IN THE SUPREME COURT OF PAKISTAN
(Original Jurisdiction)

PRESENT:

Mr. Justice Umar Ata Bandial, CJ
Mr. Justice Syed Mansoor Ali Shah
Mr. Justice Munib Akhtar
Mr. Justice Jamal Khan Mandokhail
Mr. Justice Muhammad Ali Mazhar

SUO MOTU CASE NO. 1 OF 2023

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

And

CONST. PETITION NO.1 OF 2023

And

CONST. PETITION NO.2 OF 2023

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

Muhammad Sibtain Khan and others
(in Const.P.2/2023)

...Petitioner(s)

Versus

Election Commission of Pakistan through the Chief Election Commissioner, Islamabad and others
(in Const.P.1&2/2023)

...Respondent(s)

For the petitioner : Mr. Abid S. Zuberi, ASC.
Mr. Shoaib Shaheen, ASC.
Assisted by:
Ayan Memon, Adv.
Ms. Amna Khalili, Adv.
Mr. Agha Ali Durrani, Adv.
Mr. Arif Ansari, Adv.
(in Const. P.1 of 2023)

For the petitioner : Syed Ali Zafar, ASC
Mr. Sarfraz Ahmad Cheema, ASC
Mr. Zahid Nawaz Cheema, ASC

Ch. Faisal Fareed, ASC.
Mr. Safdar Shaheen Pirzada, ASC
Mr. Ashfaq Ahmed Kharal, ASC
Mr. Amir Saeed Rawn, ASC
(in Const. P.2 of 2023)

On Court's Notice

For Federation of Pak. : Mr. Shehzad Ata Elahi,
Attorney General for Pakistan
Ch. Aamir Rehman, Addl. AGP
Malik Javaid Iqbal Wains, Addl. AG
Assisted by:
Ms. Mehwish Batool, Adv.
Mr. Aitzaz ul Haque, Adv.
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For President of Pak. : Mr. Salman Akram Raja, ASC
Mr. Amir Malik, AOR
Assisted by:
Malik Ghulam Sabir, Adv.
Mr. M. Shakeel Mughal, Adv.
Mr. Maqbool Ahmed, Adv.
Sameen Qureshi, Adv.

For Governor KP : Mr. Khalid Ishaq, ASC.

For Governor Punjab : Mr. Mustafa Ramday, ASC.
Mr. Jahanzeb Awan, ASC
Mr. Rashid Hafeez, ASC.
Assisted by:
Ms. Zoe K. Khan, Adv.
Mr. Ahmed Junaid, Adv.
Mr. Akbar Khan, Adv.
Mr. Uzair Shafi, Adv.
Barrister Maria Haq, Adv.
Barrister Salman Ahmed, Adv.

For ECP : Mr. Sajeel Shehryar Swati, ASC.
Assisted by:
Barrister Saman Mamoon, Adv.
Ms. Kiran Khadijah, Adv.
Mr. Zafar Iqbal, Special Secy.
Mr. Muhammad Arshad, DG Law
Mr. Khurram Shehzad, Addl. DG Law
Ms. Saima Tariq Janjua, DD (Law)
Ms. Bushra Rasheed, Law Officer
Mr. Zaighum Anees, Law Officer

For Govt. of Punjab : Mr. Muhammad Shan Gul, AG
Malik Waseem Mumtaz, Addl. AG
Mr. Sana Ullah Zahid, Addl. AG
Assisted by:
Mr. Khurram Chughtai, Adv.
Mr. Usman Ghani, Adv.
Mr. Raza Rehman, Adv.
Mr. Ahmed Raza Sarwar,
Addl. Chief Sec. Law (Pb)

For Govt. of KPK	:	Mr. Aamir Javaid, AG Sardar Ali Raza, Addl. AG Mian Shafaqat Jan, Addl. AG
For Govt. of Baluchistan	:	Mr. Asif Reki, A.G Mr. M. Ayaz Swati, Addl. AG.
For Govt. of Sindh	:	Mr. Hassan Akbar, A.G Mr. Saifullah, AAG (through V.L. Karachi) Mr. Fauzi Zafar, Addl. AG Mr. Zeeshan Edhi, Addl. AG
For ICT	:	Mr. Jehangir Khan Jadoon, AG
For Pak. Bar Council	:	Mr. Haroon-ur-Rasheed, ASC. Vice Chairman, PBC Mr. Hassan Raza Pasha, ASC. Chairman, Executive Council.
For Supreme Court Bar Association	:	Mr. Abid S. Zuberi, ASC. President SCBA Mr. Muqtadir Akhtar Shabbir, ASC/ Secretary SCBA Malik Shakeel-ur-Rehman, ASC/ Addl. Secretary
For PTI	:	Syed Ali Zafar, ASC. Ch. Faisal Fareed, ASC. Mr. Safdar Shaheen Pirzada, ASC Mr. Ashfaq Kharal, ASC
For PPPP	:	Mr. Farooq H. Naek, Sr. ASC. Assisted by: Barrister Sheraz Shaukat Rajpar
For PML(N)	:	Mr. Mansoor Usman Awan, ASC. Mr. Anees Shehzad, AOR.
For JUIP	:	Mr. Kamran Murtaza, Sr. ASC.
For Jamat-e-Islami	:	Mr.Ghulam Mohyuddin Malik, ASC Syed Rifaqat Hussain Shah, AOR.
For PML (Awami)	:	Mr. Azhar Siddiqui, ASC
Dates of hearing	:	27, 28.02.2023.

