoint dates for the general elections to the Assemblies thereof. The Commission also gave a range of dates for consideration by the Governors. Learned counsel submitted that the Governor Punjab responded to the Commission's letter on 01.02.2023. In that, and subsequent correspondence, the stand of the Governor was that since the Assembly was not dissolved on an order made by him Article 105(3) did not apply and the matter of the appointment of the date would therefore have to be dealt with by other provisions of the Constitution and the law, being the Elections Act, 2017 ("2017 Act"). The Governor KPK also wrote (on 31.01.2023) to the Commission but did not appoint any date. Learned counsel submitted that both Governors inter alia also referred to the law and order and security situation in the Provinces which would have to be taken into account. It was emphasized that reference to such considerations was extraneous; the matter was only in respect of the competent authority for appointing a date for the general elections and nothing more.

7. Learned counsel submitted that on 29.01.2023 a writ petition was filed by the Pakistan Tehreek e Insaf (PTI) in the Lahore High Court. That petition and other matters were placed before a learned Single Judge who decided the same vide judgment dated 10.02.2023 (reported as Pakistan Tehreek e Insaf v. Governor Punjab and others PLD 2023 Lahore 179). In that judgment, the learned Judge, by relying on Articles 218 and 219, held that the date for the general election had to be given by the Commission as the Punjab Assembly had not been dissolved by order

of the Governor. It was held in the operative part of the judgment as follows (emphasis in original): " the "ECP" is directed to immediately announce the "date of election" of the Provincial Assembly of Punjab with the Notification specifying reasons, after consultation with the Governor of Punjab, being the constitutional Head of the Province, to ensure that the elections are held not later than ninety days as per the mandate of the "Constitution"." It appears that the relevant provisions of the 2017 Act, and in particular section 57(1), were not noticed in the judgment.

8. Continuing with his submissions, learned counsel submitted that thereafter there was correspondence, and also meetings, between the Governor and the Commission but nothing fruitful emerged, inasmuch as no date was forthcoming for the holding of the general election. It appears that the judgment of the learned Single Judge was then challenged by the Governor by means of an Intra-Court Appeal on or about 16.02.2023. The stance of the Governor was that it was not for him to give the date for the general election. On that ICA notices were issued by the learned Division Bench, and the matter was fixed from time to time but without any substantive hearing. Ultimately, we were informed, the ICA was fixed on 27.02.2023 when it was adjourned sine die by reason of the present matters pending in this Court. In the meanwhile, a contempt petition was also apparently filed in the High Court in relation to the alleged non-performance of the directions given by the learned Single Judge in the aforementioned judgment.

9. Learned counsel further submitted that in the meantime the President of Pakistan had also stepped in. In a letter written to the Commission on 08.02.2023 the President referred to the dissolution of the two Assemblies and after referring to various provisions of the Constitution and the 2017 Act expressed his disquiet at the delay in the announcing of the date for the general elections. Thereafter, the President again wrote to the Commission on 17.02.2023 and referred to the apathy of the latter and the inaction on its part. The President invited the Commission to meet with him on 20.02.2023 "for consultation in terms of Section 57(1) of the Elections Act, 2017". The Commission wrote to the President on 18.02.2023 in reply to his letter of 08.02.2023 referring to its position with regard to the elections in both Provinces and setting out its own version of how events had unfolded since the dissolution of the Assemblies. The Commission also wrote to the President on 19.02.2023, this time with reference to his letter of 17.02.2023 and did not commit itself to any meeting with the latter. Indeed, the letter, while referring to an internal meeting of the Commission scheduled for 20.02.2023, stated as follows: "For the subject matter at hand, due to reasons stated above and matter being subjudice at various fora, regrettably the Commission may not be able to enter into a process of consultation with the office of the President". This led to the President making an order on 20.02.2023, in exercise of powers under section 57(1) of the 2017 Act, whereby 09.04.2023 was appointed as the date for the holding of the general elections to both the Punjab and KPK Assemblies.

10. As regards the KPK Province, learned counsel submitted that even though the Governor had himself dissolved the Assembly while acting on the Chief Minister's advice no date had yet been appointed by him for the general election. It was submitted that this was a clear violation of the Constitution in as much as here the position was clear: the Governor had to appoint the date in terms of Article 105(3). Learned counsel referred to correspondence between the Commission and the Governor but despite the same no date had been given. It was also submitted that more than one (and, apparently, three) writ petitions were pending in the Peshawar High Court in this regard, but no substantive hearing had yet taken place

in relation thereto. Thus, in respect of both Provinces, learned counsel submitted, even the very first step towards holding the general elections had not been taken. It was submitted that in both cases, the general elections had to be held within 90 days of the date of dissolution, which was a mandatory requirement. The deadline in this regard was fast approaching but nothing had been done so far. It was therefore absolutely essential for this Court to step in and make the appropriate orders by way of declarations and directions so that the rights of the electorates in both Provinces, and their fundamental rights, were protected and enforced. Learned counsel prayed accordingly.

11. Mr. Abid Zuberi, learned counsel in C.P. 1/2023, endorsed the submissions of Mr. Ali Zafar and submitted that the essential question before the Court was as to when the general election was to be held, and who had to appoint the date for the same. As to the first, learned counsel submitted that there could be no doubt that the elections had to be held within the stipulated period of 90 days. That period began as soon as the Assembly stood dissolved, whether by efflux of time (48 hours) or the Governor having made an order on the advice of the Chief Minister. As to the second, learned counsel submitted that if the latter situation applied, as it did in the case of the KPK Assembly, then the Governor was bound to give the date for the general election under Article 105(3). If the former situation applied, as it did in the case of the Punjab Assembly, then the power lay with the President in terms of section 57(1) of the 2017 Act. That was also the position where the Assembly stood dissolved on the expiry of its five year term. It was further submitted that when acting in terms of section 57(1) the President was not bound to act on the advice of the Prime Minister. Certain case law was also referred to in this regard.

12. The learned Attorney General submitted that the questions before the Court required consideration of the following points. Firstly, the power conferred on the Governor in terms of Article 105(3), which corresponded to the power of the President under Article 48(5), did not apply to the situation at hand. That power, it was submitted related only to a dissolution under Article 112(2), which corresponded to Article 58(2) in relation to the National Assembly. Secondly, the learned Attorney General submitted that the power to appoint the date for a general election was a power coupled with a duty. The appointing of the date was only directory though the learned Attorney General accepted that Article 224 was applicable to all situations of dissolution, the relevant period for the holding of general election (i.e., sixty or ninety days) applying as appropriate. Thirdly, it was submitted that constitutional provisions and their requirements could not be interpreted on the basis of statutes and therefore, section 57(1) did not control the appointment of a date of the general election. In any case, it was contended, section 57 spoke only of the date being "announced" which, it was submitted, was different from appointing the date. Finally, keeping all of the above points in mind, the learned Attorney General submitted, it was the Commission that was to appoint the date for general elections in terms of its powers and responsibilities under Articles 218 and 219, except the two situations noted above, i.e., in relation to dissolutions under Articles 112(2) and 58(2). That was the crux of the case as per the submissions of the learned Attorney General.

13. Expanding on the above submissions, the learned Attorney General referred to Articles 48 and 58 as originally adopted when the Constitution came into force in 1973 and placed before the Court the evolution of these, and related, provisions over the decades as the Constitution was successively amended. It was submitted that when the predecessor legislation to the 2017 Act, i.e., the Representation of the

People Act, 1976 ("1976 Act") was originally enacted, its section 11 had provided that the date for the holding of a general election would be given by the Commission. The President, or any other authority, did not have any role to play in this regard. It was only subsequently that the said section was substituted so as to confer the power on the President, a position that was continued when the earlier legislation was replaced with the 2017 Act. With regard to the position of the Commission reference was also made to the last part of Article 222, which expressly provides that no legislation could take away or abridge any of the powers conferred on the Commission or the Chief Election Commissioner by the Constitution. Therefore, it was submitted, in relation to the two dissolutions at hand and the general elections thereto, it was for the Commission to appoint the dates after consultation with the stakeholders/parties. It was further submitted that all efforts had to be made to hold the general elections within the stipulated 90 day period but if that was not possible for any constitutionally permissible reason then the Commission could even appoint a date beyond that. Reliance was placed on Pakistan Peoples Party Parliamentarians and others v. Federation of Pakistan and others PLD 2022 SC 574, 648. As regards section 57(1), the learned Attorney General submitted that that power was only statutory in nature and could not override the constitutional provisions, which placed the power in the hands of the Commission. The maintainability of the present matters was also challenged, in view of the pending proceedings before the Lahore and Peshawar High Courts. It was prayed that the matters be disposed of in the above terms.

14. Mr. Sajeel Shehryar Swati, learned counsel for the Commission submitted that the constitutional power lay with the Commission to give the dates for bye-elections, elections to the Senate and the election of the President. Insofar as general elections to the Provincial Assemblies were concerned, it was submitted that the power lay with the Governors in relation to a dissolution thereof in all situations except where Article 107 applied, i.e., the term of the Assembly simply expired. It was only in this last situation that section 57(1) applied, and the date had to be given by the President. Since that was not the situation at hand, learned counsel submitted that the power to appoint the dates lay with respectively with the Governors of Punjab and KPK.

15. Mr. Khalid Ishaque, learned counsel who appeared for the Governor, KPK however took a different position. Learned counsel submitted that the constitutional power lay with the Commission even in the situation at hand and not the Governor. The latter had the power to appoint the date only if he dissolved the Assembly in terms of Article 112(2). Since that was not the case the Governor stood absolved of all responsibility in the present situation. The learned Advocate General KPK, who appeared on behalf of the caretaker Government endorsed the submissions of the learned Attorney General and submitted that in the present situation the power and duty lay with the Commission to give the date for the general election. Reference was also made to section 69 of the 2017 Act. Mr. Mustafa Ramday, learned counsel who appeared for the Governor, Punjab submitted that the power and duty of the Governor arose only if the Assembly was dissolved on his order. That was patently not the case. Therefore, in the present situation it was not within his ambit to appoint the date. Learned counsel was content to rest his submissions to this extent since, it was submitted, it was not necessary for him to elaborate as to where exactly the duty and power lay in relation to the present dissolution of the Punjab Assembly. The learned Advocate General Punjab submitted that in the facts and

circumstances of the present case, the power did not lie with the President to give the date for the general election to the Punjab Assembly.

16. Mr. Farooq Naek, learned counsel who appeared for the Pakistan Peoples Party Parliamentarians (PPPP) submitted that the political parties, and certainly the party whom he represented, were not averse to the holding of the general elections within the stipulated period. However, it was important that general elections be held in a conducive environment to ensure that the whole process was in accordance with Article 218, i.e., the elections were held honestly, justly and fairly. In this context learned counsel referred to the hazards and difficulties on multiple fronts facing the nation at this time. It was submitted that the matters before the Court were all under Article 184(3) of the Constitution. As jurisprudentially developed by the Court, this provision conferred a unique power, which had to be carefully exercised. The provision conferred a power that was inquisitorial and not adversarial, and it had to be read along with Article 187. Certain case law was referred to. Learned counsel then referred to various provisions of the Constitution relating to the matters at hand, i.e., the holding of the general elections. It was submitted that where the Governor dissolved the Assembly then it was for him to appoint the date. However, where that was not the situation it was for the President under section 57(1). But the President was there bound to act on the advice of the Prime Minister. Learned counsel also questioned the maintainability of the present matters, in view of the petitions/proceedings pending in the High Courts. The legitimacy of the superior Courts was at risk and the Court should therefore be careful in exercising its power of judicial review.

17. Mr. Mansoor Awan, learned counsel who appeared for the Pakistan Muslim League (N) (PML(N)) endorsed the view taken by the learned Attorney General and submitted, referring to the judgment of the learned Single Judge in the Lahore High Court that that was given by that Court on a petition filed by the PTI. It was submitted that C.P. 2/2023 was essentially one filed by the PTI and therefore that party could not maintain such proceedings in this Court in view of the Lahore High Court judgment. Reference was also made to the ongoing census exercise and it was submitted that the appropriate course would be for the general elections in both Provinces to be held after than exercise, and the consequent reallocation of seats and re-demarcation of constituencies had been completed.

18. Mr. Kamran Murtaza, learned counsel who appeared for the Jamiat Ulema Islam (JUI), read out the joint statement that was filed on 24.02.2023 on behalf of the PML(N), the PPPP and the JUI. Learned counsel submitted that in the present situation, it was for the Governors of both the Provinces to give the dates for the general elections.

19. Finally, Mr. Salman Akram Raja, learned counsel for the President, submitted that insofar as the Punjab Assembly was concerned the power and duty lay with the President under section 57(1) to appoint the date for the general election. In exercising this power, the President was not bound by the advice of the Prime Minister. It was submitted that the word "announce" as used in that section had to be understood in the sense of fixing or appointing the date, and not otherwise. Referring to the order of the President of 20.02.2023 whereby he had appointed 09.04.2023 as the date for the general election for both Assemblies, learned counsel submitted on instructions that the President, on reflection, accepted that the power to appoint the date for the KPK Assembly lay with the Governor as

the latter had made the order for the dissolution thereof. Therefore, learned counsel stated at the Bar, that the President should be taken as having withdrawn his order to the extent of the KPK Assembly.

20. We have heard learned counsel as above and considered the relevant constitutional and statutory provisions and the material and case law referred to and relied upon. The fundamental importance of periodically holding general elections to elect, for the National Assembly and each of the Provincial Assemblies, the chosen representatives of the people who are to exercise the sacred trust of sovereignty that Allah has reposed in the people of Pakistan, can never be overemphasized. As already noted in the first para of the short order: Parliamentary democracy is one of the salient features of the Constitution. There can be no parliamentary democracy without Parliament or the Provincial Assemblies. And there can be neither Parliament nor Provincial Assemblies without the holding of general elections as envisaged, required and mandated by and under the Constitution and in accordance therewith.

21. General elections are to be held periodically as stipulated by the Constitution, as each election cycle comes to an end and in so ending triggers and gives birth to the next. This continuous and repeated recourse to the political sovereign (within the sacred limits noted in the Preamble to the Constitution) is a sine qua non for parliamentary democracy. Furthermore, given the federal nature of the Constitution each Assembly is for this purpose a separate "unit" which must, even though the substantive and procedural constitutional and statutory requirements are essentially the same, be treated in its own right and in and of itself. Thus, e.g., if in relation of a given election cycle elections to the National Assembly and all the Provincial Assemblies are held on the same day, it must always be kept in mind that, constitutionally speaking, there are in law and fact five separate general elections that are being so held.

22. We are, in these matters, primarily concerned with the very first step in the election process that marks the beginning of each election cycle: the appointing of the date for the general election. Without such date the general election cannot be held at all and whole constitutional scheme of elected parliamentary democracy, at the very least in relation to the Assembly in question, grinds to a halt. Furthermore, although the Constitution envisages different ways in which an Assembly may be dissolved (see paras 4 to 7 of the short order) it expressly imposes specific time limits in relation to each, being either 60 days or 90 days as applicable. These limits are constitutional imperatives. Since a general election is to be held within constitutional time limits and the Commission has to map the actual electoral process onto the date appointed (as required by section 57(2) of the 2017 Act), the crucial question becomes: which is the authority in whom is reposed the constitutional power and responsibility to appoint the date for the holding of a general election? This is the essence of the issue raised by the first two questions noted in para 3 of the short order.

23. In addressing the question posed, we are of the view that certain broad considerations must be kept in mind. Firstly, given the tight time limits imposed by the Constitution, the said authority must be known and identified with clarity from

the very day-indeed, moment-that an Assembly stands dissolved. It is in fact this lack of clarity (at least in relation to one situation), and the consequent delay, that led to these proceedings. Secondly, that authority must be able to act swiftly and immediately since literally every day counts. This is all the more so in relation to when an Assembly stands dissolved at the conclusion of its term. There, the time limit is 60 days. The electoral process laid out in section 57(2) (referred to as the Election Programme) is spread over more than 50 days. Given that the subsection also gives the Commission seven days to issue said programme it is readily apparent that the position is, time wise, very tight indeed. Although the position is somewhat suppler in those situations where the dissolution is such as allows for the general election to be held within 90 days, the constitutional rules and principles remain the same. The electoral process must be launched in all situations if not immediately then at least very swiftly, and (much) sooner rather than later.

24. Thirdly, in identifying the authority which is to appoint the date uniformity ought to be achieved to the maximum extent possible. The multiplicity of situations in which an Assembly can be dissolved should not lead to a multiplicity of authorities: any divergence in this context should be reduced and kept to the minimum. The constitutional reason remains the same as already noted: the necessity of remaining within the timeframe(s) imposed by the Constitution, and the desirability of the electoral process being initiated and set in motion very swiftly. As we shall see, this is indeed what is reflected in the relevant provision of the 2017 Act once it is understood and applied in the correct constitutional sense. Having set out what, in our view, are the broad parameters for the proper understanding of the primary question posed, we turn to its consideration.

25. Of the various situations in which an Assembly stands dissolved, the first (identified in para 5 of the short order) poses no special problem, and we note it in passing. All the learned counsel agreed, in our view rightly so, that when the Governor dissolves the Assembly in his discretion, in the particular circumstances envisaged by Article 112(2), then Article 105(3) applies and the date for the general election is to be given by him. The same is the position as regards the dissolution of the National Assembly by the President in his discretion under Article 58(2). We therefore move immediately to the second situation, identified in para 6 of the short order and its two sub-categories. The first sub-category applies in relation to the present dissolution of the KPK Assembly since the Assembly was dissolved on an order made by the Governor acting on the Chief Minister's advice. The second sub-category applies in relation to the present dissolution of the Punjab Assembly since the Assembly dissolved by efflux of time, the Governor not having acted on the advice tendered. Which is the authority that has the constitutional responsibility to appoint the date for the general election in each case?

26. The various solutions proposed and answers given in this regard by learned counsel have been noted above. Keeping in mind the constitutional provisions referred to, and also Parliament's legislative expression in the shape of section 57(1), in principle three possibilities offer themselves: the President, the Governor or the Commission. Now, the Constitution does not expressly refer to any power of the Commission with regard to the appointment of the date. Learned counsel who argued for this result located the power within what are, according to them, the (very) capacious folds of Articles 218 and 219. Both the President and the Governor find express mention in the Constitution in the present context, in terms

of Articles 48(5) and 105(3) respectively. However, that power is conditional: "Where the [President/Governor] dissolves the [National/ Provincial] Assembly ." Finally, the President is expressly the repository of the power in terms of section 57(1) of the 2017 Act. The Governor finds no mention in the Act, and the role of the Commission in this context is consultative. There is here also the related question as to whether the President is to act on the advice of the Prime Minister.

27. We begin by making some general observations. Firstly, the question of the authority that is to appoint the date for a general election sounds on the constitutional plane, in the sense that it cannot simply be a statutory power. The reason is that a power wholly statutory in nature is created, and exists, in terms of the statute; if the statute goes so does the power. Clearly that cannot be true for a general election. Such elections are a fundamental constitutional requirement laid out in and by the Constitution itself. The holding of such elections and, as here specifically relevant, the appointment of the date for the same cannot be defeated by reason of there being a deficient law, or even no law, on the subject. At the same time, it must be kept in mind that the Constitution does confer legislative competence on Parliament (as stated in para 9 of the short order) with regard to elections in broad terms, subject to the limitation imposed in the last part of Article 222. Secondly, notwithstanding the federal structure of the Constitution, the legislative competence in relation to both the National and the Provincial Assemblies is vested exclusively in Parliament. A preliminary answer to the question now under consideration can therefore be stated as follows. To the extent that the Constitution itself expressly identifies the authority for appointing the date for a general election it will obviously prevail. Any statutory provision must give way to the constitutional text. However, where the Constitution is silent, the question then is not whether Parliament has the legislative competence to give an answer but rather to what extent can Parliament go in this regard?

28. To address this question we need to consider, as submitted by the learned Attorney General, the 1976 Act and how it stood when enacted. The relevant provision there was section 11. It was subsequently substituted, and also amended substantially. Thereafter, when the 1976 Act was replaced with the 2017 Act, the relevant power was placed in section 57(1). It will be convenient to put these provisions in tabular form. (We may note that both statutes defined "Assembly" as meaning both the National and Provincial Assemblies, as appropriate.) As presently relevant the provisions are as follows:

Section 11 (as originally enacted)	Section 11 (as up to 2017)	Section 57
(1) For the purpose of holding general elections to an Assembly, the Commission shall, by notification in the official Gazette, call upon the electors to elect a member from each constituency: Provided that, in the case of general elections to be	(1) As soon as may be necessary and practicable the President makes an announcement of the date or dates on which the polls shall be taken, the Election Commission, not later than thirty days of such announcement shall, by notification in the	(1) The President shall announce the date or dates of the general elections after consultation with the Commission. (2) Within seven days of the announcement under sub-section (1), the Commission shall, by notification in the official

held to an Assembly following its dissolution, such notification shall be issued within two days of such dissolution becoming effective. (2) In the notification issued under subsection (1), the Commission shall, in relation to each constituency, specify- (d) a day, at least forty-two days after the nomination day, for the taking of the poll.	official Gazette, call upon a constituency to elect a representative or representatives and appoint- (g) the date or dates on which a poll shall, if necessary be taken, which or the first of which shall be a date not earlier than the twenty-second day after the publication of the revised list of candidates.	Gazette and by publication on its website, call upon the voters of the notified Assembly constituencies to elect their representatives in accordance with an Election Programme, which shall stipulate- (i) the date or dates on which a poll shall, if necessary, be taken, which or the first of which shall be a date not earlier than the twenty-eighth day after the publication of the revised list of candidates.

