

**SUPREME COURT OF PAKISTAN**  
(Advisory Jurisdiction)

**PRESENT:**

Mr. Justice Gulzar Ahmed, CJ  
Mr. Justice Mushir Alam  
Mr. Justice Umar Ata Bandial  
Mr. Justice Ijaz ul Ahsan  
Mr. Justice Yahya Afridi

**REFERENCE NO.1 OF 2020**

*[Reference by the President of the Islamic Republic of Pakistan, under Article 186 of the Constitution of the Islamic Republic of Pakistan, 1973]*

- For the Federation  
*[in Reference No.1/2020]*  
*[in CMA.127-128, 170, 989,1293/2021]* : Mr. Khalid Jawed Khan,  
Attorney General for Pakistan  
Mr. Sohail Mehmood, Addl. Attorney General  
for Pakistan  
Mr. Ayaz Shaukat, DAG  
*[Assisted by Ms. Maryum Rasheed, Advocate]*
- For the National Assembly  
*[in CMA.278/2021]* : Mr. Abdul Latif Yousafzai, Sr. ASC  
Mr. Muhammad Mushtaq, Addl. Secretary  
(Legislation)  
Mr. Muhammad Waqar, DPO (Lit.)
- For the Senate of Pakistan  
*[in CMA.296/2021]* : Senator Muhammad Ali Khan Saif  
Mr. Muhammad Javed Iqbal, DD
- For the Election Commission  
*[in CMA.210, 808, 880, 983, 1010/2021]* : Mr. Sikandar Sultan Raja, Chief Election  
Commissioner  
Mr. Justice (R) Muhammad Iltaf Ibrahim  
Qureshi, Member (Punjab)  
Mrs. Justice (R) Irshad Qaiser, Member (KP)  
Mr. Shah Mehmood Jatoi, Member  
(Balochistan)  
Mr. Nisar Ahmed Durrani, Member (Sindh)  
Mr. Sajeel Shehryar Swati, ASC  
Mr. Sana Ullah Zahid, ASC, L.A.  
Dr. Akhtar Nazir, Secretary  
Mr. Muhammad Arshad, DG (Law)
- For Government of Punjab  
*[in CMA.95/2021]* : Mr. Ahmed Awais, AG  
Barrister Qasim Ali Chohan, Addl.AG  
Ms. Imrana Baloch, AOR
- For Government of Sindh  
*[in CMA.386/2021]* : Mr. Salman Talib ud Din, AG  
Mr. Sibtain Mahmud, Addl.AG  
*(via video link from Karachi)*
- For Government of KP  
*[in CMA.104/2021]* : Mr. Shumail Ahmad Butt, AG  
Mr. Atif Ali Khan, Addl.AG
- For Government of Balochistan  
*[in CMA.185/2021]* : Mr. Arbab M. Tahir, AG  
Mr. Muhammad Ayaz Khan Swati, Addl.AG  
Mr. Muhammad Fareed Dogar, AAG
- For ICT  
*[in CMA.149/2021]* : Mr. Niazullah Khan Niazi, AG
- For JUI  
*[in CMA.129, 541/2021]* : Mr. Kamran Murtaza, Sr. ASC  
Mr. Jehangir Khan Jadoon, ASC

- For SHCBA : Mr. Salahuddin Ahmed, ASC  
[in CMA.297, 1119/2021] Barrister Omer Soomro, ASC  
Syed Riffaqt Hussain Shah, AOR  
[Assisted by Ravi Pinjani, ASC]
- [in CMA.130, 1201, 1292/2021] : Mr. Hassan Irfan Khan, ASC
- For PPP : Mian Raza Rabbani, Sr. ASC  
[in CMA.131, 704, 1217/2021] Mr. Mehmood A. Sheikh, AOR
- [in CMA.154,1295/2021] : Malik Qamar Afzal, ASC
- For JI : Mr. Ishtiaq Ahmed Raja, ASC  
[in CMA.211/2021]
- [in CMA.231/2021] : Syed Iqbal Hashmi, ASC
- For PML (N) : Barrister Zafar Ullah, ASC  
[in CMA.784, 1231/2021]
- For Pakistan Bar Council : Mr. Mansoor Usman Awan, ASC  
[in CMA.807, 1200/2021]
- For PPP (P) : Mr. Farooq H. Naek, Sr. ASC  
[in CMA.872,1218/2021]
- [in CMA.908, 1008, 1026-1030/2021] : Mr. Khurram Shehzad Chughtai, Advocate  
High Court, in person
- [in CMA.1115/2021] : Mr. Azhar Iqbal, ASC
- [in CMA.1233/2021] : Mr. Waheed Ahmed Kamal, in person
- Dates of Hearing : 04.01.2021, 11.01.2021, 13.01.2021, 14.01.2021,  
02.02.2021, 03.02.2021, 04.02.2021, 08.02.2021,  
10.02.2021, 11.02.2021, 15.02.2021, 16.02.2021,  
17.02.2021, 18.02.2021, 19.02.2021, 22.02.2021,  
23.02.2021, 24.02.2021; and 25.02.2021

## **OPINION**

**Gulzar Ahmed, CJ:-** This Reference No.1 of 2020 under Article 186 of the Constitution of the Islamic Republic of Pakistan, 1973, has been received from the President of Pakistan, in which opinion of this Court has been sought on the following question: -

“Whether the condition of ‘secret ballot’ referred to in Article 226 of the Constitution of Islamic Republic of Pakistan, is applicable only for the elections held ‘under’ the Constitution such as the election to the office of President of Pakistan, Speaker and Deputy Speaker of National Assembly, Chairman and Deputy Chairman of Senate, Speakers and Deputy Speakers of the Provincial Assemblies and not to other elections such as the election for the members of the Senate of Pakistan held under the Elections Act, 2017, enacted pursuant to

Article 222 read with Entry 41, Part I, Fourth Schedule to the Constitution, which may be held by way of secret or open ballot, as may be provided for in the Elections Act, 2017?"

2. Notices were issued to the Advocates General of all the Provinces including the Islamabad Capital Territory. Notices were also issued to the Speaker of the National Assembly, Chairman of the Senate of Pakistan and Speakers of all the Provincial Assemblies i.e. Punjab, Sindh, Khyber Pakhtunkhwa and Balochistan, as well as the Election Commission of Pakistan. Notice was also published in newspaper so that any other person, who wishes to be heard in the matter, may do so.

3. Learned Attorney General for Pakistan has contended that the specific question on which opinion has been sought by the President of Pakistan is in respect of scope of Article 226 of the Constitution, as it presently stands and whether reference to 'election under the Constitution' made in this Article includes election for Members of Senate to be conducted under the Elections Act, 2017. He has made submissions regarding the maintainability and scope of reference under Article 186 of the Constitution and in this respect has relied upon opinion of a 12-Member Bench of this Court in Reference No.2 of 2005 by the President of Pakistan (PLD 2005 SC 873) with regard to Hisba Bill. He contended that once the President considers that the question of law of public importance has arisen, Reference under Article 186 of the Constitution could be sent and the Court will consider the same and give its opinion. He also referred to the case of Reference No.1 of 1973 reported as Special reference under Article 187 of the Interim Constitution of the Islamic Republic of Pakistan by President Zulfikar Ali Bhutto (PLD 1973 SC 563), regarding adoption of Resolution by the National Assembly for recognition of Bangladesh.

4. As regards the merit of the Reference, learned Attorney General opened his arguments by giving the scheme of the Constitution, where elections are to be conducted. He has contended that Constitution has provided Bodies and Offices to be filled through elections or appointments. He has referred to Article 41(3) read with Clause 12 of the Second Schedule of the Constitution, which provide for election of the President by secret ballot. He has referred to Articles 53 and 108 of the Constitution, which deals with the elections of the Speaker and the Deputy Speaker of the National and the Provincial Assemblies, Chairman and Deputy Chairman of the Senate, held under Article 60 of the Constitution by secret ballot. He has referred to the elections of the Prime Minister and Chief Ministers, which are conducted under Articles 91(3) and 130(3) of the Constitution. He has contended that Bodies created under the Constitution are National Assembly, Senate and Provincial Assemblies and their elections are held under the Elections Act, 2017.

5. The learned Attorney General dealt with the question of composition and the term of the National and the Provincial Assemblies and mode of elections provided in the Constitution and also the composition and term of Senate of Pakistan. He contended that the election is primarily about the machinery provisions and it is not merely about balloting, either secret or open. He contended that balloting is one aspect in the process of holding of elections, which the Court has construed broadly. He referred to Article 222 of the Constitution and contended that by this Article, Parliament has been given power to make laws for elections in the National Assembly, Senate and the Provincial Assemblies. He has contended that pursuant

to this power, given to the Parliament, the Parliament has framed the Electoral Rolls Act, 1974, the Delimitation of Constituencies Act, 1974, the Senate (Election) Act, 1975 and the Representation of People Act, 1976. All the four above noted laws were repealed by the Parliament by making a new consolidated Elections Act, 2017, which is a complete code, providing for elections in the National Assembly, Provincial Assemblies and the Senate.

6. Learned Attorney General referred to Article 225 of the Constitution, which provides that no election to a House or a Provincial Assembly shall be called in question except by an election petition presented to such Tribunal and in such manner as may be determined by the Act of *Majlis-e-Shoora* (Parliament) and noted that this Article only allows challenge to the elections of Senate, National Assembly and Provincial Assemblies by an election petition under the Elections Act, 2017. He contended that no such bar extends to elections held under the Constitution, i.e. of the President, the Prime Minister, the Chief Ministers, the Speaker and Deputy Speaker of National and Provincial Assemblies and the Chairman and Deputy Chairman, Senate.

7. While dealing with Article 226 of the Constitution, learned Attorney General referring to different terms or words used in different provisions of the Constitution and submitted that though the Houses are constituted by or under the Constitution, the elections to these Houses are elections under the Elections Act, 2017, and not under the Constitution and that the elections under Article 226 of the Constitution is only restricted to the elections held under the Constitution, that of the President, etc.

8. Learned Attorney General referred to the manner of holding of elections of the President provided in the Constitution and contended that if secret ballot was to be conducted for the elections in Senate, the word secret could have been added in Article 59(2) of the Constitution, which specifies the system of proportional representation by means of single transferable vote for election in Senate, under the Elections Act, 2017, but owing to the provision of Article 222 of the Constitution, the Parliament would have required to provide for election of Senate by secret ballot. He contended that in terms of Section 81 of the Elections Act, 2017, elections of National and Provincial Assemblies are provided to be held by secret ballot and this law cannot be amended by changing it to open ballot and gave reasons for it. He also referred to an order of this Court dated 15.04.2016 passed in Civil Appeals No.760 to 765 of 2016, in the case of Province of Sindh Vs. Muttahida Qaumi Movement, where this Court has held that elections of the Local Governments are outside the ambit of Article 226 of the Constitution.

9. The learned Attorney General emphasized about the transparency and purity of elections for attainment of the Constitutional objectives and contended that heavy responsibility lies upon the Election Commission of Pakistan to ensure free, fair and transparent elections. In support of his submissions, the learned Attorney General has relied upon the cases of District Bar Association, Rawalpindi and others v. Federation of Pakistan and another (2015 PLD 401 SC), Miss Benazir Bhutto v. Federation of Pakistan and another (PLD1988 SC 416), Mian Muhammad Nawaz Sharif v. President of Pakistan and others (PLD 1993 SC 473), Ishaq Khan Khakwani and

others v. Mian Muhammad Nawaz Sharif and others (PLD 2015 SC 275), People's Union for Civil Liberties and another v. Union of India and another (2013) 10 SCC 1), Shailesh Manubhai Parmar vs. Election Commission of India through Chief Election Commissioner and others (AIR 2018 SC 3918), Workers' Party Pakistan through General Secretary and 6 others v. Federation of Pakistan and 2 others (2013 PLD 406 SC), Province of Sindh through Chief Secretary and others v. M.Q.M. through Deputy Convener and others (PLD 2014 SC 531), Speaker, National Assembly of Pakistan, Islamabad and others v. Habib Akram and others & Sami Ullah Baloch and others v. Abdul Karim Nousherwani and others (PLD 2018 SC 678 & 405), Muttahida Qaumi Movement (MQM) through the leader of the opposition and others v. Province of Sindh through Chief Secretary, Karachi and others (PLD 2017 Sindh 169), Attaullah and another v. Government of Balochistan, Local Government Rural Development and Agrovilles Department through Secretary and another (PLD 2014 Balochistan 206), Workers' Party Pakistan through Akhtar Hussain, Advocate, General Secretary and 6 others v. Federation of Pakistan and 2 others (PLD 2012 SC 681), Malik Ameer Haider Sangha and another v. Mrs. Sumaira Malik and others (2018 SCMR 1166), Sally Textile Mills Limited and another v. Collector of Customs, Customs House, Karachi (1991 SCMR 721), Begum B. H. Syed v. Mst. Afzal Jahan Begum and another (PLD 1970 SC 29), Mehreen Zaibun Nisa v. Land Commissioner, Multan and others (PLD 1975 SC 397), Reference by the President of India under Article 143 (1) of the Constitution of India on the implementation of the Indo-Pakistan Agreement relating to Berubari Union and Exchange of Enclaves. (AIR 1960 SC 845), Kuldip Nayar v. Union of India & Ors. (AIR 2006 SC

3127), Lahore Development Authority through D.G. and others v. Ms. Imrana Tiwana and others (SCMR 2015 SC 1739), In the matter of: Reference No.2 of 2005 by the President of Pakistan (PLD 2005 SC 873), Abid Hussain v. Mst. Afsar Jehan Begum and other (PLD 1973 SC 01), Government of Punjab through Secretary, Home Department v. Zia Ullah Khan and 2 others (SCMR 1992 602), The Commissioner of Income-Tax/Wealth Tax v. Messrs Engineering Cooperative Housing Society, Lahore (PTD 2000 3388), Dalco Engineering Private Ltd. V Shree Satish Prabhakar Padhye & Ors. With Fancy Rehabilitation Trust & Anr. V. Union of India & Ors. (AIR 2010 SC 1576), Messrs Mustafa Impex, Karachi and others v. The Government of Pakistan through Secretary Finance, Islamabad and others (PLD 2016 SC 808), Election Commission of Pakistan v. Asif Iqbal and others (PLD 1992 SC 342), Mahmood Khan Achakzai and others v. Federation of Pakistan and others (PLD 1997 SC 426), Chief Justice of Pakistan Iftikhar Muhammad Chaudhry v. President of Pakistan through Secretary and others (PLD 2010 SC 61), Government of Sindh through Secretary Health Department and others v. Dr. Nadeem Rizvi and others (SCMR 2020 SC 01), Muhammad Akram Baloch v. Akbar Askani and others (2014 CLC 878), Hakam Qureshi, President, District Bar Association, Lahore and 2 others v. The Judges of the Lahore High Court through the Registrar and another (PLD 1976 SC 713) and S. Raghbir Sindh Gill v. S. Gurcharan Singh Tohra and others (AIR 1980 SC 1362).

