

Qazi Faez Isa, J. This matter started when the Supreme Court took notice of a widely reported statement of Mr. Imran Khan, the Hon'ble Prime Minister of Pakistan; a statement in apparent conflict with the Constitution.¹ However, it concluded unexpectedly. The alleged transgression was not suitably probed. Instead, a Judge of the Supreme Court² was reprimanded and (substantively) restrained from performing his constitutional duties.

2. On 3 February 2021, a 2-member Bench of this Court, comprising of Hon'ble Mr. Justice Maqbool Baqar and myself ('**2-member Bench**') passed the following order:

It has been widely reported, including in a responsible newspaper, daily *Dawn* of 28 January 2021, under the title, '*Rs500m uplift grant for each lawmaker okayed*' and quotes a minister that, '*The prime minister announced Rs500m for each MNA and PMA [sic] so that they can initiate development schemes in their constituencies*'. On 1 February 2021 the same newspaper wrote an editorial titled, '*Development funds*' and questioned '*the decision by Prime Minister Imran Khan to hand out half a billion rupees in development funds to each federal and provincial lawmaker of his party for carrying out schemes in their respective constituencies...*'. Apparently, neither the news report nor the subsequent editorial comment were denied or contradicted by the Government or by the Prime Minister.

2. This Court in the case of *Action against Distribution of Development Funds by Ex-Prime Minister* (PLD 2014 Supreme Court 131), after a detailed consideration of the different articles of the Constitution of the Islamic Republic of Pakistan ('**the Constitution**') and the applicable rules observed, that:

- '... it is obligatory upon the Federal Government to lay before the National Assembly the supplementary Budget Statement so that it is subjected to the same scrutiny and procedure as is applicable to the Annual Budget Statement in terms of Articles 80 to 83 *ibid.*' (paragraph 31)
- '... under the Constitution there is no provision whatsoever that permits to use allocation of funds at the discretion of the Prime Minister/Chief Minister.' (paragraph 40)
- 'In other words, item-wise estimate of the grant is required to be placed before the National Assembly

¹Constitution of the Islamic Republic of Pakistan ('**the Constitution**').

² Qazi Faez Isa, J.

for discussion in terms of rule 186 *ibid.*' (paragraph 42)

- '... to leave or earmark any amount of money to be used/allocated at some subsequent stage during the financial year at the discretion of the Prime Minister/Chief Minister is also repugnant to the very concept and connotation of the Annual Budget Statement.' (paragraph 45)
- 'In fact, expenditure envisaged to be incurred under the Constitution is not "person specific", rather it is "grant specific"...' (paragraph 46)
- '... the language employed in the above referred provisions of the Constitution i.e. Articles 80 to 84 *ibid.*, implicitly excludes such person-specific allocations.' (paragraph 49)
- '... the allocation of funds for development schemes has to be made following the procedure provided in Articles 80 to 84 of the Constitution and the rules/instructions noted hereinabove.' (paragraph 51)

The Judgment of this Court concluded and held (paragraph 52) as under:

- "(1) The National Assembly, while giving assent to a grant which is to be utilized by the Executive at its discretion, has to follow the procedure provided in Articles 80 to 84 of the Constitution as well as the Rules of Procedure, 2007. However, such discretionary grant can not be spent at the absolute discretion of the Executive and the discretion has to be exercised in a structured manner;
- (2) The Constitution does not permit the use/allocation of funds to MNAs/MPAs/Notables at the sole discretion of the Prime Minister or the Chief Minister. If there is any practice of allocation of funds to the MNAs/MPAs/Notables at the sole discretion of the Prime Minister/Chief Minister, the same is illegal and unconstitutional. The government is bound to establish procedure/criteria for governing allocation of such funds for this purpose;
- (3) Though funds can be provided for development schemes by way of supplementary grant but for that purpose procedure provided in Articles 80 to 84 of the Constitution and the rules/instructions noted hereinabove has to be followed strictly;

- (4) Funds can be allocated by way of re-appropriation but the procedure provided in the Constitution and the rules has to be followed in its true perspective;
- (5) No bulk grant can be made in the budget without giving detailed estimates under each grant divided into items and that every item has to be specified.
- (6) The amounts as approved in the budget passed by the National Assembly have to be utilized for the purpose specified in the budget statement. Any re-appropriation of funds or their utilization for some other purpose, though within the permissible limits of the budget, are not justified. In such circumstances, the supplementary budget statement has to be placed before the Parliament following the procedure provided in Articles 80 to 84 of the Constitution and the rules/instructions noted hereinabove."

The equivalent to Articles 80 to 84 of the Constitution with regard to the provinces of the Islamic Republic of Pakistan is Articles 120 to 124 respectively of the Constitution.

3. Clause (2) of Article 5 mandates, '*Obedience to the Constitution and the law is the inviolable obligation of every citizen*', clause (2)(a) of Article 204 empowers this Court to take action against *any person who 'disobeys any order of the Court'* and the oath of office of Judges requires them to '*preserve, protect and defend the Constitution*'.

4. In view of the aforesaid position, we sent for the learned Attorney-General for Pakistan ('Attorney-General') and seek his opinion and advice as to (a) whether the said distribution of public funds accorded with the Constitution and the cited precedent and (b) whether the Federal and provincial governments had handed over or intended to hand over monies to the legislators and/or carry out development works identified by them. The learned Attorney-General states that he needs time to ascertain the facts, however, states that he will not countenance anything against any provision of the Constitution and the cited precedent of this Court.

5. Therefore, before proceeding further with this matter, in view of the statement of the learned Attorney-General, we want to ascertain the answers to the questions (a) and (b) posed in the aforesaid paragraph. Office is directed to issue notices to the Federal Government through the Cabinet Secretary/Principal Secretary to the Prime Minister, Secretary Ministry of Finance, Government of Pakistan and to all the provincial governments through their respective Chief Secretaries and Secretary Finance Departments.

Notices also to be issued to the learned Attorney-General and to the Advocate Generals of Balochistan, Sindh, Khyber Pakhtunkhwa, Punjab and of the Islamabad Capital Territory. Copy of this order to accompany the notices and the recipients are directed to submit their respective responses/replies.

6. Depending on the responses/replies, this matter may either be concluded or if the responses/replies are considered by us to not accord with the Constitution and the cited precedent, the same may be required to be taken further; and if we come to the latter conclusion, to refer the matter to the Hon'ble Chief Justice for the constitution of a bench for determination thereof.

7. To come up on **10 February 2021**.

3. Subsequently, however, the case was specifically fixed before a **5-member Bench** comprising of the Chief Justice Mr. Justice Gulzar Ahmed, Mr. Justice Mushir Alam, Mr. Justice Umar Ata Bandial, Mr. Justice Ijaz ul Ahsan ('**the Hon'ble Judges**') and myself. I objected to the constitution of the 5-member Bench and the exclusion of Mr. Justice Maqbool Baqar by writing to the Chief Justice:

10 February 2021

The Hon'ble Chief Justice.

