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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

[1] Attributed to John Marshall, Fourth Chief Justice of the United States Supreme Court (1801-1835).
[2] Oliver Wendell Holmes, Associate Justice of the United States Supreme Court (1902-1932).
[3] Mark A. Lemley, The Imperial Supreme Court,136 Harv. L. Rev. F. 97 (2022).

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 **("Constitituion")** 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 "extraordinary"[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]

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[4] Cohens v. Virginia (1821) per John Marshall.
[5] Akhtar Hassan v. Federation of Pakistan 2012 SCMR 455; Tahir-ul-Qadri v. Federation of Pakistan PLD 2013 SC 413; Ashraf Tiwana v. Pakistan 2013 SCMR 1159.
[6] Manzoor Elahi v. Federation of Pakistan PLD 1975 SC 66 per Anwarul Haq, J.
[7] Ibid per Hamoodur Rahman, C J.
[8] Ibid.
[9] H.R.C No.5818 of 2006 2008 SCMR 531.
[10] Manzoor Elahi v. Federation of Pakistan PLD 1975 SC 66 per Anwarul Haq, J.
[11] See 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); Maryam S. Khan, Genesis and Evolution of Public Interest Litigation in the Supreme Court of Pakistan: Toward A Dynamic Theory of Judicialization (2015).
[12] Planned Parenthood v. Casey (1992) 505 U.S. 833.

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

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[13] W.P. No. 5851 of 2023.

[14] Order dated 16.02.2023 passed in C.P No.3988 of 2022 titled Ghulam Mehmood Dogar v. Federation of Pakistan, citation 2023 SCP 59 at the official website of this Court.

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 No.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

[15] Administrative order dated 22.02.2023 of HCJP in S.M.C. No.1 of 2023, citation 2023 SCP 64 at the official website of this Court..
[16] Order dated 23.02.2023 passed in S.M.C. No.1/2023, citation 2023 SCP 68 at the official website of this Court.

> 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 extraordinary 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 extraordinary jurisdiction if it finds that

[17] Manzoor Elahi v. Federation of Pakistan PLD 1975 SC 66.

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.

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[18] Dicey, Morris & Collins, The Conflict of Laws, (16th ed. 2022) Vol- 1, Ch-12.
[19] Benazir Bhutto v. Federation of Pakistan PLD 1988 SC 416.

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

[20] Farough Siddiqi v. Province of Sindh 1994 SCMR 2111.

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 extraordinary 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

[21] Wukala Mahaz v. Federation of Pakistan PLD 1998 SC 1263 (7-MB)

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

[22] Benazir Bhutto v. Federation of Pakistan PLD 1988 SC 416; Nawaz Sharif v. President of Pakistan PLD 1993 SC 473.

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.
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> *(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.
>
> *(Emphsis 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

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[23] Ikram Chaudhry v. Federation of Pakistan PLD 1998 SC 103 (5-MB) Almost all important previous cases are cited in it. See also Naresh Mirajkar v. State of Maharashtra AIR 1967 SC 1 (9-MB).
[24] Shabbar Raza v. Federation of Pakistan 2018 SCMR 514.

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

[25] H.R.C. No.18877 of 2018 PLD 2019 SC 645 (Majority view).
[26] Naresh Mirajkar v. State of Maharashtra AIR 1967 SC 1 (9-MB).
[27] Daryao v. State of U.P. AIR 1961 SC 1457 (5-MB).
[28] Abdul Baqi v. Govt. of Pakistan PLD 1968 SC 313; Nawaz Sharif v. President of Pakistan PLD 1993 SC 473; Hanif Abbasi v. Imran Khan PLD 2018 SC 189.

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.

[29] Pir Bakhsh v. Chairman, Allotment Committee PLD 1987 SC 145.

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. S*tare 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

[30] Daryao v. State of U.P. AIR 1961 SC 1457.

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

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[31] The Oxford Handbook of Indian Constitution (Sujit Choudhry et al., ed., 2016) Chapter 25 on Federal Scheme.

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 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. '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.

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[32] S.M.C. No.1 of 2022 PLD 2022 SC 574.
[33] Supreme Court Bar Association v. Federation of Pakistan PLD 2023 SC 42.
[34] Parvez Elahi v. Deputy Speaker, Provincial Assembly of Punjab PLD 2022 SC 678.
[35] Presidential Reference No.1 of 2020 PLD 2021 SC 825 per Yahya Afridi, J.

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

[36] Jonathan Sumption, Trials of the State: Law and the Decline of Politics (2019).
[37] H.R.C. No.14959-K of 2018 PLD 2019 SC 183 per Syed Mansoor Ali Shah, J.

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

[38] Imran Khan v. Nawaz Sharif PLD 2017 SC 265.
[39] Imran Khan v. Nawaz Sharif PLD 2017 SC 692.
[40] Ibid.
[41] Nawaz Sharif v. Imran Khan PLD 2018 SC 1.

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 moto) 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

[42] Aman Ullah v. Federal Government PLD 1990 SC 1092 (5-MB); Chairman, R.T.A. v. Pakistan Mutual Insurance Company PLD 1991 SC 14; Govt. of N.W.F.P. v. Mejee Flour Mills 1997 SCMR 1804.

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 moto 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 moto 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 moto notice of a photograph circulating on social media that showed a funeral procession passing over sewage in a narrow street.
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> Upon taking suo moto 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 moto 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 multi-billion 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

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[43] Cambridge University Press (2022) pp. 223-225.

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 extraordinary 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 extraordinary 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

[44] Wukala Mahaz v. Federation of Pakistan PLD 1998 SC 1263 (7-MB).

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:
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> 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

[45] Emmanuel Jeuland, The right to a natural judge and the judicial organization, French Journal of Public Administration (2008).
[46] Scott v. Scott 1913 AC 417.

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 No. 1 & 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.

Judge

Islamabad,
1st March, 2023.
Approved for reporting
Sadaqat

Judge

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[47] PLD 1975 SC 66.

[48] PLD 1988 SC 416.

[49] 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.