10. Mr. Ahmed Awais, learned Advocate General, Punjab, adopted the arguments of the learned Attorney General. He additionally contended that the election to the Senate is held pursuant to the mandate given by the electorate and such mandate of the



electorate cannot be stolen by indiscipline on the part of the elected representatives. He contended that the elections to the Senate are marred by corruption and corrupt practices and Article 59 of the Constitution does not speak of secret ballot for election to the seat of Senate.

11. Mr. Arbab Muhammad Tahir, learned Advocate General Balochistan also adopted the arguments of the learned Attorney General and referred to Quranic verse on corruption and Article 21 of the Universal Declaration of Human Rights. He contended that the Election Commission of Pakistan is empowered to make pre-pole and post-pole arrangements to ensure corruption free elections, Referring to Section 238 of the Elections Act, 2017, he contended that the domestic and international election observers are allowed to observe the process of conduct of elections, access to Polling Stations, counting of votes and consolidation of results in the elections of National and the Provincial Assemblies and it should be extended to the elections of the Senate also. He has relied upon the case of Workers' Party Pakistan through Akhtar Hussain, Advocate, General Secretary & 6 others v. Federation of Pakistan & 2 others (PLD 2012 SC 681).

12. Mr. Niaz Ullah Khan Niazi, learned Advocate General, Islamabad Capital Territory (ICT) also adopted the arguments of the learned Attorney General and while referring to Article 218(3) of the Constitution, contended that it is the function of the Election Commission of Pakistan to organize and conduct the elections and make such arrangements as are necessary to ensure that the election is conducted honestly, justly, fairly and in accordance with law and that the corrupt practices are guarded against. He in support of his

submissions has relied upon the following cases of Niaz Ahmad v. Aziuddin and others (PLD 1967 SC 466), S. Raghbir Singh Gill v. S. Gurcharan Singh Tohra and others (AIR 1980 SC 1362), A. Neelalohithadasan Nadar v. George Mascrene and others (1994 SCC Suppl (2) 619), Nayini Narasimha Reddy v. Dr. K. Laxman and others [(2006) 5 SCC 239], Kuldip Nayar and other v. Union of India and others (2006) 7 SCC 1), Shailesh Manubhai v. ECL (2018) 9 SCC 100), Air Marshal (Retd). Muhammad Asghar Khan v. General (Retd). Mirza Aslam Baig, Former Chief of Army Staff and others (PLD 2013 SC 1) and Ch. Nasir Iqbal and others v. Federation of Pakistan through Secretary Law and others (PLD 2014 SC 72).

13. Mr. Shumail Ahmad Butt, learned Advocate General, Khyber Pakhtunkhwa has supported the Reference made by the President and adopted the arguments of the learned Attorney General. Additionally, he has contended that the Parliament, in terms of Article 222 of the Constitution, possesses the power to effect amendment in Section 122(6) of the Elections Act, 2017, by changing the mode and manner of conduct of elections by secret ballot to that of open ballot. He contended that the elections 'under the Constitution' are those of the President, Speaker and Deputy Speaker of National Assembly, Chairman and Deputy Chairman of Senate, Prime Minister, Speaker and Deputy Speaker of the Provincial Assemblies and the Chief Ministers of the Provinces. With the specific provision in Article 226 of the Constitution, the elections of the Prime Minister and the Chief Ministers have been excluded from being conducted by secret ballot. He has also contended that regarding secret ballot this Court has already given its judgment in the case of Niaz Ahmed v. Azizuddin and

others (PLD 1967 Supreme Court 466), where it has been held that secrecy of ballot is not an absolute rule. He has relied upon the cases of District Bar Association, Rawalpindi and others v. Federation of Pakistan and another (2015 PLD 401 SC), Muttahida Qaumi Movement (MQM) through the leader of the opposition and others v. Province of Sindh through Chief Secretary, Karachi and others (2017 PLD 169 Sindh), Attaullah and another v. Government of Balochistan, Local Government Rural Development and Agrovilles Department through Secretary and another (2014 PLD 206 Balochistan) and Kuldip Nayar v. Union of India & Ors. (AIR 2006 SC 3127).

14. Mr. Salman Talib ud Din, learned Advocate General, Sindh, contended that Article 186 of the Constitution requires obtaining of opinion from the Supreme Court by the President on pure question of law. He contended that there is no proof of corruption in Senate election and it is all based upon hearsay. He further contended that the question raised in the Reference is a political question.

15. The learned Advocate General also contended that the Constitution provides machinery for holding of elections and imposes burden upon the Election Commission of Pakistan to hold the election honestly, justly, fairly and in accordance with law and the Election Commission should ensure that the elections are held accordingly. He further contended that Article 226 of the Constitution does not allow open ballot, in that, election of members of the Senate could not be allowed by open ballot. He has further referred to Articles 51 and 59 of the Constitution to contend that open ballot for election in the Senate is not allowed by the Constitution.

16. Mian Raza Rabbani, learned Sr. ASC appearing for himself

and also for Pakistan Peoples' Party, has filed CMAs No.131/2021, 704/2021 and 1217/2021. He has raised an objection regarding the very maintainability of the Reference by contending that proceedings under Article 186 of the Constitution not similar to that of Article 184(3) thereof and the present Reference has ingredients of a petition under Article 184(3) *ibid*. He has taken us through the history of creation of Pakistan and evolution of Article 226 of the Constitution and contended that he does not stand to defend non-transparency in the electoral process and that the democratic culture evolved in Pakistan cannot be viewed in isolation to the society, and Pakistani society in all its spheres is corrupt to the core and democratic culture is the reflection of the same. He contended that in order to cleanse this very democratic culture, patchwork cannot solve the issue but requires a consolidated political package that will cover electoral reforms of Senate election to the General Elections and Local Governments' Elections.

17. He contended that though he and his party do not support horse trading but the present legal dispensation as per the Constitution, requires Constitutional amendment and an electoral reforms package is required. He made reference to the mala fide of the Cabinet and gave instances of the same and while referring to Article 172 of the Constitution of 1962, contended that this Article provides that all elections and referendums under this part shall be decided by secret ballots and Article 226 of the Constitution of 1973, has carried forward the intent of the framers of the Constitution, and Article 226 of the Constitution of 1973 is of wider scope than that of Article 172 of the Constitution of 1962, which includes all elections. He contended

that the original Article 226 of the Constitution was amended by the Constitution (Third Amendment) Order, 1985, and subsequently through Constitutional (Eighteenth Amendment) Act, 2010, the original Article 226 of the Constitution was restored. He contended that the Senate is a House that represents Federation and protect the interest of the Federating units and not the political parties.

18. Mr. Farooq H. Naek, learned Sr. ASC on behalf of Pakistan Peoples' Party Parliamentarian filed CMA No.872 of 2021. He has contended that the aim of the applicant is to build a progressive and democratic society in accordance with principles, philosophies and politics of Quaid-e-Azam Muhammad Ali Jinnah. He contended that it is evident from the bare reading of Article 186 of the Constitution that the President may obtain opinion of this Court on any question of law, whereas the question sent by the President is in essence a political question, especially in the given circumstances when the Government had already moved the (Twenty-sixth Constitution Amendment) Bill but after its failure to get the amendment, used the office of the President in shape of Reference under Article 186 of the Constitution. This Court has already decided that political questions are non-justiciable before the Courts of law.

19. With regard to the question whether the Senate Elections are held under the Constitution, he submitted that the Senate Elections are under the Constitution for the reason that Constitution of Senate, the number of its members, the electoral system of proportional representation by means of single transferable vote, the term of office, qualification and disqualification, the timing of election, the conduct of election, the method of challenging the elections are all

laid down in the Constitution itself. The Reference concedes that the election of Chairman and Deputy Chairman of Senate, Speaker and Deputy Speaker of National Assembly are under the Constitution. The relevant Articles with respect to the said positions do not offer any more details when compared with relevant provisions of the Senate election, therefore, there is no reasonable differentia to take the Senate election out of the ambit of Article 226 of the Constitution. He further contended that the literal rule of interpretation is that the Legislature says what it means and means what it says. Applying this rule to Article 226 *ibid* the election to the Senate is to be held by the secret ballot.

20. Barrister Zafar Ullah Khan, learned ASC on behalf of Pakistan Muslim League (N) has filed CMA No.1231 of 2021. He has argued that the question that Senate election should be through secret or open balloting is purely a political question, therefore, this Court may refrain from entering into political debate. Further contended that the doctrine of secrecy of ballot has a peculiar historical and philosophical background. Secrecy is linked with fundamental rights and international obligations and is ensured under the whole scheme of the Constitution. Without secrecy, representative democracy will be seriously damaged. The Constitution is binding social contract and its interpretation be in a way to integrate the nation and not to polarize it. Reference aims at a retrogressive step and also amounts to amending the Constitution.

21. Mr. Kamran Murtaza, Sr.ASC on behalf of Jamiatulema-e-Islam filed CMAs No.211 and 541 of 2021. He has submitted the instant Reference is not maintainable, inasmuch as, it raises a political

question for which the Parliament is the appropriate forum. As the Government lacks sufficient number in the Parliament, it is trying to use this Court indirectly to make amendments in the Constitution. It is further submitted that the President before passing an Ordinance under Article 89, is bound to act on the advice of the Cabinet and the Prime Minister and the term "satisfaction" is dependent upon the mechanism referred in the Rules of Business, 1973. However, the Election (Amendment) Ordinance, 2021, has been issued on the behest of one political party hurriedly, without waiting the outcome of this Reference, which shows the contradictory and confused position of the Government.

22. Mr. Mansoor Usman Awan, learned ASC on behalf of Pakistan Bar Council has submitted CMAs No.807 and 1200 of 2021. He has contended that the language of Article 226 of the Constitution contains no qualifier which limits its application to only the Elections for which the procedure has been provided in the Constitution. In presence of clear and unambiguous language, chosen by the framers of the Constitution, any distinction falls foul of principle of 'causes omissus'. Reference in this behalf was made to the case of Reference No.1 of 2012 (PLD 2013 SC 279). He contended that the Constitution prescribe the procedure for only one election, namely, the election of President, in Second Schedule to the Constitution. If Article 226 of the Constitution is to apply only to the elections for which the procedure is provided in the Constitution, it would mean that sole purpose for enacting Article 226 *ibid*, was to apply it only to the election of the President, however, the use of phrase 'All Elections' further substantiates this argument. Further contended that the

Senate elections are held pursuant to the provisions of Part VIII of the Constitution under which through Article 218 of the Constitution, the Election Commission of Pakistan has been created. This Article clearly specifies that the elections which are to be conducted under the Constitution, are the elections of both Houses of the Parliament and the Provincial Assemblies and all other elections, may be 'specified by Law', as contained in Article 218 of the Constitution. Further Contended that under Article 59(2) of the Constitution, elections are by way of 'system of proportional representation by means of the single transferable vote', which are distinct from the elections 'through proportional representation system of political parties' lists of candidates', as provided in Article 51(6)(d) of the Constitution. The requirement of guarding against the corrupt practices, under the Elections Act, 2017 and the law laid down by this Court, does not require the secrecy of the ballot to be breached. Thus, this Court may declare that the elections under the Constitution, including the Senate elections, may only be conducted by secret ballot pursuant to Article 226 of the Constitution.

23. Mr. Salahuddin Ahmed, learned ASC on behalf of the Sindh High Court Bar Association submitted CMA No.297 of 2021. He has argued that the President has wrongly and prematurely invoked Article 186 of the Constitution and the necessary preconditions for the same are not met. Inasmuch as the Reference is purposely designed to indulge in a political question, and it is an attempt to effect a Constitutional Amendment under guise of an advisory Reference. Thus, this Court may decline to answer such Reference.

24. Learned counsel further contended that the Senate



elections are the elections 'under the Constitution', as such the requirement of secret balloting, contained in Article 226 of the Constitution, is fully applicable and changing it to allow open balloting is not possible without a Constitutional Amendment. Thus, this Court may render opinion that the requirement of secret ballot in Article 226 of the Constitution is fully and squarely applicable to the Senate elections under Article 59 of the Constitution.