Dear Sir,

I am dismayed that you elected to constitute a five-member Bench at the initial stage, even though the order of 3 February 2021 stated:

*Depending on the responses/replies, this matter may either be concluded or if the responses/replies are considered by us to not accord with the Constitution and the cited precedent, the same may be required to be taken further; and **if we come to the latter conclusion, to refer the matter to the Hon'ble Chief Justice for the constitution of a bench for determination thereof.***

Adding yourself and other Hon'ble Judges to the Bench, at this stage when a two-member Bench was considering the matter, publicly expressed no confidence in two senior judges of this Court, undermined their credibility and ridiculed them. The order passed on 3 February 2021 sought to safeguard public interest and protect public money; and ensure compliance with the Constitution and the precedent of this Court.

I also take this opportunity to point out that to exclude senior judges from benches when important constitutional issues are to be heard neither serves the institution nor the people. Incidentally, you (personally) know that as counsel for twenty-seven years and as Chief Justice Balochistan

High Court for over five years, constitutional work is what I mostly did. This Court often castigates arbitrary exercise of discretion, yet in constituting benches hearing important constitutional matters unstructured discretion is exercised.

It has been my endeavor to preserve, protect and defend the Constitution and the integrity of this institution, which you may have noted I did in court by not publicly objecting to the constitution of the Bench.

I apologise for writing, but if I did not, I would betray my conscience and oath of office.

Yours sincerely,

Copies to: Brethren on this Bench and to Hon'ble Mr. Justice Maqbool Baqar.

4. The Hon'ble Chief Justice did not respond to the aforesaid letter nor did he verbally address the question of why he had reconstituted the 2-member Bench and why he had excluded Mr. Justice Maqbool Baqar from it. Therefore, the office (administrative) file was sought to understand why a Bench hearing a case was reconstituted. The file shows the exercise of unstructured discretion; it discloses that *'the matter was submitted before the Hon'ble Chief Justice on 04.02.2021 upon verbal direction'*. It further reveals that *'the following order was passed by the Hon'ble Chief Justice: "Let the matter be fixed on 10.2.2021 before the Larger Bench of CJ, HJ-1, HJ-II, HJ-III & HJ-VII at 1 p.m."'* This was how a matter being heard by a 2-member Bench was fixed before a 5-member Bench. To arbitrarily reconstitute a bench for no reason when it is hearing a case is inappropriate because it raises unnecessary questions and people start speculating about why there is extraordinary interest in a particular case. Questions left unanswered undermine the people's confidence in the impartiality and integrity of the judicial system.

5. **On 10 February 2021**, the following order was passed by the 5-member Bench:

In response to an order of this Court dated 03.02.2021, a report (CMA No. 680 of 2021) signed by Mr. Muhammad Azam Khan, Secretary to the Prime Minister has been filed. The report does not meet the requirements of said order and apparently the Secretary, Finance Division, Government of Pakistan is the relevant authority in the matter. As such, he (*Secretary, Finance Division*) is directed to file a comprehensive report, to be countersigned by the Prime Minister of Pakistan, in response to the order of this

Court referred to above in categorical, clear and unambiguous terms and such will be done by today.

2. The Government of Punjab has also filed a report by way of CMA No. 612 of 2121. No categorical statement as is required by our order dated 03.02.2021 has been made in the report. As such, the learned Additional Advocate General, Punjab present in Court is directed to make strict compliance of the aforesaid order and such be done by today.

3. Government of Khyber Pakhtunkhwa so also the Government of Balochistan have also submitted their reports (*CMA No. 568 of 2021 and CMA No. 613 of 2021 respectively*) in which a categorical statement has been made that no development fund is going to be given to any of the MPAs/Ministers or Notables of their respective Provinces and that the development fund is going to be given to any of the MPAs/Ministers or Notables of their respective Provinces and that the development funds shall be used and spent as per the constitutional mandate and the Rules framed by the respective Governments for utilization of the development funds provided in their annual budgets .

4. The Sindh Government has not filed any report in response to our order dated 03.02.2021 and the learned Additional Advocate General, Sindh who is appearing in this case through video link from Karachi Registry states that such report will be filed in Court today giving a clear position of the Government of Sindh regarding the use of development funds. Advocate General, Punjab so also Advocate General, Sindh shall ensure their presence in Court.

5. The matter is adjourned for tomorrow i.e. **11.02.2021 at 1300 hours.**

6. The aforesaid order did not state that a particular Judge should not hear cases *involving the Prime Minister of Pakistan*. And significantly, no one took such an objection, including the learned Attorney-General for Pakistan ('AG'), the law officers of the provincial governments and the Islamabad Capital Territory or any government servant.³ Therefore, there was no basis, let alone a factual basis, for a purported bias or lack of impartiality, as unilaterally attributed later to a Judge of this Court by the Chief Justice.

7. **An (unsolicited) message titled 'Confidential'** was received by me (Qazi Faez Isa, J) on my mobile phone after the hearing on 10 February 2021, which stated:

³ The audio recordings further confirm this.

The Federal Government approved multi crors rupees for certain construction works to Ch Salik Hussain s/o Ch Shujat Hussain in NA-65. The federal government has nothing to do with these construction works in any of the province. I am sending you the government notification letters for your perusal and consideration.

8. Four documents (**'the Documents'**) showing that they had been issued by the Pakistan Public Works Department, Government of Pakistan, Islamabad⁴ followed the message. The Documents were in respect of a particular National Assembly constituency (NA-65) for construction projects (within the Union Councils of Tehsils Kalar Kahar, Talagang, Lawa of District Chakwal). The total works were for an estimated amount of 281,023,385 rupees. The Documents suggested wrongdoing. This Court protects and defends the Constitution and safeguards the Fundamental Rights of the people enshrined therein; including ensuring that money from the public exchequer is not distributed, sanctioned or released in contravention of the Constitution.⁵ The Documents and the Prime Minister's statement (to provide money out of public funds to legislators), made in the backdrop of the upcoming elections, merited scrutiny. In the interest of complete transparency and accountability and in conformity of the oath⁶, the same were disclosed. They were brought to the notice of the Hon'ble Judges, the concerned governments, their law officers and this was done in open Court and it was disclosed how the Documents were received. The Federal Government and the Government of Punjab ought to have responded to the genuineness or otherwise of the Documents. If the Documents were not genuine the matter would have ended, but if the Documents were genuine then it would need to be explained why such distribution of *development funds* was not in contravention of the Constitution and the earlier decisions of this Court. The Documents mentioned

⁴ *Notice Inviting Tenders* No. EE.CCD.V/AB/01 dated 1 January 2021 and *Notice Inviting Tenders* No. EE.CCD.V/AB 1954 dated 12 November 2020, issued by Pakistan Public Works Department, Government of Pakistan.

⁵ The relevant constitutional provisions had been interpreted in the case of *Action against Distribution of Development Funds by Ex-Prime Minister* (PLD 2014 Supreme Court 131).

⁶ *I will preserve, protect and defend the Constitution of the Islamic Republic of Pakistan. And that, in all circumstances, I will do right to all manner of people, according to law, without fear or favour, affection or ill-will'* as provided by Article 178 and the Third Schedule, Constitution of the Islamic Republic of Pakistan.

the name of the officer and the office which had issued them, therefore, a single phone call from the office of the learned AG would have confirmed whether they were genuine or not. The reluctance to do so raised misgivings.