29. It will be seen that as originally enacted the power in terms of section 11 to appoint the date for a general election lay with the Commission. However, it was an oblique grant in the sense that it was but the last step of the election schedule which had to be issued by the Commission. Section 11 was then substituted/amended such that the power to announce the date lay with the President. This position was maintained in section 57. Focusing on section 11 as originally enacted, there were two possibilities. One was that the power to appoint the date for the general election lay only with the Commission in terms of Articles 218 and 219. On this view, all that Parliament could do was to give statutory expression to the constitutional grant, and therefore any statute (here the 1976 Act) was limited only to conferring the power on the Commission. No other authority could be identified as the repository of the power. The second view was that since the Constitution was silent as to which authority could be empowered to appoint the date for the holding of the general election, it lay within the legislative competence of Parliament to identify the same and, by statute, make it the repository of the power. It is important to keep in mind that even here the power itself sounded on the constitutional plane. It was simply that Parliament had more leeway in identifying the specific authority that was to exercise it. On this view, when Parliament first acted it chose to identify the Commission as the repository of the power, which was then shifted to the President by successive statutory alterations to section 11. That position was maintained when Parliament enacted fresh legislation on the subject, i.e., the 2017 Act.

30. It will be seen from the foregoing that if the first view is correct, then the subsequent amendments to section 11, and also section 57, would to this extent be ultra vires the Constitution. If the constitutional power lay within the folds of Articles 218 and 219 then Parliament's hands would be tied, in particular by the last part of Article 222. Its legislative competence could not move beyond the

constitutional limit. All it could do when making a statute would be to identify (as it would have to) the Commission (and it alone) as the repository of the power to appoint the date. Both section 11, as substituted/amended, and section 57 would necessarily fail to this extent. In our view, this approach cannot be accepted. No one suggested before us, in our view correctly, that either section 11 in its subsequent manifestation or section 57 were ultra vires the Constitution. We are clear that it is the second view that is correct. Parliament has competence under entry No.41 of the Federal Legislative List in relation, inter alia, to "Elections to the National Assembly and the Provincial Assemblies ". It is a well settled rule of constitutional law that legislative entries are fields of legislative power which are to be interpreted and applied in the widest possible terms. In and of itself this legislative competence would therefore be quite sufficient to confer power on Parliament to identify by statute the authority that is to appoint the date whether that be the Commission or the President. However, entry No. 41 cannot be read in isolation. The breadth of this constitutional grant must be tempered with, and balanced against, the command of Article 222. There, after identifying the sort of laws that Parliament is competent to enact in relation to elections, it is expressly provided that "no such law shall have the effect of taking away or abridging any of the powers of the Commissioner or the Election Commission under this Part". In our view, this requirement can, at most, be regarded as imposing some limitation on Parliament's legislative competence to identify the authority that is to be the repository of the power to appoint the date. However, it cannot and does not nullify it altogether. Put differently, it may be that there is some outer limit to the Parliament's power to identify the authority. However, that limit is certainly not reached, let alone breached, when the President is identified to be the said authority.

31. It follows from the foregoing that in those situations of dissolution where the Constitution is silent as to which is the authority for appointing the date for the general election, it is Parliament's identification that must prevail and be applied. Those are the situations identified in para 10(b) of the short order. Therefore, in the case of the Punjab Assembly the power to appoint the date for the general election lay with the President in terms of section 57(1) and not the Governor. It follows that the Commission fell into error when it sought, and continued to seek, the date for the general election from the Governor of Punjab, and the latter was correct in refusing to give such date. Furthermore, the refusal of the Commission to consult with the President was also legally incorrect. In particular, its refusal to do so by means of its letter of 19.02.2023 when called upon by the President with express reference to section 57(1) was an error that is only excusable (and was excused in the short error) on account of the lack of legal clarity. It also follows that the order of 20.02.2023 made by the President appointing the date for the Punjab Assembly was correct and well within his power and constitutional responsibility.

32. The next question that must be addressed in this context is whether the President, in exercising his power under section 57(1), can act on his own or is bound to act on the advice of the Prime Minister? Had the grant of power being entirely statutory in nature then the answer may well have been that the President would be bound to act on advice. However, as has been seen, section 57(1) merely

identifies the authority that is to exercise the power, the locus of which remains on the constitutional plane. Thus, the President is discharging a constitutional obligation and responsibility. Having considered the point, we are of the view that the President, in appointing the date for the general election under section 57(1), does not act on advice but rather on his own. In order to understand why this is so, we begin by looking at Article 48. Clause (1) provides that the President, in exercise of his functions, is to act on and in accordance with the advice of the Cabinet or the Prime Minister, as the case may be. The proviso to this clause allows for the President to require reconsideration of any advice tendered within fifteen days thereof and goes on to provide that when the advice is tendered again, he is to act on it within ten days thereof. Thus, if the proviso is applicable to a given situation, it could be up to almost a month before the advice is acted upon. Clause (2) of Article 48 provides that notwithstanding anything contained in clause (1) the President shall act in his discretion in respect of any matter "in respect of which he is empowered by the Constitution to do so". These provisions have now to be examined in the specific context of appointing the date for a general election.

33. It is to be noted that the application of Article 48(2) is not necessarily limited only to those constitutional provisions where the word "discretion" is expressly used. There are provisions where the term is not used and yet the application thereof, on any sensible approach, is meaningful only if the President is to act on his own and not on advice. For example, consider Article 91(7). The term "discretion" is not used therein. It empowers the President to ask the Prime Minister to take a vote of confidence from the National Assembly. But the power can only be exercised if the President is satisfied that the "Prime Minister does not command the confidence of the majority of the members of the National Assembly". Is the President to act on advice here? A moment's reflection will show that that cannot be so. No Prime Minister (who can in any case take a vote of confidence from the Assembly at any time) would sensibly advice the President to take recourse to Article 91(7). To require that this provision can only be invoked on advice would be reduce it to a dead letter. This is therefore a provision where, even though the term "discretion" is not used, the President is empowered to act on his own. Another example in this regard is Article 75(1) which allows the President to return a Bill (other than a Money Bill) to Parliament for reconsideration. Again, the term "discretion" is not used here. Now, it is an important constitutional convention that the Government of the day must at all times command the confidence of the majority of the National Assembly. Realistically therefore, a Bill can hardly pass the Houses of Parliament without the approval of the Government. If the power under Article 75(1) is conditional upon advice, then it could (or would) hardly ever be invoked. It would, for all practical purposes, be a dead letter. It makes sense only if it empowers the President to act on his own even though the term "discretion" is not used.

34. In our view, the discharge of the constitutional obligation and responsibility to appoint the date for a general election is another example in line with those given above. The primary reason for this is what has been noted above: the need, because of the time limits imposed by the Constitution, for the date to be appointed very swiftly if not immediately. The tightness of the time limits, especially where the Assembly is dissolved on the completion of its term, has been highlighted.

There is, to put it shortly, hardly any room for delay or slippage of the timeframe. This constitutional imperative could be directly jeopardized if, in appointing the date, the President were bound to act on advice. The reason for this stems from the proviso to Article 48(1). What if the Prime Minister advices one date, but the President is of the view that another date is preferable? As noted above, the proviso allows the President to send back any advice tendered within a period that, especially in the present context, can only be regarded as generous. Once the advice is tendered again, it may finally be acted upon after about 25 days. This period is almost half of the 60 day period that applies in one of the situations of dissolution. Furthermore, given that the Election Programme stretches over a 50 day plus period, if the proviso to Article 48(1) is invoked that may well make it impossible to hold the general election within the constitutional timeframe. The same would apply, even if not as acutely, to those situations where the general election is to be held within 90 days. We pause here to note that the differences between the President and Prime Minister as to the date would be genuine and the differing views in this regard be held in good faith. The effect however could be disastrous from the perspective of adhering to the constitutional time limits.

35. It must also be kept in mind that as soon as an Assembly is dissolved the process of appointing a caretaker cabinet starts off. That has its own deadlines and strict timeframe, as set out in Articles 224 and 224A (about eight days). It could therefore easily be the situation that the advice for the date of the general election is given by the outgoing Prime Minister and if it is sent for reconsideration a caretaker Prime Minister is in place. This could result in considerable confusion. For example, would the process for tendering advice then have to restart?

36. Yet another aspect of the matter is that in terms of section 57(1) the President is empowered to appoint the date also for the general election to a Provincial Assembly. Quite obviously, the Chief Minister of said Assembly, whether the outgoing one or the incoming caretaker, cannot advice the President in constitutional terms: that is reserved only for the Prime Minister (or Federal Cabinet). If the President is to act on advice, then that would mean that the Prime Minister would, in effect, appoint the date for a Provincial Assembly. This would go against the grain of the federal structure of the Constitution. On the other hand, if the President is empowered to act on his own, there would be uniformity both in relation to federal elections (i.e., to the National Assembly) and provincial elections. This view is bolstered by Article 41, which expressly states that not only is the President the Head of State he also represents the unity of the Republic. Finally, as noted above, the statutory identification of the authority by Parliament can result in that authority even being the Commission which, on any view, does not, at least constitutionally speaking, act on the instructions of the Prime Minister. Indeed, quite the opposite: the Commission can call all executive authorities in the country to provide suitable aid and assistance under Article 220. It would therefore be somewhat anomalous if the identified repository of the power in one case is to act on advice and in another is free from any such requirement.

37. When all of the foregoing points are taken into consideration, we are of the view that the President, in exercising the power conferred by section 57(1) and thereby discharging a constitutional obligation and responsibility is empowered to act on his own and is not bound by advice in the constitutional sense. We were informed during the hearing that in relation to the general elections of 2018 (and also, possibly, 2013) the President was sent advice by the Prime Minister and acted

on it. If so, on its proper understanding that can only be regarded as information provided to the President and not advice in the constitutional sense.

38. It will be convenient to address here also the distinction sought to be made by the learned Attorney General between "announcing" the date for the general election, and fixing or appointing said date. With respect, in our view that is a distinction without any merit. The President is not a mere mouthpiece for anyone else. He is acting on his own, and discharging a constitutional responsibility. The "announcement" is not a mere formality but a substantive act. In the context of the general elections required by the Constitution, it must have, and be given, real meaning, content and effect. In our view, it can mean nothing less than the appointment of the date for the general election.

39. What of the KPK Assembly? It will be recalled the some of the learned counsel submitted that Article 105(3) was limited to that one situation where the Governor dissolved the Assembly in his discretion, i.e., Article 112(2). On this view, even though the KPK Assembly was dissolved by the Governor acting on the advice of the Chief Minister, the power to appoint the date for the general election would lie with the President under section 57(1). Is this correct? Having considered the point, in our view the answer must be in the negative. Here, Article 105 needs to be considered. As presently relevant it is in the following terms:

> "105. Governor to act on advice, etc.--(1) Subject to the Constitution, in the performance of his functions, the Governor shall act on and in accordance with the advice of the Cabinet, or the Chief Minister
>
> (3) Where the Governor dissolves the Provincial Assembly, notwithstanding anything contained in clause (1), he shall,-
>
> (a) appoint a date, not later than ninety days from the date of dissolution, for the holding of a general election to the Assembly .
>
> (5) The provisions of clause (2) of Article 48 shall have effect in relation to a Governor as if reference therein to "President" were reference to "Governor"."

Article 48(2) provides as follows:

> "Notwithstanding anything contained in clause (1), the President shall act in his discretion in respect of any matter in respect of which he is empowered by the Constitution to do so ."

A combined reading of clauses (1) and (5) of Article 105 indicates that the Governor is bound to act on the advice of the Chief Minister or the Provincial Cabinet but that he can act in his discretion in respect of any matter where he is empowered by the Constitution to do so. This is the general position. We are of course concerned with clause (3). It does not as such use the term "in his discretion" as is, e.g., to be found in Article 112(2). However, substantially the same result is achieved by the inclusion of the non-obstante clause therein ("notwithstanding anything contained in clause (1)"), for if clause (1) is excluded what is left but for the Governor to act on his own? The situation to which clause (3) applies is where the Governor dissolves the Assembly. Those situations are

provided for in clauses (1) and (2) of Article 112. Both use exactly the same phrase, "dissolve the Provincial Assembly", which of course precisely matches the words used in Article 105(3). In our view, that is sufficient to indicate that the last mentioned provision applies to both clauses of Article 112. These are the situations covered by para 10(a) of the short order. Therefore, in the present situation, where the Governor did dissolve the KPK Assembly on the Chief Minister's advice he was under a constitutional obligation to give the date for the general election. Here, the Commission was correct in pursuing the Governor for the date, and continuing to do so despite his refusal to act. The failure of the Governor was therefore a breach of constitutional responsibility, and it was so held and declared in the short order. Furthermore, the President was in error when he made the order dated 20.02.2023 giving the date for the general election to the KPK Assembly. His subsequent instructions to learned counsel appearing on his behalf, noted above, to withdraw from this position must be acknowledged.

40. Before proceeding further one point must also be addressed. During the course of the case it became clear that the delay in appointing the date, caused by the lack of clarity on who had the authority in the case of the Punjab Assembly and a breach of constitutional obligation in the case of the KPK Assembly, had already taken a considerable portion (around half) from the 90 day time-limit set by the Constitution. Section 57(2) of the 2017 Act allows for an Election Programme spread over a fifty day plus period. It became clear therefore that it would be exceedingly difficult, if not practically impossible, in the facts and circumstances as prevailing to keep within the constitutional timeframe. Therefore, though with considerable reluctance, the Court felt impelled to allow for a certain margin (constituting the barest minimum deviation) in this regard. This is the aspect covered by para 14 of the short order. It is to be emphasized that, as expressly stated in the opening words of the said para, the declarations and directions made therein were only "in relation to the matters before the Court", i.e., only for the position presented at the time of the hearing and decision of these matters in relation to the present dissolution of the two Assemblies, and not otherwise.

41. The foregoing analysis and discussion deal with the first two of the questions noted in para 3 of the short order. We turn to the third. Although the question is in a certain sense ancillary to the first two, it is no less important for that. As soon as a Provincial Assembly stands dissolved the obligations of the Federation, under Article 148(3), come into play. And as soon as the caretaker Chief Minister is appointed and the caretaker cabinet seated its obligations, laid out both in the case law and the 2017 Act, become operative. These obligations and responsibilities necessarily interact with the whole of the electoral process including the very first step of appointing the date for the general election. The matter has been set out in para 15 of the short order, which does not require further elaboration, at least for present purposes.

42. We now turn to the objection of maintainability taken by some of the learned counsel, including the learned Attorney General. This was for the reason that petitions/appeals were pending in the Lahore High Court and the Peshawar High Court involving question(s) that were substantially the same. It was submitted that in fact, as noted above, a learned Single Judge of the Lahore High Court had

already given judgment in this regard, and an appeal was pending before a learned Division Bench of that Court in ICA. In such circumstances, it was submitted that this Court should stay its hand and allow the High Courts to proceed with the matters. It was emphasized that the jurisdiction of the Court under Article 184(3) was co-extensive or concurrent with that of the High Courts under Article 199 for the enforcement of fundamental rights. Propriety required, and it would be in the fitness of things, for these matters not to be proceeded with. In this sense they were not maintainable. Reliance was placed on Manzoor Elahi v. Federation of Pakistan and others PLD 1975 SC 66 and Benazir Bhutto v. Federation of Pakistan and others PLD 1988 SC 416.

43. Having considered the point, we were, with respect, not persuaded that the matters were not maintainable and that this Court ought to stay its hand. As has been noted above, the matter of holding a general election to an Assembly is constitutionally time bound and moves within a narrow locus in this regard. The holding of the general election is subject to strict temporal constraints. The record of the proceedings of the High Courts was placed before the Court. It became clear that while the learned Single Judge in the Lahore High Court had acted with admirable promptitude the same could not, unfortunately and with all due respect, be said of the learned Division Bench nor of the Peshawar High Court. Dates of hearing were being given repeatedly and matters were proceeding at what, in the present context, can only be described as a rather relaxed pace. Several weeks had already elapsed. Furthermore, it was almost certain that whatever be the decisions in the High Courts they would be appealed to this Court. So, the matter would essentially be back where it already was, the only difference being that out of the constitutional time limit several more days (at the very least) if not weeks would be consumed. Furthermore, the possibility of a difference of opinion between the two High Courts could not be ruled out, with further attendant confusion and delay. All of these factors satisfied us that these were fit matters to be proceeded with here directly under Article 184(3) notwithstanding the proceedings pending in the High Court. For this Court to hold its hand and allow for the routine litigation process to play out would, in the facts and circumstances before us, detract from rather than serve the public interest.

44. We now turn to consider the two decisions relied upon and begin with Manzoor Elahi v. Federation of Pakistan and others PLD 1975 SC 66. Briefly stated the facts were as follows. The petitioner's brother, Ch. Zahoor Elahi, who was one of the prominent Opposition leaders in those times, was arrested and detained for offences allegedly committed in the erstwhile Tribal Areas of Balochistan. The detenue was arrested in Lahore and taken to the Tribal Areas by a circuitous route, to remove him beyond the jurisdiction of the Superior Courts. A writ petition was filed in the High Court of Sindh and Balochistan (the two Provinces then had a common High Court: see Article 192) for the quashing of the proceedings and also his production before the Court. A preliminary objection as to maintainability was taken (on the ground that the jurisdiction of the High Court did not extend to the Tribal Areas where the detenue was being held) but repelled. The Provincial Government appealed to this Court against that preliminary finding, the petition before the High Court still pending. At the same time a petition under Article

184(3) was also filed by the petitioner seeking the release of his brother. These were among the three matters decided by the cited case (the other not being relevant). As to the petition under Article 184(3), an objection was taken that it was not maintainable on account of the writ petition pending before the High Court. In the event, this Court granted interim bail to the detenue pending decision of the writ petition in the High Court. Other than that, it was held that "no order is passed on Constitutional Petition No. 61-P of 1973, since the Constitutional Petition under Article 199 of the Constitution being No. 1143 of 1973 is still pending adjudication on the merits in the High Court." (pg. 159)

45. We begin by making some preliminary observations. Firstly, the Bench comprised of four members, each of whom gave his own judgment. We of course sit as a five member Bench. Secondly, it appears that the petition under Article 184(3) was the first of its kind before the Court under the present Constitution: see the judgments of the learned Chief Justice (Hamoodur Rahman, CJ) at pg. 79 and of Anwarul Haq, J at pg. 131. The jurisprudence as regards Article 184(3) was thus quite literally in its infancy. In the half-century that has since passed, things have of course changed enormously. The jurisprudence has matured, developed and deepened and the Court has developed an altogether more muscular approach in its understanding and application of Article 184(3). There has been a sea change in how the Court views this constitutional power. Thus, e.g., the observation of the learned Chief Justice, that "[t]his is an extraordinary power which should be used with circumspection" (pg. 79) is, with respect, hardly reflective of present times. Time does not stand still and nor does the jurisprudence of the Court. In the common law tradition, the law is connected to the past but not shackled by it.

46. Insofar as the precise point for which the case was cited, determining the ratio decidendi on this aspect requires consideration of all four judgments. For present purposes the following suffices. The learned Chief Justice expressed his complete agreement with the "elaborate reasons" given by Anwarul Haq, J "for not passing any order" on the petition under Article 184(3) (pg. 79). We turn therefore to the judgment of the latter. His Lordship held as follows (pp. 157-159; emphasis supplied):

> "It was submitted by the learned Attorney-General, as well as the Advocates-General of Punjab and Baluchistan that we should not pass any operative order in this case for the reason that the constitution petition moved by Malik Ghulam Jillani of the Tahrik-e-Istiqlal, on these very facts, was still pending final adjudication before the High Court of Sindh and Balochistan, which had so far only decided the preliminary question of its territorial jurisdiction in the matter. The learned counsel submitted that the petition filed in this Court as well as one pending in the High Court, have raised several disputed questions of fact, which could not be determined without an elaborate enquiry and recording of evidence. They suggested that we may not wish to undertake this exercise in the present proceedings under Article 184(3) of the Constitution.
>
> I am inclined to agree with these submissions. While undoubtedly the petition filed in this Court involves questions of public importance with reference to

the enforcement of certain fundamental rights guaranteed by the Constitution, it is at the same time clear that the petition pending before the High Court of Sindh and Balochistan also proceeds on identical facts. That High Court has already decided the preliminary question of jurisdiction in favour of the prisoner, and would have proceeded to examine the allegations of mala fides, fabrication of documents and falsification of records etc., if the matter had not been brought to this Court by both sides.