25. Mr. Khurram Shehzad Chughtai, learned ASC has filed CMA No.908 of 2021. He has contended that the question framed in the Reference is not a question of law rather a political question for the simple reason that the whole set of assertions, grounds, contentions and arguments of the learned Attorney General are based on factual controversy that is buying of votes by the candidates in the election of Senate, which are result of secret ballot, therefore, the open ballot should be adopted. It is further submitted that the President has sent this Reference for advice of this Court to defeat the clear Constitutional provisions regarding 'secret ballot' contrary to his constitutional role and has also promulgated the Elections (Amendment) Ordinance, 2021. The actions in connection with the Reference and the said Ordinance are *ex facie* an attempt to disturb the legislative business regarding elections and also an attempt to cause harm to the constitutional mandate of Election Commission of Pakistan. Thus, the Reference and the said Ordinance are *prima facie* tainted with *malice* in Law and facts. Further contended that there is not a single election, which was unanimously accepted as free and fair by all the political parties and always challenged by loosing parties. In 2014, a Parliamentary Committee on Electoral Reforms was constituted, which

after deliberations and considerations submitted its report, pursuant thereto the Constitution (Twenty-sixth Amendment) Bill, 2017, which is still under consideration. In January, 2020, a Cabinet Committee was constituted to formulate recommendations regarding electoral reforms to ensure free and fair elections in the country based upon the recommendations of the Committee. The Cabinet approved electoral reforms package, which is still under consideration. It is the fundamental duty and obligation of the Parliament to provide mechanism for free and fair election.

26. Mr. Qamar Afzal, learned ASC has filed CMAs No.154 and 1295 of 2021 and has submitted that our Constitution is an instructive Constitution and not an exhaustive one, which is like a seed in womb to allow growth, therefore, it has provided Advisory Jurisdiction under Article 186 of the Constitution empowering this Court to exercise a sovereign inherent authority which is more than a report or opinion. The object of the Reference is to get an opinion from this Court that the Senate elections are not conducted "under the Constitution", and if this be so through an amendment in Section 122(6) of the Elections Act, 2017, the Senate election could be held through open balloting. This Court has sovereign authority to discuss the merits and demerits of secret balloting vis-à-vis open balloting and may advise a solution finally to be undertaken by the Parliament. It was prayed that this Court may answer the Reference by declaring the Senate election "under the Constitution", with an exception to Article 59(b) and (c) of the Constitution and may advise that the secret vote cast shall be open for inspection after the expiry of the tenure of the public office for which the vote is cast.

27. Mr. Waheed Ahmed Kamal, Secretary General, Pakistan Tehreek-e-Insaf (Gulalai) has filed CMA No.1233 of 2021. He has submitted that the danger in secret balloting is that the corruption will rank high and will damage the integrity of the country. There is allegation of buying of votes in the Senate election for handsome amount of money, which practice should be stopped.

28. Syed Iqbal Hashmi, learned ASC has filed CMAs No.231 of 2021. He has addressed on the history of Article 226 of the Constitution and prayed for allowing him to assist this Court.

29. Mr. Hassan Ifran Khan, learned ASC has filed CMA No.1201 of 2021. He has submitted that the Senate election is clearly "under the Constitution", as provided by Article 59 of the Constitution. The procedure for election is provided under Article 59(1)(a) to (f) and Article 59(2) of the Constitution through proportional representation by means of the single transferable vote. The Elections Act, 2017 only provides various procedural steps to be adopted in the election process. Article 59 of the Constitution does not provide for secret ballot because under Article 226 of the Constitution, the secret ballot has to be adopted for all elections held under the Constitution, except the Prime Minister and the Chief Minister. The Senate elections are not separate from the elections of the Chairman and the Deputy Chairman of Senate but part and parcel of each other. There is no basis for the Reference to say that while the elections to the Office of the Chairman and the Deputy Chairman of Senate, fall "under the Constitution", the election for members of the Senate are not under the Constitution. Article 226 of the Constitution excludes only election of Prime Minister and Chief Minister and does not exclude the Senate elections. The

issues of corrupt practices in the elections have already been addressed by the Elections Act, 2017. Thus, the Reference in question may be answered in negative.

30. Mr. Muddassar Hassan, Advocate High Court, has submitted CMAs No.130 and 1292 of 2021. He has argued that the word "All" in Article 226 of the Constitution, was used to emphasize not to exclude any one of the elections mentioned in the Constitution from the application of Article 226 of the Constitution. If the intention of the legislation was to exclude the Senate election from the scope and application of Article 226 of the Constitution it could have clearly done so, in the same manner as was done in the case of Prime Minister and the Chief Minister.

31. Mr. Azhar Iqbal, learned ASC has submitted CMA No.111 of 2021. He has argued that in democracy there is no place for corrupt practices. In order to counter the rampant corruption in the Senate election, it is very important to make certain arrangements for guarding against the corrupt practices and the only mode is to print serial number on the counter file as well as on the ballot paper.

32. Mr. Sajeel Sheryar Swati, learned ASC has filed concise statements on behalf of the Election Commission of Pakistan, wherein it is submitted that Article 226 contains three phrases, 'all', 'under the Constitution' and 'other than', which are relevant for the purpose of this Reference. The Reference, primarily, rests on the interpretation of the term 'under the Constitution' and suggests that an election, which is not under the Constitution, could be conducted in a manner other than by 'secret ballot'. The most ordinarily and natural meaning elucidate by Article 226 *ibid* is that 'elections under the Constitution'

are those elections, which are held by or under the authority of the Constitution. This Article provides only two exceptions, namely, election to the office of the Prime Minister and the Chief Minister. As per rules of statutory interpretation when exceptions to a general rule have been specified in the rule itself, those are the only exceptions and no other exception can be implied or read into the said provision.

33. We have considered the submission made by the learned counsel and have also gone through the record.

34. As the issue of very maintainability of the Reference has been raised, we take up this issue first.

35. The learned Advocate General, Sindh, has raised the objection that the Reference raises a political question and therefore, this Court may not give its opinion. Similar objection has also been raised by Mr. Farooq H. Naek, Mr. Zafrullah Khan, Mr. Kamran Murtaz, Mr. Salah-ud-Din Ahmed and Mr. Khurram Shahzad Chughtai, learned counsel. Mian Raza Rabbani, learned Sr. ASC has objected to the Reference on the ground that proceedings under Article 186 are not akin to that of Article 184(3) of the Constitution and the present Reference has ingredients of a petition under Article 184(3) of the Constitution.

36. The learned Attorney General has made submissions regarding the very maintainability of the Reference. He has contended that the Reference is very much maintainable and the President of Pakistan has rightly made the Reference in which opinion of this Court has been sought on the question of law, which the President has considered to be of public importance, and this Court has to consider such a question and report its opinion to the President. He has cited

previous precedents on which the President has sought opinion from this Court and the Court has given its opinion.

37. Whether the question, as is posed by the President in the present Reference, is a question of law of public importance, learned Attorney General has contended that it is such a question and admitted that the question as to whether it is desirable to amend any provision of the Constitution or the law, including Article 226 of the Constitution, or whether there exists a consensus in the Parliament in that regard, are political issues which fall within the exclusive domain of the Parliament, however, as it is within the exclusive domain of this Court to interpret the Constitutional provision, the President has sought opinion of this Court, which necessarily requires interpretation of the Constitution with particular reference to Article 226 of the Constitution.

38. The Constitution of 1973 in its Article 186, has given Advisory Jurisdiction to this Court in the following terms:

**"186. Advisory Jurisdiction** (1) If, at any time, the President considers that it is desirable to obtain the opinion of the Supreme Court on any question of law which he considers of public importance, he may refer the question to the Supreme Court for consideration.

(2) The Supreme Court shall consider a question so referred and report its opinion on the question to the President."

The plain reading of this Article shows that if at any time the President considers that it is desirable to obtain the opinion of the Supreme Court on any question of law which he considers of public importance, he may refer the question to this Court for consideration, and this Court shall consider a question so referred and report its opinion on the said question to the President. The underlined principle

is that the question has to be of law and of public importance.

39. The first ever Reference under the Advisory Jurisdiction of this Court was filed by his Excellency the Governor General, which is reported as Reference by His Excellency the Governor-General (PLD 1955 FC 435). In this Reference, the Governor General has referred the following question to the then Federal Court:

"(1) What are the powers and responsibilities, of the Governor-General in respect of the Government of the country before the new Constituent Convention passes the necessary legislation?

(2) The Federal Court having held in Usif Patel's case that the laws listed in the Schedule to the Emergency Powers Ordinance could not be validated under section 42 of the Government of India Act, 1935, nor retrospective effect given to them, and no Legislature competent to validate such laws being in existence, is there any provision in the constitution or any rule of law applicable to the situation by which the Governor-General can by order or otherwise declare that all orders made, decisions taken and other acts done under those laws shall be valid and enforceable and those laws which cannot without danger to the State be removed from the existing legal system shall be treated as part of the law of the land until the question of their validation is determined by the new Constituent Convention?

Subsequently as suggested in the course of this Court's order, dated the 18th April 1955, the following further questions were also referred for opinion:

(3) Whether the Constituent Assembly was rightly dissolved by the Governor-General?

(4) Whether the Constituent Convention proposed to be set up by the Governor-General will be competent to exercise the powers conferred by subsection (1) of section 8 of the Indian Independence Act, 1947, on the Constituent Assembly?

Question No. 4 was later modified and in the form in which it has now to be answered is:

Whether the Constituent Convention proposed to be set up by the Governor-General will be competent to exercise the powers conferred by section 8 of the Indian Independence Act, 1947, on the Constituent Assembly."

40. This Court extensively considered the question so posed

before it and ultimately gave its opinion as follows:

**"OPINION OF THE COURT**

Question No.1? What are the powers and responsibilities of the Governor-General in respect of the Government of the country before the new Constituent Convention passes the necessary legislation?

Answer-That this question is too general and need not be answered.

Question 2.-? The Federal Court having held in Usif Patel's case (PLD 1955 F C 387), that the laws listed in the Schedule to the Emergency Powers Ordinance could not be validated under section 42 of the Government of India Act, 1935, nor retrospective effect given to them, and no Legislature competent to validate such laws being in existence, is there any provision in the Constitution or any rule of law applicable to the situation by which the Governor-General can, by order or otherwise declare that all orders made, decisions taken, and other acts done under those laws, shall be valid and enforceable and those laws which cannot without danger to the State be removed from the existing legal system shall be treated as part of the law of the land until the question of their validation is determined by the new Constituent Convention?

Answer.-That in the situation presented by the Reference the Governor-General has during the interim period that power under the common law of civil or state necessity of retrospectively validating the laws listed in the Schedule to the Emergency Powers Ordinance, 1955, and all those laws, until the question of their validation is decided upon by the Constituent Assembly are during the aforesaid period valid and enforceable in the same way as if they had been valid from the date on which they purported to come into force.

Question No.-3? Whether the Constituent Assembly was rightly dissolved by the Governor-General.

Answer.- That on the facts stated in the Reference, namely, (1) that the Constituent Assembly, though it functioned for more than 7 years, was unable to carry out the duty to frame a constitution for Pakistan to replace the transitional constitution provided by the Indian Independence Act, 1947 : (2) that in view of the repeated representations from and resolutions passed by representative bodies throughout the country the Constituent Assembly, in the opinion of the Governor-General, became in course of time wholly unrepresentative of the people of Pakistan, and ceased to be responsible to them ; (3) that for all practical purposes the Constituent Assembly assumed the form of a perpetual Legislature ; and (4) that throughout the period of its existence the Constituent Assembly



asserted that the provisions made by it for the constitution of the Dominion under subsection (1) of section 8 of the Indian Independence Act were valid laws without the consent of the Governor-General, the Governor-General had under section 5 of the Indian Independence Act, legal authority to dissolve the Constituent Assembly.

Question No.4.- Whether the Constituent Convention proposed to be set up by the Governor-General, is competent to exercise the powers conferred by subsection (1) of section 8 of the Indian Independence Act, 1947, on the Constituent Assembly?

Answer.? That subject to this :

(1) that the correct name of the Constituent Convention is Constituent Assembly ;

(2) that the Governor-General's right to dissolve the Assembly can only be derived from the Indian Independence Act ;

(3) that the arrangements for representation of States and Tribal Areas can, under the proviso to subsection (3) of section 19 of the Indian Independence Act, be made only by the Constituent Assembly and not by the Governor-General ; and

(4) that the Governor-General's duty being to bring into existence a representative legislative institution he can only nominate the electorate and not members to the Constituent Assembly.

The new Assembly, constituted under the Constituent Convention Order, 1935, as amended to date, would be competent to exercise all the powers conferred by the Indian Independence Act, 1947, on the Constituent Assembly including those under section 8 of that Act."

41. In Reference by the President of Pakistan under Article 162

of the Constitution of the Islamic Republic of Pakistan (PLD 1957 SC

219), the question for the court's opinion was as under:

"Is the Governor of a Province in Pakistan empowered under Article 83 or any other provision of the Constitution or any other principle of law to dissolve the Provincial Assembly of his Province functioning under Article 225 of the Constitution?"

The Court gave its opinion as follows:

"For these reasons, we are of the view that the Governor has no power to dissolve the Provincial Assembly functioning under Article 225, and in accordance with this opinion the reply to the Reference is in the

negative."

42. In Special Reference under Article 187 of the Interim Constitution of the Islamic Republic of Pakistan by the President Zulfikar Ali Bhutto (PLD 1973 SC 563), the question for consideration, *inter alia*, was as under:

"Can the Resolution of the purport described in paragraph 6 above, and envisaging such constitutional measures as may be, necessary before the according of formal recognition be validly adopted by to National Assembly?"

The question posed to the Court was with regard to the Government of Pakistan giving formal recognition to Bangladesh through a dissolution of the National Assembly of Pakistan. The Court gave its opinion, *inter alia*, that there is no bar to the National Assembly for considering or adopting the resolution of the purport described in Para-6 of the Reference.