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O R D E R

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

> "By a majority of 3:2 (Mr. Justice Syed Mansoor Ali Shah and Mr. Justice Jamal Khan Mandokhail dissenting) and for detailed reasons to be recorded later and subject to what is set out therein by way of amplification or otherwise, these matters are disposed of in the following terms:
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> 1. Parliamentary democracy is one of the salient features of the Constitution. There can be no parliamentary democracy without Parliament or the Provincial Assemblies. And there can be neither Parliament nor Provincial Assemblies without the holding of general elections as envisaged, required and mandated by and under the Constitution and in accordance therewith. Elections, and the periodic holding of elections, therefore underpin the very fabric of the Constitution. They are a sine qua non for parliamentary democracy, and ensure that the sacred trust of sovereignty entrusted to the people of Pakistan is always in the hands of their chosen representatives.
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> 2. While the holding of general elections has different aspects and requirements, one that is absolutely crucial is the timeframe or period in which such elections are to be held. The Constitution envisages two such periods, being of sixty and ninety days respectively. In relation to a Provincial Assembly, the first period applies when the Assembly dissolves on the expiration of its term under Article 107 and the second period is prescribed when it is sooner dissolved under Article 112. The time periods so set down in Article 224(1) and (2) respectively are constitutional imperatives that command complete fidelity. We are here concerned with the dissolution of two Provincial Assemblies before the expiry of their terms and therefore to the holding of general elections in relation to each within 90 days.
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> 3. It is in the foregoing context that three questions have to be considered by the Court. The Assemblies in question are those of the Punjab and Khyber Pakhtunkhwa Provinces, which dissolved on 14.01.2023 and 18.01.2023 respectively. In both cases, the then Chief Ministers tendered advice to their respective Governors under Article 112(1) of the Constitution to dissolve the Assembly. In the case of the Punjab Province the Governor chose not to act on the said advice so that the Assembly stood dissolved on the expiry of 48 hours, on the date just mentioned. In the case of the KPK Province, the Governor did act on the advice and made an order dissolving the

Assembly, on 18.01.2023. The questions which have been considered with the assistance of learned counsel for the various parties and the Law Officers are as follows:

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

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

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

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

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

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

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

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

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

8. Article 105(3)(a) provides that where the Governor dissolves the Assembly he shall appoint a date for the

holding of a general election thereto, being a date not later than 90 days from the date of the dissolution.

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

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

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

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

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

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

13. It further follows that the order of the President dated 20.02.2023 is constitutionally competent and

subject to what is observed below, it is hereby affirmed insofar as it applies to the Punjab Assembly; but the same is constitutionally invalid insofar as it applies to the KPK Assembly and is therefore hereby set aside. It also follows that the Governor of KPK Province, inasmuch as he has not appointed a date for the holding of the general election to the Assembly of that Province is in breach of his constitutional responsibility.

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

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

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

15. It is the constitutional duty of the Federation, in terms of clause (3) of Article 148, "to ensure that the Government of every Province is carried on in accordance with the provisions of the Constitution". There can be no doubt that this duty includes ensuring that a general election to the Assembly of every Province is held, and enabled to be held, in a timely manner within the period set out in the Constitution. This duty is in addition to, and applies independently of, the duty cast under Article 220 on "all executive authorities in the Federation and in the Provinces to assist the Commissioner and the Election Commission in the discharge of his or their functions". It follows that the Federation, and in particular the Federal Government, is, inter alia, obligated, on an immediate and urgent basis, to forthwith provide the Election

> Commission with all such facilities, personnel and security as it may require for the holding of the general elections. In like manner, it is the duty of the Provincial Governments, acting under the Caretaker Cabinets, to proactively provide all aid and assistance as may be required by the Election Commission. The duty cast upon the authorities as set out in s. 50 of the 2017 Act must also be discharged forthwith and proactively.
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> 16. The three matters before the Court are found maintainable and stand disposed of as above."

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

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

3. We begin, for reasons that will later become apparent, by briefly setting out the chronology of the proceedings of these matters. Initially, the Hon'ble Chief Justice, as master of the roster, constituted a nine-member Bench, before which these matters were placed on 23.02.2023. That Bench comprised of the following Judges: the Hon'ble Chief Justice, Mr. Justice Ijaz ul Ahsan, Mr. Justice Syed Mansoor Ali Shah, Mr. Justice Munib Akhtar, Mr. Justice Yahya Afridi, Mr. Justice Sayyed Mazahar Ali Naqvi, Mr. Justice Jamal Khan Mandokhail, Mr. Justice Muhammad Ali Mazhar and Mr. Justice Athar Minallah. On 23.02.2023 no substantive hearing took place and the matters were not taken up on the merits. The order of the Court for that day was made by majority, with four of the learned Judges (Syed Mansoor Ali Shah, Yahya Afridi, Jamal Khan Mandokhail and Athar Minallah, JJ) making their own orders. These orders are, for purposes of the record, appended to this judgment as Annex A. It is pertinent to note that through his order Yahya Afridi, J, for "detailed reasons to be recorded later", dismissed all three matters. It was also

observed as follows (emphasis supplied): "… I find that my continuing to hear the said petitions is of no avail. However, I leave it to the Worthy Chief Justice to decide my retention in the *present* bench hearing the said petitions". Athar Minallah, J in his order expressed his concurrence "with the articulate opinion recorded by my learned brother Justice Yahya Afridi". In the event, Yahya Afridi, J released his detailed reasons on 31.03.2023. Athar Minallah, J also released reasons on 07.04.2023.