My conclusions may now be summed up. The original petition on behalf of the prisoner under Article 184(3) of the Constitution does involve several questions of public importance with reference to the enforcement of fundamental rights as embodied in Articles 9 and 10(2) of the Constitution .

As the Constitution petition filed by Malik Ghulam Jillani of the Tehrik-e-Istiqlal on identical facts, is still pending final adjudication before the High Court of Sindh and Balochistan, I would not pass any operative order in the original petition before this Court, but leave the matter to be finally decided by the High Court in the light of the observations made in this judgment regarding the various legal and constitutional questions arising in the case. I would dispose of the petition in these terms."

Muhammad Yaqub Ali, J dealt with the matter rather sparingly. In not making any order on the petition under Article 184(3) his Lordship was persuaded by the fact that the allegations of mala fides were the same as those made in the petition before the High Court, which could deal with them (see at pg. 85 and pp. 95-6). Salahuddin Ahmed, J dealt with the matter essentially in passing.

47. As is clear from the foregoing, there was no question that the issues raised brought the matter firmly within the ambit of Article 184(3). What persuaded the Court to stay its hand was that there were, in addition to the constitutional and legal questions involved, also disputed questions of fact including those mentioned in the portions emphasized above. In the present matters, there are no such issues or questions. None of the learned counsel disputed any of the facts and the entire record was read several times without any objection of a factual nature being taken in relation thereto. The whole case has turned entirely on matters of law and high constitutional importance. The cited case is therefore clearly distinguishable. It has, with respect, no application to the matters at hand. Indeed, in our view, if regard be had to the modern jurisprudence and current understanding of the Court even the points that were then found persuasive for the Court staying its hand would not perhaps prevail today. Thus, e.g., in making the observations that he did, Anwarul Haq J was clearly proceeding within the traditional adversarial framework. However, it is now well settled that proceedings under Article 184(3) are also to be regarded as inquisitorial where, if so warranted, the Court may itself examine disputed factual questions and issues as well. It is also to be noted that in a practical sense substantial relief was in fact granted by the Court, inasmuch as the detenue was directed to be released on interim bail. It did not, perhaps, then matter greatly to the respective petitioners before this Court and the High Court whether the constitutional and legal questions raised were in fact finally answered or not. The position here is of course starkly different. Unless the constitutional and legal issues are resolved there can inter alia be no resolution of, or relief for, the

violation of the fundamental rights of the electorate. In our view therefore, and with respect, the cited case does not lend support to the objection of maintainability.

48. We turn to consider the other case, Benazir Bhutto v. Federation of Pakistan and others PLD 1988 SC 416. The petition under Article 184(3) raised important questions relating primarily to the fundamental right enshrined in Article 17(2). As presently relevant, the objection as to maintainability was that writ petitions involving the same issues were pending in the High Courts, two being before the Lahore High Court and one before the High Court of Sindh (pg. 493). The learned Attorney General focused attention, in particular, on one of the petitions filed before the Lahore High Court as that had been filed by the political party of which the petitioner was the leader. This Court noted and expressed its regret at the rather lethargic pace of the proceedings in the High Court (pp. 494-495). The Manzoor Elahi case (among others) was cited in support of the objection as to maintainability but the case law was distinguished. In relation to the case just mentioned, it was observed as follows: "As to the choice of forum of the Court, it is no doubt correct that ordinarily the forum of the Court in the lower hierarchy should be invoked but that principle is not inviolable and genuine exceptions can exist to take it out from that practice such as in the present case where there was a denial of justice as a result of the proceedings being dilatory" (pg. 496). It was also held as follows (ibid):

> "There is another way of looking at this problem if it only be the choice of forum without there being anything further. The practice, which has the status of a rule of law, is merely regulatory to control the exercise of discretion in regard to the exercise of judicial power. And, therefore, like a precedent under Article 189 of the Constitution, the principle of stare decisis is also not rigidly applicable to the practice in constitutional interpretation if it leads to or is likely to lead to injustice."

Finally, it was observed: " the salutary practice of long standing as applied to the particular facts and circumstances of Ch. Manzoor Elahi's case cannot be invoked with any force to stultify the hearing of this petition" (p. 497). In our view, the main reason why the Manzoor Elahi's case was distinguished was because of the long time that the petition in the High Court had been pending (which was in excess of a year and a half), and the slow pace of those proceedings. In other words, it was a question of time. That, in our view, has to be placed in its proper context. Here also it is a question of time. But the timeframe in the matters before us is much narrower and sharply constrained. Each day counts. Within the context of the present matters even a delay of a few days, what to speak of a few weeks, is unacceptable. And yet, as noted above, that is regrettably what has happened in the proceedings before the Lahore and Peshawar High Courts. The learned Single Judge showed a commendable and lively awareness of the importance of time. Unfortunately, the same cannot be said of the other Benches. To insist on these matters being, in effect, returned to the High Courts would be tantamount in the present circumstances to a denial of justice of a matter of high constitutional importance, involving the fundamental rights of the electorate at large and relatable to one of the salient features of the Constitution. Therefore, for essentially the same reason, in principle, why the objection of maintainability was not accommodated in the

Benazir Bhutto case, we also declined to accept the objection for the matters at hand.

49. This finally brings us to one point that also, regrettably, has to be addressed. That point, which we take up with reluctance, is one aspect of the minority opinion. Ordinarily, in line with the practice of this Court we would not comment at all on anything said in dissent. However, we believe we should do so on account of what (with great respect) can only be described as an unusual view adopted by the minority: that rather than these matters being disposed of in terms of the short order set out herein above by 3:2, they have been dismissed by 4:3. Reference in this regard may be made to paras 35 and 36 of the minority opinion, the section titled "Decision by 4-3 or 3-2 majority". Since the minority opinion has purported to reverse the very outcome of these matters it is something that should be examined. In doing so, we preface what is about to be said by stating that we act with the greatest respect, and a heavy heart.

50. For convenience, we set out below the relevant portion of what the minority opinion claims (italics in original; underlining added):

> "We believed that our decision concurring with the decision of our learned brothers (Yahya Afridi and Athar Minallah, JJ.) in dismissing the present suo motu proceedings and the connected constitution petitions, had become the Order of the Court by a majority of 4-3 while our other three learned brothers held the view that their order was the Order of the Court by a majority of 3-2. Because of this difference of opinion, the Order of the Court, which is ordinarily formulated by the head of the Bench could not be issued. We are of the considered view that our decision concurring with the decision of our learned brothers (Yahya Afridi and Athar Minallah, JJ.) in dismissing the present suo motu proceedings and the connected constitution petitions is the Order of the Court with a majority of 4 to 3, binding upon all the concerned." (para 35)

The genesis of the above view appears to lie in the third footnote of the short order dated 01.03.2023 made by our two learned colleagues in dissent. That footnote appeared in para 2 of their short order. The said para and the footnote are set out below (original italicized; the asterisk marks the footnote):

> "2. We, therefore, agree with the orders dated 23.02.2023 passed by our learned brothers, Yahya Afridi and Athar Minallah, JJ[*]., and dismiss the present constitution petitions and drop the suo motu proceedings."
>
> "[*] Initially a nine member bench heard this matter. The aforementioned two Hon'ble Judges decided the matter by dismissing the said petitions. Later on two other Hon'ble Judges disassociated themselves from the Bench for personal reasons and as the two aforementioned judges had dismissed the matter, the Bench was reconstituted into a five member bench vide order dated 27.02.2023. The decisions of the aforementioned two Hon'ble Judges dated 23.2.2023 form part of the record of this case."

51. With very great respect, we draw attention to a fundamental point: that causes, appeals and matters in this Court are heard by Benches, and not Judges. At first sight some may find this formulation a bit surprising since Benches are, after all, comprised of Judges. However, the distinction is real and substantial. A Bench is a body of Judges validly and properly constituted as such; it is not simply an aggregate of a given number of Judges. It is well settled that (as recently affirmed by a five member Bench in In re: Suo Motu Case No. 4 of 2021 PLD 2022 SC 306)

Benches are constituted by the Chief Justice alone, who is the master of the roster. Benches cannot self-constitute, and once properly constituted cannot self-propagate or self-perpetuate (see para 33 thereof). It is the Bench, as properly constituted, that defines and delineates the Court for the purpose of any matter, appeal or cause and judgment therein, and not simply any agglomeration of Judges.

52. One obvious corollary of the foregoing is that if a cause, appeal or matter is not decided unanimously by a Bench but by way of a division among the members thereof, the ratio (and hence the outcome of the matter) is determined only by the Bench as constituted. Putting this more concretely, if a matter is said to be decided by the Bench "split" in the ratio A:B, A plus B must be (and can necessarily only be) the total of the members of the Bench as constituted, and not otherwise. Thus, if the minority opinion were correct that these matters were decided 4:3, it must be shown that a seven-member Bench was properly constituted to hear the same, and that such Bench actually did sit, hear and decide them. The fact of the matter is of course that the matters were decided 3:2 as indicated in the short order reproduced above because the Bench constituted by the Hon'ble Chief Justice comprised of

five members, who sat as said Bench and heard the matters over two days and then decided the same. We may note that at no stage over those two days was any claim made by any person, including any of the learned counsel who appeared before the Court nor, indeed, by any member of the Bench that the Judges sitting and hearing the matters were not the properly constituted Bench, in that it had two additional members who were absent or missing. For, had that been the case (which it emphatically was not) then the five Judges who did sit and hear the matters would not have been the Bench constituted for the purpose. They could not even have sat and heard the matters, let alone deciding them.

53. The chronology of the proceedings in these matters has already been set out above. As noted, a nine member Bench was initially constituted by the Hon'ble Chief Justice as master of the roster. The matters were placed before that Bench on 23.02.2023 and 24.02.2023. It is apparent that the minority opinion does not dispute this, and also accepts that two of the learned members of that Bench (being Yahya Afridi and Athar Minallah, JJ) dismissed these matters on the very first day. The relevant extracts to this effect from their orders have also been reproduced above. Thereafter, the nine members of the Bench unanimously made an order, reproduced above in para 4, referring the matter to the Hon'ble Chief Justice "for reconstitution of the Bench". This order, of 27.02.2023, was not and could not be an administrative order. It was a judicial order, made by the nine-member Bench. The reconstitution of the Bench by the Hon'ble Chief Justice, i.e., the constitution of the present five-member Bench, was in response to this judicial order. Unfortunately, it appears that this judicial order has not been noticed in the minority opinion (see, in particular, at paras 35-36). The judicial order constituted a decisive break-indeed, a barrier-between the two validly constituted Benches. On the prior side of it lay the initial, validly constituted nine-member Bench of which alone the learned Yahya Afridi and Athar Minallah, JJ were members. On the latter side lay the subsequent, validly constituted five-member Bench of which, respectfully, they were not.

54. The minority opinion appears to take exception to what is regarded as the "removal" of Yahya Afridi and Athar Minallah, JJ from the Bench without their consent, which as per the opinion "is not permissible under the law and not within

the powers of the Hon'ble Chief Justice" (para 36 of the opinion). It is stated in the said para as follows:

> "The reconstitution of the Bench was simply an administrative act to facilitate the further hearing of the case by the remaining five members of the Bench and could not nullify or brush aside the judicial decisions given by the two
>
> Hon'ble Judges in this case [i.e., Yahya Afridi and Athar Minallah, JJ], which have to be counted when the matter is finally concluded."

With great respect, the foregoing extracts serve only to highlight the point on which we, with respect, cannot agree. It is to be noted that both Yahya Afridi and Athar Minallah, JJ were signatories, as members of the nine-member Bench, to the judicial order of 27.02.2023. Indeed, our two learned colleagues now in minority were also signatories thereto, in like manner. The failure of the minority opinion to notice this order in paras 35-36 and take it into account is therefore, and with great respect, implausible. The reconstitution of the Bench by the Hon'ble Chief Justice was only subsequent to, and consequent upon, the judicial order of 27.02.2023. It was not simply a matter of administrative convenience or facilitation of the "remaining five members of the Bench" for "further hearing of the case". There was no such "further" hearing, nor any "remaining five members", because the earlier constituted Bench had ceased to exist. The hearings on 27.02.2023 and 28.02.2023 were before another Bench, subsequently constituted. Furthermore, insofar as Yahya Afridi and Athar Minallah, JJ were concerned the unanimous request made for the reconstitution of the Bench was in line with their orders of dismissal on 23.02.2023. (That dismissal did not of course result in the matters being decided since it was 7:2.) As noted above, they had themselves accepted that their continued "retention" on the "present bench" may be of no avail, and had left the matter to the Hon'ble Chief Justice. The Bench to which the learned Judges referred was of course the nine-member Bench. The learned Judges themselves believed that they had, on account of their orders of dismissal, nothing more to contribute to the Bench of which they were actually members. How then could anything said or done by them in such capacity be "counted" or "reckoned" when determining the proceedings before the reconstituted Bench of which they were not members? This, with great respect, is the central conundrum that lies at the heart of the reasoning adopted in the minority opinion.

55. Where then did the ratio 4:3 claimed in the minority opinion come from? With great respect, it could only have come about by taking two learned Judges from the initial, validly constituted nine-member Bench and all the other Judges of the subsequent, validly constituted five-member Bench, and melding this number into a seven-member "Bench" that was never constituted, and which never existed in law or in fact. Since there was never ever any such Bench, there could not, ipso facto, be any decision in the ratio "4:3". By focusing on the number of Judges simpliciter and not the constitution of Benches, the minority opinion (with great respect) has sought to breach the barrier posed by the unanimous judicial order of

27.02.2023. That is not possible. Therefore, with great respect, the claim that these matters stood dismissed in the self-computed ratio "4:3" is erroneous.

56. The foregoing are the reasons for the short order of the majority, by and in terms of which these matters were disposed of.

Sd/-
Chief Justice

Sd/-
Judge

Sd/-
Judge

Annexure-A

IN THE SUPREME COURT OF PAKISTAN
(Original Jurisdiction)

PRESENT:

Mr. Justice Umar Ata Bandial, CJ
Mr. Justice Ijaz ul Ahsan
Mr. Justice Syed Mansoor Ali Shah
Mr. Justice Munib Akhtar
Mr. Justice Yahya Afridi
Mr. Justice Sayyed Mazahar Ali Akbar Naqvi
Mr. Justice Jamal Khan Mandokhail
Mr. Justice Muhammad All Mazhar
Mr. Justice Athar Minallah

SUO MOTU CASE NO. 1 OF 2023

(Suo Motu Regarding Holding of General Elections to the Provincial Assemblies of Punjab and Khyber Pakhtunkhwa).

And

CONST. PETITION NO.1 OF 2023

And

CONST. PETITION NO.2 OF 2023

Islamabad High Court Bar Association Islamabad through its President Muhammad Shoaib Shaheen, Advocate Supreme Court, Islamabad
(in Const.P.1/2023)

Muhammad Sibtain Khan and others
(in Cunst. P. 2/2023) ...Petitioner(s)

versus

Election Commission of Pakistan through the Chief Election Commissioner,

Islamabad and others ...Respondent(s)
(in Const.Ps. 1 and 2/2023)

In attendance:

Mr. Shehzad Ata Elahi, Attorney General for Pakistan Ch. Aamir Rehman, Addl. AGP
Mr. Muhammad Shoaib Shaheen, ASC Mr. Abid S. Zuberi, ASC
(in Const.P.1/ 2023)

Syed Ali Zafar, ASC
Mr. Zahid Nawaz Cheema, ASC
(in Const.P.2 / 2023)

Mr. Sajeel Sheryar Swati, ASC
Mr. M. Arshad, DG Law, (ECP)
Mr. Zafar Iqbal, Spl. Sec. (ECP)

Date of hearing: 23.02.2023

ORDER

We have before us two Constitution Petitions; one is filed by the Islamabad High Court Bar Association through its President Mr. Shoaib Shaheen (Const. P.1 of 2023) and the other is filed by the Hon'ble Speakers of the Punjab Provincial Assembly and the Khyber Pakhtunkhwa Provincial Assembly, respectively (Const. P. 2 of 2023). Both the petitioners have challenged the failure by the Governors of the respective Provinces to announce the date of holding of general elections to the respective Provincial Assemblies. For reference it is noted that the Provincial Assembly of the Punjab was dissolved on 14.01.2023 whereas the Provincial Assembly of Khyber Pakhtunkhwa was dissolved on 18.01.2023.

2. Prior to the filing of the petition by the Hon'ble Speakers of the two Provincial Assemblies, the Hon'ble President of Pakistan wrote to the Election Commission of Pakistan directing them to announce the date of holding of elections to the said Provincial Assemblies. Finally on 20.02.2023 the Hon'ble President of Pakistan in exercise of his power under Section 57(1) of the Elections Act, 2017 announced 09.04.2023 as the date for the holding of elections to both the Provincial Assemblies.

3. Constitution petitions seeking the above mentioned relief are also pending before the learned Lahore High Court and the learned Peshawar High Court. The petition filed before the learned Lahore High Court matured into a judgment dated 10.02.2023 passed by a learned Single Judge wherein the Election Commission of Pakistan has been directed to announce a date in consultation with the Governor of the Province. Both the Election Commission of Pakistan and the Governor of Punjab have reservations about the judgment dated 10.02.2023 and have challenged the same in Intra Court Appeals. The appeals were initially fixed on 16.02.2023 when the notices were issued for 21.02.2023. However, on 21.02.2023 the learned

Law Officer sought further time to obtain instructions from the learned Attorney General for Pakistan and the matter was adjourned for 27.02.2023.

4. The proceedings before the learned Peshawar High Court have also been pending for considerable time. These are next scheduled for 28.02.2023 in which report by the Election Commission of Pakistan has to be submitted.

5. Notwithstanding the lapse of nearly five weeks after the dissolution of the respective Provincial Assemblies, the matter regarding the constitutional authority that has the power to fix the date of elections to the Provincial Assemblies under the Constitution of Islamic Republic of Pakistan, 1973 ("Constitution") is still sub judice. Article 224 of the Constitution imposes a constitutional imperative that General Elections must be held within 90 days of the date of dissolution of the Assembly. Meanwhile, a request by a Bench of the Court was made on 16.02.2023 to one of us (the CJP) for taking up Suo Motu proceedings on the matter of fixing date of holding of general elections in the two Provinces. This request was deliberated. The time already consumed in the conclusive pending proceedings before the High Courts and the initiative taken by the Hon'ble President of Pakistan to fix the date of election under Section 57(1) of the Elections Act, 2017 was duly considered. In these circumstances, on 22.02.2023 one of us (the CJP) invoked the Suo Motu original constitutional jurisdiction to hear the following three questions:

a) Who has the constitutional responsibility and authority for appointing the date for the holding of a general election to a Provincial Assembly, upon its dissolution in the various situations envisaged by and under the Constitution?

b) How and when is this constitutional responsibility to be discharged?

c) What are the constitutional responsibilities and duties of the Federation and the Province with regard to the holding of the general election?

6. In essence there is a short question about which authority is reposed with the power by the Constitution to fix the date of elections to a Provincial Assembly. This short question has not been addressed or answered before in any judicial proceedings. There is a constitutional time constraint and for that reason we have taken up this matter for our urgent consideration.

7. Therefore, in the first place, notice is issued under Order XXVII-A, C.P.C. to the learned Attorney General for Pakistan and the Advocate Generals of all the four Provinces and the Islamabad Capital Territory to assist the Court, inter alia, on the questions formulated above. In addition, notice is issued to the Election Commission of Pakistan, Government of Pakistan through Secretary Cabinet Division, Government of Punjab through its Chief Secretary and Government of Khyber Pakhtunkhwa through its Chief Secretary.

8. The Hon'ble President of Pakistan and the Hon'ble Governors of the Provinces of the Punjab and Khyber Pakhtunkhwa are high constitutional functionaries who are mentioned in the Constitution with respect to the matter of holding of elections consequent upon the dissolution of the relevant Assemblies. In the circumstances of the present case, they are immune under the provisions of Article 248 of the

Constitution from process of the Court. However, they may have points of view to share with the Court on the constitutional questions that have arisen for our determination. Therefore, the Principal Secretaries to each of those three high constitutional functionaries shall be served with a notice to inform the Hon'ble President of Pakistan and the Hon'ble Governors of the two Provinces of Punjab and Khyber Pakhtunkhwa for giving instructions to their respective Principal Secretaries for placing their respective points of view on record of this Court.