43. In Reference made by the President of Pakistan under Article 186 of the Constitution (PLD 1989 SC 75), the President of Pakistan has sent the following question for opinion of this Court:

"In view of the aforementioned circumstances what measures may be adopted to enable the Federal and Provincial Governments to authorize incurring of expenditure out of the Federal and Provincial Consolidated Funds mentioned above in the absence of National and Provincial Assemblies after 31-10-1988 till the respective Budgets are passed by the new National and Provincial Assemblies to be elected in the ensuing general elections as aforesaid."

The Court gave its opinion as follows:

"In accordance with the majority opinion, the question referred is answered as follows:-

The question referred under Article 186(1) by the President of Pakistan is answered under Article 186(2) in the terms that the Federal and Provincial Governments can authorize incurring of expenditure out of the Federal and Provincial Consolidated

Funds upto one month after the declaration of the results of the general election of the National and the Provincial Assemblies, scheduled for 16 and 19 November, 1988, respectively."

44. In Reference No.2 of 1996 reported as Al-Jihad Trust through Raees-ul-Mujahidin Habib Al-Wahabul Khairi, Advocate Supreme Court and another Vs. Federation of Pakistan and others (PLD 1997 SC 84) wherein petitions under Article 184(3) were also considered by this Court along with Reference, the question was whether or not the powers of the President to make appointment to the Supreme Court and the High Courts under Articles 177 and 193 of the Constitution are subject to provision of Article 48(1) of the Constitution. The unanimous opinion of the Court was as follows:

"For the reasons to be recorded later, we hold that for the appointments of Judges of the superior Courts under Articles 177 and 193, Article 48(1) of the Constitution is attracted and the President shall act in accordance with the same provided it is in accordance with the judgment in the case of Al-Jehad Trust v. Federation of Pakistan PLD 1996 SC 324."

45. Another reference, Reference No.2 of 2005 by the President of Pakistan (PLD 2005 SC 873) was in respect of constitutional validity of the Hisba Bill enacted by the Provincial Assembly of the then North-West Frontier Province (now Khyber Pakhtunkhwa). The Court not only found the reference to be maintainable but gave its opinion holding various provisions of Hisba Bill as ultra vires the Constitution.

46. Another reference, Reference No.01 of 2012 (PLD 2013 SC 279) was with regard to seniority of a Judge in the Islamabad High Court and his appointment as Chief Justice of that Court. This Court, *inter alia*, gave opinion that though it is desirable that the most senior Judge of the High Court should be appointed as Chief Justice of that

Court, however, in view of clauses (2) and (3) of Article 175A read with clause (5) thereof, appointment of a judge not most senior judge as a Chief Justice of High Court is not violative of any provision of the Constitution.

47. The overall examination of the opinions rendered by this Court on the References made by the then Governor General and the President shows that most diverse questions have been sent for opinion of this Court, which questions were of law and of public importance. The consensus of these opinions show that whenever question or questions are sent to this Court for opinion, the Court has always given its opinion. However, where the question does not admit of opinion, the Court has answered it accordingly. As to what the opinion of the Court would be, the same can only be decided on examining the material placed before the Court for seeking of the opinion. In our view, the present Reference and the question posed before the Court is within the domain of Article 186 of the Constitution.

48. We may note that the very document of the Constitution of 1973, is a political document, which the people of Pakistan through their chosen representatives have given to themselves, in which limits of powers to be exercised by the State organs have been expressly laid down. The State and its organs have to function within those limits and all excesses of limits would be nothing but illegal. Broadly speaking, where the questions such as that of Foreign Policy, Defence of the Country from external threat, Monetary Policy, making amendments in the Constitution, organizing the governments at the Federal and Provincial level apparently, are the questions purely of

political nature and the Courts always exercise restraint in entering upon such questions as these questions necessarily are best left to the people, subject, however to the law laid down by this Court in the case of District Bar Association, Rawalpindi v. Federation of Pakistan (PLD 2015 SC 401) which is a full Court decision.

49. The question that has been posed before the Court by the present Reference is more of interpretation of the Constitutional provisions, particularly, Article 226 of the Constitution and in all circumstances, it is the exclusive domain of the superior Courts especially this Court, to interpret the Constitutional provisions. In the District Bar Association, Rawalpindi's case *ibid* this Court has observed that in Pakistani Constitutional dispensation, the duty of the judiciary was to protect the Constitution as the embodiment of the will of the people. Failing to do so, would deny the role for which the Courts had been created. This important consideration must be factored into the role of the Courts and Judges while interpreting the Constitution. Powers vested in and exercisable by Courts were not a matter of Parliamentary grace or sufferance, but were granted to protect the people against the excesses, *inter alia*, of the State organs and functionaries. As such, these powers were to be guarded vigilantly against erosion and encroachment because the same were a grant of the Constitution for an important fiduciary purpose.

50. Thus, the superior Courts and this Court, being the exclusive forum for the interpretation of the constitutional provisions, conferred on it by the Constitution itself, and the question which is raised in the present Reference being primarily of interpretation of the constitutional provisions, particularly, its Article 226, we, in our

opinion, find the Reference to be maintainable.

51. Now dealing with the question in the Reference, it is essential to read Article 226 of the Constitution, in the first place, which is as follows:-

**"226. Election by secret ballot.-** All elections under the Constitution, other than those of the Prime Minister and the Chief Minister, shall be by secret ballot."

It is apparent from reading of Article 226 of the Constitution that it has made provision that all elections under the Constitution, other than those of the Prime Minister and the Chief Minister, shall be by secret ballot.

52. Before proceeding to interpret this Article of the Constitution, it is necessary to consider the scheme of the Constitution providing for the elections. The Constitution has provided Offices and Bodies, which are to be elected and those Offices are that of the President of Pakistan, the Prime Minister of Pakistan, the Speaker and the Deputy Speaker of the National Assembly, the Chairman and the Deputy Chairman of the Senate, the Chief Ministers of the Provinces and the Speaker and the Deputy Speaker of the Provincial Assemblies.

53. Article 41(3) of the Constitution provides that the President shall be elected in accordance with the provision of Second Schedule by the members of the Electoral College consisting of the members of both Houses, i.e. the National Assembly and the Senate and members of the Provincial Assemblies. The Second Schedule to the Constitution enjoins upon the Election Commission of Pakistan to hold and conduct the election of the Office of the President and whole procedure for the election and announcing of its result, has been laid down in the Second Schedule to the Constitution.

54. The election to the Office of the Prime Minister is provided under Article 91(3) of the Constitution and clause (4) thereof provides that the Prime Minister shall be elected by the votes of the majority of the total membership of the National Assembly. The election to the Office of the Speaker and the Deputy Speaker of the National Assembly is provided in Article 53(1) of the Constitution, while election to the Office of the Chairman and the Deputy Chairman of the Senate is provided in Article 60(1) of the Constitution. The election to the Office of the Chief Minister of the Province is provided under Article 130(3) of the Constitution and clause (4) thereof provides that the Chief Minister shall be elected by the votes of the majority of the total membership of the Provincial Assembly. The election to the Office of the Speaker and the Deputy Speaker of the Provincial Assembly is provided under Article 108 of the Constitution. Article 51(6) of the Constitution provides for the election of the National Assembly. Article 59(1) and (2) of the Constitution provides for the election to fill seats in the Senate.

55. As we are dealing with the matter of election to the Senate. Article 59(1) & (2) needs to be responded as under:-

“59. (1) The Senate shall consist of [ninety-six] members, of whom,-

(a) fourteen shall be elected by the members of each Provincial Assembly;

\* \* \* \* \*

(c) two on general seats, and one woman and one technocrat including *aalim* shall be elected from the Federal Capital in such manner as the President may, by Order, prescribe;

(d) four women shall be elected by the members of each Provincial Assembly;

(e) four technocrats including *ulema* shall be elected by the members of each Provincial Assembly; and

(f) four non-Muslims, one from each Province, shall be elected by the members of each Provincial Assembly:

Provided that paragraph (f) shall be effective from the next Senate election after the commencement of the Constitution (Eighteenth Amendment) Act, 2010.

(2) Election to fill seats in the Senate allocated to each Province shall be held in accordance with the system of proportional representation by means of the single transferable vote.

Clause (1) of Article 59 of the Constitution provides that the Senate shall consist of ninety-six members and paragraphs (a) to (f) provide for election of the members of the Senate. Clause (2) of Article 59 of the Constitution provides that the election to fill seats in the Senate allocated to each Province shall be held in accordance with the system of proportional representation by means of the single transferable vote.

56. The use of the word "elected", which is a second form of word elect of which noun is "election" will bring this very election within the term 'all elections under the Constitution', as provided in Article 226 of the Constitution and such elections are to be held by secret ballot. No other meaning to Article 226 of the Constitution can legitimately be given than the one that the election to the Senate are elections under the Constitution and they are to be held by secret ballot. No exclusion of elections either of the President, or that of the Speaker and the Deputy Speaker of the National as well as the Provincial Assemblies, and the Chairman and the Deputy Chairman of the Senate, from the ambit of Article 226 of the Constitution, which has itself excluded from its operation, the elections of the Prime Minister and the Chief Ministers.

57. Part VIII of the Constitution deals with the Elections.



Chapter 2 thereof contains, *inter alia*, Article 222, which is as follows: -

"222. Subject to the Constitution, [Majlis-e-Shoora (Parliament)] may by law provide for—

- (a) the allocation of seats in the National Assembly as required by clauses (3) and (4) of Article 51;
- (b) the delimitation of constituencies by the Election Commission [including delimitation of constituencies of local governments];
- (c) the preparation of electoral rolls, the requirements as to residence in a constituency, the determination of objections pertaining to and the commencement of electoral rolls;
- (d) the conduct of elections and election petitions the decision of doubts and disputes arising in connection with elections;
- (e) matters relating to corrupt practices and other offences in connection with elections; and
- (f) all other matters necessary for the due constitution of the two Houses [,] the Provincial Assemblies [and local governments];

but no such law shall have the effect of taking away or abridging any of the powers of the Commissioner or an Election Commission under this Part."

58. Pursuant to this very provision of the Constitution, the Majlis-e-Shoora (Parliament) has promulgated the Elections Act, 2017. Section 239 of the Act of 2017, gave powers to the Commission, by notification in the official gazette and published on the website of the Commission, to make rules for carrying out the purposes of the said Act. The Election Rules, 2017, have been made by the Election Commission of Pakistan, in the manner provided by Section 239 of the Act of 2017.

59. Chapter VII of the Elections Act, 2017, deals with the subject of conduct of election to the Senate and it contains Sections 105 to 131, where exhaustive manner has been provided for the conduct of election to the Senate. Section 122 thereof deals with the

procedure of voting and sub-section (6) thereof provides as follows:

“(6) The poll for election of Members of the Senate shall be held by secret ballot.”

Though the above mention sub-section (6) of Section 122 of the Elections Act, 2017, has laid down that the poll for election of members of the Senate shall be held by secret ballot but making of this provision will not cast any shadow or doubt on provision of Article 226 of the Constitution, being a Constitutional provision which independently controls its own mandate being the supreme law of the land.

60. In Section 81 of the Elections Act, 2017, provision has been made that elections shall be held by secret ballot and, subject to provisions of Section 93 (Postal ballot), 94 (Voting by Overseas Pakistanis) and Section 103 (Electronic voting and biometric verification). This provision is contained in Chapter V of the Elections Act, 2017, which provides for the conduct of elections to the Assemblies.

61. The learned Attorney General has contended that the elections to the Assemblies by direct and free voting is provided in the very Constitution. Such voting cannot be held by open ballot as the very principle of direct voting and free voting requires secret ballot. Thus, providing for secret ballot in Section 81 of the Elections Act, 2017, does not change the very character of the elections, which are provided by the Constitution to be conducted through secret ballot. Same is the case with regard to the provision of sub-section (6) of Section 122 of the Elections Act, 2017, where it has provided for secret ballot in the election of the members of the Senate.

62. We may also make reference to the provision of Article 225 of the Constitution, which provides that no election to a House or a Provincial Assembly shall be called in question except by an election petition presented to such Tribunal and in such manner as may be determined by Act of Majlis-e-Shoora (Parliament). The learned Attorney General has contended that this very Article of the Constitution i.e. Article 225 only provides for challenge to elections for House, which is defined under Article 260 of the Constitution to mean the Senate or the National Assembly, and to the Provincial Assemblies, and this bar does not extend to the elections that of the President, the Prime Minister, the Chief Minister, the Speaker and the Deputy Speaker of the National Assembly, the Chairman and the Deputy Chairman of the Senate and the Speaker and the Deputy Speaker of the Provincial Assemblies.

63. We may not like to give any opinion on this very submission of the learned Attorney General for that while making interpretation of Article 226 of the Constitution, the construction and interpretation of Article 225 of the Constitution substantially may not be of much relevance, as no nexus, apparently, is found between the two Articles.

64. The learned Attorney General during the course of his arguments has greatly emphasized upon the provisions of paragraphs (d) and (e) of clause (6) of Article 51 of the Constitution, to contend that the reserved seats for women and reserved seats for non-Muslims in the National Assembly are not filled in by direct and free vote rather by the proportional representation system of political parties' lists of candidates. He has contended that no election to these seats are held, in that, no voting or polling for these seats are conducted, rather the

names from the parties' lists for the seats provided in paragraphs (d) and (e) are accepted to be elected in the National Assembly. His contention was that this different manner of election of seats in the National Assembly, to be filled under paragraphs (d) and (e) will come in direct conflict with Article 226 of the Constitution but it can be reconciled, if it is accepted that Article 51 *ibid* only provides for composition and complexion of the National Assembly that is comprising of directly elected representative of the people on general seats, women seats and minority seats through method specified there, leaving the elections to be conducted in accordance with law.