9. **Elections to the Senate** are to be held next month, right before which (as reported in the media) the Prime Minister made the statement, that five hundred million rupees as *development funds* would be given to legislators or spent in their constituencies. The Documents suggested that the Prime Minister kept his word. Both sides of the political divide have been publicly making serious allegations against the other of buying votes. It had also been alleged that the election of the Hon'ble Chairman of the Senate was seriously tainted.⁷ In these circumstances, the Supreme Court could not ignore such alleged constitutional transgressions and permit the barter of the peoples' rights. However, rather than verifying the Documents, the learned AG felt the need to transmute a Judge into a *complainant*. The Hon'ble Chief Justice agreed with the learned AG immediately and, promptly and unilaterally, '*ordered*' that a Judge (who he himself included on the Bench) '*should not hear matters involving the Prime Minister of Pakistan*'. This was contrary to judicial propriety, decorum, restraint and courtesy.

10. **Definition of *complaint* and *complainant*:** The reason put forward by the learned AG to transform a Judge (hearing the case) into a complainant was that the Judge showed and questioned him about the Documents, even though it was clearly, and repeatedly, stated that it was not known whether the Documents were genuine or not. The appropriate thing would have been for the learned AG to verify the Documents instead of referring to a Judge as a *complainant*. The word complainant is derived from the word

⁷ A political party together with its coalition partners did not have majority in the Senate yet their candidate was elected as its Chairman. The late Mr. Hasil Bizenjo, a senior politician from Balochistan, had made a very serious allegation; the Election Commission did not determine whether his statement was true or not, therefore, doubts linger; if it was false statement, it had unnecessarily maligned the named individual and had also undermined the election results, but if it was true it would have serious consequences.

complaint. In the English language a *complainant*⁸ is a person who makes a formal *complaint*; asking a question did not amount to a formal complaint nor renders such person a *complainant*. Entries from English language and law dictionaries of the word *complaint* and *complainant* are reproduced below:

Complaint:

'a formal statement that someone has harmed somebody else or done something illegal, which must be proved in a court of law'⁹

'a formal charge brought against someone'¹⁰

Complainant:

'The party who brings a legal complaint against another; esp., the plaintiff in a court of equity or, more modernly, in a civil suit.'¹¹

'Someone who, under oath, signs a statement (called a "complaint") establishing reasonable grounds to believe that some named person has committed a crime.'¹²

The word *complaint* is also used in a number of laws, including in the Code of Criminal Procedure, 1898 ('**Code**'). Section 4(h) of the Code states, '*Complaint means the allegation made orally or in writing to a Magistrate, with a view to his taking action, under this Code that some person whether known or unknown, has committed an offence, but it does not include the report of a police officer.*' The word *complainant* occurs about 55 times in the Code.¹³ The words *compliant* and *complainant* are also used in the National Accountability Bureau Ordinance, 1999¹⁴ and in the Elections Act, 2017.¹⁵ Therefore, under the law, one who questions cannot be referred to as a complainant. The learned AG is the principal law officer of Pakistan, hence a great responsibility rests on him; he should be circumspect in the use of his words and not give meaning to words contrary to the laws of Pakistan.

⁸ Cambridge Business English Dictionary.

⁹ Cambridge Business English Dictionary.

¹⁰ Oxford Advanced American Dictionary.

¹¹ Black's Law Dictionary, 11th Edition.

¹² Black's Law Dictionary, 11th Edition.

¹³ Including in sections 68(2), 200, 203, 241-A, 249, 265-F of the Code.

¹⁴ Including in its section 18 and in its Schedule.

¹⁵ In section 15.

11. **The hearing on 11 February 2021** concluded abruptly after the Hon'ble Chief Justice unilaterally declared in open Court (without conferring with the other members of the Bench), that a Judge '*should not hear matters involving the Prime Minister of Pakistan*'. He then rose from his seat, compelling the other Judges to follow suit. By the evening the media was abuzz that an order/judgment had been issued. A Judge of the Supreme Court found out about it through the media, even though it was passed by a Bench of which he was a member; an order he had not read and one which had not been sent to him for signing (in agreement/disagreement). Therefore, the first thing the next morning (12 February 2021), I wrote to the Registrar of the Supreme Court:

12 February 2021

Dear Registrar,

Sub: CMA No. 490/2021 in CP No. 20/2013.

I have learnt that an order/judgment (don't know which one) was passed in the subject case on 11 February 2021, and released to the media. This is shocking since, as yet, I have not received the file with the order/judgment.

It is settled practice that after the Judge heading the Bench (in this case, the Hon'ble Chief Justice) writes the order/judgment, it is sent to the next senior judge, and so on; however, Hon'ble Mr. Justice Ijaz ul Ahsan apparently received it, but I never did, and the world knows of it before I've seen it.

Kindly let me know: (1) Why the order/judgment was not sent to me? (2) Why the settled practice of sending it to the next senior judge was not followed? (3) Why was it released to the media before I read it (let alone had the opportunity to sign it in agreement / disagreement)? (4) Who ordered its release to the media? (5) And, provide me the case file so I may finally read the order/judgment.

Yours faithfully,

Copies to: Hon'ble Chief Justice and all Hon'ble Judges of the Supreme Court.

12. The Registrar did not deem it necessary to reply to a letter written by a Judge of the Supreme Court, let alone answer the following 4 questions asked of him:

(1) Why the order/judgment was not sent to me?

- (2) Why the settled practice of sending it to the next senior judge was not followed?
- (3) Why was it released to the media before I read it (let alone had the opportunity to sign it in agreement/disagreement)?
- (4) Who ordered its release to the media?

The Registrar, however, did deign to provide the office file; the following entry from which is revelatory:¹⁶

67. PUC is a letter dated 12th February 2012, received from Hon'ble Mr Justice Qazi Faez Isa, stating, *inter alia*, that C.M.A No.490/2021 in Const. Petition No.20/2013 was heard on 11.2.2021, by a five member Bench headed by the Hon'ble Chief Justice of Pakistan including him, however, an order has been released to the media without his signatures which is against the settled practice. He has desired that he be apprised as to who ordered its release to media and he be also provided the case file for reading the order/judgment.

68. In this behalf, it is submitted that ordinarily the orders/judgments after signatures of HJJs are released to media and uploaded on the website upon verbal communication of the PSs/Secretary of HCJ and Hon'ble Judges. This order was only uploaded on the website after signatures of majority of Hon'ble Judges (4HJJs). The office is not yet in possession of said order.

13. **The order:** There is not a single precedent which states that an 'order' which has not been sent for signing can still be categorized as a legal order. Therefore, what was uploaded on the website is referred to as an *order* in italics. In every order/judgment in which one or more Judges dissent a separate - *Order of the Court* - is always written. But this was not done in the instant case. If it had been written it would have said something to the following effect: *with a majority of four to one (Qazi Faez Isa, J. dissenting) it is decided that...* . There was also a transgression; four Judges of a 5-member Bench had passed an *order* against one of their colleagues. Therefore, since there is no *Order of the Court* the Hon'ble Judges should reconsider and re-evaluate, or themselves review the *order* which, as explained herein, is merited.