9. Notice is also issued to Vice Chairman Pakistan Bar Council and the President, Supreme Court Bar Association to assist the Court on the legal questions raised.

10. The Attorney General for Pakistan has submitted that the major political parties in Parliament should also be issued notices so that they are aware of these proceedings and may express their point of view, if so inclined. Let notices be issued to the member parties of the Pakistan Democratic Movement (PDM). However, on account of the urgency of the matter, the persons, office bearers and parties named above shall not wait to respond notices ordered today in Court, when such information is conveyed through the electronic media, the print media or courier. The Secretary Ministry of Information and Broadcasting is directed to take step for our aforesaid notices to be conveyed to all concerned through the print and electronic media.

11. During the course of proceedings, one of us (Athar Minallah, J.) raised the point that the dissolution of Punjab Assembly and Khyber Pakhtunkhwa Assembly on 14.01.2023 and 18.01.2023 respectively were violative of the Constitution because the Chief Ministers of both the Provinces acted on the dictate of a political party/ political leader. Likewise, one of us (Syed Mansoor Ali Shah, J.) has enquired about the reasons behind the dissolution of the Punjab Assembly and Khyber Pakhtunkhwa Assembly and if these are justiciable can the Court examine whether either or both Assemblies can be restored. These points are reflected neither in the petitions before the Court nor the request for invoking the Suo Motu jurisdiction. The points, may subject to the foregoing, be considered at an appropriate stage while keeping in mind the urgency in the matter.

12. These proceedings are accordingly adjourned to tomorrow i.e. 24.02.2023 at 11:00 a.m. when those in attendance shall present their skeleton arguments and file any documents that are necessary in aid of their submissions.

Justice Jamal Khan Mandokhail.

1. Late last night (22.2.2023) I received a file that the Hon'ble Chief Justice has taken suo motu notice on the basis of an order passed by Hon'ble Mr. Justice Ijaz ul Ahsan and Hon'ble Mr. Justice Mazahar Ali Akbar Naqvi in CPLA No 3988/2022, which was filed by Ghulam Mehmood Dogar against order dated 24.11.2022 passed by the Federal Service Tribunal ("PST") in respect of his transfer. Learned Mr. Abid S. Zuberi is the counsel of Ghulam Mehmood Dogar.

2. The petition of Ghulam Mehmood Dogar was pending when on 16.2.2023 the learned members of the Bench called the Chief Election Commissioner of

the Election Commission of Pakistan, who was not a party to the petition, and was asked about the holding of elections to the Provincial Assembly of Punjab. Irrespective of the reply of the Chief Election Commissioner the Hon'ble Mr. Justice Ijaz ul Ahsan and Hon'ble Mr. Justice Mazahar Ali Akbar Naqvi deemed it appropriate to refer the matter to the Hon'ble Chief Justice to take suo motu notice. The matter pertaining to election has no nexus or connection with the abovementioned service matter.

3. It is noteworthy that three audio recordings came out. In one recording

learned Mr. Abid Zuberi is reportedly talking to ex-Chief Minister about the pending case of Ghulam Mehmood Dogar, which in my opinion was very serious.

4. Besides the learned Judges have already expressed their opinion by stating

that elections "are required to be held within 90 days" and that there was "eminent danger of violation" of the Constitution. With greatest respect the Hon'ble Chief Justice has added to the points mentioned by the two learned Judges and has also expressed his opinion. Such definite opinions have decided this matter and done so without taking into consideration Article 10A of the Constitution.

5. Thus in these circumstances it was not appropriate to refer the matter to Hon'ble Chief Justice for taking suo motu notice under Article 184(3) of the Constitution. Suo motu action is not justified.

Islamabad.
23.02.2023.

Syed Mansoor Ali Shah, J.---It is a constitutional and a legal duty of every Judge of this Court to sit in a Bench constituted by the Hon'ble Chief Justice and hear case(s) entrusted to that Bench, unless for some lawful justification a Judge recuses himself from hearing a particular case. In the absence of any lawful justification, mere recusal may amount to abdication of the constitutional and legal duty. With this understanding, I have opted not to recuse myself from hearing these cases, despite having reservations on how the original jurisdiction of this Court under Article 184(3) of the Constitution has been invoked suo motu in the present case as well as on the constitution of the present Bench. I, however, find it my constitutional and legal obligation to bring on record my reservations, lest it may be misunderstood that I have none and my silence taken as my assent.

2. The suo motu matter (S.M.C. 01/ 2023) before us arises from a judicial order of a learned two-member Bench of this Court[1] made while hearing a service matter of a civil servant, wherein they made recommendation to the Hon'ble Chief Justice to invoke suo motu the original jurisdiction of this Court under Article 184(3) of the Constitution. The order was made in a case which, in my view, had no concern whatsoever with the present matter before us, reflecting to an ordinary reader of the order an unnecessary interest of the two-member Bench in the matter. Attached to the said order is the a controversy in the public domain, generated by the audio leaks relating to one[2] of the members of the said Bench. Inspite of the requests

from within the Court and outside the Court, there has been no institutional response to the allegations either by this Court or by the constitutional forum of the Supreme Judicial Council. Further, there is news of references being filed against the said member before the Supreme Judicial Council by the Bar Councils. In this background and before these allegations could be probed into and put to rest, inclusion of the said member on the Bench in the present matter of "public importance" appears, most respectfully, inappropriate. This inclusion becomes more nuanced when other senior Hon'ble Judges of this Court are not included on the Bench.

3. The Hon'ble Chief Justice has been pleased to observe in his order invoking

the original jurisdiction of this Court under Article 184(3) of the Constitution suo motu, in categorical terms that "These matters involve the performance of constitutional obligations of great public importance apart from calling for faithful constitutional enforcement." But, in spite of the said observation, the two senior most Hon'ble Judges of this Court have not been made part of this Bench to hear and decide upon the matters of "great public importance", for reasons not expressed in the order constituting the present Bench.

4. Our greatest strength as an apex judicial institution lies in the public confidence and public trust people of our country repose in us. Our impartiality, including the public perception of our impartiality, transparency and openness in dispensing justice must at all times be undisputed and beyond reproach.

Islamabad,
23rd February, 2023

Yahya Afridi, J.---For detailed reasons to be recorded later, it appears that prima facie these petitions fall within the purview of Article 184(3) of The Constitution of the Islamic Republic of Pakistan, 1973. However, it would not be judicially appropriate to exercise the power to make an order under the aforementioned provision of the Constitution given that the matters raised in the petitions are presently pending adjudication before the Lahore High Court in Intra-Court Appeal No. 11096 of 2023, Contempt of Court Petition No. 10468/W/2023, and the Peshawar High Court in Writ Petition No. 407-P/2023.

While the jurisdiction of this Court under Article 184(3) of the Constitution is an independent original jurisdiction that is not affected by the pendency of any matter on the same subject matter before any other court or forum, the decision already rendered by the Lahore High Court in Writ Petition No. 6093/2023, pending challenge in Intra-Court Appeal No. 11096 of 2023, and the peculiarly charged and unflinching contested political stances taken by the parties, warrant this Court to show judicial restraint to bolster the principle of propriety. This is to avoid any adverse reflection on this Court's judicial pre-emptive eagerness to decide.

Therefore, passing any finding or remarks during the proceeding of the present petitions by this Court would not only prejudice the contested claims of the parties in the said petition/appeal pending before the respective High Courts but, more importantly, offend the hierarchical judicial domain of the High Court as envisaged under the Constitution. It would also disturb the judicial propriety that the High

Court deserves in the safe, mature, and respectful administration of justice. Accordingly, I dismiss these three petitions.

Having decided that exercising powers under Article 184(3) of the

Constitution in the present three petitions pending before us would not be appropriate, I find that my continuing to hear the said petitions is of no avail. However, I leave it to the Worthy Chief Justice to decide my retention in the present bench hearing the said petitions.

Athar Minallah, J.---I concur with the articulate opinion recorded by my learned brother Justice Yahya Afridi. I also had the privilege of going through the order of the Hon'ble Chief Justice of Pakistan. However, with utmost respect, it does not appear to be consistent with the proceedings and the order dictated in the open Court. The questions raised before us cannot be considered in isolation because questions regarding the constitutional legality of the dissolution of the provincial assemblies of Punjab and Khyber Pakhtunkhwa cannot be ignored. Were they dissolved in violation of the scheme and principles of constitutional democracy before completion of the term prescribed under the Constitution of the Islamic Republic of Pakistan ('the Constitution')? The questions regarding the legality of the dissolution involve far more serious violations of fundamental rights. The matter before us is definitely premature, because it is pending before a constitutional Court of a province, as noted in the opinion of my learned brother Yahya Afridi, J. During the proceedings, I had proposed that the question of legality of the dissolution of the respective provincial legislatures must also be examined before considering the matter placed before us. The Hon'ble Chief Justice, who was heading the bench, had by assuming and invoking the suo motu jurisdiction conferred under Article 184(3), accepted to include the proposed questions for consideration. The learned brothers on the bench did not object and, therefore, while dictating the order in open Court, the inclusion of the proposed additional questions for consideration was duly acknowledged and announced. The Hon'ble Chief Justice was, therefore, pleased to assume/invoke the jurisdiction in consonance with the principles highlighted by this Court in Suo Motu Case No.4 of 2021 (PLD 2022 SC 306). I was asked to formulate the precise questions which are as follows:

(a) Whether the power of a Chief Minister to make advice for the dissolution of the Provincial Assembly is absolute and does not require any valid constitutional reason for its exercise?

(b) Is a Chief Minister to make such advice on his own independent opinion or can he act in making such advice under the direction of some other person?

(c) If such advice of a Chief Minister is found constitutionally invalid for one reason or another, whether the provincial assembly dissolved in consequence thereof can be restored?

2. The interpretation of the Constitution is the prerogative as well as the duty of this Court. It is also an onerous duty to protect, preserve and defend the Constitution. It has been observed by this Court that the Constitution is an organic document designed and intended for all times to come. Interpretation of the Constitution by this Court has a profound impact on the lives of the people of this country, besides having consequences for future generations. The framers of the Constitution have conferred an extra-ordinary jurisdiction on this Court under Article 184(3). The manner in which this power is to be exercised is in itself a matter of immense public importance. While invoking the jurisdiction great care has to be exercised. Article 176 of the Constitution describes the constitution of this Court. I am of the opinion that it is implicit in the language of Article 184(3) that the conferred extra-ordinary original jurisdiction must be entertained and heard by the Full Court. In order to ensure public confidence in the proceedings in hand and keeping in view the importance of the questions raised for our consideration, it is

imperative that the matter regarding the violation and interpretation of the Constitution is heard by a Full Court. The interpretation of Article 184(3) of the Constitution in this context, therefore, also requires interpretation.

Annexure-B

ORDER OF THE BENCH

Keeping in view the order dated 23.02.2023 and the additional notes attached thereto by four of us (Justice Syed Mansoor Ali Shah, Justice Yahya Afridi, Justice Jamal Khan Mandokhail and Justice Athar Minallah) as well as the

discussion/deliberations made by us in the ante-Room of this Court, the matter is referred to the Honible Chief Justice for reconstitution of the Bench.

Sd/-
Chief Justice
Sd/- Sd/-
Judge Judge
Sd/- Sd/-
Judge Judge
Sd/- Sd/-
Judge Judge
Sd/- Sd/-
Judge Judge

Islamabad
27.02.2023

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JUDGMENT

Syed Mansoor Ali Shah, J.---(For himself and Jamal Khan Mandokhail, J.)

Preface

The jurisdiction of a court is determined by the Constitution and laws, not by caprice or convenience of the judges.[1] And, it is the nature of the controversy that determines the jurisdiction of a court and not the magnitude of the interests involved.[2] When caprice and convenience of the judges takes over, we enter the era of an "imperial Supreme Court". According to Professor Mark A. Lemley,[3] the U.S. Supreme Court has by its decisions given in the past few years, restricted the power of the Congress, the administration and the lower federal courts, and has concentrated the power in itself. The immediate danger of the imperial Supreme Court, writes Professor Lemley, is that it will damage the constitutional system by usurping the power that doesn't belong to it; but the longer-term danger may be the opposite. The Court, by turning it in the minds of the public into just another political institution, may ultimately undermine its legitimacy and credibility of its judgments. We must ensure that our Supreme Court does not assume the role of an imperial Supreme Court with its judicial decisions restricting the power of the Parliament, the Government and the provincial High Courts assuming all the powers to itself, and must remember that "we have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given."[4]

2. The present suo motu proceedings and the connected constitutional petitions invite the Court to exercise its original jurisdiction under Article 184(3) of the Constitution of the Islamic Republic of Pakistan ("Constitution") inspite of the fact that the matters involved are already pending adjudication before the provincial High Courts and the question of law involved in one case has been decided by the High Court of the Province concerned. It is, therefore, crucial that before embarking upon its original jurisdiction under Article 184(3) of the Constitution, this Court carefully assesses that such an exercise of discretionary jurisdiction does not border on judicial overreach, painting the Court, in the words of Professor Lemley, as an "imperial Supreme Court". The original jurisdiction of this Court under Article 184(3) of the Constitution is not only "discretionary"[5] but also "special"[6] and "extra-ordinary"[7], which is to be exercised "with circumspection"[8] only in the "exceptional cases"[9] of public importance relating to the enforcement of fundamental rights that are considered "fit"[10] for being dealt with under this jurisdiction by the Court. This jurisdiction of the Court is special and extraordinary, for in the exercise of it the Court acts as the first and the final arbiter, which leaves a party aggrieved of the determination made by the Court with no remedy of appeal to any higher court. This jurisdiction must not, therefore, be frequently and incautiously exercised, lest it damages the public image of the Court as an impartial judicial institution.[11] Foundations of a judicial institution stand on, and its real strength lies, in the public trust and without such public trust and public acceptance, a court loses the legitimacy it requires to perform its functions. A

court's concern with legitimacy is therefore not for its own sake but for the sake of the people to which it is responsible.[12]

Background facts

3. In the context of the dissolution of the Provincial Assembly of the Province of Punjab on 14.01.2023, a dispute arose in regard to appointing a date for the election, which involved the question of law:

> Who has the constitutional power and duty to appoint a date for the holding of a general election to a Provincial Assembly that stands dissolved under the second part of clause (1) of Article 112 of the Constitution at the expiration of forty-eight hours after the Chief Minister has advised the Governor to dissolve the Assembly but the Governor has not made any express order thereon?

A political party, Pakistan Tehreek-i-Insaaf ("PTI"), through its Secretary General moved the Provincial High Court concerned, i.e., the Lahore High Court, by filing a writ petition[13] under Article 199 of the Constitution for determination of the said question. A Single Bench of the Lahore High Court decided the said writ petition, along with other connected writ petitions, by its judgment dated 10.02.2023, holding that it is the Election Commission of Pakistan ("ECP") which is to appoint a date for the holding of a general election when a Provincial Assembly stands dissolved under the second part of clause (1) of Article 112 of the Constitution and consequently directed the ECP to immediately announce the date of the election, after consultation with the Governor of Punjab.

4. The ECP and the Governor of Punjab preferred intra-court appeals ("ICAs") before the Division Bench of the Lahore High Court against the Single Bench judgment dated 10.02.2023, which are pending adjudication. In the ICA, the Governor prayed for the suspension of the impugned judgment as an interim relief, which was however not granted by the Division Bench, and for the implementation of the judgment of the Single Bench, PTI filed a contempt petition, which is also pending adjudication.

Suo motu proceedings and constitution petitions in this Court

5. Meanwhile, on 16.02.2023 a two-member Bench of this Court while hearing a service matter of a civil servant,[14] surprisingly apprehended delay in the holding of the general election to the Provincial Assembly of Punjab and took suo motu notice of the matter, with the following observations:

> 7. We note that the Provincial Assembly of Punjab stood dissolved on 14.01.2023 pursuant to the Advice of the Chief Minister, Punjab dated 12.01.2023. As such, elections to the Punjab Provincial Assembly are required to be held within 90 days of the said date in terms of Article 224(2) of the Constitution. However, no progress appears to have taken place in

this regard and there is a real and eminent danger of violation of a clear and unambiguous constitutional command.

The Hon'ble Members of the said Bench expressed their view on the matter and referred the same to the Hon'ble Chief Justice of Pakistan to invoke the suo motu jurisdiction of this Court under Article 184(3) of the Constitution, thus:

> 8 .We are, however, of the view that the matter brought to our notice during these proceedings raises a serious question of public importance with reference to enforcement of Fundamental Rights conferred by Chapter-1 of Part-II of the Constitution. Considering the fact that unless timely steps are taken to remedy the situation, there is an eminent danger of violation of the Constitution which we are under a constitutional, legal and moral duty to defend. We therefore consider it a fit case to refer to the Hon'ble CJP to invoke the suo motu jurisdiction of this Court under Article 184(3) of the Constitution, who may if he considers appropriate after invoking jurisdiction under the said Article constitute a Bench to take up the matter. Let the office place this file before the Hon'ble CJP for appropriate orders.

After two days, on 18.02.2023, Mr. Muhammad Sibtain Khan, the Speaker of the Provincial Assembly of Punjab (a member of PTI before his election as Speaker) and some prominent members of PTI, like Mian Mahmood ur Rashid etc., filed Constitution Petition No.2 of 2023 in this Court under Article 184(3) of the Constitution, agitating the same grievance as recorded in the order of the two-member Bench. The Speaker of the Provincial Assembly of Khyber Pakhtunkhwa also joined in Constitution Petition No.2 of 2023 for agitating the grievance as to not appointing the date of the election by the Governor of the Province of Khyber Pakhtunkhwa. It may also be pertinent to mention here that earlier to the said suo motu notice taken by the two-member Bench, the President of the Islamabad High Court Bar Association had also filed Constitution Petition No.1 of 2023 in this Court under Article 184(3) of the Constitution on the same matter, on 09.02.2023, but the same had not been fixed for hearing till then.

6. Upon the recommendation of the two-member Bench, the Hon'ble Chief Justice of Pakistan invoked the suo motu jurisdiction of this Court under Article 184(3) of the Constitution, by his administrative order dated 22.02.2023,[15] and constituted a nine-member Bench to consider the questions of law framed therein; his lordship also fixed the connected Constitution Petitions Nos.1 and 2 of 2023 for hearing before the nine-member Bench.

Our reservations on the invocation of suo motu jurisdiction and constitution of the Bench

7. We had serious reservations on the mode and manner how the original jurisdiction of this Court under Article 184(3) was invoked suo motu in the present matter as well as on the constitution of the nine-member Bench, which we expressed in our orders dated 23.02.2023[16] and the details thereof need not be reiterated here. Our reservations were regarding the administrative decision of the Hon'ble Chief Justice invoking the suo motu jurisdiction in the matter, after having noticed the mode and manner in which the issue arose out of an unrelated service

matter of a civil servant being heard by a two-member Bench, nuanced by the surfacing of audio leaks involving one of the Hon'ble Judges of that two-member Bench and thereafter the constitution of the nine-member Bench that included the said two Hon'ble Judges. It is clarified that the actual sitting of the said two Hon'ble Judges on the Bench or their recusal from the Bench is of little concern to us, as it is a matter between the Judges and their conscience, only to be adjudged by history. Our reservations, however, remain to the extent of the administrative powers exercised by the Hon'ble Chief Justice and have been elaborated upon later in the judgment.

Decision by two Hon'ble Judges and recusal by two Hon'ble Judges and further hearing by the remaining five Judges

8. On the first date of hearing, i.e., 23.02.2023, at the very outset one of us (Jamal Khan Mandokhail, J.) read a note in Court expressing his opinion that the present suo motu proceedings were not justified. Two Hon'ble Judges of the nine-member Bench (Yahya Afridi and Athar Minallah, JJ.) dismissed the suo motu proceedings as well as the connected constitution petitions, by their orders dated 23.02.2023,1 inter alia holding:

> While the jurisdiction of this Court under Article 184(3) of the Constitution is an independent original jurisdiction that is not affected by the pendency of any matter on the same subject matter before any other court or forum, the decision already rendered by the Lahore High Court in Writ Petition No.6093/2023, pending challenge in Intra-Court Appeal No. 11096 of 2023, and the peculiarly charged and unflinching contested political stances taken by the parties, warrant this Court to show judicial restraint to bolster the principle of propriety. This is to avoid any adverse reflection on this Court's judicial pre-emptive eagerness to decide.

On the second date of hearing, i.e., 24.02.2023, an application was filed by three political parties, namely, Pakistan Muslim League (N), Pakistan Peoples' Party and Jamiat Ulema-e-Islam, requesting that the two Hon'ble Judges of the nine-member Bench (Ijaz ul Ahsan and Sayyed Mazahar Ali Akbar Naqvi, JJ.) may recuse themselves from hearing this case, for the reasons stated in the said application. Taking stock of the situation, the Hon'ble Chief Justice called a meeting of the Judges of the nine-member Bench, which took place on 27.02.2023.