65. We may note that such an interpretation as proposed by the learned Attorney General, apparently, does not read out from the Constitution as the elections to the National Assembly as a whole is provided in Article 51(6) *ibid* and a special method and manner of elections to the women seats and the minority seats has itself been provided in constitutional machinery, and these elections are to be held as elections under the Constitution, and cannot be legally and justifiably separated from the scheme of elections provided in the Constitution.

66. Paragraph (a) of clause (6) of Article 51 of the Constitution provides that the constituencies for the general seats shall be single member territorial constituencies and the members to fill such seats shall be elected by direct and free vote in accordance with law. This provision specifically deals with the manner in which constituencies for the general seats are to be voted and while election itself is to be conducted under the very Article 51(6) *ibid*, the manner of direct and free vote has been left to be in accordance with law. No such similar

provision has been made in respect of the election to the seats reserved for women and seats reserved for non-Muslims, which are to be conducted in the manner as is provided in paragraphs (d) and (e) of clause (6) of Article 51 of the Constitution.

67. The learned Attorney General has contended that Article 226 of the Constitution does not use the term all elections, referred to in the Constitution, shall be by secret ballot or all elections, to the Offices and Bodies established under the Constitution, shall be by secret ballot.

68. We see no reason as to why Article 226 of the Constitution in any manner be read other than the language, which has been applied and used in the very Article and it plainly says all elections under the Constitution, other than those of the Prime Minister and the Chief Minister, shall be by secret ballot. Once the Article 226 itself uses the term 'all elections under the Constitution', it cannot be read in any other manner than that all elections under the Constitution, as stated and discussed in the preceding paras.

69. It is true that general principle of interpretation of the Constitution is that no specific provision of the Constitution has to be read in isolation. The Constitution is an organic whole. It is true that no provision of the Constitution could be interpreted in isolation, rather the Constitution has to be read organically and holistically, and articles and clauses of the Constitution, if read in isolation from the rest of the Constitution, may mislead the readers because the meaning of the Constitution has to be gathered from the Constitution as an integrated whole, not as a mechanical deduction but based on reasons.

70. In this background, the learned Attorney General has read

different provisions of the Constitution to demonstrate that in some of the provisions of the Constitution, the Constitution has used the words 'by the Constitution', 'under the Constitution', 'by or under the Constitution', 'by the Constitution or by Act of Parliament', 'by the Constitution or by or under any law', 'by the Constitution or by law made by Parliament', 'by, under, or by virtue of the Constitution', 'in accordance with the Constitution', 'by or under an Act of Parliament, 'by or under any law' and 'by virtue of'. He contends that by use of different terminologies in the constitutional provisions, each of such terminologies is to be given meaning in the context in which the same has been used and thus, in the present context it only means that the Houses have to be constituted by law and under the Constitution. The elections to these Houses are elections under the Elections Act, 2017 and not under the Constitution, and reference to election under Article 226 of the Constitution is only restricted to the elections held under the Constitution itself, such as, election of the President and not the election of the Houses, which are held under the Elections Act, 2017.

71. It is also settled principle of interpretation of the constitutional provisions that there is a possibility of restricting the meaning of certain words in the Constitution, to the situation provided by the Constitution itself. No different meaning could be assigned to specific words in a given provision of the Constitution for the reason that in other places the Constitution has used different terminologies. Even though there may be different terminologies used in the Constitution but until any nexus is found by those other terminologies to the terminology used in a specific provision of the Constitution, in our view, the very specific provision has to be given plain meaning to it

without the reading into it.

72. As noted in the preceding discussion that the elections to the Houses are provided by the Constitution itself and we cannot see as to how the election, for Houses, which otherwise are to be held under the Constitution, could be taken out from the purview of the Constitution and hold that they are held under the Elections Act, 2017. Taking of the view, as propounded by the learned Attorney General, in our view, will not be harmonious and holistic construction of the Constitution.

73. Article 226 of the Constitution has its own characteristics and when read as a whole, leads to only one conclusion that the words 'all elections under the Constitution', are all those elections, which are provided in the Constitution including the elections to the Senate. The elections to the Senate are held under the Constitution and the procedure and machinery provision for conducting of the elections to the Senate is laid down in the Elections Act, 2017. The substantive provision of the elections to the Senate are contained in the Constitution while the Elections Act, 2017, only deals with the procedure and machinery provision for holding of such elections.

74. As regard the transparency and purity in the elections, Article 218(3) of the Constitution provides as follows: -

**"218. Election Commission.-** (1) .....  
(2) .....  
(3) It shall be the duty of the Election Commission to organize and conduct the election and to make such arrangements as are necessary to ensure that the election is conducted honestly, justly, fairly and in accordance with law, and that corrupt practices are guarded against."

In the case of Workers' Party Pakistan through Akhtar Hussain,

Advocate, General Secretary and 6 others vs. Federation of Pakistan and 2 others (PLD 2012 SC 681), this Court while interpreting Article 218(3) of the Constitution has observed as follows:

“40. A bare reading of Article 218(3) makes it clear that the Election Commission is charged with the duty to 'organize' and 'conduct the election'. The language of the Article implies that the Election Commission is responsible not only for conducting the election itself, but also for making all necessary arrangements for the said purpose, prior to the Election Day. By conferring such responsibility on the Election Commission, the Constitution ensures that all activities both prior, on and subsequent to Election Day, that are carried out in anticipation thereof, adhere to standards of justness and fairness, are honest, in accordance with law and free from corrupt practices. This Court in Election Commission of Pakistan v. Javaid Hashmi and others (PLD 1989 SC 396), observed that "(g)enerally speaking election is a process which starts with the issuance of the election programme and consists of the various links and stages in that behalf, as for example, filing of nomination papers, their scrutiny, the hearing of objections and the holding of actual polls. If any of these links is challenged it really (is) tantamount to challenging the said process of election". It interpreted that the phrase 'conduct the election' as having "wide import" and including all stages involved in the election process. These observations subject all election related activities that take place between the commencement and the end of the election process to the jurisdiction conferred on the Election Commission under Article 218(3). The Election Commission therefore has to test all election related activities that are carried out in the relevant period, both individually and collectively, against the standards enumerated therein.

41. The Election Commission may also exercise its powers in anticipation of an ill that may have the effect of rendering the election unfair. In the case titled as In Re: Petition filed by Syed Qaim Ali Shah Jellani (PLD 1991 Jour. 41) the Elections Commission exercised its powers under Article 218(3) pre-emptively, by making all necessary arrangements to ensure that a certain class of people would be allowed to vote. This case implies that where a violation of the standards mentioned in Article 218(3) has not as yet taken place, the Election Commission is legally empowered under Article 218(3) to exercise its powers pre-emptively in order to avoid a violation of these standards. Furthermore, Mst. Qamar Sultana v. Public at Large (1989 MLD 360) and In Re: Complaint of Malpractices in Constituency No. NA-57, Sargodha-V (supra) both reinforce the argument that the Election Commission is fully empowered by Article 218(3) to make 'such orders as may in its opinion be



necessary for ensuring that the election is fair, honest etc'. These decisions recognize that the Election Commission enjoys broad powers not only to take pre-emptive action but also to pass any and all orders necessary to ensure that the standards of 'honesty, justness and fairness' mentioned in Article 218(3) are met.

While dealing with the provision of Article 220 of the Constitution, this Court has observed as follows:

"42. ... Article 220 of the Constitution also directs the Federal and Provincial machinery to assist the Election Commission in fulfilling its constitutional responsibilities. The law, therefore, entrusts the Election Commission with exclusive, broad and extensive powers to attend to all issues related directly and ancillary to the election process."

In the case of Ch. Nasir Iqbal and others v. Federation of Pakistan through Secretary Law and others (2013 SCMR 874), while considering the difficulties faced by the Election Commission of Pakistan regarding identification of Pakistani voters living abroad, this Court observed as follows:

" ... Firstly, amendment in the Representation of the People Act, 1976 and signing of MOUs with the countries where ECP proposed to extend the facility of voting to Overseas Pakistanis on the plea that in some of the countries such congregations are prohibited. Attending to this aspect of the case, we observe that as at present interim Government is functioning, the amendments so desired or required can be made by adhering to the procedure of temporary legislation, as provided under Article 89 of the Constitution. So far as signing of MOUs is concerned, no law has been cited, however, in this behalf if need be, the ECP can solicit opinion from the Ministry of Foreign Affairs;

Secondly, the issue of non-availability of software, which shall be used by the Overseas Pakistanis for the purpose of extending facility/benefit to cast their votes and if the Ministry of I.T. is taken into confidence or independently the I.T. experts are engaged with the mandate to prepare such software under the instruments as early as possible but in any case much before the date of polling this difficulty can also be overcome; and

Thirdly, the issue of identification of the voters/electors who are living in different countries.

Again this issue relates to NADRA and on taking on board the authorities of NADRA, the issue being faced by the ECP can conveniently be resolved.

2. We are constrained to observe that these petitions are pending since 2011 onward and much time has already been given to the ECP to do the needful, but so far no progress in this behalf has been made except analyzing suggestions which were put forward by the Court itself and offering explanation to convince the Court that extending the right of franchise to the Overseas Pakistani Citizens is not possible this time but we are not persuaded because as has been observed time and again that these difficulties are not insurmountable and could conveniently be solved within a shortest possible time if there is a coordinated effort between the ECP, Ministry of Foreign Affairs, Ministry of Law and Justice, NADRA and other authorities relevant in this behalf in order to achieve the object and all possible efforts must be made to allow an opportunity to the Overseas Pakistanis so they may participate in the election of their representatives in National and Provincial Assemblies."

77. Article 222 of the Constitution while empowering the Majlis-e-Shoora (Parliament) to make laws, *inter alia*, providing for matters relating to corrupt practices and others offences in connection with elections but has provided that no such law shall have the effect of taking away or abridging any of the powers of the Commissioner or the Election Commission. This very provision of the Constitution itself prohibits the Majils-e-Shoora (Parliament) from making of such law which shall have the effect of taking away or abridging any of the powers of the Commissioner or the Election Commission, thus, the Commissioner or the Election Commission has all powers vested in them to ensure that the elections are organized and conducted honestly, justly, fairly and in accordance with law and corrupt practices are guarded against.

78. Article 220 of the Constitution also provides that it shall be the duty of all executive authorities in the Federation and in the Provinces to assist the Commissioner and the Election Commission in the discharge of his or their functions.

79. We may her make reference to the case reported as Niaz Ahmad v. Azizuddin and others (PLD 1967 SC 466), wherein there was a dispute for election to the Electoral College of Pakistan in Electoral Unit No.446, Garden Quarters, Karachi, in which some 48 votes where challenged. The Presiding Officer endorsed ballot papers, issued to the challenged voters, with the serial numbers of the Electors in the Voters' List and in some cases, the names of the voters and their parentage was also endorsed on the ballot papers. The Court dealt with the matter as follows:

"It will be seen that the majority judgment in the High Court turned on the true effect of Article 172 of the Constitution, which enjoins that all elections and referendums under Part VII of the Constitution shall be decided by secret ballot. The first question, therefore, that arises for consideration is whether this provision should be interpreted as implying that absolute and ideal secrecy is to be aimed at, during an election. If this had been the intention, however, one would have expected some further guide-lines to be given in the Constitution itself, on this point. On the contrary, the matter has been left to be regulated by sub-constitutional Legislation, as laid down in Article 164 of the Constitution. That Article reads as follows:-

"Elections and referendums required to be held under this Constitution shall, subject to this Constitution, be conducted and decided in such manner as may be provided by law."

The relevant provisions of the Act, therefore, are referable to this Article. Waheeduddin Ahmad, J., in support of his position that the Constitutional injunction regarding secrecy is an absolute one, referred to an English decision, reported as Woodward v. Sarsons & Sadler (32 L T R 867). In that case, which related to Municipal elections in England, the Presiding Officer at one of the polling stations had marked on the face of 294 ballot papers, the numbers on the burgess rolls, of the voters in question. The ballot papers so marked were rejected by the Returning Officer as invalid and his decision was upheld. It has, however, been pointed out by Anwarul Haq, J., and recognised by Farooqi, J that the case is distinguishable from the present one in so far as there was express provision in section 2 of the Ballot Act, to the effect that any ballot paper, which has not on its back the official mark or on which votes are given to more candidates than the voter

is entitled to vote for, or on which anything except the said number on the back is written or marked, by which the voter can be identified, shall be void and not counted. It cannot be said, therefore, that the decision in that case was based on any notion of absolute secrecy apart from the specific provision of the statute.

As has been noticed even in the High Court, some guidance could be obtained from the decision of this Court in *Mir Ghulam Nabi Khan v. The Election Petitions Tribunal*, on this point. The case dealt with a dispute about the election to the West Pakistan Interim Legislature. The arrangements made by the Governor for the conduct of elections under para. 10, Second Schedule, Establishment of West Pakistan Act, 1955, consisted of certain rules and notes of guidance issued to the Returning Officers. The rules, inter alia, provided that the poll shall be by secret ballot and that the ballot paper was to be deposited by the voter in the ballot box bearing the symbol or colour assigned to the candidate in whose favour the voter wished to vote. In addition to this, one of the directions in the notes of guidance was to the effect that the ballot boxes should be placed on the table of the Returning Officer. It was contended that the latter direction amounted to breach of the rule requiring secrecy of the ballot. It was held that in an election conducted by means of the coloured box system, it would be in the nature of things necessary that the ballot boxes were kept in the view of the Presiding Officer or some other officer appointed by him, so that foul play could be successfully averted and blind or colour blind voters could be helped to cast their votes. The reasonable interpretation of the relevant rule was that it required secrecy consistent with the supervision which was essential for a fair election to be held. It was further observed that even if absolute secrecy was contemplated by the arrangement, it did not seem fair or reasonable to disfranchise voters merely because a rule had been violated by the Returning Officer. Reliance was placed in that case on the following passage occurring in Vol. 18 of *American Jurisprudence, Elections*, 225:

"It may, therefore, be stated as a general rule that if ballots are cast by voters who are, at the time, qualified to cast them and who have done all on their part that the law requires of voters to make their voting effective, an erroneous or even unlawful handling of the ballots, by the election officers charged with such responsibility, will not be held to disfranchise such voters, by throwing out their votes, on account of erroneous procedure had solely by the election officers, provided the votes are legal votes in their inception and are still capable of being given proper effect as such. Nor will an election be set aside because of irregularities on the part of the election officials, unless it appears that such

irregularities affect the result."