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

> "Keeping in view the order dated 23.02.2023 and the additional notes attached thereto by four of us (Justice Syed Mansoor Ali Shah, Justice Yahya Afridi, Justice Jamal Khan Mandokhail and Justice Athar Minallah) as well as the discussion/deliberations made by us in the ante-Room of this Court the matter is referred to the Hon'ble Chief Justice for reconstitution of the Bench."

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

6. We now turn to the submissions made by learned counsel for the parties. Mr. Ali Zafar, learned counsel

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

7. Learned counsel submitted that on 29.01.2023 a writ petition was filed by the Pakistan Tehreek e Insaf (PTI) in the Lahore High Court. That petition and other matters were

placed before a learned Single Judge who decided the same vide judgment dated 10.02.2023 (reported as *Pakistan Tehreek e Insaf v Governor Punjab and others* PLD 2023 Lahore 179). In that judgment, the learned Judge, by relying on Articles 218 and 219, held that the date for the general election had to be given by the Commission as the Punjab Assembly had not been dissolved by order of the Governor. It was held in the operative part of the judgment as follows (emphasis in original): "…the *"ECP"* is directed to immediately announce the *"date of election"* of the Provincial Assembly of Punjab with the Notification specifying reasons, after consultation with the Governor of Punjab, being the constitutional Head of the Province, to ensure that the elections are held not later than ninety days as per the mandate of the *"Constitution"*." It appears that the relevant provisions of the 2017 Act, and in particular s. 57(1), were not noticed in the judgment.

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

9. Learned counsel further submitted that in the meantime the President of Pakistan had also stepped in. In a letter written to the Commission on 08.02.2023 the President

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

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

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

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

12. The learned Attorney General submitted that the questions before the Court required consideration of the following points. Firstly, the power conferred on the Governor in terms of Article 105(3), which corresponded to the power of the President under Article 48(5), did not apply to the situation at hand. That power, it was submitted related only to a

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

13. Expanding on the above submissions, the learned Attorney General referred to Articles 48 and 58 as originally adopted when the Constitution came into force in 1973 and placed before the Court the evolution of these, and related, provisions over the decades as the Constitution was successively amended. It was submitted that when the predecessor legislation to the 2017 Act, i.e., the Representation of Peoples Act, 1976 ("1976 Act") was originally enacted, its s. 11 had provided that the date for the holding of a general election would be given by the Commission. The President, or any other authority, did not have any role to play in this regard. It was only subsequently that the said section was substituted so as to confer the power on the President, a position that was continued when the earlier legislation was replaced with the 2017 Act. With regard to the position of the Commission reference was also made to the last part of Article

222, which expressly provides that no legislation could take away or abridge any of the powers conferred on the Commission or the Chief Election Commissioner by the Constitution. Therefore, it was submitted, in relation to the two dissolutions at hand and the general elections thereto, it was for the Commission to appoint the dates after consultation with the stakeholders/parties. It was further submitted that all efforts had to be made to hold the general elections within the stipulated 90 day period but if that was not possible for any constitutionally permissible reason then the Commission could even appoint a date beyond that. Reliance was placed on *Pakistan Peoples Party Parliamentarians and others v Federation of Pakistan and others* PLD 2022 SC 574, 648. As regards s. 57(1), the learned Attorney General submitted that that power was only statutory in nature and could not override the constitutional provisions, which placed the power in the hands of the Commission. The maintainability of the present matters was also challenged, in view of the pending proceedings before the Lahore and Peshawar High Courts. It was prayed that the matters be disposed of in the above terms.

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

15. Mr. Khalid Ishaque, learned counsel who appeared for the Governor, KPK however took a different position. Learned counsel submitted that the constitutional power lay with the Commission even in the situation at hand and not the

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

16. Mr. Farooq Naek, learned counsel who appeared for the Pakistan Peoples Party Parliamentarians (PPPP) submitted that the political parties, and certainly the party whom he represented, were not averse to the holding of the general elections within the stipulated period. However, it was important that general elections be held in a conducive environment to ensure that the whole process was in accordance with Article 218, i.e., the elections were held honestly, justly and fairly. In this context learned counsel referred to the hazards and difficulties on multiple fronts facing the nation at this time. It was submitted that the matters before the Court were all under Article 184(3) of the Constitution. As jurisprudentially developed by the Court, this provision conferred a unique power, which had to be carefully exercised. The provision conferred a power that was inquisitorial and not adversarial, and it had to be read along

with Article 187. Certain case law was referred to. Learned counsel then referred to various provisions of the Constitution relating to the matters at hand, i.e., the holding of the general elections. It was submitted that where the Governor dissolved the Assembly then it was for him to appoint the date. However, where that was not the situation it was for the President under s. 57(1). But the President was there bound to act on the advice of the Prime Minister. Learned counsel also questioned the maintainability of the present matters, in view of the petitions/proceedings pending in the High Courts. The legitimacy of the superior Courts was at risk and the Court should therefore be careful in exercising its power of judicial review.