14. **The order was uploaded on the Supreme Court's website** at 7:33 pm on 11 February 2021 (it was later learnt).¹⁷ Never

¹⁶ Office Note 68, p. 12.

before has an order/judgment been uploaded before all the concerned judges have signed, or at the very least, read it. The following part of the *order* was directed against a fellow Judge on the same Bench:

6. At this stage one of us (*Qazi Faez Isa, J.*) sought to place on record photocopies of certain documents statedly received by him from some anonymous source through a WhatsApp message. Copies of such documents were handed over by the Hon. Judge to other Hon. Members of the Bench. A copy was also handed over to the learned Attorney General for Pakistan. The Hon. Judge also stated that he was unsure if the documents were genuine. The learned Attorney General for Pakistan submitted that since the authenticity of the documents was questionable, the same may not be taken on record. He further submitted that in any event the Hon. Judge would become a complainant in the matter and in that capacity it would not be appropriate for the Hon. Judge to hear the matter. The Hon. Chief Justice of Pakistan, therefore, observed that in these circumstances it would not be proper for the Hon. Judge to hear the matter considering that he had already filed a petition against the Prime Minister of Pakistan, in his personal capacity. Therefore, to uphold the principle of unbiasedness and impartiality, it would be in the interest of justice that the Hon. Judge should not hear matters involving the Prime Minister of Pakistan.

And the matter was concluded thus:

7. In view of the above position on record, it appears that the queries raised by this Court in the order dated 03.02.2021 have been responded/addressed by all the respective Governments and thus, we see no reason to further proceed with the matter. Accordingly, the Civil Miscellaneous Application No. 490 of 2021 in Constitution Petition No. 20 of 2013 is disposed of.

15. Without verifying the Documents and without ensuring that the said Documents (if genuine) were an isolated incident or whether there were others, the matter was abruptly disposed of. The Hon'ble Chief Justice having himself constituted the Bench to hear the matter, availed the opportunity to assume purported bias and lack of impartiality on the part of one of the Judge's on the Bench and passed a restraining order against the said Judge.

¹⁷ My Senior Private Secretary on 12 February 2021 wrote to Mr. Asim Javed, Webmaster, IT Wing, Supreme Court of Pakistan, Islamabad, who is responsible for uploading orders/judgments on the Supreme Court website, and enquired from him when and on whose directions the *order* was uploaded. Mr. Asim Javed replied *vide* his letter dated 12 February 2021 that it was done, '*on directions of Mr. Masood Ul Hassan, Secretary to Hon'able Chief Justice of Pakistan at 07:33 p.m. on 11th February 2021.*'

16. **There are factual inaccuracies in the order.** I had not, 'filed a petition against the Prime Minister of Pakistan, in his personal capacity'. The alluded petition was filed against Presidential Reference No. 1/2019 (to which was later added Reference No. 427/2019) in which 13 respondents¹⁸ were arrayed, including Mr. Imran Khan, the Prime Minister of Pakistan.

17. **The reasoning/logic used to restrain a Judge:** The petition was not filed 'against the Prime Minister of Pakistan, in his personal capacity'. Mr. Imran Khan in his capacity as the Prime Minister of Pakistan, and not in his personal capacity, had advised the President to file a Reference against Justice Qazi Faez Isa who subsequently challenged the Reference. Mr. Imran Khan neither did advise, nor could have advised, the President in his personal capacity to file the Reference. Moreover, the Documents pertained to a National Assembly constituency (NA-65) from which Mr. Imran Khan had not contested elections, therefore, in no manner is it correct to say that the matter was personal to him.

18. The purported reason to restrain a Judge from hearing the said genre of cases is that he may be biased and not impartial because he had filed a petition against Mr. Imran Khan, Prime Minister. As mentioned above, the petition was filed against Mr. Imran Khan in his capacity as Prime Minister, who had advised the filing of the Reference. Therefore, if the said reason is to be accepted, then the very same petition had also been filed against three members of the Bench in their capacity as Chairman and Members of the Supreme Judicial Council ('SJC') and thus, they too would be equally biased and lack impartiality, and should not have passed the order to the extent of the said petitioner/Judge. The SJC was arrayed as respondent No. 6 in the petition. The

¹⁸ (1) President of Pakistan, (2) Federation of Pakistan, (3) Mr. Imran Khan, Prime Minister of Pakistan, (4) Mr. Muhammad Farogh Nasim, Federal Minister for Law and Justice, (5) Mr. Anwar Mansoor Khan, Attorney-General for Pakistan, (6) The Supreme Judicial Council, (7) Mr. Arbab Muhammad Arif, Secretary, Supreme Judicial Council, (8) Mr. Mirza Shahzad Akbar, Chairman, Assets Recovery Unit, (9) Mr. Zia Ul Mustafa Nasim, Legal Expert, Assets Recovery Unit, (10) Mr. Abdul Waheed Dogar, Complainant in Special Reference No. 1/2019, (11) Mr. Waheed Shahzad Butt, Complainant in Reference No. 427/2019/SJC, (12) Pakistan Bar Council, and (13) Supreme Court Bar Association (the last 2 being pro forma respondents).

Chairman and members of the SJC are determined by the Constitution¹⁹ and its Chairman is Mr. Justice Gulzar Ahmed and two Members are Mr. Justice Mushir Alam and Mr. Justice Umar Ata Bandial (all of whom signed the *order*). Mr. Justice Umar Ata Bandial became a member of the SJC on 21 December 2020 when the petition against the said references was pending, but his lordship elected not to recuse himself and continued to hear the petition. The Reference was quashed unanimously by ten Hon'ble Judges.

19. **Mr. Imran Khan's person and the office of the Prime Minister** are two different things and are not interchangeable. The *order* says that a Judge '*should not hear matters involving the Prime Minister of Pakistan*'. The Prime Minister is the head of the Federal Government. Even the Head of State (the President) in most matters, acts on his advice. Therefore, if the *order* is implemented it means that a Judge of the Supreme Court can only hear cases of private civil disputes, because even in criminal cases the State is always a party.

20. ***Un-biasness and impartiality*** are cited in the *order* as the reasons to restrain a Judge from hearing '*matters against the Prime Minister of Pakistan*'. I assume that the word *unbiasedness* was meant to be used and not *un-biasness*. I do not personally know Mr. Imran Khan; therefore, I could not possibly have a *bias* against him in his *personal* capacity. I also do not have any *bias* against him as Prime Minister. I am more than capable of adjudicating impartially and without bias. Failing which, I would violate the Constitution, my oath, my conscience and my faith. My brethren are not my conscience keepers, nor am I theirs.