9. In the meeting, the two Hon'ble Judges (Ijaz ul Ahsan and Sayyed Mazahar Ali Akbar Naqvi, JJ.) after deliberations decided to recuse themselves from the Bench. It was also considered that the two Hon'ble Judges (Yahya Afridi and Athar Minallah, JJ.), who had already made and announced their final decision of dismissing the constitution petitions and the suo motu proceedings on 23.02.2023 and had in their order left it to the Hon'ble Chief Justice to decide if they were required to sit through the remaining proceedings in the following words - "However, I leave it to the Worthy Chief Justice to decide my retention in the present bench hearing the said petitions." Therefore, a Bench comprising the remaining five Judges of the nine-member Bench was reconstituted by the Hon'ble

Chief Justice, to simply further hear the case and no specific order was passed to exclude the two Hon'ble Judges.

10. In the said backdrop, the remaining five members of the Bench heard the arguments of the learned counsel for the parties to the constitution petitions as well as the other major political parties including Pakistan Muslim League (N), Pakistan Peoples' Party and Jamiat Ulema-e-Islam, and examined the record of the case.

Scope of jurisdiction of this Court under Article 184(3) during pendency of the same matter before the High Courts

11. As the constitutional petitions involving the same matter are pending adjudication before the respective High Courts, we think it appropriate to first take up the question regarding the scope of jurisdiction of this Court under Article 184(3) of the Constitution during pendency of the same matter before the High Courts.

12. After the coming into force of the Constitution in 1973, it did not take much time that the question as to the nature and scope of the original jurisdiction conferred on this Court under Article 184(3), came for consideration before this Court in Manzoor Elahi[17]. The Court not only elaborated the meaning and scope of the phrase "question of public importance with reference to the enforcement of any of the Fundamental Rights" as used in Article 184(3) but also explained the different contours of this jurisdiction, which so far as are relevant for the present case may be stated briefly as follows.

13. The original jurisdiction of this Court under Article 184(3) is an "extraordinary" jurisdiction, which is to be exercised "with circumspection". It confers the "enabling powers", and the Court is not bound to exercise them even where the case brought before it involves a question of public importance with reference to the enforcement of any of the Fundamental Rights. Before exercising this extra-ordinary jurisdiction, the Court is to see whether the facts and circumstances of the case justify the exercise of it and whether the case is "fit" for being dealt with by the Court under this jurisdiction. As the jurisdiction of this Court under Article 184(3) is concurrent with that of the High Courts under Article 199, if the jurisdiction of any of the High Courts has already been invoked under Article 199 and the matter is pending adjudication, then the two well-established principles are also to be considered before exercising its jurisdiction under Article 184(3) by this Court: First, where two courts have concurrent jurisdiction and a petitioner elects to invoke the jurisdiction of one of the courts then he is bound by his choice of forum and must pursue his remedy in that court; and second, if one of the courts having such concurrent jurisdiction happens to be a superior court to which an appeal lies from the other court of concurrent jurisdiction then the superior court should not normally entertain such a petition after a similar petition on the same facts has already been filed and is pending adjudication in the lower court, otherwise it would deprive one of the parties, of his right of appeal. Even where no similar petition on the same facts has already been filed in any of the High Courts, this Court can decline to exercise its extra-ordinary jurisdiction if it

finds that sufficient justification has not been shown for bypassing, and not invoking, the concurrent jurisdiction of the High Court concerned.

14. We may add a third principle, i.e., the principle of forum non conveniens (inconvenient forum), which can also be usefully considered by this Court while deciding upon its discretion to exercise or not to exercise its jurisdiction under Article 184(3) in a particular matter. This principle of forum non conveniens is a legal doctrine in common law jurisdictions that allows a court to decline jurisdiction over a case if it determines that another court would be more appropriate or convenient for the parties involved. This principle aims to promote fairness and efficiency in the judicial system by ensuring that cases are heard in the most suitable venue. In other words, when a court is satisfied that there is some other court having the competent jurisdiction in which the case may be heard and decided more suitably for the interests of all the parties and the ends of justice, this principle allows it to decline the exercise of its jurisdiction despite having the same.[18] This principle is generally applied in matters where courts of two or more countries have concurrent jurisdiction, and the court whose jurisdiction is invoked by one of the parties, is of the view that a court in another jurisdiction is more suitable to adjudicate the case and thus waives its jurisdiction over the case. The rationale of this principle can, however, be applied by the courts of concurrent jurisdiction that are situated in one and the same country also. Given this principle, this Court if, after considering the convenience of the parties and the nature of the matter involved, finds that the case may be heard and decided more suitably by a High Court under Article 199 of the Constitution, it may decline to exercise its jurisdiction under Article 184(3) of the Constitution.

15. The scope of original jurisdiction of the Court was again examined by an 11-Member Full Court Bench of this Court in Benazir Bhutto[19]. The Court, in that case, considered and further explained the principles enunciated in Manzoor Elahi in regard to the exercise of this jurisdiction. No principle enunciated in Manzoor Elahi was dissented to or overruled. The Court simply found it proper to exercise its original jurisdiction under Article 184(3) in the facts and circumstances of the case before it.

16. In Benazir Bhutto, the Court endorsed the principle enunciated in Manzoor Elahi, that in matters of concurrent jurisdiction, the lower court should normally be approached in the first instance, by holding that it is no doubt correct that ordinarily the forum of the court in the lower hierarchy should be invoked but the principle is not inviolable and there may be genuine exceptions to it, such as the case before it where there had been a denial of justice as a result of the proceedings before the High Courts being dilatory and when the High Courts had not exercised its judicial power in the matter by making an order admitting the petitions for regular hearing and were thus not seized of the dispute. The Court also cautioned that the applicability of this principle is to be judged in the light of the particular facts and circumstances of each case, as there can be an abuse of this principle if there is an indiscriminate filing of petitions by persons motivated to stultify the exercise of judicial power under Article 184(3) of the Constitution. The Court explained that the petitioner before it was not bound by the choice of the forum made by another

person who had filed a similar petition in a High Court in his individual capacity without there being any authorisation from the petitioner, the co-chairperson of the aggrieved political party, and held that the element of "common interest" of the two petitioners would strike at the choice of selecting the forum only when there is a proof to elicit a common design between them. The Court finally held that the facts of Manzoor Elahi and that of the petition before it were distinguishable, and thus proceeded to exercise its jurisdiction under Article 184(3) of the Constitution, without superseding in any manner the principles enunciated in Manzoor Elahi. Nor any other judgment of this Court has come or brought to our notice, which has overruled the principles enunciated in Manzoor Elahi. Thus, the principles enunciated in Manzoor Elahi and explained in Benazir Bhutto as to the nature and scope of the original jurisdiction of this Court under Article 184(3) of the Constitution is the law of the land till today, which should therefore be applied and followed by this Court unless a Bench of this Court larger than an 11-member Bench overrules the same.

17. Given the above legal position, this Court declined to exercise its jurisdiction under Article 184(3) of the Constitution in a later case of Farough Siddiqi,[20] after considering the case of Benazir Bhutto, and held that it saw no reason whatsoever to deprive the High Court, of hearing the identical petition which was pending there, particularly when the facts and questions of law are same and when no dilatory tactics had been adopted in the High Court. The Court held that in the circumstances of the case, the direct petition before it under Article 184(3) was not maintainable on the ground that on the same subject-matter, a petition under Article 199 was pending in the Sindh High Court and dismissed the petition under Article 184(3) with the observation that the High Court would take up the petition under Article 199 pending before it for hearing in the first week after vacation. Similarly, in Wukala Mahaz[21] this Court reiterated that there is no doubt that the Court cannot, as a matter of course, entertain a constitution petition under Article 184(3) of the Constitution and allow a party to bypass a High Court which has jurisdiction under Article 199 of the Constitution, inter alia, to enforce the Fundamental Rights under clause (2) thereof, and that the Court should be discreet in selecting cases for entertaining under Article 184(3) of the Constitution.

18. In the light of the above principles enunciated in Manzoor Elahi and explained in Benazir Bhutto, when we examine the facts and circumstances of the present case, we find that the writ petitions filed in the Lahore High Court by PTI and others cannot be said to have been filed to "stultify" the exercise of original jurisdiction by this Court under Article 184(3) nor is there any inordinate delay in the proceedings being conducted in that High Court, which could have justified the exercise of extra-ordinary jurisdiction by this Court under Article 184(3). The delay, if any, has in fact been caused by the present proceedings and, as observed by Justice Anwarul Haq in Manzoor Elahi that the "High Court ... would have proceeded to examine the allegations..., if the matter had not been brought to this Court", we find that the Division Bench of the Lahore High Court would have decided the ICAs pending before it and the Peshawar High Court would have decided the writ petition pending before it if the present proceedings had not been taken up by this Court. Further, we find the principle of choice of forum, as

enunciated in Manzoor Elahi and explained in Benazir Bhutto, is also applicable to the present case as the writ petitions filed by PTI and others in the Lahore High Court and the constitution petitions, particularly C.P. No.2 of 2023 filed in this Court by the Speaker of the Provincial Assembly of Punjab and others, involve the element of "common interest" of the petitioners. We are, therefore, of the opinion that in view of the principles settled in Manzoor Ilahi and Benzair Bhutto, the present suo motu proceedings and the connected constitution petitions do not constitute a fit case to exercise the extraordinary original jurisdiction of this Court under Article 184(3) of the Constitution.

High Court judgment already in the field - how can original jurisdiction under Article 184(3) be exercised against a judicial pronouncement of a High Court, directly or indirectly

19. As aforementioned, the question of law involved in the present matter, is: who has the constitutional power and duty to appoint a date for the holding of a general election to a Provincial Assembly that stands dissolved under the second part of clause (1) of Article 112 of the Constitution, at the expiration of forty-eight hours after the Chief Minister has advised the Governor to dissolve the Assembly but the Governor has not made any express order thereon? And, this question has already been decided by a Single Bench of the Lahore High Court in the exercise of its constitutional jurisdiction under Article 199 of the Constitution by its judgment dated 10.02.2023, which judgment having not been set aside or suspended by any higher forum is in the field and is thus fully operative and binding on the parties to the writ petitions wherein the same was passed.

20. In view of the above position, the question as to the maintainability of the present suo motu proceedings and constitution petitions, falls for our determination: whether this Court in the exercise of its original jurisdiction under Article 184(3) of the Constitution has the power to make an order of the nature mentioned in Article 199 of the Constitution against a judicial order of a High Court, directly or indirectly.

21. We are aware of certain judgments[22] of this Court wherein this Court has exercised its jurisdiction under Article 184(3) of the Constitution, in the peculiar facts and circumstances of the cases, notwithstanding the pendency of writ petitions under Article 199 of the Constitution before the High Courts, but we could not lay our hands on any judgment wherein this Court has specifically taken up and decided the said question, and exercised its jurisdiction under Article 184(3) of the Constitution despite there being a judgment of a High Court passed under Article 199 of the Constitution in the matter taken up by this Court. The present case, therefore, appears to be one of first impression. And, before delving into the said

question, we find it appropriate to reproduce here the relevant provisions of Article 199 and Article 184 of the Constitution for ease of reference:

199. 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) .

(b) .

(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 II.

(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;

184. Original Jurisdiction of Supreme Court.

(1) .

(2) .

(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.

(Emphasis added)

From the bare reading of the above-cited provisions of Articles 199(1)(c) and 184(3) of the Constitution, it is evident that the jurisdiction of a High Court under Article 199(1)(c) and that of this Court under Article 184(3) of the Constitution are concurrent, in so far as they relate to the enforcement of any of the Fundamental Rights conferred by Chapter I of Part II of the Constitution.

22. Article 184(3) of the Constitution empowers this Court "to make an order of the nature mentioned in the said Article", i.e., Article 199, and as per clause (5) of Article 199 a High Court and this Court are excluded from the definition of the term "person" to whom any order or direction can be made, or whose any act or proceeding can be declared to have been done or taken without lawful authority, in the exercise of jurisdiction under Article 199. Thus, a petition under Article 199 of the Constitution is not maintainable before a High Court, nor can any order, direction or declaration under the Article be made, against itself or any other High Court or this Court, or in regard to any act done or proceeding taken by such Courts. The bar created by clause (5) of Article 199, which affects the jurisdiction

of the High Courts conferred under that Article, being a substantive provision is also applicable to the exercise of its jurisdiction by this Court under Article 184(3) of the Constitution. Therefore, neither a High Court nor this Court can exercise its respective jurisdiction under Articles 199 and 184(3), against a High Court or this Court or against any act or proceeding of a High Court or this Court. We are fortified in our this view by the following opinion of a five-member Bench of this Court delivered in Ikram Chaudhry:[23]

> 5. We tried to impress upon them that the above facts would not attract Article 184(3) of the Constitution if otherwise the aforesaid petitions are not sustainable in view of well-settled proposition of law; firstly, that a Bench of this Court cannot sit as a Court of Appeal over an order or a judgment of another Bench of this Court and, secondly, Article 184(3) confers jurisdiction on this Court of the nature contained in Article 199 of the Constitution, clause (5) of which excludes inter alia the Supreme Court and the High Courts. In other words, no writ can be issued by a High Court or the Supreme Court against itself or against each other or its Judges in exercise of jurisdiction under Article 199 of the Constitution, subject to two exceptions, namely, (i) where a High Court Judge or a Supreme Court Judge acts as persona designata or as a Tribunal or (ii) where a quo warranto is prayed for and a case is made out.
>
> (Emphasis added)

Because of the above legal position, a seven-member Bench of this Court has categorically and firmly held in Shabbar Raza[24] that a judgment or an order of this Court "can never be challenged by virtue of filing independent proceedings under Article 184(3) of the Constitution"; such course is "absolutely impermissible".

23. There is another legal aspect of the matter, which bars the interference by this Court with any judgment, decree or order of a High Court, in its jurisdiction under Article 184(3) of the Constitution. The jurisdiction conferred on this Court under Article 184 is its original jurisdiction, as mentioned in the title of this Article, in contrast to its appellate jurisdiction under Article 185 of the Constitution, which denotes that this Court is to exercise it in a matter that has not already been heard and decided by a High Court.[25] This Court can examine the legality of any judgment, decree or order passed by a High Court and can set it aside, if the same is found to have been passed otherwise than in accordance with law, only in the exercise of its appellate jurisdiction conferred on it under Article 185 of the Constitution or by or under any law and not in the exercise of its original jurisdiction under Article 184(3) of the Constitution.

24. A similar view has been pronounced by the Indian Supreme Court in Naresh Mirajkar[26] and Daryao[27] in the context of its original writ jurisdiction under Article 32 of the Indian Constitution, which jurisdiction is similar to that of this Court under Article 184(3) of our Constitution. A nine-member Bench of the Indian Supreme Court held in Naresh Mirajkar that the correctness of a judicial order passed by a High Court can be challenged only by appeal and not by writ proceedings before it under Article 32 of the Indian Constitution. And in Daryao, a

five-member Bench held that an original petition for a writ under Article 32 of the Indian Constitution cannot take the place of an appeal against an order passed by a High Court under Article 226 of the Indian Constitution (which is similar to Article 199 of our Constitution), and that there can be little doubt that the jurisdiction of the Court to entertain applications under Article 32, which are original, cannot be confused or mistaken or used for the appellate jurisdiction of this Court which alone can be invoked for correcting errors in the decisions of the High Courts pronounced in writ petitions under Article 226 of the Indian Constitution.

25. It is a well-settled principle of law that what cannot be done "per directum" (directly) is not permissible to be done "per obliquum" (indirectly).[28] When anything is prohibited, everything by which it is reached is prohibited also (quando aliquid prohibetur, prohibetur et omne per quod devinetur ad illud). Article 175(2) of the Constitution unequivocally declares 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. No court, including this Court, can evade this constitutional command by indirect or circuitous means. Thus, when a High Court or this Court cannot directly entertain a constitution petition under Article 199 or Article 184(3) of the Constitution against itself or each other or against any act done or proceeding taken by them, either of them cannot do it indirectly or impliedly by giving a decision contrary to the decision already given by any of them on the same facts and in the same matter, in the exercise of their respective jurisdiction under the said Articles. We can, therefore, safely conclude that this Court in the exercise of its original jurisdiction under Article 184(3) of the Constitution does not have the power to make an order of the nature mentioned in Article 199 of the Constitution against a judicial order of a High Court, directly or indirectly. Hence, the present suo motu proceedings initiated, and the connected constitution petitions filed, under Article 184(3) of the Constitution are not maintainable in view of the constitutional bar of Article 199(5) read with Article 175(2) of the Constitution, in so far as they relate to the matter already decided by the Single Bench of the Lahore High Court in exercise of its jurisdiction under Article 199 of the Constitution.

Applicability of res judicata to a decision of a High Court made under Article 199

26. We have pondered upon this aspect also, that if this Court decides upon the question of law involved in the present matter against that what has been decided by the Single Bench of the Lahore High Court without setting aside that decision, which decision the ECP would be bound to obey and comply with. At first blush, it appears that it would be the decision of this Court, in view of Article 201 of the Constitution which is subject to Article 189 and the provisions of the latter Article that make the decision of this Court binding on all other courts of the country. However, when such a position is examined profoundly, it presents a serious legal problem in the said answer because of the difference between the doctrine of stare decisis incorporated in Articles 189 and 201 of the Constitution and the doctrine of res judicata codified in Section 11 of the Code of Civil Procedure 1908. Fortunately, we need not dive deep and do labour for explaining the difference between the two doctrines as this Court, while dealing with and rejecting the contention that the bar of res judicata is not attracted to a decision on a question of

law, has already elaborated these doctrines and explained the difference between them in Pir Bakhsh,[29] which we can advantageously state here in brief.

27. "Stare decisis" and "res judicata" both are Latin terms; stare decisis literally means to stand by a decision and res judicata, a matter adjudged. The core distinction between the two doctrines lies in what a case decides generally and what it decides between the parties to that case. What a case decides generally is the ratio decidendi (rationale for the decision) or the rule of law on which the decision is based, for which it stands as a precedent and is to be applied and followed in the later cases by virtue of the doctrine of stare decisis; and what it decides between the parties is far more than this, which includes the decision on both issues of law and issues of facts arisen in the case as well as the adjudication on the contested claims of the parties, and the parties and their privies are bound by that decision and adjudication because of the doctrine of res judicata. Stare decisis is based upon the legal principle or rule involved in a prior case and not upon the adjudication which resulted therefrom, whereas res judicata is mainly based upon the adjudication. Res judicata applies only when the same parties, or their privies, are involved in the subsequent case as were involved in the prior case, the applicability of stare decisis is not affected by the fact that the parties to the subsequent case were not involved in the prior case wherein the question of law was decided. The basis of the doctrine of stare decisis is the need to promote certainty, stability and predictability of the law while that of the doctrine of res judicata is the need to have an end of the litigation over a dispute between the parties. Stare decisis is, thus, applicable only to questions of law; res judicata applies to decisions on both questions of law and fact. Res judicata is strictly applicable even where the decision on the questions of law or fact and the consequent adjudication on the respective claims of the parties were erroneous, whereas stare decisis has a certain flexibility and does not prevent a court from overruling its prior decision if, upon re-examination thereof, it is convinced that the decision was erroneous.

28. In view of the above exposition of the difference in the scope and applicability of the doctrines of stare decisis and res judicata, we are of the considered opinion that the judgment of the Single Bench of the Lahore High Court, if it is not set aside in the ICAs pending before the Division Bench of that High Court or in an appeal filed by any of the parties to the case or any other aggrieved person before this Court under Article 185 of the Constitution, would remain binding on the ECP and the Governor of Punjab by virtue of the doctrine of res judicata, notwithstanding any decision of this Court contrary to that of the Single Bench of the Lahore High Court. And such a situation, instead of resolving the question of law, would create more constitutional and legal anomalies. Therefore, on this ground also, we find it not a fit case to exercise the jurisdiction of this Court under Article 184(3) of the Constitution. That is why a five-member Bench of the Indian Supreme Court has held in Daryao[30] that the general rule of res judicata applies to writ proceedings before it under Article 32 of the Indian Constitution (which is similar to Article 184(3) of our Constitution), and if a writ petition filed by a party under Article 226 of the Indian Constitution (which is similar to Article 199 of our Constitution) has been dismissed on the merits by a High Court, the judgment thus pronounced is binding between the parties, which

cannot be "circumvented or by passed" by taking recourse to Article 32 of the Indian Constitution. We agree with and adopt this view, in holding that a judgment pronounced by a High Court in the exercise of its jurisdiction under Article 199 of the Constitution cannot be "circumvented or by-passed" by taking recourse to Article 184(3) of the Constitution, on the constitution petitions filed by the litigants or suo motu by the Court.