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

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

19. Finally, Mr. Salman Akram Raja, learned counsel for the President, submitted that insofar as the Punjab Assembly was concerned the power and duty lay with the President under s.

57(1) to appoint the date for the general election. In exercising this power, the President was not bound by the advice of the Prime Minister. It was submitted that the word "announce" as used in that section had to be understood in the sense of fixing or appointing the date, and not otherwise. Referring to the order of the President of 20.02.2023 whereby he had appointed 09.04.2023 as the date for the general election for both Assemblies, learned counsel submitted on instructions that the President, on reflection, accepted that the power to appoint the date for the KPK Assembly lay with the Governor as the latter had made the order for the dissolution thereof. Therefore, learned counsel stated at the Bar, that the President should be taken as having withdrawn his order to the extent of the KPK Assembly.

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

21. General elections are to be held periodically as stipulated by the Constitution, as each election cycle comes to an end and in so ending triggers and gives birth to the next. This continuous and repeated recourse to the political sovereign (within the sacred limits noted in the Preamble to the Constitution) is a sine qua non for parliamentary democracy. Furthermore, given the federal nature of the Constitution each

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

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

23. In addressing the question posed, we are of the view that certain broad considerations must be kept in mind. Firstly, given the tight time limits imposed by the Constitution, the said authority must be known and identified with clarity from the very day—indeed, moment—that an Assembly stands dissolved. It is in fact this lack of clarity (at least in relation to one situation), and the consequent delay, that led to these proceedings. Secondly, that authority must be able to act

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

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

25. Of the various situations in which an Assembly stands dissolved, the first (identified in para 5 of the short order) poses no special problem, and we note it in passing. All the learned counsel agreed, in our view rightly so, that when the Governor dissolves the Assembly in his discretion, in the particular circumstances envisaged by Article 112(2), then Article 105(3) applies and the date for the general election is to be given by him. The same is the position as regards the dissolution of the

National Assembly by the President in his discretion under Article 58(2). We therefore move immediately to the second situation, identified in para 6 of the short order and its two sub-categories. The first sub-category applies in relation to the present dissolution of the KPK Assembly since the Assembly was dissolved on an order made by the Governor acting on the Chief Minister's advice. The second sub-category applies in relation to the present dissolution of the Punjab Assembly since the Assembly dissolved by efflux of time, the Governor not having acted on the advice tendered. Which is the authority that has the constitutional responsibility to appoint the date for the general election in each case?

26. The various solutions proposed and answers given in this regard by learned counsel have been noted above. Keeping in mind the constitutional provisions referred to, and also Parliament's legislative expression in the shape of s. 57(1), in principle three possibilities offer themselves: the President, the Governor or the Commission. Now, the Constitution does not expressly refer to any power of the Commission with regard to the appointment of the date. Learned counsel who argued for this result located the power within what are, according to them, the (very) capacious folds of Articles 218 and 219. Both the President and the Governor find express mention in the Constitution in the present context, in terms of Articles 48(5) and 105(3) respectively. However, that power is conditional: "Where the [President/Governor] dissolves the [National/ Provincial] Assembly…." Finally, the President is expressly the repository of the power in terms of s. 57(1) of the 2017 Act. The Governor finds no mention in the Act, and the role of the Commission in this context is consultative. There is here also the related question as to whether the President is to act on the advice of the Prime Minister.

27. We begin by making some general observations. Firstly, the question of the authority that is to appoint the date for a general election sounds on the constitutional plane, in the sense that it cannot simply be a statutory power. The reason is that a power wholly statutory in nature is created, and exists,

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

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

Section 11 (as originally enacted)	Section 11 (as up to 2017)	Section 57
(1) For the purpose of holding general elections to an Assembly, the Commission shall, by	(1) As soon as may be necessary and practicable the President makes an announcement of the	(1) The President shall announce the date or dates of the general elections after consultation with the

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

29. It will be seen that as originally enacted the power in terms of s. 11 to appoint the date for a general election lay with the Commission. However, it was an oblique grant in the sense that it was but the last step of the election schedule which had to be issued by the Commission. Section 11 was then substituted/amended such that the power to announce the date lay with the President. This position was maintained in s. 57. Focusing on s. 11 as originally enacted, there were two possibilities. One was that the power to appoint the date for the general election lay only with the Commission in terms of Articles 218 and 219. On this view, all that Parliament could do was to give statutory expression to the constitutional grant, and therefore any statute (here the 1976 Act) was limited only to conferring the power on the Commission. No other authority could be identified as the repository of the power. The second view was that since the Constitution was silent as to which authority could be empowered to appoint the date for the holding of the general election, it lay within the legislative competence of Parliament to identify the same and, by statute,

make it the repository of the power. It is important to keep in mind that even here the power itself sounded on the constitutional plane. It was simply that Parliament had more leeway in identifying the specific authority that was to exercise it. On this view, when Parliament first acted it chose to identify the Commission as the repository of the power, which was then shifted to the President by successive statutory alterations to s. 11. That position was maintained when Parliament enacted fresh legislation on the subject, i.e., the 2017 Act.