21. **An allegation of bias and impartiality has to be levelled first** and only then is it to be addressed by the concerned Judge. No one had alleged bias or impartiality. If Mr. Imran Khan wanted to make the said allegation he had to do so himself. The learned AG is not the personal lawyer of the Prime Minister; the

¹⁹ Article 209(2)(a) and (b) of the Constitution.

constitutional remit of the post of the Attorney-General for Pakistan is provided in the Constitution;²⁰ nor can a Chief Justice extend support to a Prime Minister or restrain a Judge of the Supreme Court; nor the Constitution or law permits Judges to look into the hearts of colleague Judges, and determine whether they suffer from biasness and lack of impartiality. Almighty Allah alone knows what is in the hearts.²¹

22. **A non-issue was raised by the Hon'ble Chief Justice.** A non-issue was raised and simultaneously, without hearing anyone, let alone asking me, it was unilaterally decided, observing that I may be biased and lack impartiality. On the three dates that this matter was fixed in Court (3, 10 and 11 February 2021) neither the learned AG nor anyone else had alleged that Justice Qazi Faez Isa was biased or not impartial, let alone filed an application (supported by an affidavit) alleging this. There is not a single precedent in Pakistan (nor in the world of reported precedents) to support what transpired. Question marks on my reputation have instead been raised by the Hon'ble Chief Justice unilaterally and arbitrarily in open Court on 11 February 2021 and then in the *order*, despite the fact that no one had alleged bias or lack of impartiality. In unprecedented fashion, without any evidence, without recourse to petition or appeal, the reputation of a Judge of the Supreme Court has been tarnished. Consequently, the credibility and integrity of the Judiciary has also been undermined.

23. **The precedents of this Court** (spanning decades) hold that the *order* was not an 'order' as contemplated by law nor a 'decision' in terms of Article 189 of the Constitution. In the case of ***Muhammad Akhtar***,²² this Court held that a judgment which did not set out the facts and the evidence is improper and of doubtful validity. '*A judgment of this kind delivered by an appellate Court cannot be regarded as proper and is of doubtful validity. It does not represent an honest discharge of its duty by the appellate Court.*'²³

²⁰ Article 100 of the Constitution.

²¹ '*And Allah knows what (is) in your hearts*' ('*wal-lahu ya'lamu ma fi qulubikum*') *Al-Ahzab* (33) verse 51, see also *Ash-Shura* (42) verse 24.

²² *Muhammad Akhtar v State* (PLD 1957 Supreme Court 297).

²³ *Ibid*, p. 299, per A. R. Cornelius, J on behalf of a 4-member Bench.

Chief Justice A. R. Cornelius headed a 6-member Bench of this Court in the case of **Faridsons Ltd**,²⁴ and the decision held that before deciding against a person he must be provided an opportunity to meet the allegations against him,²⁵ the authority must '*give reasoned order in writing*' and that there is a '*duty to decide the case in an objective manner*'.²⁶ It was further held, '*Without knowing the real grounds of the decision, how could the appellants controvert them before the appellate authority.*'²⁷ **Abdul Kabeer**²⁸ applied the same principle and stated that '*when important points of law are involved in the case the appellate Court must indicate the points raised and the reasons for its decision.*'²⁹ This is all the more important in respect of a Court exercising *original* jurisdiction. In passing the *order*, original jurisdiction was improperly exercised by the Hon'ble Judges.

24. In the case of **Gouranga Mohan Sikdar**,³⁰ this Court expressed its displeasure when a High Court dismissed a petition without giving reasons and reiterated the earlier decisions of this Court and held that '*The abovementioned decisions did enunciate a principle of law*'³¹ which it was the duty of the High Court to follow.³² In **Mollah Ejahar Ali**,³³ the law on the subject was dexterously expounded: '*A judicial order must be a speaking order manifesting by itself that the Court has applied its mind to the resolution of the issues for their proper adjudication. The ultimate result may be reached by a laborious effort, but if the final order does not bear an imprint of that effort and on the contrary discloses arbitrariness of thought and action, the feeling with the painful*

²⁴ *Faridsons Ltd. v Government of Pakistan* (PLD 1961 Supreme Court 537).

²⁵ *Ibid*, per B. Z. Kaikus, J, p. 562P.

²⁶ *Ibid*, per Fazle-Akbar, J, p. 561M.

²⁷ *Ibid*, per S. A. Rahman, J, p. 553.

²⁸ *Abdul Kabeer v Abdul Wahid* (1968 SCMR 464), a 3-member Bench headed by Chief Justice A. R. Cornelis.

²⁹ *Ibid*, per Fazle-Akbar, J, p. 468.

³⁰ *Gouranga Mohan Sikdar v Collector of Import and Export* (PLD 1970 Supreme Court 158).

³¹ Article 63 of the Constitution of Pakistan (1962), which is now Article 189 of the Constitution (1973).

³² *Ibid*, 161, per Hamoodur Rahman, CJ, heading a 3-member Bench.

³³ *Mollah Ejahar Ali v Government of East Pakistan* (PLD 1970 Supreme Court 173), Chief Justice S. A. Rahman headed a 5-member Bench.

*results, that justice has neither been done nor seem to have been done is inescapable.*³⁴

25. The **Muhammad Afzal**³⁵ case decided what constitutes a proper 'judgment' and 'order' and stressed that reasons must be given for the decision:

'Judgment' has been defined in section 2, clause (9) of the Civil Procedure Code as 'judgment' means the statement given by the Judge of the grounds of a decree or order' and Order has been defined in clause 14 of the same section as 'formal expression of any decision of a civil Court which is not a decree'. Further, Order XX, Rule 4, sub-rule (2) prescribes that judgment of Courts other than the Court of a small causes 'shall contain a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decisions'. Rule 5 of the same Order provides 'in suits in which issues have been framed the Court shall state its finding or decision with reasons therefor upon each separate issue, unless the finding upon anyone or more of the issues is sufficient for the decision of the suit.'³⁶

In **Airport Support Services**³⁷ this Court reviewed the case law and noted that the principle requiring reasons to be given had now received statutory backing by inserting section 24-A in the General Clauses Act, 1897, and that substantive law too now required Judges to '*give reasons for making the order*'. In the **Hyderabad Development Authority**³⁸ case, it was held '*that judicial pronouncement (judgment) by a Judicial Officer should be based on evidence/material available on record and reasons must be outcome of the evidence available on record and on the basis of such reason conclusion should be drawn and if the order lacks of these ingredients it cannot be termed to be a judicial verdict (judgment) in stricto sensu and at best such pronouncement can be termed to be an administrative order...*'³⁹ The **Government of Sindh**⁴⁰ case held that '*...the Court must pass a speaking judicial order manifesting by itself that the Court applied its mind to the issue*

³⁴ Ibid, per Sajjad Ahmad, J, p. 176.

³⁵ *Muhammad Afzal v Muhammad Altaf Hussain* (1986 SCMR 1736), a judgement of a 5-member Bench headed by Chief Justice Muhammad Haleem.

³⁶ Ibid, per Shaifur Rahman, J, p. 1760C.

³⁷ *Airport Support Services v Airport Manger* (1998 SCMR 2268), 3-member Bench, the judgment was authored by Wajihuddin Ahmed, J.

³⁸ *Hyderabad Development Authority v Abdul Majeed* (PLD 2002 Supreme Court 84), a 2-member Bench decision.

³⁹ Ibid, per Iftikhar Muhammad Chaudhry, J, p. 88B.

⁴⁰ *Government of Sindh v Muhammad Juman* (2009 SCMR 1407), a 2-member Bench decision.