The secrecy of the ballot, therefore, has not to be implemented in the ideal or absolute sense but to be tempered by practical considerations necessitated by the processes of election. Viewed in this light the question whether the provisions of Article 172 of the Constitution are to be regarded as mandatory or directory, would not apparently arise."

80. After we have heard the learned counsel for the parties, we have announced our opinion, which is as follows: -

### OPINION OF THE COURT

For the detailed opinion to be recorded later, by majority of 4 against 1 (*Yahya Afridi, J.*) dissenting, the REFERENCE is answered as follows:

- (i) The Elections to the Senate of Pakistan are held "under the Constitution" and the law;
- (ii) It is the duty of the Election Commission of Pakistan in terms of Article 218(3) of the Constitution, to ensure that the election is conducted honestly, justly, fairly and in accordance with law and that corrupt practices are guarded against on which this Court has given successive judgments and the most exhaustive being **Workers' Party Pakistan through Akhtar Hussain, Advocate, General Secretary & 6 others v. Federation of Pakistan & 2 others** (PLD 2012 SC 681);
- (iii) The Election Commission of Pakistan is required by the Constitution to take all necessary steps in order to fulfil the above mandate/duty in terms of Article 222 of the Constitution, which empowers the Parliament, subject to the Constitution to legislate, *inter alia*, on the conduct of elections and matters relating to corrupt practices and other offences in connection with elections but categorically provides that, "*no such law shall have the effect of taking away or abridging any of the powers of the Commissioner or the Election Commission*" under Part VIII, Chapter 1 of the Constitution;
- (iv) Further in terms of Article 220 of the Constitution, all the executive authorities in the Federation and Provinces are obliged to assist the Commissioner and the Election Commission of Pakistan in discharge of his or their functions, as provided for in Article 218(3) of the Constitution;

- (v) As far as the secrecy of ballot is concerned, this Court has already answered this question in a judgment of a 5-member Bench of this Court reported as **Niaz Ahmad v. Azizuddin & others** (PLD 1967 SC 466), where it has been held that secrecy is not absolute and that *“the secrecy of the ballot, therefore, has not to be implemented in the ideal or absolute sense but to be tempered by practical considerations necessitated by the processes of election”*;
- (vi) Furthermore, in order to achieve the mandate of the Election Commission in terms of Article 218(3) read with Article 220 and other enabling provisions of the Constitution and the law, the Election Commission is required to take all available measures including utilizing technologies to fulfil the solemn constitutional duty to ensure that the election is “conducted honestly, justly, fairly and in accordance with law and that corrupt practices are guarded against”.

81. Above are the reasons of the same.

CHIEF JUSTICE

JUDGE

JUDGE

LARGER BENCH  
ISLAMABAD  
01.03.2021

*\*Rabbani\**

APPROVED FOR REPORTING

JUDGE

JUDGE

I with respect differ with the above, and have noted my reasons for the dissent.

YAHYA AFRIDI, J.- The worthy President of the Islamic Republic of Pakistan (**"President"**) has sought the opinion of this Court under Article 186 of the Constitution of the Islamic Republic of Pakistan, 1973 (**"Constitution"**) on the following question:

Whether the condition of 'secret ballot' referred to in Article 226 of the Constitution of Islamic Republic of Pakistan, is applicable only for the elections held 'under' the Constitution such as the election to the office of President of Pakistan, Speaker and Deputy Speaker of National Assembly, Chairman and Deputy Chairman of Senate, Speakers and Deputy Speakers of the Provincial Assemblies and not to other elections such as the election for the members of the Senate of Pakistan held under the Elections Act, 2017, enacted pursuant to Article 222 read with Entry 41, Part 1, Fourth Schedule to the Constitution, which may be held by way of secret or open ballot, as may be provided for in the Election Act, 2017?

The Hon'ble Chief Justice of Pakistan was pleased to constitute a Bench of five Judges to consider, and report the opinion of the Court on, the question referred in the Reference. After thorough deliberation of all aspects of the question referred in the Reference, and considering the valuable submissions of the learned Attorney-General for Pakistan and all other learned counsel representing the persons, who had applied and were allowed by the Court to be heard in the present Reference, I came to the conclusion that:

"the opinion sought by the Worthy President, Islamic Republic of Pakistan in the instant Reference, is not [on] a question of law within the contemplation of Article 186 of the Constitution of the Islamic Republic of Pakistan, 1973, accordingly, the same is returned unanswered."

#### Submissions

2. The learned Attorney-General for Pakistan (**"Attorney-General"**) was first to address the Court. He commenced his submissions by adroitly submitting the concern of the worthy President regarding the state of political affairs in the then approaching Senate elections, which warranted an urgent opinion of the Court on the referred question. The core submission of the Attorney-General

was that Article 226 of the Constitution requiring “secret ballot” is restricted to elections for offices and authorities, the procedure whereof is expressly provided under the Constitution and not under the Election Act, 2017 (“Act”). He, thus, concluded that as the procedure for election to the Senate is not provided in the Constitution but in the Act, the requirement of “secret ballot” under Article 226 of the Constitution does not apply thereto. His stance was endorsed in unison by the Provincial Governments,<sup>1</sup> where the political party that forms the Federal Government,<sup>2</sup> or a political party in coalition with that party is in power, while the said stance was starkly opposed by the Government of Sindh, where the governing political position is otherwise.

3. Similarly, the position of the political parties who had applied and were allowed audience before the Court, also exposed a clear divide between the ruling and major opposition political parties in the Parliament. A brief resume of the stand taken by the said opposition parties is as follows:

**Jamiat Ulema-e-Islam (F)**

3.1. The learned counsel for Jamiat Ulema-e-Islam (F) contended that during the pendency of the present Reference, the Election (Amendment) Ordinance 2021 (“Ordinance of 2021”) was issued which undermined the pending judicial proceedings of the present Reference; that different attempts are being made to ensure that the Senate elections are conducted by open ballot; and that the President cannot overreach legislative power which vests in

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<sup>1</sup> Government of Punjab, Government of Khyber Pakhtunkhwa, and Government of Baluchistan.

<sup>2</sup> Pakistan Tehreek-e-Insaf.



Parliament. He prayed that the Ordinance of 2021 may be declared void and *ultra vires* to the Constitution as it undermines the judicial proceedings of the present pending Reference.

**Jammat-e-Islami**

3.2. The learned counsel for Jamaat-e-Islami contended that the present Reference is not maintainable and should be returned unanswered, as it raises a political question for which the appropriate forum would be the Parliament to amend section 122(6) of the Election Act 2017; that the advisory jurisdiction of this Court under Article 186 of the Constitution is not binding on the other branches of government; and that, the Federal Government seeks to amend the Constitution indirectly by obtaining an opinion from this Court *via* the present Reference.

**Pakistan People's Party (PPP)**

3.3. The learned counsel for the Pakistan People's Party (PPP) contended that the present Reference should be returned unanswered, as it comprises of a political question, which is non-justiciable. Reference was made to the failure of the Federal Government to get the 26<sup>th</sup> Constitutional Amendment Bill passed through the National Assembly for amendment of Clause 2 of Article 59 and Article 226 of the Constitution, thereby submitting that the said Reference seeks to further political objectives. Without prejudice to the said contention, the learned counsel also contended that the elections to the Senate are held under the Constitution. Reliance was placed on various Articles of the Constitution to show that the Senate elections being under the

Constitution are to be held by secret ballot as per Article 226 of the Constitution.

**Pakistan Muslim League (N)**

3.4. The learned counsel for Pakistan Muslim League (N) contended that, the question whether the election to the Senate should be by secret ballot or by open ballot is a political question, which the Court should refrain from answering, as the proper forum to address this question is the Parliament; that the present Reference is politically motivated to achieve an outcome, which could not be achieved by a constitutional amendment due to a failure of the Federal Government to pass the 26<sup>th</sup> Constitution Amendment Bill from the Parliament. Therefore, it was urged that the present Reference seeks to bypass the Parliament. It was finally prayed that the present Reference may be returned unanswered.

**Article 186 of the Constitution - Advisory Jurisdiction**

4. Before I attend to the submissions of the learned Attorney-General and other learned counsel for the persons that were allowed audience by the Court, it would be appropriate to first explain the import and extent of the 'Advisory Jurisdiction' vested in this Court under Article 186 of the Constitution.

5. The constitutional genesis of the 'Advisory Jurisdiction' of this Court originates from Section 213 of Government of India Act, 1935 ("Act of 1935"). It was under the said provision that the Governor-General of India could send a 'question of law' to the Federal Court of British India for consideration, and that Court, after such hearing, as it thought fit, had the discretion to report its

opinion thereon to the Governor-General. After independence and partition of British India, the Islamic Republic of Pakistan was governed in accordance with the Act of 1935 by virtue of Section 8 of the Indian Independence Act, 1947 till promulgation of the Constitution of Pakistan, 1956 (“**Constitution of 1956**”). Therefore, the Federal Court of Pakistan possessed the ‘Advisory Jurisdiction’ under Section 213 of the Act of 1935, and in fact, exercised that jurisdiction in the year 1955 in a Reference<sup>3</sup> made by the then Governor-General of Pakistan. This Court was established under Article 148 of the Constitution of 1956, and it then replaced the Federal Court of Pakistan, as the apex court of the country. By Article 162 of the Constitution of 1956, this Court was conferred the same ‘Advisory Jurisdiction’; the only difference was in the language of the provision, by substituting the words “Governor-General” and “Federal Court” with “President” and “Supreme Court”, respectively. Article 59 of the Constitution of Pakistan, 1962 and later Article 187 of the Interim Constitution of Pakistan, 1972 provided for and carried on the ‘Advisory Jurisdiction’ of this Court. Finally, Article 186 of the present Constitution has retained the said jurisdiction of this Court, which is reproduced hereunder for reference:

**186. Advisory Jurisdiction**

(1) If, at any time, the President considers that it is desirable to obtain the opinion of the Supreme Court on any question of law which he considers of public importance, he may refer the question to the Supreme Court for consideration.

(2) The Supreme Court shall consider a question so referred and report its opinion on the question to the President.

(Emphasis added)

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<sup>3</sup> Opinion of the Federal Court is reported in PLD 1955 FC 435.

A careful reading of Article 186 of the Constitution highlights three essentials: first, the worthy President has the power to refer a 'question of law' to the Supreme Court for consideration and reporting its opinion thereon; second, the worthy President must consider the said question to be of 'public importance'; and lastly, the Supreme Court is to consider and report its opinion on the referred 'question of law' of 'public importance'. The authority to determine, whether a particular 'question' is of 'public importance' is conferred by the Constitution on the worthy President, but the determination, as to whether or not the same is a 'question of law', respectfully stated, does not fall within his exclusive domain - but remains with this Court. And that too, as a jurisdictional fact, before this Court ventures to render its opinion on the question referred to it in the Reference. Thus, once the Court finds that the 'question' referred to it is a 'question of law', only then will this Court consider the same, and report its opinion thereon to the President.

6. It is noted that the opinions of this Court as well as of the Federal Court given in ten References are reported, the particulars of which are as under:

1. Reference No.1 of 1955 under Section 213 of Government of India Act, 1935 (PLD 1955 FC 435).
2. Reference No. 1 of 1957 under Article 162 of the 1956 Constitution (PLD 1957 SC 219).
3. Reference No.1 of 1973 under Article 187 of the 1972 Interim Constitution (PLD 1973 SC 563).
4. Reference No. 1 of 1988 under Article 186 of the 1973 Constitution (PLD 1989 SC 75).
5. Reference No. 1 of 1996 under Article 186 of the 1973 Constitution.<sup>4</sup>

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<sup>4</sup> It was subsequently withdrawn.

6. Reference No. 2 of 1996 under Article 186 of the 1973 Constitution (PLD 1997 SC 84).
7. Reference No. 2 of 2005 under Article 186 of the 1973 Constitution (PLD 2005 SC 873).
8. Reference No. 1 of 2006 under Article 186 of the 1973 Constitution (2007 SCMR 817).
9. Reference No. 1 of 2011 under Article 186 of the 1973 Constitution.<sup>5</sup>
10. Reference No. 1 of 2012 under Article 186 of the 1973 Constitution (PLD 2013 SC 279).

In the aforementioned References, this Court had the occasions to explore the nature and scope of its 'advisory jurisdiction', and the principles, which are relevant for the present Reference, are described succinctly, as under:

- i. Advisory jurisdiction of this Court can be invoked by the President on the advice of the Cabinet or the Prime Minister, as per Article 48(1) of the Constitution.<sup>6</sup>
- ii. Advisory jurisdiction of this Court is comprehensive to cover both the question of law, which has arisen or the question of law, which is likely to arise in the future.<sup>7</sup>
- iii. Guidance of this Court is sought in advisory jurisdiction with the object to avoid controversies and to ensure that Constitutional provisions are fully enforced.<sup>8</sup>
- iv. No one is strictly a party to the Reference and right of hearing cannot be claimed by anyone as of right in advisory jurisdiction.<sup>9</sup>
- v. The principles of law laid down by Supreme Court in adjudicatory jurisdiction cannot be reviewed in advisory jurisdiction.<sup>10</sup>
- vi. This Court sitting in advisory jurisdiction is not a fact-finding Tribunal and the Reference has to be answered on the assumption of facts on which it has been made

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<sup>5</sup> It is still pending.