30. It will be seen from the foregoing that if the first view is correct, then the subsequent amendments to s. 11, and also s. 57, would to this extent be *ultra vires* the Constitution. If the constitutional power lay within the folds of Articles 218 and 219 then Parliament's hands would be tied, in particular by the last part of Article 222. Its legislative competence could not move beyond the constitutional limit. All it could do when making a statute would be to identify (as it would have to) the Commission (and it alone) as the repository of the power to appoint the date. Both s. 11, as substituted/ amended, and s. 57 would necessarily fail to this extent. In our view, this approach cannot be accepted. No one suggested before us, in our view correctly, that either s. 11 in its subsequent manifestation or s. 57 were *ultra vires* the Constitution. We are clear that it is the second view that is correct. Parliament has competence under entry No. 41 of the Federal Legislative List in relation, inter alia, to "Elections … to the National Assembly … and the Provincial Assemblies…". It is a well settled rule of constitutional law that legislative entries are fields of legislative power which are to be interpreted and applied in the widest possible terms. In and of itself this legislative competence would therefore be quite sufficient to confer power on Parliament to identify by statute the authority that is to appoint the date whether that be the Commission or the President. However, entry No. 41 cannot be read in isolation. The breadth of this constitutional grant must be tempered with, and balanced against, the command of Article 222. There, after identifying the sort of laws that Parliament is competent to enact in relation to elections, it is expressly provided that

"no such law shall have the effect of taking away or abridging any of the powers of the Commissioner or the Election Commission under this Part". In our view, this requirement can, at most, be regarded as imposing some limitation on Parliament's legislative competence to identify the authority that is to be the repository of the power to appoint the date. However, it cannot and does not nullify it altogether. Put differently, it may be that there is some outer limit to the Parliament's power to identify the authority. However, that limit is certainly not reached, let alone breached, when the President is identified to be the said authority.

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

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

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

33. It is to be noted that the application of Article 48(2) is not necessarily limited only to those constitutional provisions where the word "discretion" is expressly used. There are provisions where the term is not used and yet the application thereof, on any sensible approach, is meaningful only if the President is to act on his own and not on advice. For example, consider Article 91(7). The term "discretion" is not used therein. It empowers the President to ask the Prime Minister to take a vote of confidence from the National Assembly. But the power can only be exercised if the President is satisfied that the "Prime Minister does not command the confidence of the majority of the members of the National Assembly". Is the President to act on advice here? A moment's reflection will show that that cannot be so. No Prime Minister (who can in any case take a vote of confidence from the Assembly at any

time) would sensibly advice the President to take recourse to Article 91(7). To require that this provision can only be invoked on advice would be reduce it to a dead letter. This is therefore a provision where, even though the term "discretion" is not used, the President is empowered to act on his own. Another example in this regard is Article 75(1) which allows the President to return a Bill (other than a Money Bill) to Parliament for reconsideration. Again, the term "discretion" is not used here. Now, it is an important constitutional convention that the Government of the day must at all times command the confidence of the majority of the National Assembly. Realistically therefore, a Bill can hardly pass the Houses of Parliament without the approval of the Government. If the power under Article 75(1) is conditional upon advice, then it could (or would) hardly ever be invoked. It would, for all practical purposes, be a dead letter. It makes sense only if it empowers the President to act on his own even though the term "discretion" is not used.

34. In our view, the discharge of the constitutional obligation and responsibility to appoint the date for a general election is another example in line with those given above. The primary reason for this is what has been noted above: the need, because of the time limits imposed by the Constitution, for the date to be appointed very swiftly if not immediately. The tightness of the time limits, especially where the Assembly is dissolved on the completion of its term, has been highlighted. There is, to put it shortly, hardly any room for delay or slippage of the timeframe. This constitutional imperative could be directly jeopardized if, in appointing the date, the President were bound to act on advice. The reason for this stems from the proviso to Article 48(1). What if the Prime Minister advices one date, but the President is of the view that another date is preferable? As noted above, the proviso allows the President to send back any advice tendered within a period that, especially in the present context, can only be regarded as generous. Once the advice is tendered again, it may finally be acted upon after about 25 days. This period is almost half of the 60 day period that applies in one of the situations of dissolution.

Furthermore, given that the Election Programme stretches over a 50 day plus period, if the proviso to Article 48(1) is invoked that may well make it impossible to hold the general election within the constitutional timeframe. The same would apply, even if not as acutely, to those situations where the general election is to be held within 90 days. We pause here to note that the differences between the President and Prime Minister as to the date would be genuine and the differing views in this regard be held in good faith. The effect however could be disastrous from the perspective of adhering to the constitutional time limits.