*involved in the case.*⁴¹ The appraisal and review of the decisions of this Court dating back to the 1950s show that to be properly categorized as an 'order' or a 'judgment,' reasons therein must be given, adjudication should take place after a careful consideration of the facts and the law and the decision made only after giving the affected party an opportunity of being heard. With respect, the *order* does not meet the stipulated criteria to constitute a legal *order* or a *decision* in terms of Article 189 of the Constitution, is contrary to the rules of natural justice, the Constitution,⁴² impartiality and fair play and undermines this Court.

26. Islamic Jurisprudence: Pakistani jurisprudence conforms to longstanding Islamic principles. The Holy Qur'an ordains justice:

O you who believe! stand out firmly for Allah, as witnesses to fair dealing, and let not the hatred of others to you make you swerve to wrong and depart from justice. Be just: that is next to piety: and fear Allah. For Allah is well-acquainted with all that ye do⁴³.

The Holy Qur'an also mandates that all those who judge (judges) must adjudicate justly:

And if you judge, judge justly between them. Indeed, Allah loves the just.⁴⁴

The second Caliph of the Muslim Ummah, Umar ibn al-Khattab (Allah be pleased with him) gave written instructions in the *Siyasah*⁴⁵ which became a beacon of guidance for judges and required judges to ponder, reflect and use precedents before deciding:

Ponder over the matter, ponder over what is causing you concern in your heart and is something that has not reached you from the Noble Qur'an and the *Sunnah*. Thereafter, identify the precedents and resembling cases and undertake analogy when such cases are found.

⁴¹ Ibid, per Mian Hamid Farooq, J, p. 1409B.

⁴² Article 10A of the Constitution.

⁴³ *Al-Ma'idah* (5) verse 8, '*yā ayyuhā alladhīna āmanū kūnū qawwāmīna lillahi shuhadāa bil-qis'ṭi walā yajrimannakum shanaānu qawmin 'alā allā ta'dilū i'dilū huwa aqrabu lilttaqwā wa-ittaqu l-laha inna l-laha khabīrun bimā ta'malūna*'.

⁴⁴ *Al-Ma'idah* (5) verse 42, '*wa-in ḥakamta fa-uḥ'kum baynahum bil-qis'ṭi inna l-laha yuḥibbu l-muq'siṭīna*'.

⁴⁵ *Kitāb siyast al-qada wa tadbir* ('Letter of Judicial Policy and Administration') written to Abu Musa al-Ash'ari, also called the Letter of *Siyasah* (Administration of Justice).

The letter also offers advice to judges and tells them how to act in court:

Beware! Do not become angry, perturbed, or overwhelmed (while deciding), and do not torment the public, who are litigating... .

Ala al-Din al-Kasani, a famous Muslim jurist of the 12th century, incorporates instructions from the *Siyasah* in his book⁴⁶ and says:

Among the requirements is that the judge should display complete understanding during litigation. He is to focus his entire concentration, hearing and heart ... due to the words of 'Umar (Allah be pleased with him) in the letter on *Siyasah*: 'Understand fully the matter that is brought before you'.⁴⁷

27. **The order is unconstitutional, illegal and contrary to the precedents of this Court.** In the *Abdul Wali Khan*⁴⁸ case, which was decided by a 6-member Bench headed by Chief Justice Hamoodur Rahman, it was held that a Judge's colleagues cannot impose their decision on him:

As regards the objection taken to the constitution of the Bench, learned counsel were informed on the very first day that no party to a litigation can claim the right to be tried by a particular Judge or Judges of his choice. In the case of superior Courts, it is entirely a matter for the Judge or Judges concerned to decide as to whether they will or will not sit in that particular case. Mr. Wali Khan has been informed that both the learned Judges, against whom the objection has been raised, on the record minutes in writing which have been raised, have now recorded of these proceedings to say that they do not feel embarrassed in sitting to hear this proceeding. The objection based purely on conjectures is, therefore, in our view, unwarranted. Judges concerned are fully conscious of their own responsibilities. There is nothing to show that they are in any way disqualified from sitting to hear this reference. The objection is, accordingly, overruled.

It was further held that a Judge against whom an objection has been raised is to himself decide whether to hear the case:

... it is entirely a matter for the Judge or Judges concerned to decide as to whether they will or will not sit in that particular case. ... both the learned Judges, against whom the objection has been raised, say that they do not feel embarrassed in sitting to hear this proceeding. The objection based purely on conjectures is, therefore, in our view, unwarranted. Judges concerned are fully conscious of their own responsibilities. There is nothing to show that they are in any way disqualified from sitting to hear this reference. The objection is, accordingly, overruled.⁴⁹

⁴⁶ *Bada'i al-Sana'i fi Tartib al-Shara'i* ('Unseen Artistry in the Arrangement of the Religious-Legal Regulations'). Ala al-Din al-Kasani, 12th century jurist.

⁴⁷ *Siyasah*, Op. cit.

⁴⁸ *Islamic Republic of Pakistan v Abdul Wali Khan* (PLD 1976 Supreme Court 57).

⁴⁹ Ibid.

28. The aforementioned principle settled 45 years ago (in the *Abdul Wali Khan* case) has been continuously and consistently followed by this Court. The only challenge that can be brought against a Judge is to seek a writ of *quo warranto*.⁵⁰ This Court, in the case of *Abrar Hassan*,⁵¹ held that:

The provisions of the Constitution are clear and need no support from decisions of any other country which either has no written Constitution, or has a written Constitution, which does not make the point clear and beyond dispute. Nevertheless, the following extract from 46 American Jurisprudence 2nd Edn, section 246 supports the view that information in the nature of *quo warranto* lies in such a matter and that the validity of the appointment of such a Judge cannot be challenged in a collateral proceeding:

Generally, a *de facto* Judge's title or right to the office can be determined only in a *quo warranto* proceeding or information in the nature of a *quo warranto* at suit of the sovereign, and cannot be questioned in the case before him or in a collateral proceeding. Thus, generally, his title and authority may not be questioned in a proceeding to obtain a writ of prohibition to prevent him from doing an official act, or in a suit to enjoin him from performing the duties of his office, ...

It was categorically held that a Judge cannot be prevented from his official work or from performing the duties of his office. In the (*Malik*) *Asad Ali*⁵² case, which was decided by a 10-member Bench, the Supreme Court held that:

While dealing with the scope of proceedings under Article 199 of the Constitution, filed against a Judge of the superior Court, we have held that **the actions of the Judge which relate to the performance of his duty and functions as a Judge of the Court or as a member of the Court, cannot be brought under challenge** under Article 199 of the Constitution before the High Court. Only such actions of a Judge of superior Court are amenable to the jurisdiction of High Court under Article 199 of the Constitution, which he performs in his personal capacity, having no nexus with his official functions as a Judge of the Court. [emphasis added]

29. In *Muhammad Akram Shaikh*,⁵³ the *ratio decidendi*⁵⁴ of the abovementioned cases was emphatically reiterated. This Court,

⁵⁰ Article 199(b)(ii) of the Constitution.

⁵¹ *Abrar Hassan v Government of Pakistan* (PLD 1976 Supreme Court 315, p. 338), a 4-member Bench headed by Yaqub Ali, Chief Justice.