Federalism - Judicial propriety in allowing the High Courts of the respective Provinces to decide upon matters that relate to those Provinces only

29. Pakistan is a federal republic and its Constitution is a federal constitution. The preamble of the Constitution states that the territories included in or in accession with Pakistan shall form a Federation wherein the units will be autonomous with such boundaries and limitations on their powers and authority as may be prescribed, and Article 1 of the Constitution declares that Pakistan shall be Federal Republic to be known as the Islamic Republic of Pakistan. 'The commonly accepted features of a federal constitution are: (i) existence of two levels of government; a general [federal] government for the whole country and two or more regional [provincial] governments for different regions within that country; (ii) distribution of competence or power - legislature, executive, judicial, and financial - between the general [federal] and the regional [provincial] governments; (iii) supremacy of the constitution - that is, the foregoing arrangements are not only incorporated in the constitution but they are also beyond the reach of either government to the extent that neither of them can unilaterally change nor breach them; (iv) dispute resolution mechanism for determining the competence of the two governments for exercising any power or for performing any function.'[31] Federalism is, thus, based upon the division of powers between the federation and its federating units, where both of them are independent and autonomous in their own domains.

30. Federalism under our Constitution, therefore, also envisages independent federating units with the autonomous legislature, executive and judiciary. Chapter 1 of Part V of the Constitution provides for the distribution of legislative power between the Federation and the Provinces. Chapter 2 of the same Part deals with the distribution of executive power between the Federation and the Provinces. Chapters 1 to 3 of Part VII of the Constitution deal with the Judicature; they provide a separate High Court for each Province with its jurisdiction limited to the territory of that Province and a Supreme Court for the whole country with an overarching jurisdiction. The jurisdictional limits between the co-ordinate High Courts on the basis of territory and the overarching jurisdiction of the Supreme Court, form the construct of judicial federalism. It also fosters diversity in legal interpretations and allows for experimentation in legal and policy solutions first at the provincial level.

31. The core principle of federalism is provincial autonomy, which means the autonomy and autonomous functioning of the provincial legislative, executive and judicial institutions. The federal institutions must abide by this principle in federalism. Under our Constitution, a High Court of a Province is the highest constitutional court of that Province and is conferred with the jurisdiction under

Article 199 of the Constitution to judicially review the acts and proceedings of all persons performing, within its territorial jurisdiction, functions in connection with the affairs of the Federation, a Province or a local authority. The principle of provincial autonomy requires that when a matter which relates only to a Province, and not to the Federation or to more than one Provinces, the High Court of that Province should ordinarily be allowed to exercise its constitutional jurisdiction to decide upon that matter, and this Court should not normally interfere with and exercise its jurisdiction in such a matter under Article 184(3) of the Constitution, which jurisdiction is primarily federal in character. The federal structure of our Constitution necessitates that the autonomy and independence of the apex provincial constitutional court of a Province, should not be readily interfered with by this Court but rather be supported to strengthen the provincial autonomy and avoid undermining the autonomy of the provincial constitutional courts.

Parliament is the best forum and political dialogue is the best way to resolve political issues

32. By the present suo motu proceedings and the connected constitution petitions, this Court has been ushered into a "political thicket", which commenced last year with the dissolution of the National Assembly of Pakistan[32] and reached the dissolution of the Provincial Assemblies of two Provinces this year after passing through the disputes over the matters of counting of votes of defected members of political parties[33] and election to the office of the Chief Minister of a Province,[34] and that too, in the exercise of its original jurisdiction under Article 184(3) of the Constitution.

33. Where the political parties and the people subscribing to their views are sharply divided, and their difference of opinion has created a charged political atmosphere in the country, the involvement and interference of this Court in its discretionary and extra-ordinary jurisdiction under Article 184(3) of the Constitution into a "political thicket", would be inappropriate and would inevitably invite untoward criticism of a large section of the people. 'We must not forget that democracy is never bereft of divide. The very essence of the political system is to rectify such disagreements, but to take this key characteristic outside the realm of our political system and transfer it to the judiciary, threatens the very core of democratic choice - raison d'etre' of democracy. We must also remain cognisant that there will always be crucial events in the life of a nation, where the political system may disappoint, but this cannot lead to the conclusion that the judiciary will provide a better recourse.'[35] A democratic political process, however that may be, is best suited to resolve such matters.

34. Democracy, it must be understood, does not mean majoritarian rule. The essence of democracy is the participation of all concerned in the decision-making process and arriving at collective decisions by accommodating differences of interest and opinion to a possible extent. Taking all decisions only by majority rule is no less dictatorship, and the absolutist approach to controversial issues is the hallmark of extremists. Opacity and inconsistency, which are taken as intellectual impurity in judicial decisions, are often inseparable from the kind of compromises

the politicians have to make in the democratic process. Unbending attachment to a standpoint is often proved politically sterile. Litigation is not a consultative or participatory process and can therefore rarely mediate differences on issues where there is room for reasonable people to disagree; only a political process can resolve such issues and adjust disagreements. Thus, a nation cannot reduce divisions among its people unless their representatives - the politicians - adopt and participate in the democratic process of political dialogue, in finding solutions to the people's social, economic and political problems.[36]

Decision by 4-3 or 3-2 majority

35. We also find it necessary to narrate the reasons for non-issuance of the Order of the Court in the present case, to make them part of the record. We believed that our decision concurring with the decision of our learned brothers (Yahya Afridi and Athar Minallah, JJ.) in dismissing the present suo motu proceedings and the connected constitution petitions, had become the Order of the Court by a majority of 4-3 while our other three learned brothers held the view that their order was the Order of the Court by a majority of 3-2. Because of this difference of opinion, the Order of the Court, which is ordinarily formulated by the head of the Bench could not be issued. We are of the considered view that our decision concurring with the decision of our learned brothers (Yahya Afridi and Athar Minallah, JJ.) in dismissing the present suo motu proceedings and the connected constitution petitions is the Order of the Court with a majority of 4 to 3, binding upon all the concerned. The answer lies in understanding the administrative powers enjoyed by the Hon'ble Chief Justice in reconstituting a Bench, when the Bench once constituted and assigned a case has commenced hearing of a case. This court has held in H.R.C. No. 14959-K of 2018,[37] that "once the bench is constituted, cause list is issued and the bench starts hearing the cases, the matter regarding constitution of the bench goes outside the pale of administrative powers of the Chief Justice and rest on the judicial side, with the bench. Any member of the bench may, however, recuse to hear a case for personal reasons or may not be available to sit on the bench due to prior commitments or due to illness. The bench may also be reconstituted if it is against the Rules and requires a three-member bench instead of two. In such eventualities the bench passes an order to place the matter before the Chief Justice to nominate a new bench. Therefore, once a bench has been constituted, cause list issued and the bench is assembled for hearing cases, the Chief Justice cannot reconstitute the bench, except in the manner discussed above." The Court further held that "in the absence of a recusal by a member of the Bench, any amount of disagreement amongst the members of the Bench, on an issue before them, cannot form a valid ground for reconstitution of the Bench.... reconstitution of a bench while hearing a case, in the absence of any recusal from any member on the bench or due to any other reason described above, would amount to stifling the independent view of the judge. Any effort to muffle disagreement or to silence dissent or to dampen an alternative viewpoint of a member on the bench, would shake the foundations of a free and impartial justice system... a bench, once it is constituted and is seized of a matter on the judicial side,

cannot be reconstituted by the Chief Justice in exercise of his administrative powers, unless a member(s) of the bench recuses or for reasons discussed above."

36. We endorse the above view and hold that a Judge forming part of a Bench once constituted and seized of the case assigned to it cannot be excluded from that Bench unless he recuses himself from hearing that case or becomes unavailable to sit on the Bench for some unforeseen reason. After having made a final decision on the matter at an early stage of the proceedings of a case, the non-sitting of a Judge in the later proceedings does not amount to his recusal from hearing the case nor does it constitute his exclusion from the Bench. In this case, the two Hon'ble Judges having decided the matter, left the option of their sitting or not sitting on the Bench with the Hon'ble Chief Justice, for further hearing of the case. The exercise of this option by the Hon'ble Chief Justice has no effect on the judicial decision of those two Hon'ble Judges passed in the case. The reconstitution of the Bench was simply an administrative act to facilitate the further hearing of the case by the remaining five members of the Bench and could not nullify or brush aside the judicial decisions given by the two Hon'ble Judges in this case, which have to be counted when the matter is finally concluded. It is important to underline that the two Hon'ble Judges (Ijaz ul Ahsan and Sayyed Mazahar Ali Akbar Naqvi, JJ.) were not removed from the Bench but had voluntarily recused themselves. Thus, their short orders are very much part of the case, therefore, the administrative order of reconstitution of the Bench by the Hon'ble Chief Justice cannot brush aside the judicial decisions of the two Hon'ble Judges who had decided the matter when the case was heard by a nine-member Bench. Failure to count the decision of our learned brothers (Yahya Afridi and Athar Minallah, JJ.) would amount to excluding them from the Bench without their consent, which is not permissible under the law and not within the powers of the Hon'ble Chief Justice. Therefore, we are of the opinion that the dismissal of the present suo motu proceedings and the connected constitution petitions is the Order of the Court by a majority of 4 to 3 of the seven-member Bench. We are also fortified in our opinion by the precedent of the well-known Panama case. In the said case, the first order of the Court was passed by a 3-2 majority,[38] and in the subsequent hearings conducted in pursuance of the majority judgment the two Hon'ble Judges, who had made and announced their final decision, did not sit on the Bench[39] but they were not considered to have been excluded from the Bench and were made a party to the final judgment passed by the remaining three Hon'ble Judges[40], and they also sat on the Bench that heard the review petitions[41].

Need of making rules for regulating the exercise of jurisdiction under Article 184(3) and the constitution of Benches

37. Lastly, we find it essential to underline that in order to strengthen our institution and to ensure public trust and public confidence in our Court, it is high time that we revisit the power of "one-man show" enjoyed by the office of the Chief Justice of Pakistan. This Court cannot be dependent on the solitary decision of one man, the Chief Justice, but must be regulated through a rule-based system approved by all Judges of the Court under Article 191 of the Constitution, in regulating the exercise of its jurisdiction under Article 184(3) including the

exercise of suo motu jurisdiction; the constitution of Benches to hear such cases; the constitution of Regular Benches to hear all the other cases instituted in this Court; and the constitution of Special Benches.

38. The power of doing a "one-man show" is not only anachronistic, outdated and obsolete but also is antithetical to good governance and incompatible to modern democratic norms. One-man show leads to the concentration of power in the hands of one individual, making the system more susceptible to the abuse of power. In contrast, a collegial system with checks and balances helps prevent the abuse and mistakes in the exercise of power and promote the transparency and accountability. When one person has too much power, there is a risk that the institution may become autocratic and insulated, resulting in one-man policies being pursued, which may have a tendency of going against the rights and interests of the people. We must not forget that our institution draws its strength from public perception. The entire edifice of this Court and of the justice system stands on public trust and confidence reposed in it. Therefore, one-man show needs a revisit as it limits diverse perspectives, concentrates power, and increases the risk of an autocratic rule. On the other hand, the collegial model ensures good governance as it rests on collaboration, shared decision-making and balance of power to ensure the best outcome.

39. The Chief Justice of this Court is conferred with wide discretion in the matter of constituting Benches and assigning cases to them under the present Supreme Court Rules 1980. Ironically, this Court has time and again held how public functionaries ought to structure their discretion[42] but has miserably failed to set the same standard for itself leaving the Chief Justice with unfettered powers in the matter of regulating the jurisdiction under Article 184(3) (including suo motu) and in matters of constituting benches and assigning cases. It is this unbridled power enjoyed by the Chief Justice in taking up any matter as a suo motu case and in constituting Special Benches after the institution of the cases and assigning cases to them that has brought severe criticism and lowered the honour and prestige of this Court. Our acts and decisions as members of a constitutional institution are recorded in history and commented upon. Political scientist and legal scholar, Yasser Kureshi, in his recent book "Seeking Supremacy- The Pursuit of Judicial Power in Pakistan"[43] criticizes this unfettered power of the Chief Justice, thus:

> During the tenure of Chief Justice Saqib Nisar (2016- 2019), the Supreme Court used its suo motu powers to intervene in governance to an extent that had never been seen before. It is hard to do justice to Justice Nisar's whirlwind of on-bench and off-bench interventions, as he sought to fix all of Pakistan's socio-economic problems: water purity and distribution, milk production, public sector corruption, hospital management, educational disparities and population control, through the striking of the gavel. Within the first three months of 2018 alone, Nisar launched thirty suo motu cases, often prompted by news articles he read, headlines he watched on the evening news or even posts he saw on social media. In one case, Nisar took suo motu notice of a

photograph circulating on social media that showed a funeral procession passing over sewage in a narrow street.

Upon taking suo motu notice, Nisar would then order public officials to present themselves before the Court. During these proceedings, he would typically reprimand public officers and comment on state mismanagement, and in interim orders, he would direct public officers to remedy the issue and report back to the Court, dismiss officers who did not adequately address his concerns and sometimes even issue contempt of court charges against public officials who did not satisfactorily comply with his orders. Perhaps the most controversial example of Justice Nisar's suo motu jurisprudence was his order to construct new dams to resolve Pakistan's water shortages, 'for the collective benefit of the nation'. Nisar launched a fundraising scheme for donations to pay for the multibillion dollar dam-building project, authorizing televised ads and newspaper articles to openly solicit funding, and even ordering convicted parties in cases to do with assault, land acquisitions and environmental damage to deposit funds into the fund for the dam for the Court's new project. Off the bench, Nisar also transformed the role of the chief justice, donning the hat of government inspector and international fundraiser, showing up at hospitals, schools and water plants to assess their conditions, followed by news cameras.

In order to build a strong, open and transparent institution, we have to move towards a rule-based institution. The discretion of the Chief Justice needs to be structured through rules. This Court has held that structuring discretion means regularizing it, organizing it and producing order in it, which helps achieve transparency, consistency and equal treatment in decision-making - the hallmarks of the rule of law. The seven instruments that are usually described as useful in the structuring of discretionary power are open plans, open policy statements, open rules, open findings, open reasons, open precedents, and fair procedure. Our jurisprudence must first be applied at home.

40. Apprehending the misuse of the extra-ordinary original jurisdiction of this Court under Article 184(3) of the Constitution, Ajmal Mian, CJ., speaking for the majority of a seven-member Bench of this Court in Wukala Mahaz,[44] emphasized in 1998 that "a balanced, consistent and indiscriminate policy" is to be evolved by this Court for invoking and exercising this extra-ordinary original jurisdiction of the Court. The later years proved his apprehension true. The experience of last two decades has shown a rather more need to frame "a balanced, consistent and indiscriminate policy" for invoking and exercising this jurisdiction. Leaving it to the unstructured discretion of one person - the Chief Justice - has utterly failed. With the change in the office of the Chief Justice, there is a change in the "policy" of invoking and exercising the jurisdiction under Article 184(3) of the Constitution. What then is the solution? In our opinion, it is the making of rules on the matter by this Court in the exercise of its rule-making power conferred on it by Article 191 of the Constitution, which can serve the purpose. Such rules may provide that the extraordinary jurisdiction of the Court under Article 184(3) of the Constitution, either on the petition of a person or suo motu by the Court, shall be invoked only if a majority of all the Judges or the first five or seven Judges of the Court, including

the Chief Justice, as may be prescribed in the rules, agrees to it while considering the matter on the administrative side. The criterion for selecting cases for being dealt with under this jurisdiction should also be clearly laid down in the rules, to make the practice of the Court in this regard, uniform and transparent.

41. So far as the matter of constituting a Bench for hearing a case under Article 184(3) of the Constitution is concerned, there must also be uniformity and transparency, which can be best assured by constituting a regular five or seven-member Bench once at the commencement of every judicial year, or twice a year for each term of six months, by including in that Bench the senior most Judges or the senior most Judges of each Province on the strength of this Court with the Chief Justice or the Senior Puisne Judge as head of that Bench. Constituting special

Benches on case to case basis, after the institution of the cases, is complete negation of fairness, transparency and impartiality required of a judicial institution to maintain its legitimacy and credibility of its judgments.

42. The right to have his case heard by a Bench or a Judge to whom the cases are assigned on the basis of a notified objective criterion is referred to as a "right to a natural judge" in some jurisdictions.[45] An objective criterion prevents a Judge from choosing his cases and the parties from choosing their Judge. The said right is rooted and enshrined in our jurisdiction in the fundamental rights of access to justice through an independent and impartial court, fair trial and equality before law guaranteed by Articles 9, 10A and 25 of the Constitution. The right to be treated in accordance with law conferred by Article 4 of the Constitution also embodies this right, as the rule of law mandated by Article 4 assumes the existence of laws that are known to those who or whose matters are to be treated in accordance therewith. This Court, being the guardian of the fundamental rights of the people of Pakistan against encroachments made by other public authorities and institutions, is to enforce the fundamental right of the public relating to its own functioning with more fervor and commitment than others. We are enlightened in this respect by the invaluable remarks of Fletcher Moulton, L.J., and quoted by Earl Loreburn in Scott v. Scott,[46] that "courts of justice, who are the guardian of public liberties, ought to be doubly vigilant against encroachments by themselves." That is why this Court needs to be rule based and those rules should be uniform, open and available to the public.

43. These are the reasons for our short order dated 01.03.2023, dismissing the present constitution petitions and dropping the suo motu proceedings, with the observation that the respective High Courts shall decide the matters pending before them within three working days, which is reproduced hereunder for completion of record:

For the reasons to be recorded later, we hold that:

i. The suo motu proceedings (SMC No. 1 of 2023), in the facts and circumstances of the case, are wholly unjustified in the mode and manner they were taken up under Article 184(3) of the Constitution of the Islamic

Republic of Pakistan ("Constitution"), besides being initiated with undue haste.

ii. The Suo Motu Case No.1 of 2023 and the two Const. Petitions Nos. 1 and 2 of 2023 under Article 184(3) of the Constitution, in the light of the principles settled in Manzoor Ilahi[47] and Benzair Bhutto[48], do not constitute a fit case to exercise the extraordinary original jurisdiction of this Court under Article 184(3) of the Constitution and are thus not maintainable as the same constitutional and legal issues seeking the same relief are pending and being deliberated upon by the respective Provincial High Courts in Lahore and Peshawar, without there being any inordinate delay in the conduct of the proceedings before them.

iii. There is no justification to invoke our extraordinary jurisdiction under Article 184(3) to initiate suo motu proceedings or entertain petitions under Article 184(3) of the Constitution, as a single Bench of the Lahore High Court has already decided the matter in favour of the petitioner before the said High Court vide judgment dated 10.02.2023 and the said judgment is still in the field. The intra court appeals (ICAs) filed against the said judgment are pending before the Division Bench of the Lahore High Court (and none of the said petitioners has approached this Court under Article 185(3) of the Constitution).

iv. Once a constitutional issue is pending before a Provincial High Court, keeping in view the Federal structure of our Constitution the autonomy and independence of the apex provincial constitutional court, should not be readily interfered with rather be supported to strengthen the provincial autonomy and avoid undermining the autonomy of the provincial constitutional courts.

v. There is no inordinate delay in the proceedings pending before the High Courts, infact the instant proceedings have unnecessarily delayed the matter before the High Courts. However, considering the importance of the matter

we expect that the respective High Courts shall decide the matters pending before them within three working days from today.

vi. Even otherwise without prejudice to the above, such like matters should best be resolved by the Parliament.

2. We, therefore, agree with the orders dated 23.02.2023 passed by our learned brothers, Yahya Afridi and Athar Minallah, JJ.[49], and dismiss the present constitution petitions and drop the suo motu proceedings.

Sd/-
Judge

Sd/-
Judge

Islamabad,
1st March, 2023.

Yahya Afridi, J*.---I had, in my order dated 23.02.2023, dismissed all three proceedings as they were not maintainable for adjudication of this Court under its original jurisdiction provided under Article 184(3) of the Constitution of the Islamic Republic of Pakistan, 1973 ('Constitution').

2. Before I explain the reasons for my short order declaring all three proceedings as not maintainable under the law, it would be appropriate to first record the admitted factual background leading to the present proceedings. It started with the dissolution of the Provincial Assembly of Punjab on 14.01.2023, followed by the dissolution of the Provincial Assembly of Khyber Pakhtunkhwa on 18.01.2023. This led Pakistan Tehreek-e-Insaf ("PTI"), through its Secretary General, to move the Lahore High Court by filing a constitutional petition (Writ Petition No. 5851 of 2023) under Article 199 of the Constitution, seeking, in essence, the constitutional authority to appoint a date for the holding of the General Election for the Provincial Assembly of Punjab. This petition, along with three petitions filed by Munir Ahmed (Writ Petition No. 6118 of 2023), Zaman Khan Vardag (Writ Petition No. 6093 of 2023) and Sabir Raza Gill (Writ Petition No. 6119 of 2023) on the same matter, were taken up on 30.01.2023, and after providing three hearings to the parties, were finally decided by the Single Bench of the Lahore High Court vide judgment dated 10.02.2023, whereby a clear writ of mandamus was issued to the Election Commission of Pakistan in terms that;

"Given the constitutional provisions mentioned above and the judgments of the Supreme Court of Pakistan, the prayer made in the "consolidated petitions" is allowed and the "ECP" is directed to immediately announce the "date of election" of the Provincial Assembly of Punjab with the Notification specifying reasons, after consultation with the Governor of Punjab, being the constitutional Head of the Province, to ensure that the elections are held not later than ninety days as per the mandate of the "Constitution"."