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

36. Yet another aspect of the matter is that in terms of s. 57(1) the President is empowered to appoint the date also for the general election to a Provincial Assembly. Quite obviously, the Chief Minister of said Assembly, whether the outgoing one or the incoming caretaker, cannot advice the President in constitutional terms: that is reserved only for the Prime Minister (or Federal Cabinet). If the President is to act on advice, then that would mean that the Prime Minister would, in effect, appoint the date for a Provincial Assembly. This would go against the grain of the federal structure of the Constitution. On the other hand, if the President is empowered to act on his own, there would be uniformity both in relation to federal elections (i.e., to the National Assembly) and provincial elections. This view is bolstered by Article 41, which expressly states that not only is the President the Head of State he also represents the unity of the Republic. Finally, as noted above,

the statutory identification of the authority by Parliament can result in that authority even being the Commission which, on any view, does not, at least constitutionally speaking, act on the instructions of the Prime Minister. Indeed, quite the opposite: the Commission can call all executive authorities in the country to provide suitable aid and assistance under Article 220. It would therefore be somewhat anomalous if the identified repository of the power in one case is to act on advice and in another is free from any such requirement.

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

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

39. What of the KPK Assembly? It will be recalled the some of the learned counsel submitted that Article 105(3) was limited to that one situation where the Governor dissolved the Assembly in his discretion, i.e., Article 112(2). On this view,

even though the KPK Assembly was dissolved by the Governor acting on the advice of the Chief Minister, the power to appoint the date for the general election would lie with the President under s. 57(1). Is this correct? Having considered the point, in our view the answer must be in the negative. Here, Article 105 needs to be considered. As presently relevant it is in the following terms:

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

Article 48(2) provides as follows:

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

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

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

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

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

42. We now turn to the objection of maintainability taken by some of the learned counsel, including the learned Attorney General. This was for the reason that petitions/appeals were pending in the Lahore High Court and the Peshawar High Court involving question(s) that were substantially the same. It was submitted that in fact, as noted above, a learned Single Judge of the Lahore High Court had already given judgment in this regard, and an appeal was pending before a learned Division Bench of that Court in ICA. In such circumstances, it was submitted that this Court should stay its hand and allow the High Courts to proceed with the matters. It was emphasized that the jurisdiction of the Court under Article 184(3) was co-extensive or concurrent with that of the High Courts under Article 199 for the enforcement of fundamental rights. Propriety required, and it would be in the fitness of things, for these matters not to be proceeded with. In this sense they were not maintainable. Reliance was placed on *Manzoor Elahi v Federation of Pakistan and others* PLD 1975 SC 66 and *Benazir Bhutto v Federation of Pakistan and others* PLD 1988 SC 416.

43. Having considered the point, we were, with respect, not persuaded that the matters were not maintainable and that

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

44. We now turn to consider the two decisions relied upon and begin with *Manzoor Elahi v Federation of Pakistan and others* PLD 1975 SC 66. Briefly stated the facts were as follows. The petitioner's brother, Ch. Zahoor Elahi, who was one of the prominent Opposition leaders in those times, was arrested and detained for offences allegedly committed in the erstwhile Tribal Areas of Balochistan. The detenue was arrested in Lahore and taken to the Tribal Areas by a circuitous route, to remove him beyond the jurisdiction of the Superior Courts. A writ petition was filed in the High Court of Sindh and

Balochistan (the two Provinces then had a common High Court: see Article 192) for the quashing of the proceedings and also his production before the Court. A preliminary objection as to maintainability was taken (on the ground that the jurisdiction of the High Court did not extend to the Tribal Areas where the detenue was being held) but repelled. The Provincial Government appealed to this Court against that preliminary finding, the petition before the High Court still pending. At the same time a petition under Article 184(3) was also filed by the petitioner seeking the release of his brother. These were among the three matters decided by the cited case (the other not being relevant). As to the petition under Article 184(3), an objection was taken that it was not maintainable on account of the writ petition pending before the High Court. In the event, this Court granted interim bail to the detenue pending decision of the writ petition in the High Court. Other than that, it was held that "no order is passed on Constitutional Petition No. 61-P of 1973, since the Constitutional Petition under Article 199 of the Constitution being No. 1143 of 1973 is still pending adjudication on the merits in the High Court." (pg. 159)

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

jurisprudence of the Court. In the common law tradition, the law is connected to the past but not shackled by it.

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

> "It was submitted by the learned Attorney-General, as well as the Advocates-General of Punjab and Baluchistan that we should not pass any operative order in this case for the reason that the constitution petition moved by Malik Ghulam Jillani of the Tahrik-e-Istiqlal, on these very facts, was still pending final adjudication before the High Court of Sind & Baluchistan, which had so far only decided the preliminary question of its territorial jurisdiction in the matter. *The learned counsel submitted that the petition filed in this Court as well as one pending in the High Court, have raised several disputed questions of fact, which could not be determined without an elaborate enquiry and recording of evidence*. They suggested that we may not wish to undertake this exercise in the present proceedings under Article 184 (3) of the Constitution.
>
> I am inclined to agree with these submissions. While undoubtedly the petition filed in this Court involves questions of public importance with reference to the enforcement of certain fundamental rights guaranteed by the Constitution, it is at the same time clear that the petition pending before the High Court of Sind & Baluchistan also proceeds on identical facts. That High Court has already decided the preliminary question of jurisdiction in favour of the prisoner, *and would have proceeded to examine the allegations of mala fides, fabrication of documents and falsification of records etc., if the matter had not been brought to this Court by both sides*.
>
> My conclusions may now be summed up. The original petition on behalf of the prisoner under Article 184 (3) of the Constitution does involve several questions of public importance with reference to the enforcement of fundamental rights as embodied in Article 9 and 10(2) of the Constitution....
> ...
>
> As the Constitution petition filed by Malik Ghulam Jillani of the Tehrik-e-Istiqlal on identical facts, is still pending final adjudication before the High Court of Sind &