⁵² *Asad Ali v Federation of Pakistan* (PLD 1998 Supreme Court 161, para. 84, p. 295-6).

⁵³ *Federation of Pakistan v Muhammad Akram Shaikh* (PLD 1989 Supreme Court 689), headed by Chief Justice Muhammad Haleem.

⁵⁴ The reason or rationale for the decision.

comprising of 12 Judges, held that '*The law on the subject of general bias attributed to Judges of the superior courts has been fully dealt with in the case of Islamic Republic of Pakistan v Abdul Wali Khan.*'⁵⁵ It was held that a Judge enjoys the same judicial power as the Chief Justice:

Now it may be noticed that the Supreme Court, as a body under the Constitution, consists of a Chief Justice and the Judges of that Court, and each Judge is vested with the judicial powers equal to any other Judge, even for that matter, the Chief Justice. There is, therefore, equal distribution of judicial power among the Judges.⁵⁶

The question whether a writ restraining a Judge could be issued was answered in the negative:

I may refer to a well-settled position in law that a writ under the Constitutional jurisdiction cannot be issued by a High Court to itself, or a Judge of that Court on the principle of necessity of maintaining a high degree of comity among the Judges of the Superior Courts. This Court highlighted this principle in the case of *Mian Jamal Shah v. Election Commission* (PLD 1966 SC 1).⁵⁷

It was also specifically held that no Judge could issue a writ against another or direct him not to hear any case on the ground that he has a bias and that it would be unconstitutional to do so:

The above views expressed by Cornelius, C.J. and Muhammad Yaqub Ali, C.J. are weighty principles of law, and I am clearly of the opinion that one set of Judges of this Bench, which has been constituted by my Lord the Chief Justice, cannot issue a direction to the other set of Judges or any of the Judges of this Bench, not to associate themselves or himself in the hearing of the Review Petition. I cannot conceive of a situation where one Judge of a Division Bench constituted by my Lord the Chief Justice to hear a case can direct the other Judge of the Bench not to hear the case on the ground that he has a bias or an interest in the case, or for that matter on any other ground whatsoever. If this bar were not to exist, then it would amount to permitting the Judges to destroy or take away the judicial function or power of each other, which position is neither conceived nor permitted by the Constitution.⁵⁸

Whether a Judge should hear a case or hear cases of any party was left to the sagacity and wisdom of the Judge:

I am, therefore, clearly of the view that it is for the three Hon'ble Judges of this Bench concerned, and not the rest

⁵⁵ Ibid, paras. 33-35, p. 708-709.

⁵⁶ Ibid, p. 737.

⁵⁷ Ibid, p. 738.

⁵⁸ Ibid, p. 741.

nine Judges of the Bench, to decide in their judicious sagacity and wisdom whether they may participate in the proceedings of the Review Petition.⁵⁹

30. **A smaller Bench cannot take a view contrary to a larger Bench.** The *order* is contrary to the decisions in the cases of *Abdul Wali Khan, Abrar Hassan, Asad Ali and Muhammad Akram Shaikh*; which were decided by larger benches of the Supreme Court. The Hon'ble Judges will undoubtedly heed the instructions issued by Caliph Umar ibn al-Khattab (Allah be pleased with him), given to judges in the *Siyasah*,⁶⁰ on how to undo mistakes:

Let not a judgment you rendered yesterday, and that you have (later) reflected upon, receiving guidance towards the correct view, prevent you from restoring a right. Rights are ancient and cannot be annulled. Restoring a right is by far better than persisting in a manifest error.

And gracefully withdraw the *order*.

31. **The Supreme Court does not have jurisdiction to pass such an order.** The Supreme Court is a creation of the Constitution and the Constitution bestows jurisdiction on it. The Supreme Court has a number of jurisdictions: *original*,⁶¹ *appellate*,⁶² *advisory*⁶³ and *review*,⁶⁴ jurisdiction to *transfer cases from one High Court to another*,⁶⁵ jurisdiction in respect of *administrative courts and tribunals*,⁶⁶ and, jurisdiction conferred *by or under law*.⁶⁷ The Supreme Court does not have jurisdiction to pass an order of the nature of the *order*. Significantly, the *order* does not state which particular jurisdiction was exercised. If a court assumes jurisdiction which it does not have, such an action/order is liable to be struck down; the Constitution enables the High Courts⁶⁸ and the Supreme Court⁶⁹ to do so. Neither a

⁵⁹ Ibid, p. 741.

⁶⁰ *Siyasah Op. Cit.*

⁶¹ Article 184 of the Constitution.

⁶² Article 185 of the Constitution.

⁶³ Article 186 of the Constitution.

⁶⁴ Article 188 of the Constitution.

⁶⁵ Article 186A of the Constitution.

⁶⁶ Article 212(2) of the Constitution.

⁶⁷ Article 175(2) of the Constitution.

⁶⁸ Article 199(1) and (2) of the Constitution.

⁶⁹ And under Article 184(3) of the Constitution if the prerequisites of 'public interest' and 'enforcement of fundamental rights' are met.

High Court nor the Supreme Court can confer jurisdiction on itself which it does not already have.

32. **The Pitfalls of Unstructured Discretion:** The 2-member Bench acted in the public interest to protect public money and ensure compliance with the Constitution and legal precedent; however, it was not permitted to proceed. The Hon'ble Chief Justice reconstituted the Bench. Chief Justices may have discretion to constitute benches but must do so for some reason. The reconstitution of a Bench already seized with a matter (and in which a *date-by-court* had been given) must always be for a good, if not compelling, reason. Unstructured and arbitrary use of discretion gives rise to misgivings and undermines the peoples' confidence. It also demoralizes the members of the bench from whom the matter has been taken away. In my letter of 10 February 2021 to the Hon'ble Chief Justice, I wrote '*to exclude senior judges from benches when important constitutional issues are to be heard neither serves the institution nor the people*' and '*This Court often castigates arbitrary exercise of discretion, yet in constituting benches hearing important constitutional matters unstructured discretion is exercised.*' This recurrent issue has been left unattended by Chief Justices and not made into an agenda item for Full-Court meetings. The Supreme Court is the final arbiter of all disputes and the custodian of the Constitution. It is tasked to ensure that the Executive does not overreach or act contrary to the Constitution. If the Executive's transgressions are not checked, and instead benches are reconstituted and Judges restrained, the people suffer.

33. **The oath of office of a Judge requires him to hear all cases** '*to the best of my ability, and faithfully, in accordance with the Constitution*' and to '*do right to **all** manner of people*',⁷⁰ which would include Mr. Imran Khan in his personal capacity and in his

⁷⁰ '*And that, in all circumstances, I will do right to all manner of people, according to law, without fear or favour, affection or will*', Article 178 and Third Schedule to the Constitution.

capacity as the Prime Minister. Moreover, if a Judge⁷¹ is restrained from hearing a genre of cases then his salary, judicial allowance, housing, utilities, etcetera, paid by the taxpayers is effectively wasted because they are not getting what they pay for.