<sup>6</sup> (PLD 1997 SC 84 (5-MB)

<sup>7</sup> (PLD 2005 SC 873 (9-MB).

<sup>8</sup> (PLD 2005 SC 873 (9-MB).

<sup>9</sup> (PLD 1973 SC 563 (5-MB).

<sup>10</sup> (PLD 2013 SC 279 (5-MB).

without entering into a fact-finding enquiry as to their accuracy.<sup>11</sup>

- vii. **Opinion** of this Court given in advisory jurisdiction **has the binding effect**, when it is formed and delivered after undertaking an extensive judicial exercise of hearing, evaluating and appreciating the arguments advanced by the Advocates appearing on behalf of the parties summoned by the Court, and is to be esteemed utmost by all the organs of the State.<sup>12</sup>
  
- viii. This **Court** is **not bound to answer every question referred** to it for opinion in advisory jurisdiction. The Court may return the question unanswered for some cogent reasons, like, if it finds that the question is of a too general character,<sup>13</sup> or the question is not suitable to be determined in advisory jurisdiction,<sup>14</sup> or the question has already been decided by the Court in adjudicatory jurisdiction.<sup>15</sup>
  
- ix. Questions of law referred for advisory **opinion must be cast in a precise and exact form**, and it should not be too general.<sup>16</sup>
  
- x. **This Court cannot, in advisory jurisdiction**, decide the matter as a *lis* between the parties, wherein exercise of other powers are available to the Court including discretionary powers and **pass consequential directions**.<sup>17</sup>

In particular, the last four principles stated above are relevant to the question referred in the present Reference, and therefore, are dilated upon in some detail, in seriatim:

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<sup>11</sup> (PLD 1989 SC 75 (11-MB).

<sup>12</sup> (PLD 2005 SC 873 (9-MB).

<sup>13</sup> (PLD 1955 FC 435 (5-MB).

<sup>14</sup> (PLD 2013 SC 279 (5-MB).

<sup>15</sup> (PLD 2013 SC 279 (5-MB).

<sup>16</sup> (PLD 1955 FC 435 (5-MB).

<sup>17</sup> (PLD 1989 SC 75, per Muhammad Afzal Zullah, J.; approvingly quoted by the majority in PLD 2013 SC 279.

### **Binding effect of the Opinion**

7. An 'opinion' recorded by this Court in its 'Advisory Jurisdiction' conferred by Article 186 of the Constitution, is distinct from the 'judgment', 'decision' or 'order' rendered by this Court under its 'adjudicatory jurisdiction' conferred by Articles 184, 185, 187 and 188 of the Constitution. The distinction is apparent from the very meaning of the said relevant terms, as the same have been defined in Black's Law Dictionary:<sup>18</sup>

**"Advisory Opinion.** A formal opinion by judge or judges or a court or a law officer upon a question of law submitted by a legislative body or a governmental official, but not actually presented in a concrete case at law.

**Judgment.** The official and authentic decision of a court of justice upon the respective rights and claims of the parties to an action or suit therein litigated and submitted to its determination.

**Decision.** A judgment or decree pronounced by a court in settlement of a controversy submitted to it and by way of authoritative answer to the questions raised before it.

**Order.** A mandate, precept; a command or direction authoritatively given; a rule or regulation.

**Adjudication.** The giving or pronouncing a judgment or decree in a cause; also the judgment given."

Apart from the stark difference in the meaning of the terms, the distinction between a 'decision' of a dispute between the contesting parties by this Court in its 'adjudicatory jurisdiction', and reporting an 'opinion' on a referred question by this Court to the worthy President in its 'advisory jurisdiction' is also accentuated by the variance in their respective procedures. In 'adjudicatory' proceedings, the Court is in substantial control of its proceedings: leave to amend the pleadings could be given at any stage, new parties may be added, and names of existing parties may be deleted; persons against whom no claim is made, but whose rights

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<sup>18</sup> Black's Law Dictionary (Revised 4<sup>th</sup> edn)

might be affected by the decision of the court, may be joined as proper parties; issues are framed by the court and may be amended at any time before judgement is delivered; if the correctness of facts is disputed, evidence must be led to prove the correct facts; further, an "*ex-parte*" decision of the court would bind the parties, if the party served with notice has chosen not to appear; and the judgment so recorded would operate as *res judicata* and equally operates as a binding precedent, if it lays down a principle of law.<sup>19</sup> In contrast, in advisory proceedings of this Court under Article 186 of the Constitution, it is the President, and not the Court, who is in substantial control of proceedings: first, the President is to decide and formulate the 'question of law' of 'public importance', as he thinks fit for seeking an opinion of the Court; second, the Court must proceed on the facts, as stated in the Presidential Reference; and third, the Court must take, consider and report its opinion on the question referred in the Reference, as it is referred to it, lacking the legal mandate to amend the same.

8. It seems, the framers of the Constitution being cognisant of the intended legal efficacy of an 'opinion' of this Court given in its 'advisory jurisdiction' did not provide a forum of redressal to any person aggrieved thereof. This conspicuous omission of providing a forum of redressal against an 'opinion' of this Court rendered in its 'advisory jurisdiction' to an aggrieved person, becomes more distinct, when we note that the Constitution framers expressly

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<sup>19</sup> H.M. Seervai, Constitutional Law of India (4th edn, Volume 3)



provided the remedy of a 'review' against a judgment or an order of this Court passed in its 'adjudicatory jurisdiction', but not against the opinion given in its 'advisory jurisdiction', by enacting Article 188 in the Constitution, which is quoted below for ease of reference:

**188. Review of Judgments or Orders by the Supreme Court.**

The Supreme Court shall have power, subject to the provisions of any Act of [Majlis-e-Shoora (Parliament)] and of any rules made by the Supreme Court, to review any judgment pronounced or any order made by it.

9. The evolution of the judicial approach to the nature and status of the 'opinion' may be traced back to the celebrated judgment of the Privy Council in **AG Ontario v. AG Canada (1912 AC 571)**, a Reference appeal from the Canadian jurisdiction, wherein it was held that:

"the answers [to the questions referred to for opinion of the Court] are only advisory and will have no more effect than the opinions of the law officers".

The Federal Court of British India reiterated this view of the Privy Council in the **Reference of Estate Duty Bill (AIR 1944 FC 73)**, and the Supreme Court of India in the **Reference on the matter of U.P. Legislative Assembly (AIR 1965 SC 745)** and **St. Xavier's College Society v. State of Gujarat (AIR 1974 SC 1389)**. Similarly, in our jurisdiction, a five-member Bench of this Court, while deciding two constitution petitions and answering a Reference together in **Al-Jehad Trust v. Federation (PLD 1997 SC 84)**, observed that:

"[o]pinion of the Supreme Court [given in advisory jurisdiction under Article 186 of the Constitution] is just opinion with explanation on the question of law and is not of binding nature and it is up to the President or the Federal Government to act upon it or not."<sup>20</sup>

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<sup>20</sup> Majority view, per Sajjad Ali Shah, C.J., Fazal Ilahi Khan and Raja Afrasiab Khan, JJ. agreeing.

Without taking any judicial heed to the above stated principle of law enunciated by this Court exercising its 'adjudicatory jurisdiction', this Court later in the **Hisba Bill Reference (PLD 2005 SC 873)**, declared the 'opinion' of the Court recorded in its 'advisory jurisdiction' to have binding effect. The nine-member bench unanimously observed:

"It is true that opinion by the Court on the reference by the President is not a decision between the parties but the Court undertakes an extensive judicial exercise during which the arguments advanced by the Advocates appearing on behalf of the parties summoned by the Court are evaluated and appreciated and then **an opinion is formed, therefore, it has binding effect**... [O]pinion expressed by the Supreme Court in a reference under Article 186 is required to be esteemed utmost by all the organs of the State, therefore, it would not be fair to say that the opinion expressed by the Supreme Court on Presidential Reference under Article 186 of the Constitution has no binding effect."  
**(Emphasis provided)**

It appears that this Court, while making the above finding, was influenced by the view so recorded by Chandrachud, C.J. of the Indian Supreme Court in **Reference of Special Courts Bill (AIR 1979 SC 478)** when he, speaking for the majority, observed:

"We are inclined to the view that though it is always open to this Court to re-examine the question already decided by it and to over-rule, if necessary, the view earlier taken by it insofar as all other courts in the territory of India are concerned, they ought to be bound by the view expressed by this Court even in the exercise of its advisory jurisdiction under Article 143(1) of the Constitution.....It would be strange that a decision given by this Court on a question of law in a dispute between two private parties should be binding on all courts in this country but the advisory opinion should bind no one at all even if as in the instant case, it is given after issuing notice to all interested parties, after hearing everyone concerned who desired to be heard, and after a full consideration of the questions raised in the reference. Almost everything that could possibly be urged in favour of and against the Bill was urged before us and to think that our opinion is an exercise in futility is deeply frustrating."

We are not to lose sight of the fact that the above finding regarding the binding nature of the 'opinion' recorded by the nine-member Bench of this Court in **Hisba Bill Reference**, and by the Indian Supreme Court in **Special Courts Bill Reference**, were made by both the Supreme Courts in the course of exercising its 'advisory', not 'adjudicatory', jurisdiction. This subtle yet crucial aspect of the jurisdiction, whereunder the said finding has been recorded gives rise to a question, whether the very finding can be treated as a "decision", deciding a "question of law" or enunciating a "principle of law", and thus binding on all other courts in Pakistan, within the meaning of that expression used in Article 189 of the Constitution, which provides:

**189. Decisions of Supreme Court binding on other Courts.**

Any decision of the Supreme Court shall, to the extent that it decides a question of law or is based upon or enunciates a principle of law, be binding on all other courts in Pakistan.

10. Keeping in perspective the above legal position, the finding of a nine-member bench of this Court in **Hisba Bill Reference (PLD 2005 SC 873)** declaring the 'opinion' recorded by the Court under Article 186 of the Constitution to be binding has, in my earnest view, disturbed the settled jurisprudential consensus on the status of 'opinion' recorded in exercise of its 'advisory jurisdiction'. Article 186 of the Constitution ordains an answer of the Court to the 'question of law' of 'public importance' referred to it, as a mere 'opinion' not a 'decision', yet the effect thereof with the pronouncement in **Hisba Bill Reference (supra)** is now held to be binding.

11. The declaration as to the binding nature of the 'opinion' reported by this Court in its 'advisory jurisdiction' has created grey areas in defining its jurisdictional contours. Nonetheless, I myself, also sitting in a Bench of this Court exercising its 'advisory jurisdiction' do not consider it judicially proper to take up and pass a finding on the said question, rather find it appropriate to leave this for an authoritative decision in an appropriate case by this Court in its 'adjudicatory', and not 'advisory', jurisdiction.

**Discretion to decline answering the question referred**

12. The discretion of this Court to answer or decline to answer the question referred by the worthy President is well established. Sir Zafrullah Khan J., while on the bench of the Federal Court of British India that was hearing the **Reference of Estate Duty Bill (AIR 1944 FC 73)**, observed that the questions of law referred for advisory opinion must be cast in a precise and exact form, and it should not be left to counsel to supplement the Reference during the course of the hearing by oral submissions. His lordship, finding the material supplied in the Reference insufficient, declined to express any opinion on the questions referred. Following the cue, the Federal Court of Pakistan, also returned one question unanswered in **Reference No.1 of 1955 (PLD 1955 FC 435)**<sup>21</sup> with the observation that the question is too general. In the **Bangladesh Reference (1973 PLD SC 563)** this Court recognised the autonomy of the Legislature to freely legislate but reserved its opinion regarding any determination as to the constitutional validity of the legislative measures, which had

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<sup>21</sup> Majority opinion, Per Muhammad Munir, C.J; Akram and S.A. Rahaman, JJ agreeing.

yet to be adopted. The Court highlighted that though it chose to reserve its opinion at this stage, such legislative measures, once adopted, could be challenged before the Courts on valid grounds. Similarly, this Court in **Reference No. 1 of 2012 (PLD 2013 SC 279)** did not answer one question, considering it unsuitable to be determined in the advisory jurisdiction, essentially for the reason that the person whose rights were likely to be affected was not before the Court. The Indian Supreme Court also returned **Reference No.1 of 1993 (AIR 1995 SC 605)** unanswered, considering it not proper to answer mainly for the reason that it involved a religious dispute.

**Lack of clarity and precision in the question referred**

13. Given the judicial inclination to refrain from reporting its ‘opinion’ on a vague question, let us revisit the question referred in the present Reference, which is reproduced here again for better understanding of the discussion:

**Whether the condition of ‘secret ballot’ referred to in Article 226 of the Constitution of Islamic Republic of Pakistan, is applicable only for the elections held ‘under’ the Constitution such as the election to the office of President of Pakistan, Speaker and Deputy Speaker of National Assembly, Chairman and Deputy Chairman of Senate, Speakers and Deputy Speakers of the Provincial Assemblies and not to other elections such as the election for the members of the Senate of Pakistan held under the Elections Act, 2017, enacted pursuant to Article 222 read with Entry 41, Part 1, Fourth Schedule to the Constitution, which may be held by way of secret or open ballot, as may be provided for in the Election Act, 2017?**

(Emphasis added)

A careful reading of the above question reveals that it contains three statements: the first two statements are couched as instances by the use of expression ‘such as’; and the third statement adjoined with the second statement of instance by the use of expression ‘which’. To further clarify the point, and highlight

the ambiguity in the actual question sought to be answered, we may segregate the three statements from the text of the question referred to the Court in the Reference. The said three statements are:

- (i) the election to the offices of President of Pakistan, Speaker and Deputy Speaker of National Assembly, Chairman and Deputy Chairman of Senate, Speakers and Deputy Speakers of the Provincial Assemblies are held under the Constitution;
- (ii) the election for the members of the Senate of Pakistan falls within the category of elections other than those held under the Constitution and is held under the Elections Act, 2017, enacted pursuant to Article 222 read with Entry 41, Part 1, Fourth Schedule to the Constitution; and
- (iii) the elections that are held under the Elections Act, 2017 may be held by way of secret or open ballot, as may be provided for in the Election Act, 2017.