> Baluchistan, I would not pass any operative order in the original petition before this Court, but leave the matter to be finally decided by the High Court in the light of the observations made in this judgment regarding the various legal and constitutional questions arising in the case. I would dispose of the petition in these terms."

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

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

respective petitioners before this Court and the High Court whether the constitutional and legal questions raised were in fact finally answered or not. The position here is of course starkly different. Unless the constitutional and legal issues are resolved there can inter alia be no resolution of, or relief for, the violation of the fundamental rights of the electorate. In our view therefore, and with respect, the cited case does not lend support to the objection of maintainability.

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

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

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

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

"Decision by 4-3 or 3-2 majority". Since the minority opinion has purported to reverse the very outcome of these matters it is something that should be examined. In doing so, we preface what is about to be said by stating that we act with the greatest respect, and a heavy heart.

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

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

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

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

> "[*] Initially a nine member bench heard this matter. The aforementioned two Hon'ble Judges decided the matter by dismissing the said petitions. Later on two other Hon'ble Judges disassociated themselves from the Bench for personal reasons and as the two aforementioned judges had dismissed the matter, the Bench was reconstituted into a five member bench vide order dated 27.02.2023. The decisions of the aforementioned two Hon'ble Judges dated 23.2.2023 form part of the record of this case."

51. With very great respect, we draw attention to a fundamental point: that causes, appeals and matters in this

Court are heard by Benches, and not Judges. At first sight some may find this formulation a bit surprising since Benches are, after all, comprised of Judges. However, the distinction is real and substantial. A Bench is a body of Judges validly and properly constituted as such; it is not simply an aggregate of a given number of Judges. It is well settled that (as recently affirmed by a five member Bench in *In re: Suo Moto Case No. 4 of 2021* PLD 2022 SC 306) Benches are constituted by the Chief Justice alone, who is the master of the roster. Benches cannot self-constitute, and once properly constituted cannot self-propagate or self-perpetuate (see para 33 thereof). It is the Bench, as properly constituted, that defines and delineates the Court for the purpose of any matter, appeal or cause and judgment therein, and not simply any agglomeration of Judges.

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

would not have been the Bench constituted for the purpose. They could not even have sat and heard the matters, let alone deciding them.

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

54. The minority opinion appears to take exception to what is regarded as the "removal" of Yahya Afridi and Athar Minallah, JJ from the Bench without their consent, which as per the opinion "is not permissible under the law and not within the powers of the Hon'ble Chief Justice" (para 36 of the opinion). It is stated in the said para as follows:

> "The reconstitution of the Bench was simply an administrative act to facilitate the further hearing of the

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

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

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

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

Chief Justice

Judge

Judge

Annexure-A

IN THE SUPREME COURT OF PAKISTAN
(Original Jurisdiction)

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

SUO MOTU CASE NO. 1 OF 203
Suo Motu Regarding Holding of General Elections to the Provincial Assemblies of Punjab and KP)
And
CONST. PETITION NO.1 OF 2023
And
CONST. PETITION NO.2 OF 2023

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

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

Versus

Election Commission of Pakistan through the Chief Election Commissioner, Islamabad and others **...Respondent(s)**
(in Const.P.1&2/2023)

In attendance:

Mr. Shehzad Ata Elahi, Attorney General for Pakistan
Ch. Aamir Rehman, Addl. AGP

Mr. Muhammad Shoaib Shaheen, ASC
Mr. Abid S. Zuberi, ASC
(in Const.P.1/2023)

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

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

Date of Hearing : 23.02.2023

ORDER

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

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

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

when the notices were issued for 21.02.2023. However, on 21.02.2023 the learned Law Officer sought further time to obtain instructions from the learned Attorney General for Pakistan and the matter was adjourned for 27.02.2023.

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

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

a) Who has the constitutional responsibility and authority for appointing the date for the holding of a general election to a Provincial Assembly, upon its

dissolution in the various situations envisaged by and under the Constitution?

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

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

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

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

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

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

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

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

11. During the course of proceedings, one of us *(Athar Minallah, J.)* raised the point that the dissolution of Punjab Assembly and Khyber Pakhtunkhwa Assembly on 14.01.2023 and 18.01.2023 respectively were violative of the Constitution because the Chief Ministers of both the Provinces acted on the dictate of a political party/political leader. Likewise,

one of us *(Syed Mansoor Ali Shah, J.)* has enquired about the reasons behind the dissolution of the Punjab Assembly and Khyber Pakhtunkhwa Assembly and if these are justiciable can the Court examine whether either or both Assemblies can be restored. These points are reflected neither in the petitions before the Court nor the request for invoking the Suo Motu jurisdiction. The points, may subject to the foregoing, be considered at an appropriate stage while keeping in mind the urgency in the matter.