34. **The Election Commission** is mandated to conduct elections and to ensure that they are conducted *honestly, justly, fairly* and that *corrupt practices are guarded against*.⁷² The Election Commission is also empowered by the Constitution to call upon '*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 duties*.'⁷³ The Election Commission also conducts the Senate elections. The Election Commission did not take notice of the present matter of 'development funds' said to have been promised by the Prime Minister. Therefore, this Court could not ignore the matter, nor the Documents, as it needed to be ascertained whether the Constitution was violated.

35. **Financial Loss:** It may be clarified that notice in the instant matter was issued not under Article 184(3) but to ensure that the decision of the Supreme Court⁷⁴ is implemented with regard to *development funds* disbursed to legislators or spent on projects and in areas identified by them. This method of using *development funds* was first introduced by General Zia-ul-Haq to garner personal support at the cost of the country. The 2-member Bench had issued notice to prevent the hemorrhaging of public funds. In the past, many a time on insubstantial grounds and without supporting material, jurisdiction was assumed and exercised under Article 184(3) of the Constitution. In one such matter,⁷⁵ a 'WhatsApp' message (from an unknown and unverified source) was received, the WhatsApp transformed into a Human Rights Case and an interim order was passed stopping the recovery of two

⁷¹ One out of 16, and presently one out 15.

⁷² Article 218(3) of the Constitution.

⁷³ Article 220 of the Constitution.

⁷⁴ *Action against Distribution of Development Funds by Ex-Prime Minister* (PLD 2014 Supreme Court 131)

⁷⁵ *Human Rights Case No. 1887/2018* (PLD 2019 Supreme Court 645); the Bench which suspended the collection of taxes included members on this 5-member Bench.

Federal and four provincial taxes. By the time the case was decided, the Federal and provincial governments had suffered a loss of about one hundred billion rupees. It was later decided that there was no merit in the case, consequently, the injunctive order was discharged/recalled and the case was dismissed. The instant matter has no similarity with the abovementioned case because: (1) notice in this matter had already been taken (it was not taken on the basis of the said message or the Documents), (2) the Documents appeared official, (3) the Documents were provided to all concerned, (4) opportunity to verify the Documents was provided, (5) if the Documents were genuine, another opportunity to explain them would be provided and (5) no unilateral order, without first hearing the concerned, would be passed.

36. **Article 248 of the Constitution** was referred to during the hearing by an Hon'ble Judge and passing reference has been made to it in the *order*, but since it has not been elaborated it need not be discussed in detail. However, this Court has held that only actions in accordance with the Constitution and the law have constitutional protection. There is no constitutional protection if an office is misused for personal or political gain, enriching friends, taking bribes or resorting to other corrupt practices, including diverting public funds to buy or influence legislators to vote for particular candidates. If it was felt that the *order* should accurately reflect what transpired in Court and, therefore, Article 248 was mentioned in the *order*, then for completeness it should have also been stated that a Judge had questioned the learned AG to opine, '*If the Documents were genuine whether the same conformed with the Constitution and precedent of this Court?*' and, that the question was not answered by the learned AG.

37. **Loyalty, Institutions and Oaths:** Loyalty is always to the Constitution, which needs remembering and restating; if the head of an institution deviates he must be reminded. The Constitution commences with Almighty Allah's name and so too do all oaths.

Allah commands justice.⁷⁶ To be just is to be righteous.⁷⁷ To adjudicate is a form of worship (*'ibadah*) of Allah.⁷⁸

38. **Cumulative improprieties and illegalities:** The *order* and the events leading up to it suffer from the following improprieties and illegalities:

- (1) Without informing the 2-member Bench, which was already hearing the matter, the Hon'ble Chief Justice decided to reconstitute the Bench, expand it and exclude Mr. Justice Maqbool Baqar from it;
- (2) No one had alleged bias or lack of impartiality against any Judge on the Bench;
- (3) Without consulting his colleagues on the Bench, the Hon'ble Chief Justice tersely announced that a Judge of the Supreme Court should not hear *any case involving the Prime Minister*;
- (4) The Hon'ble Chief Justice arbitrarily introduced a non-issue - bias and lack of impartiality on the part of a Judge on the Bench;
- (5) The said Judge was not made privy to the written *order*;
- (6) The *order* was sent to a junior Judge while the said Judge, his senior, was bypassed;
- (7) The 'Order of the Court' was not written and thus, not signed, therefore, there is no Order of the Court and the matter remains pending;
- (8) The *order* was uploaded on the Supreme Court website before a Judge had seen it, let alone had the opportunity to agree/disagree with it;
- (9) The *order* and case file were not sent, in accordance with long-standing established practice, to the said Judge;
- (10) The said Judge learnt of the *order* through the media;
- (11) The said Judge had to write to the Registrar seeking the order and case file;

⁷⁶ *An-Nahl* (16) verse 90, 'Indeed, Allah commands justice' (*'inna l-laha yamuru bil-'adli*).

⁷⁷ *Al-Ma'idah* (5) verse 8, 'Be just it is close to righteousness/piety' (*i'dillu huwa aqrabu lilttaqwa*).

⁷⁸ *Al-Hadid* (57) verse 25, 'we sent down with them the Book and the Balance so that the people establish justice' (*'anzalna ma'ahumu l-kitaba wal-mizana liyakuma l-nasu bil-qisti*).

- (12) Paragraph 6 of the *order* is unconstitutional as it was not passed under any of the different jurisdictions of the Supreme Court stipulated in the Constitution;
- (13) Paragraph 6 of the *order* does not constitute a legal 'order' as per law and as per the precedents of this Court;
- (14) Paragraph 6 of the *order* does not constitute a *decision* in terms of Article 189 of the Constitution;
- (15) Paragraph 6 of the *order* contravenes the precedents of several larger Benches of this Court, holding that only the concerned Judge can decide if he should hear a case;
- (16) Paragraph 6 of the *order* is contrary to settled jurisprudence;
- (17) Paragraph 6 of the *order* is contrary to Islamic principles and jurisprudence;
- (18) Paragraph 6 of the *order* contravenes the oath of Judges;
- (19) The Prime Minister of Pakistan's reported statement said that money from the public purse would be disbursed for apparent political patronage at a time when the Senate elections were on the horizon, therefore, notice was issued by the 2-member Bench, however without a proper determination, and without ascertainment of the veracity and effect of the Documents, the matter was abruptly disposed of; and
- (20) Paragraph 6 of the *order* (passed against a Judge) undermines the judiciary and the Supreme Court.

39. What commenced as an attempt to prevent corrupt practices and bribery ended with a Judge being rebuked and restrained. Submitting a resignation letter was contemplated, but then I remembered that this is not about a Judge and his mistreatment. It is about something far more important; the Constitution, the peoples' rights and their monies. All of which I have, with Almighty Allah's help and grace, endeavored to protect and will (*insha'Allah*) continue to do so.

40. **In conclusion**, I must say that it has been extremely painful for me to write this order. I apologise if anything herein has hurt or offended as that has not been my intention. I have said what I felt I needed to say in the hope that unstructured discretion is curtailed

since it has never served any institution nor the interest of the people. To end on a positive note, the most resilient and finest institutions are those wherein there is candour, transparency and legitimate dissent. I pray that this institution unwaveringly stands against all manner of constitutional violations and safeguards the people against misuse of power.

Islamabad, 20 February 2021.

Judge.

Approved for Reporting