The Governor of Punjab and the Election Commission of Pakistan challenged the above Single Bench judgement in Intra-Court Appeals before the Divisional Bench

of the Lahore High Court. With the set appeals was also a Contempt Petition filed by PTI, seeking enforcement of the Single Bench judgement dated 10.02.2023. Similarly, on 06.02.2023, Mashal Azam Advocate invoked the original jurisdiction of the Peshawar High Court seeking similar relief for the appointment of a date for the holding of the election to the Provincial Assembly of Khyber Pakhtunkhwa. During the pendency of the Intra-Court appeals before the Division Bench of the Lahore High Court and petition before the Peshawar High Court, a two-member bench of this Court on 16.02.2023 while hearing a service matter relating to the transfer of police officer Ghulam Mehmood Dogar (Civil Petition No. 3988 of 2022), apprehended the delay in holding of the General Elections of the Provincial Assembly of Punjab, and found that there was 'rare and imminent danger of violation of a clear and unambiguous constitutional command'; the bench made a referral to the Hon'ble Chief Justice of Pakistan for invoking and initiating of the suo motu jurisdiction of this Court under Article 184(3) of the Constitution. The referral was positively considered on 22.02.2023, and Suo Motu Case No. 1 of 2023, along with two other Constitutional Petitions filed by the Islamabad High Court Bar Association (Const.P.1 of 2023) and a joint petition filed by Muhammad Sibtain Khan and Mushtaq Ahmed Ghani (Const.P.2 of 2023), the worthy Speakers of the Punjab and Khyber Pakhtunkhwa Assemblies, respectively, were fixed for hearing on 23.02.2023.

3. Given the factual matrix of the legal proceedings leading to the present three petitions, which came up for hearing before this Court on 23.02.2023, we note that: firstly, the Intra-Court Appeals filed by the Governor of Punjab and the Election Commission of Pakistan against the judgment of the Single Bench dated 10.02.2023 were pending before the Lahore High Court, while the Peshawar High Court was also hearing a Constitutional Petition seeking similar relief for appointment of the date of election to the Provincial Assembly of Khyber Pakhtunkhwa; secondly, the judgments of the pending proceedings before both the High Courts could be challenged before this Court under its appellate jurisdiction envisaged under Article 185 of the Constitution.

4. This Court in Ch. Manzoor Elahi's case[1], while dilating on the jurisdictional contours of the original jurisdiction of the Supreme Court under Article 184(3) of the Constitution, inter alia, laid down that where the High Court under Article 199 of the Constitution and this Court under Article 184(3) of the Constitution had concurrent jurisdiction and the matter was pending adjudication before both courts, the later had to show restraint in exercising its jurisdiction, premised on the principle of ensuring that a party is not deprived of his vested right of Appeal under the law. To appreciate the principle enunciated by this Court in the above case, we must consider the facts leading Ch. Manzoor Elahi to seek his legal redressal by invoking the original jurisdiction of this Court under Article 184(3) of the Constitution. Ch. Manzoor Elahi, initially challenged his incarceration in the High Court of Sindh and Balochistan, wherein the High Court on a preliminary issue of jurisdiction declared that it had the authority to issue writs in relation to tribal areas of Quetta division in the Province of Balochistan. While the appeal of the Federation against this preliminary finding of the High Court before this Court, and the main petition before the High Court was pending, Ch. Manzoor Elahi also

challenged before this Court his illegal detention by filing a petition invoking the original jurisdiction of the Supreme Court under Article 184(3) of the Constitution. Mr Justice Hamoodur Rahman, C.J., while rendering the opinion of the court opined that:

> "It is no doubt correct that the jurisdiction of this court under clause (3) of the Article 184 can be invoked when a question of public importance concerning the enforcement of any of the fundamental rights is involved but, I would like to add, since this is the first application of its kind, that it does not follow from that this Court is bound to exercise these concurrent powers even where these conditions are fulfilled for this is only an enabling provision. If the jurisdiction of any of the High Courts has already been invoked under Article 199 of the Constitution and the matter is pending adjudication there then two further well-established principles become attracted. The first is that where two Courts have concurrent jurisdiction and a petitioner has already elected to invoke the jurisdiction of one of such Courts then he should be bound by his election and must pursue his remedies in that Court. The second is that if one of the Courts having such concurrent jurisdiction happens to be a superior Court to which an appeal lies from the other court of concurrent jurisdiction then the Superior Court will not normally entertain such an application after a similar application on the same facts has already been filed and is pending adjudication in the lower Court, because, that would deprive one of the parties to the litigation in the lower court of his vested right of appeal conferred by another provision of the Constitution, namely, Article 185."

(emphasis provided)

5. I am also mindful of the positive exercise of the original jurisdiction by an eleven member bench of this Court in the case of Miss Benazir Bhutto[2], while the petitions on the same subject matter were pending adjudication before the Lahore High Court. This Court, in the said case, made an exception to the strict adherence of the practice of this Court, as settled in Ch. Manzoor Elahi's case (supra), on the touchstone of enforcement of fundamental rights, and it was declared that the measure of applicability of the said practice has to be judged in the light of the particular facts and circumstances of each case. However, nowhere was the principle of practice given judicial recognition in Ch. Manzoor Elahi's case (supra) overturned by this Court in Benazir Bhutto's case (supra). In fact, the Court was very cautious, while invoking its jurisdiction under its original jurisdiction, as it was careful in making it clear that it was only distinguishing the case from the precedent set in Ch. Manzoor Elahi's case and not deviating from the principle set therein. The Court (as per Haleem J. as he was then) observed,

> "It is regrettable to note that the High Court has surrendered the management of the case to the sweet will of the counsel who was taking dates at his convenience without making any serious effort to get the matter admitted to

regular hearing, and the High Court, in turn, acquiescing in it, dillydallying and shirking from its duty towards a pending cause by accommodating the

counsel. Therefore, there was, for a period of a year and eight months, a failure on the part of the High Court to pass any order either admitting the petition to regular hearing or rejecting it in limine, and, for that matter, even on the date of hearing of this petition, it was not known as to whether it was admitted or not. On these facts, the learned Attorney General has invoked the principle of practice as to the choice of the forum and so also the vested right of the opposite party to come in appeal to this Court as material considerations for this Court to keep its hands off from hearing the petition. As the High Court was not legally seized of the dispute as a result of an order admitting it, it remains to be seen to what extent the practice can be followed which without doubt is salutary and of long-standing"[3]

This observation led to taking an exception to the principle recognised in Ch. Manzoor Elahi's case (supra), which it declared declared salutary and of long standing. The judicial precedents that have since followed have recognised with respect, and maintained the ratio decidendi of Ch. Manzoor Elahi's case (supra).[4]

5. Given the promptness with which the single bench of the Lahore High Court proceeded with the petitions before it and decided the same, and that the judgment so rendered was under challenge in Intra-Court Appeals, surely distinguish the facts leading to the present three proceedings when placed in juxtaposition with those leading this Court in Benazir Bhutto's case (supra), to take an exception to the settled principle of restraint recognised in Manzoor Elahi's case (supra). The inordinate delay of one year and eight months in proceeding with the matters pending before the High Court was surely a justifiable reason to take exception to the general principle of restraint. However, the events which led to the present proceedings before this Court are starkly distinguishable. Not only were the petitions proceeded with in an expeditious manner, but decided by the Singh Bench of the Lahore High Court, thus, the facts leading to the exception taken by this Court in Benazir Bhutto's case (supra) cannot be applied to the facts and circumstances of the present case. Accordingly, I am of the firm opinion that the principle of restraint in exercising original jurisdiction to safeguard the right of appeal of the parties should be respected and maintained, and the three proceedings pending before this Court should not be proceeded with at this stage, being premature and not maintainable. I am also sanguine that the High Courts would proceed expeditiously with the pending matters.

6. Another crucial aspect of the present proceedings is that the matter in dispute, though in essence is constitutional, has developed into being peculiarly charged, with unflinching contested political stances being taken by the parties, which warrant this Court to show judicial restraint. This would also bolster the principle of propriety and comity, so as to not offend the hierarchal judicial domain of the High Court envisaged under the Constitution, and disturb the judicial propriety that the High Court deserves - lest it may reflect adversely on this Court's judicial preemptive eagerness to decide.

7. And thus, as I have decided to declare the present three proceedings pending before this Court being premature as not maintainable, I find my continuing to sit on the bench and hear the said petitions would not be appropriate, as any findings

passed or remarks made during the hearing of the present matters by me may prejudice the contested claims of the parties in the said petitions/ appeal pending before the respective High Courts. However, I leave it to the Worthy Chief Justice to decide my retention in the present bench hearing the said petitions.

8. Accordingly, for the reasons stated hereinabove, I am of the firm opinion that the present proceedings pending before this Court; Suo Motu 1. of 2023, Constitutional Petition 1. of 2023, and Constitutional Petition 2. of 2023 are not maintainable to be adjudicated at this stage by this Court in its original jurisdiction envisaged under Article 184(3) of the Constitution, and thus are dismissed.

Sd/-
Judge

Athar Minallah, J*.---The reasons in support of orders dated 23.02.2023 and 24.02.2023 respectively, whereby the petitions and the assumption of suo motu jurisdiction were dismissed are as follows:

2. There are three fundamental grounds for dismissing the petitions and the assumption of suo motu jurisdiction. Firstly, the 'salutary principles' expounded by the Full Court regarding the assumption of jurisdiction under Article 184(3) of the Constitution of the Islamic Republic of Pakistan, 1973 ("Constitution") are binding on this bench; secondly, in matters which involve the interests of the political parties, utmost caution must be exercised so as not to prejudice the appearance of impartiality of the Court, particularly when jurisdiction is invoked suo motu; and lastly, the conduct and bona fides of the political stakeholder who has approached the Court. As will be discussed later, public trust and confidence is sacrosanct for the ability of the judicial branch to perform its functions effectively as the guardian of the Constitution and the fundamental rights enshrined in it by its framers. The legitimacy of the Court's verdict solely depends on the public's belief that the Court is an independent, impartial, and apolitical arbiter of disputes between political stakeholders. The matter placed before us has arisen from a dispute which is essentially political in nature and one of the High Courts has already adjudicated upon it. My learned brother Yahya Afridi, J. has correctly observed in his note, dated 23.02.2023, to show restraint so as to avoid any adverse reflection on this Court's judicial pre-emptive eagerness to decide". Preserving public trust and confidence in the Court's independence and impartiality is crucial. This Court has been dragged into controversies of a political nature for a third time in quick succession.

3. The petitions and assumption of suo motu jurisdiction under Article 184(3) of the Constitution stem from an unceasing political turmoil. This Court has remained at the centre stage of an unprecedented charged and polarised political milieu. The first indulgence of this Court was when the voting on the resolution of no-confidence motion was stalled by the Deputy Speaker followed by dismissal of the National Assembly by the President. The latter had acted in pursuance to the advice tendered by the then-Prime Minister, Mr Imran Khan. The Chief Justice had assumed suo motu jurisdiction under Article 184(3) of the Constitution on the recommendation of twelve Judges of this Court and the proceedings had culminated in the rendering of the judgment reported as Pakistan Peoples' Party Parliamentarians v. Federation of Pakistan (PLD 2022 SC 574). The unanimous

verdict handed down by a bench consisting of five Judges had set aside the act of the Deputy Speaker and had declared the dissolution of the National Assembly as 'extra-constitutional'. The resolution of no-confidence was revived and consequently the National Assembly was restored. The request of the Attorney General to continue with the process of elections was turned down and the action of the Deputy Speaker was declared as biased. Subsequently, the resolution was carried by a majority and resultantly the Prime Minister, Mr Imran Khan, ceased to hold the office under Article 95(4) of the Constitution. The political crisis escalated when, after losing the vote of confidence, Mr. Imran Khan chose not to take the exalted seat of leader of the opposition and decided to resign from the membership of the National Assembly along with other members belonging to the political party Pakistan Tehreek-e-Insaf. The resignations were tendered but their acceptance by the Speaker was delayed. The strategy had profound consequences for the political process and constitutional democracy of Pakistan. This Court was called upon to become an arbiter in resolving yet another political quagmire created by the political stakeholders. The advisory jurisdiction of the Court was invoked by the President who had sought interpretation of Article 63A of the Constitution. By a majority of three to two, the bench of this Court, in the judgment reported as Supreme Court Bar Association of Pakistan v. Federation of Pakistan (PLD 2023 SC 42), interpreted Article 63A and, inter alia, held that "the vote of any member (including a deemed member) of a Parliamentary Party in a House that is cast contrary to any direction issued by the latter in terms of para (b) of clause (1) of Article 63A cannot be counted and must be disregarded". The political ramifications of this declaration were profound in a highly charged and polarised political atmosphere. A review against the judgment was sought and the petitions are pending before this Court.

4. The effects of the interpretation of Article 63A on the ensuing events were far-reaching for the polarised political stakeholders. After the government was formed in the province of Punjab, the major coalition partner, Pakistan Tehreek-e-Insaf, decided to dissolve the legislatures of the provinces of Punjab and Khyber Pakhtunkhwa (KPK) respectively. The Assemblies of the provinces of Punjab and Khyber Pakhtunkhwa ("KPK") stood dissolved on 14.1.2023 and 18.1.2023 respectively, pursuant to advice tendered by the respective Chief Ministers. In the case of the provincial Assembly of Punjab, the Governor had chosen not to act upon the advice and, therefore, it stood dissolved upon the lapse of the period prescribed under the Constitution, while the Governor of KPK decided otherwise and, therefore, the assembly was dissolved through his order passed on 18.1.2023.

5. While the competent authorities were yet to announce a date for elections, one of the political stakeholders, Pakistan Tehreek-e-Insaf, invoked the jurisdiction of the Lahore High Court, vested in it under Article 199 of the Constitution. Some other citizens had also filed petitions. They were aggrieved because they felt that the inaction on the part of the competent authorities was likely to delay the elections, resulting in a violation of the Constitution. They had urged the High Court to issue appropriate writs to compel the responsible authorities to hold the elections within the timeframe explicitly prescribed under Article 224 of the Constitution. Likewise, petitions were also filed before the Peshawar High Court seeking appropriate writs with respect to the announcement of a date and the holding of elections in KPK.

6. The proceedings relating to the petitions filed before the Lahore High Court were diligently concluded and they were adjudicated vide judgment dated 10.2.2023 passed in Pakistan Tehreek-e-Insaf through its General Secretary v.

Governor of Punjab and another (Writ Petition No. 5851 of 2023), Munir Ahmad v. The Governor of Punjab and others (Writ Petition No. 6118 of 2023), Zaman Khan Vardag v. Province of Punjab and another (Writ Petition No. 6093 of 2023), and Sabir Raza Gill v. Governor of Punjab (Writ Petition No. 6119 of 2023). The High Court had allowed the prayers sought in the petitions and appropriate writs were granted under Article 199 of the Constitution in the following terms:-

> "In view of the constitutional provisions mentioned above and the judgments of the Supreme Court of Pakistan, the prayer made in the "consolidated petitions" is allowed and the "ECP" is directed to immediately announce the "date of election" of the Provincial Assembly of Punjab with the Notification specifying reasons, after consultation with the Governor of Punjab, being the constitutional Head of the Province, to ensure that the elections are held not later than ninety days as per the mandate of the "Constitution".

7. The above judgment was assailed by preferring intra court appeals which are pending before a Division Bench of the High Court. The appeals have been taken up for hearing and they are being heard. Admittedly, the writs granted by the single judge of the High Court vide the aforementioned judgment have not been interfered with since no injunctive order has been passed by the Division Bench. The judgment of the Lahore High Court is, therefore, validly subsisting and binding on the public authorities who are saddled with the responsibility to enforce it. Petition(s) have also been filed seeking implementation of the judgment by way of initiation of contempt proceedings. This Court has no reason to doubt the ability and competence of the High Court to enforce its judgment because, by doing so, the competence and independence of a provincial constitutional court would be unjustifiably undermined. The enforceable writs granted by the High Court are binding and any attempt to impede its implementation could expose the delinquent authorities to grave consequences. On the other hand, the Peshawar High Court has assiduously taken up the petitions and there is no reason to assume that the proceedings and adjudication of the petitions would be delayed. The High Court has taken effective steps and any assumption regarding its competence or ability would be unwarranted and unjustified.

8. While the Lahore High Court had already rendered an authoritative judgment and it was in the process of being enforced, petitions were filed before this Court urging assumption of jurisdiction under Article 184(3) of the Constitution regarding the same matter: holding of elections within the time prescribed under the Constitution. One of the petitions was filed in the name of the Islamabad High Court Bar Association by its President while the other by the Speakers of the two dissolved legislatures and former elected members. It is noted that the petitioners in the latter petition are associated with the same political party, Pakistan Tehreek-e-Insaf, which had invoked the jurisdiction of the Lahore High Court and its prayers were granted by issuance of appropriate writs. Simultaneously, a two-member bench of this Court, while seized with a service matter relating to the transfer of a police officer, had summoned the Chief Election Commissioner and, after hearing him, had passed the order dated 16.2.2023 in the case titled Ghulam Mehmood Dogar v. Federation of Pakistan through Secretary Government of Pakistan and

others (Civil Petition No. 3988 of 2022). It was observed by the bench that elections to the Provincial Assembly of Punjab were required to be held within the period prescribed under Article 224(2) of the Constitution. The learned Judges were of the opinion that "no progress" had been made. It was further observed in the order that lack of progress had given rise to a "real and imminent danger of violation of a clear and unambiguous constitutional command". The bench also observed that since this question was not involved in the lis before it, therefore, it was fit to refer the matter to the Chief Justice for invoking suo motu jurisdiction under Article 184(3) of the Constitution on the touchstone of the principle highlighted in the judgment reported as Suo Motu Case No.4 of 2021 (PLD 2022 SC 306). The Registrar, acting pursuant to the order passed by the two Judges, placed a note before the Chief Justice on 17.2.2023, recommending fixation of the petitions and consideration of invocation of suo motu jurisdiction. The Chief Justice, through the administrative order dated 22.2.2023, constituted a bench consisting of nine Judges of this Court. The petitions and suo motu assumption of jurisdiction were ordered to be fixed before the special bench and the following questions were framed:

"a) Who has the constitutional responsibility and authority for appointing the date for the holding of a general election to a Provincial Assembly upon its dissolution in the various situations envisaged by and under the Constitution?

b) How and when is this constitutional responsibility to be discharged?

c) What are the constitutional responsibilities and duties of the Federation and the Province with regard to the holding of the general election?"

9. The reasons recorded by the Chief Justice in his administrative order dated 22.02.2022, referred to the adjudication of the petitions by the Lahore High Court but apprehensions were recorded regarding the likely delay in the holding of the elections. The suo motu invocation of jurisdiction along with the petitions was fixed before the special bench on 23.02.2023. In my opinion the questions framed by the Chief Justice had already been adjudicated upon by the Lahore High Court and it was competent to enforce the writs granted by it. The legitimacy of the dissolution of the Provincial Assemblies before the lapse of time prescribed under

Article 107 of the Constitution was raised during the hearing held on 23.02.2023 and the following questions were further framed:

"(a) Whether the power of a Chief Minister to make advice for the dissolution of the Provincial Assembly is absolute and does not require any valid constitutional reason for its exercise?

(b) Is a Chief Minister to make such advice on his own independent opinion or can he act in making such advice under the direction of some other person?

(c) If such advice of a Chief Minister is found constitutionally invalid for one reason or another, whether the provincial assembly dissolved in consequence thereof can be restored?"

10. The written order relating to the hearing held on 23.02.2023 included a separate note of Yahya Afridi, J, who had dismissed the petitions on the ground of maintainability. The reasoning recorded in the short order was persuasive and I had no hesitation in concurring with the decision regarding dismissal of the petitions. I had reiterated my decision by recording my note in the order dated 24.02.2023. I have had the privilege of reading the detailed reasoning recorded by my learned brothers, Syed Mansoor Ali Shah and Jamal Khan Mandokhail, JJs and I agree with their opinion, particularly regarding the final outcome of the petitions and the suo motu assumption of jurisdiction by a majority of 4 to 3 because this was the understanding in the meeting held in the anteroom on 27.02.2023. It is noted that I had not recused nor had any reason to dissociate myself.