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

Justice Jamal Khan Mandokhail.

1. Late last night (22.2.2023) I received a file that the Hon'ble Chief Justice has taken suo motu notice on the basis of an order passed by Hon'ble Mr. Justice Ijaz ul Ahsan and Hon'ble Mr. Justice Mazahar Ali Akbar Naqvi in CPLA No. 3988/2022, which was filed by Ghulam Mehmood Dogar against order dated 24.11.2022 passed by the Federal Service Tribunal ("FST") in respect of his transfer. Learned Mr. Abid S. Zuberi is the counsel of Ghulam Mehmood Dogar.
2. The petition of Ghulam Mehmood Dogar was pending when on 16.2.2023 the learned members of the Bench called the Chief Election Commissioner of the Election Commission of Pakistan, who was not a party to the petition, and was asked about the holding of elections to the Provincial Assembly of Punjab. Irrespective of the reply of the Chief Election Commissioner the Hon'ble Mr. Justice Ijaz ul Ahsan and Hon'ble Mr. Justice Mazahar Ali Akbar Naqvi deemed it appropriate to refer the matter to the Hon'ble Chief Justice to take suo motu notice. The matter pertaining to election has no nexus or connection with the abovementioned service matter.
3. It is noteworthy that three audio recordings came out. In one recording learned Mr. Abid Zuberi is reportedly talking to ex Chief Minister about the pending case of Ghulam Mehmood Dogar, which in my opinion was very serious.
4. Besides the learned Judges have already expressed their opinion by stating that elections "are required to be held within 90 days" and that there was "eminent danger of violation" of the Constitution. With greatest respect the Hon'ble Chief Justice has added to the points mentioned by the two learned Judges and has also expressed his opinion. Such definite opinions have decided this matter and done so without taking into consideration Article 10A of the Constitution.
5. Thus in these circumstances it was not appropriate to refer the matter to Hon'ble Chief Justice for taking suo motu notice under Article 184(3) of the Constitution. Suo motu action is not justified.

Islamabad.
23.02.2023.

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

2. The *suo motu* matter (SMC 01/ 2023) before us arises from a judicial order of a learned two-member Bench of this Court[1] made while hearing a service matter of a civil servant, wherein they made recommendation to the Hon'ble Chief Justice to invoke *suo motu* the original jurisdiction of this Court under Article 184(3) of the Constitution. The order was made in a case which, in my view, had no concern whatsoever with the present matter before us, reflecting to an ordinary reader of the order an unnecessary interest of the two-member Bench in the matter. Attached to the said order is the a controversy in the public domain, generated by the audio leaks relating to one[2] of the members of the said Bench. Inspite of the requests from within the Court and outside the Court, there has been no institutional response to the allegations either by this Court or by the constitutional forum of the Supreme Judicial Council. Further, there is news of references being filed against the said member before the Supreme Judicial Council by the Bar Councils. In this background and before these allegations could be probed into and put to rest, inclusion of the said member on the Bench in the present matter of *"public importance"* appears, most respectfully, inappropriate. This inclusion becomes more nuanced when other senior Hon'ble Judges of this Court are not included on the Bench.

3. The Hon'ble Chief Justice has been pleased to observe in his order invoking the original jurisdiction of this Court under Article 184(3) of the Constitution *suo motu,* in categorical terms that *"These matters*

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[1] Dated 16.02.2023 passed in CP No. 3988 of 2022 and CMA No. 676 of 2023.
[2] Justice Sayyed Mazahar Ali Akbar Naqvi

involve the performance of constitutional obligations of great public importance apart from calling for faithful constitutional enforcement." But, in spite of the said observation, the two senior most Hon'ble Judges of this Court have not been made part of this Bench to hear and decide upon the matters of *"great public importance"*, for reasons not expressed in the order constituting the present Bench.

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

Islamabad,
23rd February, 2023

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

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

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

Having decided that exercising powers under Art. 184(3) of the Constitution in the present three petitions pending before us would not be appropriate, I find that my continuing to hear the said petitions is of no avail. However, I leave it to the Worthy Chief Justice to decide my retention in the present bench hearing the said petitions.

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

(PLD 2022 SC 306). I was asked to formulate the precise questions which are as follows:

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

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

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

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

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

ORDER OF THE BENCH

Keeping in view the order dated 23.02.2023 and the additional notes attached thereto by four of us (Justice Syed Mansoor Ali Shah, Justice Yahya Afridi, Justice Jamal Khan Mandokhail and Justice Athar Minallah) as well as the discussion/deliberations made by us in the ante-Room of this Court, the matter is referred to the Hon'ble Chief Justice for reconstitution of the Bench.

Sd/-
Chief Justice

Sd/-
Judge

Sd/-
Judge

Sd/-
Judge

Sd/-
Judge

Sd/-
Judge

Sd/-
Judge

Sd/-
Judge

Islamabad
27.02.2023