With the said statements separated, the actual question that remains to be answered by the Court is:

Whether the condition of 'secret ballot' referred to in Article 226 of the Constitution of Islamic Republic of Pakistan, is applicable only for the elections held 'under' the Constitution...and not to other elections...?

Upon a patient reading of the above actual question referred to this Court, the present Reference does not provide the essential clarity to be ascertained therefrom. Thus, the referred question fails to reveal, in what respect, with what object, or to avoid what controversy, guidance of the Court has been sought in its 'advisory jurisdiction'. In fact, it appears to be a general question in abstract, and requires one to guess the true purport thereof - the election of Senate. The composite form in which the question referred to this Court in the Reference, in my opinion, remains a cause of concern. The articulation of the question could have been made simpler to avoid ambiguity and vagueness. More than one

questions could have been framed in clear, concise and precise terms, and referred to for opinion in a single Reference, as there is no legal compulsion to restrict a Reference to only one question.

**No power to dispute or amend the question referred**

14. The learned Attorney-General and other learned counsel, who appeared before this Court in the present Reference have tried to contextualise the question and focused, in their arguments, on the procedure of the Senate election. However, the expression, 'question so referred', as provided in clause (2) of Article 186 of the Constitution, makes it clear that this Court cannot change, amend and rephrase the text of the question referred by the President or add any further question thereto. The 'Advisory Jurisdiction' of this Court, under Article 186 of the Constitution, is restricted only to the text of the question referred by the President.

15. There is also another strong reason for the Court not to amend the 'question so referred' by the President. The power of referring a question to this Court by the President involves the constitutional process of 'acting on' and 'in accordance' with the 'advice' of the Cabinet or the Prime Minister under the provisions of Article 48(1) of the Constitution, as earlier explained by this Court, while answering Reference No. 2 of 1996 and deciding connected constitution petitions in **Al-Jehad Trust v. Federation (PLD 1997 SC 84)**. The relevant observations<sup>22</sup> are reproduced hereunder for ready reference:

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<sup>22</sup> Majority view, per Sajjad Ali Shah, C.J., Fazal Ilahi Khan and Raja Afrasiab Khan, JJ. agreeing.

"19. [I]t is indisputable that advisory jurisdiction of the Supreme Court can be invoked by the President on the advice of the Prime Minister.....

20. Article 90 of our 1973 Constitution envisages that the Executive Authority of the Federation shall vest in the President and shall be exercised by him either directly or through officers subordinate to him in accordance with the Constitution. Article 99 provides that all Executive actions of the Federal Government shall be expressed to be taken in the name of the President. In exercise of powers conferred by both these Articles, the Federal Government has made Rules of Business of 1973 under Schedule V-B, Rule 15-A(1), list is made of cases requiring orders of President on the advice of the Prime Minister. Entry No.54 specifically mentions Reference to the Supreme Court on any question of law to be filed under Article 186, which is to be done on the advice of the Prime Minister....."

This constitutional process of identifying and then referring the question by the President on advice of the Prime Minister cannot be circumvented by this Court, by amending or changing, or adding to, the question referred for its opinion. In **Reference No.1 of 1955 (PLD 1955 FC 435)**, initially two questions were referred to the Federal Court of Pakistan for consideration and reporting its opinion but during pendency of the Reference, two more related questions were also referred to by the Governor-General on the Court's suggestion; the Court did not add those questions by itself. The Indian Supreme Court also held in the **Kerala Educational Bill Reference (AIR 1958 SC 956)** that it is for the President to determine, what question should be referred; the Supreme Court cannot go beyond the questions referred in the Reference and discuss other questions.

16. Thus, it can safely be concluded that this Court cannot change or amend the question referred; it can only be done in accordance with the same procedure, as prescribed for referring the question, that is, by the President on advice of the Prime Minister. This Court can record its 'opinion' only on the question,



which is referred, and not on the question, which could have been but has not been referred.

17. As far as the contention of the learned Attorney-General, that the referred question, in fact, is: "whether the election for the members of the Senate is held under the Constitution, or not under the Constitution but under the law". I am afraid, that the said contention is beyond the text of the referred question. At best, the same can be an interpretation of the question referred, and that too of the learned Attorney-General, but no more. If the said interpretation of the learned Attorney-General on the question referred by the President is to be accepted, then it would amount to conferring the authority on the Attorney-General to amend the question referred by the President, which even this Court lacks. And, secondly, if the learned Attorney-General is correct in his interpretation of the question referred by the President, then the question so referred is, in fact, ambiguous and vague, and thus requires further explanation. In such circumstances, positive exercise of discretion by this Court to decline recording any opinion on the question referred in the Reference is warranted.

**Directions in advisory jurisdiction**

18. It may also be pertinent to mention here that that an attempt was made to persuade the Court during arguments, to issue appropriate directions to the Election Commission of Pakistan to perform its constitutional duty under Article 218(3) of the Constitution to ensure that the elections are conducted

honestly, justly, fairly and in accordance with law, and that corrupt practices are guarded against.

19. I am of the considered view that the power of issuing such directions is not available to this Court, while answering a 'question of law' referred to it by the President under Article 186 of the Constitution. The 'advisory jurisdiction' of the Court, under clause (2) of Article 186 of the Constitution, is restricted to consider the question referred and report its opinion only on that question to the President. The ancillary and inherent powers that the Court has under Article 187(1) of the Constitution to issue such directions, orders or decrees as may be necessary for doing 'complete justice' in any case or matter pending before it, are not available to the Court while exercising 'advisory jurisdiction'. This principle has earlier been emphasised by Muhammad Afzal Zullah, J. (as he then was) in **Reference No. 1 of 1988 (PLD 1989 SC 75)**, and approvingly quoted by the majority in **Reference No. 1 of 2012 (PLD 2013 SC 279)**, by observing that this Court cannot, in 'advisory jurisdiction', decide the matter as a *lis* between the parties, wherein exercise of other powers are available to the Court including discretionary powers and taking other consequential actions.

#### **Political question**

20. Finally, I advert to the submissions of the learned counsel appearing for the major political parties seated on opposition benches in the Parliament. They all have in unison contended that the present Reference raises a political question, the determination

whereof be best left to the Parliament. They further submitted that the present Reference is politically motivated to achieve an outcome, which could not be attained by the Federal Government due to its failure to obtain the requisite majority to pass the 26<sup>th</sup> Constitution Amendment Bill from the Parliament, therefore, the present Reference, in essence, seeks to bypass the Parliament. It was finally urged that the Court should, uphold the 'trichotomy of power' envisaged in the Constitution, and thereby exercise judicial restraint and return the Reference unanswered.

21. Learned Attorney-General, in rebuttal, by referring to the observations of this Court made in **Ishaq Khakwani v. Nawaz Sharif (PLD 2015 SC 275)** contended that it has been the consistent view of this Court that if the determination of any question raised before the Court requires interpretation of any provision of the Constitution, the Court is obliged to adjudicate upon the same, notwithstanding that the question raised has some political overtones. He submitted that this Court has earlier answered the References that involved political questions, and referred to the case of Reference No.1 of 1973, **Recognising Bangladesh Reference (PLD 1973 SC 563)**, in support of his submission.

22. I am afraid, the submission of the learned Attorney-General is not correct and the reliance is not apt. In the **Recognising Bangladesh Reference (supra)**, opinion of the Supreme Court was sought on the question:

"Can the Resolution of the purport described in paragraph 6 above [of the Reference], and envisaging such constitutional measures as may be necessary before the according of formal

recognition [to Bangladesh], be validly adopted by the National Assembly?"

The Court gave the opinion that:

"there is no legal bar to the National Assembly considering or adopting a resolution of the purport described in Para. 6 of the Reference."

The Court, however, made it clear that it expressed:

"no opinion at this stage as to the constitutionality or the validity of the measures, legislative or executive, that may have to be taken before the according of formal recognition.....does not...mean that the validity of the legislative measures and/or the Constitutional amendments, if and when made, will not be amenable to a challenge in the Courts of law upon valid grounds, if any available."

The political aspect of the matter, that is, whether Pakistan should or should not accord recognition to the new State of Bangladesh was neither considered by the Court nor was any opinion given thereon. More importantly, no opinion was expressed on the constitutionality or validity of the legislative measure, which were to follow the resolution.

23. There is no cavil to the contention of the learned Attorney-General and his reliance upon the observations of this Court made in **Ishaq Khakwani case** (*supra*) that it has been the consistent view of this Court that if the determination of any question raised before the Court requires interpretation of any provision of the Constitution, the Court is obliged to 'adjudicate' upon the same, notwithstanding that the question raised has some political overtones. The expression, 'adjudicate', used in the referred observations of this Court, however, makes the distinction. I am fully convinced and agree with the proposition that this Court should not decline to adjudicate a case, or to answer a question of law involving interpretation of some provisions of the law or the

Constitution raised therein, in its 'adjudicatory jurisdiction' merely because the decision of the case or the determination of the question would have some political repercussions. The Court cannot abdicate performance of its constitutional duty. The following observations of this Court made in the case of **Nawaz Sharif v. Federation (PLD 1993 SC 433)** may also be cited in this regard:

The Courts' function is to enforce, preserve, protect and defend the Constitution. Any action taken, act done or policy framed which violates the provisions of the Constitution or is not permissible under the Constitution or law, the Court irrespective of the fact that it is a political question, must exercise power of judicial review.

Similarly, this Court in the case of **DBA, Rawalpindi v. Federation (PLD 2015 SC 401)** held:

A matter pertaining to the Judicial Power of Interpreting the Constitution, identifying the limits of the Executive and the Legislature thereunder and enforcing such limits is the sole and exclusive jurisdiction of the Courts. While exercising such powers, the Court will not abdicate its jurisdiction merely because the issue raised, has a political complexion or political implication.

But the position would be different, when a 'question of law' that has, political implication is referred to this Court for its 'opinion', in its 'advisory jurisdiction' under Article 186 of the Constitution. In this jurisdiction, the Court has the discretion not to answer the question; the only restraint is that, like all other discretions, the Court is to exercise this discretion judiciously for valid reasons and not arbitrarily. The Indian Supreme Court returned **Reference No.1 of 1993, Ismail Frauqui v. Union of India (AIR 1995 SC 605)**, unanswered with the observation that the Reference favours one religious community and disfavors another; and the dignity and honour of the Supreme Court cannot be compromised because of it. Like the

religious disputes, the involvement of the Court in political disputes in its advisory jurisdiction would also have, in my humble but considered view, the effect of compromising the dignity and honour of the apex Court of the country.<sup>23</sup>

24. In the present Reference, it is not in dispute that: the question referred has political implications; the Federal Government earlier, unsuccessfully attempted to resolve it through a constitutional amendment<sup>24</sup>; and all major political parties in opposition want resolution of the question through political and legislative process in Parliament. In such a clear split between the ruling political parties and major opposition political parties, and the charged political atmosphere, the resolution of the question through intervention of the Court, and that too in its advisory jurisdiction, would be, in my considered opinion, inappropriate and, to say the least, would invite untoward criticism on the Court.

25. 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'être* 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. In fact, the role of the

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<sup>23</sup> *Ismail Frauqui v. Union of India* (AIR 1995 SC 605): “158. Ayodhya is a storm that will pass. The dignity and honour of the Supreme Court cannot be compromised because of it.” Per S.P. Barucha J.

<sup>24</sup> Constitution (twenty-sixth Amendment) Bill 2020

courts ought not be expanded to entrench on other organs of the state, but must remain to function within the ambit of determining questions on the basis of legality alone, as otherwise the courts can pass findings on political issues, without being politically accountable or responsible to anyone. As a result, careful judicial treading is needed to ensure that the courts are not indulging in decision-making to rectify moral wrongs, which in my view should best be left in the hands of the elected majority<sup>25</sup>.

### **Conclusion**

26. To sum up the above discussion, till the jurisdictional contours of the 'advisory jurisdiction' of this Court are not settled and the legal efficacy of the 'opinion' remains binding, and that too, without any judicial check or any clarity in the composition of the bench of this Court, particularly the numeric strength of the bench and the seniority of its members that is to hear a Reference in its 'Advisory Jurisdiction',<sup>26</sup> the standard of determining clarity and precision in a 'question of law' envisaged under Article 186 is required to be raised to ensure that it is free from political overtones or undertones - Lest it may expose this Court to unwitting condemnation of bias and crossing the delicate boundaries of 'trichotomy of power' engrained in the Constitution.

27. Accordingly, for the reasons stated hereinabove, I conclude that the question referred in the Reference by the worthy President is vague, general, lacking the requisite clarity and precision, and

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<sup>25</sup> Views adopted from "Trials of the State Law and the Decline of Politics" by Jonathan Sumption

<sup>26</sup> Article 145(2) of the Indian Constitution expressly sets out the minimum number of judges that will sit to hear a Reference under Article 143 of the Constitution of India.

thus does not qualify to be a 'question of law' envisaged under Article 186 of the Constitution. This, in my view, justifies the exercise of discretion of abstention by this Court from expressing any 'opinion' thereon. I, therefore, respectfully return the question referred in the Reference unanswered to the worthy President of Pakistan.

Judge