JURISDICTION UNDER ARTICLE 184(3) AND THE BINDING SALUTARY PRINCIPLES

11. The Supreme Court is the creation of the Constitution. Article 175(1), inter alia, declares that there shall be a Supreme Court. Article 176 explicitly provides that the Supreme Court shall consist of the Chief Justice, to be known as the Chief Justice of Pakistan, and so many other Judges as may be determined by the Act of the Majlis-e-Shoora (Parliament) or, until so determined, as may be fixed by the President. The Chief Justice and the Judges collectively constitute the Supreme Court. The powers exercised by the Chief Justice have been conferred by the Supreme Court vide the rules made under the Constitution. Article 191 provides that, subject to the Constitution and the law, the Supreme Court may make rules regarding the practice and procedure of the Court and, pursuant to the power conferred thereunder, the Supreme Court has made the Supreme Court Rules, 1980 ("Rules of 1980"). The powers enjoyed by the Chief Justice as Master of the Roster are derived from these rules and have been delegated for administrative convenience.

12. The framers of the Constitution have conferred three distinct categories of jurisdictions on the Supreme Court: original, appellate, and advisory. The original jurisdiction is vested under Article 183(4). It is extraordinary and its exercise is subject to two limitations; firstly, that it must involve questions of public importance and secondly, that such a question must be with regard to the enforcement of the fundamental rights conferred by Chapter 1 of Part II of the Constitution. This jurisdiction is not subject to the procedural trappings and

limitations provided under Article 199. The exercise of jurisdiction under Article 184(3), therefore, is not dependent on its invocation by an aggrieved party. The assumption of jurisdiction will be justified when both of the aforementioned conditions are met. This Court, in Manzoor Elahi v. Federation of Pakistan (PLD 1975 SC 66) set out the salutary principles for the assumption of original jurisdiction vested in it under Article 184(3). These salutary principles were later reaffirmed by a bench consisting of eleven Judges of this Court in the case Benazir Bhutto v. Federation of Pakistan (PLD 1988 SC 416). It was explicitly observed that the power conferred under Article 184(3) of the Constitution must always be exercised with circumspection and utmost caution. It has been held that if the two conditions stipulated under Article 184(3) are satisfied, even then this Court may not exercise the jurisdiction if sufficient justification has not been shown for failing to invoke the wider concurrent jurisdiction vested in a High Court under Article 199 of the Constitution. The jurisdiction vested in the Supreme Court and the High Courts under Article 184(3) and Article 199, respectively, is coterminous and concurrent. The deference shown by this Court is premised on the established principle that the lowest court or tribunal must be approached in the first instance when the jurisdictions are concurrent. The High Courts have extensive jurisdiction and powers under Article 199 of the Constitution and a High Court is as competent as the Supreme Court to deal with matters of public importance involving interpretation of the Constitution and the enforcement of fundamental rights. The Judges of both the courts have sworn a similar oath to 'protect, defend and preserve the Constitution'. Moreover, when two courts have concurrent jurisdiction and one of them happens to be a superior court, to which a remedy of appeal lies, then normally the latter will not entertain a similar matter pending before the lower court. No party can be deprived of its vested right of appeal provided under Article 185 of the Constitution. In the Benazir Bhutto case, this Court held that although ordinarily the forum of the court lower in the hierarchy must be invoked but such a principle is not inviolable and assuming jurisdiction in exceptionally genuine cases is not barred. In the case the jurisdiction was assumed because the High Court had not admitted the petition for regular hearing despite the lapse of more than eighteen months. This Court, in that case, had therefore assumed jurisdiction because of the inordinate delay and the fact that the High Court was not seized of the matter. In Suo Motu Case No. 7 of 2017 (PLD 2019 SC 318), this Court has stressed the need for taking all possible care before entertaining or making an order under Article 184(3) of the Constitution since there was no right of appeal against such an order. The salutary principles expounded in the Manzoor Elahi's case are binding since they were reaffirmed by a bench consisting of eleven judges of this Court in the Benazir Bhutto case. In the case in hand, one of the High Courts has already adjudicated the matter while the other is competently seized with it. It does not qualify to be an exceptionally genuine case so as to cross the bar set out in the Benazir Bhutto's case. The independence and competence of the High Courts is likely to be undermined by assuming that the questions raised before us cannot be resolved or answered by them.

THE DUTY OF THE COURT TO PRESERVE PUBLIC TRUST WHEN ENTERTAINING AND EXERCISING POWERS CONFERRED UNDER

ARTICLE 184(3) OF THE CONSTITUTION

13. The original jurisdiction vested in this Court under Article 184(3) is extraordinary and its language manifests that the framers of the Constitution had intended that the authority will be exercised only when the two conditions expressly stated therein are met. The legitimacy of this monumental authority and the verdicts handed down pursuant thereto solely depends on public trust. Courts have no control over the sword nor the purse. Public trust and confidence cannot be taken for granted nor would judges be justified in expecting others to have faith in their independence, fairness and impartiality without a continuous pursuit to earn it through judicial conduct, institutional standards, transparent procedures and propriety. Appearances and public perceptions are as important as the reality because they give legitimacy to the proceedings and the verdicts of the courts. It is public trust which enables the courts to effectively discharge their functions. Even unpopular decisions are respected when people have faith in the independence, fairness and impartiality of the adjudicatory process. This Court has consistently held that it will not refuse to exercise judicial review if a question raised has political content, provided that it involves a legal or constitutional issue. But in doing so, the Court will always be mindful of its duty to ensure that it is not only an apolitical, independent, fair and impartial arbiter but also appears to be so. This duty becomes far more challenging when the controversy brought before the Court involves the interests of the political stakeholders. Each one must believe that the court and judges hearing the lis are fair, independent and impartial. The institutional processes and procedures, whether administrative or judicial, must appear to be transparent and based on decisions which are an outcome of the exercise of structured discretion. No political stakeholder should have the remotest doubt regarding the impartiality, integrity and fairness of the adjudicatory process. Ironically, the frequent invocation of the jurisdiction under 184(3) in matters which were of a political nature must have had profound consequences in moulding public trust.

14. It is manifest from the language that the framers of the Constitution had intended to confer the power under Article 184(3) to be exercised for protecting the fundamental rights of the vulnerable, marginalised and depressed classes of the society. The phenomena of enforced disappearances is probably one of the gravest and most atrocious examples of violation of fundamental rights and it is no less than a subversion of the Constitution. The appeals against the Peshawar High Court judgment relating to extra-judicial detention in internment centres are pending before this Court. The inhuman, harsh and life-threatening conditions in prisons, custodial torture, extra-judicial killings, violence against journalists, and arbitrary restrictions on freedom of expression are other instances which should have had priority in the context of the jurisdiction conferred under Article 184(3) of the Constitution. The power was intended and ought to have been exercised to alleviate the plight and distress of such sections of society. The framers had inserted Article 184(3) intending that the jurisdiction shall be exercised to ensure that the fundamental rights of the weak, vulnerable and marginalised classes are protected. Instead, the jurisdiction was exercised to legitimise the removal of elected Prime Ministers and endorse military takeovers. This Court handed down the judgment in

Begum Nusrat Bhutto v. Chief of Army Staff and Federation of Pakistan (PLD 1977 SC 657) to validate the imposition of Martial Law, based on the doctrine of necessity, while exercising its original jurisdiction and it lasted for a decade despite the time frame committed to it. The deposed Prime Minister was convicted and sent to the gallows after his appeal was dismissed by this Court by a majority of 4 to 3. During the trial the appellant had filed an application because he had reservations on the constitution of the Bench. The application was dismissed vide judgment reported as Zulfiqar Ali Bhutto v. The State (PLD 1978 SC 125) and it was observed as follows by the then-Chief Justice:

> "One other important aspect may also be mentioned. The appellant not only wants me not to sit on this Bench, but also wants me to refrain from nominating the Judges for hearing this case. Under the constitution and the law regulating the practice of the Supreme Court, it is not only the privilege but the duty and obligation of the Chief Justice to personally preside over all important cases, and to nominate Judges for hearing cases which come up before the Court. No person has the right to ask me to abdicate this responsibility, nor has he the right to demand a Bench of his own choice. This would be contrary to the well-established norms regulating the functioning of the superior Courts of this country. Any objection, if raised, must be left to be decided according to my conscience and sense of duty in the light of all the surrounding circumstances of the case, including any possible repercussions on the capacity of my other colleagues to continue on the Bench if similar objections are raised against some of them as the appeal proceeds."

It is a matter of record that one of the Judges on the bench had later publically indicated that the proceedings may have been influenced. The advisory jurisdiction of this Court was invoked in 2012, questioning the legitimacy of the verdict and the reference has not been decided as yet.

15. The Constitution suffered another setback in 1999 when the then Chief of Army Staff forcibly removed the elected Prime Minister and the legislatures were dissolved. The jurisdiction of this Court under Article 184(3) was invoked and the takeover was validated through the judgment in Zafar Ali Shah v. General Pervez Musharraf (PLD 2000 SC 869) despite having discarded the doctrine of necessity in the case of Miss Asma Jilani v. The Government of the Punjab and another (PLD 1972 SC 139). The power to amend the Constitution was also granted. When Judges of this court were unconstitutionally removed on 3rd November 2007 the act was validated through judgment titled Tika Iqbal Muhammad Khan v. Pervez Musharraf (PLD 2008 SC 178). In a first, the usurper was tried and convicted by a special court for the offence of high treason. The conviction and sentence were set aside by a High Court and the verdict was challenged before this Court, but the petitions and appeals have not been heard as yet. In the meanwhile, the usurper has passed away. The original jurisdiction under Article 184(3) was exercised which disqualified two elected Prime Ministers and they were removed from their office vide judgments reported as Muhammad Azhar Siddiqui v. Federation of Pakistan (PLD 2012 SC 774) and Imran Ahmed Khan v. Muhammad Nawaz Sharif (PLD 2017 SC 692) respectively. Several elected representatives were disqualified for not

being 'sadiq' and 'ameen' under Article 63(f) while some were declared otherwise. The role of the Court in the realm of politics has moulded public perceptions which were indeed not favourable for public trust and confidence. Public trust can only be preserved when utmost restraint is exercised in entertaining questions and issues which involve political content. Public trust is eroded when the Court is perceived as politically partisan and the judges as 'politicians in robes'.

16. The unregulated invocation of suo motu jurisdiction has been a subject of debate and has invited criticism. The first reported case of suo motu invocation was Darshan Masih v. State (PLD 1990 SC 513). The Rules of 1980 are silent about suo motu jurisdiction and only refer to Article 184(3). When the rules were framed the jurisdiction in this mode had not been invoked as yet. The cases of Steel Mills and Reko Diq were decided vide judgment reported as Wattan Party v. Federation of Pakistan (PLD 2006 SC 697) and Abdul Haque Baloch v. Government of Balochistan (PLD 2013 SC 641) respectively. Both the cases were the outcome of the invocation of suo motu jurisdiction and they were perceived to be judicial overreach in the domain of economic policies of the State. The indulgence has had financial implications and in the latter case the State was exposed to international litigation. The collection of funds for building dams through Zafarullah Khan v. Federation of Pakistan (2018 SCMR 1621) had also raised public concerns. This Court has recognised in Suo Motu Case No.4 of 2021 that "the suo motu invoking the jurisdiction of the Court under Article 184(3) has over the years come in for its share of analysis, debate, discussion and, indeed, criticism. It must be acknowledged that this is not something confined just to the Bar but extends to the Bench also. But the time has come to recognise that there is certain imbalance, which ought to be corrected." Commentators, legal experts and representative bodies of the lawyers have been consistent in urging regulating the exercise of suo motu powers conferred under Article 184(3). This Court, in the case of Suo Motu Case No.4 of 2021 has described how and by whom it is to be exercised. It has been held that the power exclusively vests in the Chief Justice who is the 'Master of the Roster'.

17. The Chief Justice enjoys the status of the Master of the Roster by virtue of the powers conferred under the Rules of 1980. The jurisdiction under Article 184(3) exclusively vests in the "Supreme Court", which collectively means the Chief Justice and the Judges of the Court. The Chief Justice is first among equals. The Rules of 1980 have been made by the Supreme Court i.e., the Chief Justice and the Judges for administrative convenience. The power under Article 184(3) is inherent and exclusively vests in the Supreme Court. The Chief Justice exercises the powers conferred under the Rules of 1980 as a delegatee, trustee or an agent. The Master of the Roster, therefore, owes a fiduciary duty of care towards the Supreme Court. As a fiduciary it is the duty of the Master of the Roster to preserve good faith and exercise the discretion with utmost care and in the best interest of the Supreme Court. The discretion under the Rules of 1980 is not unfettered nor can it be exercised arbitrarily. It is settled law and consistently affirmed by this Court that powers conferring discretion, no matter how widely worded, must always be exercised reasonably and subject to the existence of the essential conditions required for the exercise of such powers within the scope of the law. The discretion

ought to be structured by organising it and producing order in it. The seven instruments of structuring of discretionary power - open plans, open policy statements, open rules, open findings, open reasons, open precedents and fair informal procedures - are by now embedded in our jurisprudence. These principles are binding in discharging the functions and exercising jurisdiction under the Rules of 1980. The discretionary powers of the Master of the Roster are, therefore, not unfettered nor can be exercised arbitrarily or capriciously. As a corollary, it is the duty of the Master of the Roster to exercise discretion in a manner that preserves and promotes public trust and confidence. It is also an onerous duty of the Chief Justice to act in the best interest of the Supreme Court. Moreover, the Chief Justice and Judges are jointly and severally responsible to ensure that the jurisdiction under Article 184(3) is exercised to promote and preserve public trust. In case of breach of this duty the responsibility would rest with the Chief Justice and all the Judges, because they collectively constitute the Supreme Court. The Court is accountable to the Constitution, the law and the people of this country, who are our sole stakeholders. No one is above the law and every public office holder is accountable for the authority exercised under the Constitution and the law. The 'imbalance' referred to in the aforementioned judgment requires review of the Rules of 1980 in order to protect judicial integrity and impartiality in relation to constitution of the benches and allocation of cases. The Basic Law, the constitution of the Federal Republic of Germany, recognises the right to a 'lawful judge'. The right prevents ad hoc and personam allocation of cases. The selection of judges and allocation of cases is made on the basis of objective criteria. If public trust is to be restored, the Court has to assume that each litigant has a right to a lawful judge.

18. In a nutshell, the invocation of jurisdiction under Article 184(3) and the exercise of discretion relating to the constitution of benches and fixation of cases are crucial in the context of preserving public trust and confidence. The process of constitution of benches and allocation of cases must be transparent, fair and impartial. The Court must always show extreme restraint in matters which involve the political stakeholders, having regard to the past practice and precedents as discussed above. The Court must not allow any stakeholder to use its forum for advancing its political strategy or gaining advantage over other competitors. It is the duty of the Court to ensure that political stakeholders are not encouraged to bring their disputes to the courts for judicial settlement by bypassing the institutions and forums created under the Constitution. It weakens the Majlis-e-Shoora (Parliament) and the forums meant for political dialogue and, simultaneously, harms the judicial branch of the State by prejudicing public trust in its independence and impartiality. It also encourages the political stakeholders to shun the democratic values of tolerance, dialogue and settlement through political means. This Court owes a duty to more than fifty thousand litigants whose cases on our docket are awaiting to be heard and decided. They ought to be given priority over the political stakeholders who are under an obligation to resolve their disputes in the political forums through democratic means. This Court has a duty to preserve

public trust and confidence and not to appear politically partisan. This is what the Constitution contemplates.

Conclusion.

19. It is not disputed that the Lahore High Court has already allowed the petitions and rendered an authoritative judgment and its competence to have it implemented cannot be doubted. The Peshawar High Court is also seized of the matter. In the light of the binding 'salutary principles' discussed above, the petitions and the suo motu jurisdiction must not be entertained lest it may interfere with the implementation of the judgment of the Lahore High Court and the proceedings pending before the Peshawar High Court. The premature and pre-emptive proceedings before this Court at this stage is likely to delay the enforcement of the judgment of the Lahore High Court, leading to infringement of the Constitution by exceeding the time frame prescribed ibid. This is also obvious from the opinions of my learned brothers Syed Mansoor Ali Shah, Yahya Afridi and Jamal Khan Mandokhel, JJs who have also dismissed the petitions and on this ground, i.e., pendency of the same matter before two competent High Courts. Moreover, any person who would be aggrieved from the judgments of the High Courts will have the option to exercise the right to invoke this Court's jurisdiction under Article 185 of the Constitution. In the facts and circumstances of the case in hand, it is not a 'genuinely exceptional' case to deviate from the binding salutary principles. By entertaining the petitions and suo motu jurisdiction, the Court would be unjustifiably undermining the independence of two provincial High Courts. The indulgence at this stage would be premature and it would unnecessarily prejudice public trust in the independence and impartiality of this Court. This Court has no reason to apprehend that the High Courts are less competent to defend, protect and preserve the Constitution.

20. The manner and mode in which these proceedings were initiated have unnecessarily exposed the Court to political controversies. It has invited objections from political stakeholders in an already polarised political environment. The objections have also been submitted in writing. This obviously has consequences for the trust the people ought to repose in the impartiality of the Court. The Court, by proceeding in a premature matter, will be stepping into already murky waters of the domain of politics. It is likely to erode public confidence. The assumption of suo motu jurisdiction in itself may raise concerns in the mind of an informed outside observer. In the circumstances, the rights of litigants whose cases are pending before us would be prejudiced, besides eroding public trust in the independence and impartiality of the Court. This could have been avoided if a Full Court was to take up these cases. It would have ensured the legitimacy of the proceedings. The legitimacy of the judgment rendered in the Pakistan Peoples' Party Parliamentarians' case was solely based on the invocation of the suo motu jurisdiction on the recommendation of twelve Judges of this Court. Every Judge has sworn an oath to defend, protect and preserve the Constitution. The constitution of a Full Court, as was suggested in my note dated 23.02.2023, was imperative to preserve public trust in this Court. There is another crucial aspect which cannot be ignored; the conduct of the political stakeholders. The political climate in the country is so toxic that it is inconceivable that political parties will even agree to

having a dialogue, let alone arriving at a consensus. As a political strategy, resignations en masse were tendered from the National Assembly, rather than discharging their constitutional obligations as members of the opposition. The constitutional courts were first approached to compel the Speaker to accept the resignations and when they were accepted the courts were again approached to have the decision reversed. The dissolution of the provincial legislature as part of the political strategy of the stakeholders raises questions. Is such conduct in consonance with the scheme of constitutional democracy? Is it not in itself a violation of the Constitution? Should this Court allow its forum to be exploited for advancing political strategies or appear to be encouraging undemocratic conduct? Should this Court not take notice of forum shopping by political stakeholders by invoking the jurisdictions of High Courts and this Court simultaneously? This Court cannot and must not appear or be seen as advancing the political strategies of political stakeholders. The public trust will be eroded in the independence and impartiality of the Court if it appears or is seen to encourage undemocratic norms and values. The Court would be unwittingly weakening the Majlis-e-Shoora (Parliament) and the forums created under the Constitution by encouraging political stakeholders to add their disputes to our dockets. The political stakeholders must establish their bona fides before their petitions could be entertained. The conduct of the stakeholders has created an unprecedented political instability by resorting to conduct that is

devoid of the democratic values of tolerance, dialogue and debate. The conduct of the stakeholders does not entitle them to invoke the jurisdiction of this Court under Article 184(3) of the Constitution lest it is seen or appears to facilitate or promote undemocratic values and strategies.

21. Before parting with the above reasoning in support of my orders dated 23.02.2023 and 24.02.2023, I feel it necessary to record my observations regarding the hearings. It is ironic and unimaginable for the political stakeholders to involve the Court in resolving political disputes which ought to have been settled in the forums created for this purpose under the Constitution. It is also alarming that the conduct of the political stakeholders and their political strategies would create unprecedented political turmoil and instability in the country. Political stability is a precondition for economic progress and prosperity of the people. The power struggle between the political stakeholders is undermining the welfare and economic conditions of the people of this country. The people of Pakistan have been made to suffer for a long time by depriving them of their fundamental rights. The long spells of undemocratic regimes validated by this Court have caused irretrievable loss to the country and its people. The institutions which represent the will of the people were not allowed to take roots. Even today, seventy-five years after the creation of Pakistan, the institutions remain weak. The country is on the brink of a political and Constitutional crisis and it is high time that all those responsible take a step back and resort to some introspection. All the institutions, including this Court, need to set aside their egos and strive towards fulfilling their Constitutional obligations. Speaking for my institution, it is obvious that we may not have learnt any lessons from our past bleak history. We cannot erase the judgments from the law reports but at least endeavour to restore public trust and

confidence so that the past is forgotten to some extent. When politicians do not approach the appropriate forums and bring their disputes to the courts, the former may win or lose the case, but inevitably the court is the loser.

Sd/-
Judge

MWA/I-6/SC Order accordingly.