

HIGH COURT OF AZAD JAMMU AND KASHMIR

Writ petition No. 580/2018
Date of Inst. 15.03.2018
Date of decision 05.11.2020

1. Fayyaz Ahmed Janjua Advocate Supreme Court of AJ&K, Member Central Bar Association Muzaffarabad;
2. Waheed Bashir Awan Advocate High Court, Member Central Bar Association Old Secretariat Muzaffarabad Azad Kashmir;
3. Raja Waqas Khan Advocate High Court Member Central Bar Association Old Secretariat Muzaffarabad Azad Kashmir.

... Petitioners

VERSUS

1. Legislative Assembly of Azad Jammu & Kashmir through its Speaker Legislative Assembly Azad Jammu & Kashmir having his office at New Secretariat Complex Muzaffarabad;
2. Azad Govt. of the State of Azad Jammu & Kashmir through its Concerned Secretary having its office at New Secretariat Complex Muzaffarabad (Secretary Law Azad Jammu & Kashmir);
3. Law, Justice and Parliamentary Affairs and Human Rights Azad Jammu & Kashmir through Secretary Law, Justice and Parliamentary Affairs of Azad Kashmir having his office at New Secretariat Complex Muzaffarabad;

...Real Respondents

4. Azad Jammu & Kashmir High Court through its Registrar, having his office at High Court Building Muzaffarabad Azad Jammu & Kashmir.

.....Proforma respondent

WRIT PETITION

Before; Justice Sadaqat Hussain Raja, J.

PRESENT:

Petitioners No. 2 & 3 through Mr. Fayyaz Ahmed Janjua Advocate, (Petitioner No.1).

Raja Akhlaq Hussain Kiani, AAG for the respondents;

M/s Barrister Humayun Nawaz Khan and Mr. Abdul Rasheed Abbasi, Amicus Curiae.

ORDER:

Through this petition filed under Article 44 of the Azad Jammu and Kashmir Interim Constitution, 1974, Act namely State Judicial (Policy Making) Committee Act, 2017 [Act XXXVIII of 2017] dated 13.09.2017 has been challenged for having been issued without lawful authority.

2. Brief facts as stated in the petition are that the petitioners are 1st Class State Subjects, professional lawyers, and permanent members of Central Bar Association, Muzaffarabad. It is contended that the High Court of Azad Jammu & Kashmir

in a case reported in [PLD 2013 AJ&K 34] held that without treating petitioners as aggrieved person, the inconsistent provisions of law can be struck down if the same are against the fundamental rights or constitutional provisions. It is contended that Articles 42 to 42-D of the Interim Constitution, 1974, the Supreme Court has been defined clearly regarding its establishment, issue and execution of process of Supreme Court, decision of the same Court binding on other Courts, seat of Supreme Court, review of judgment or order by the Supreme Court etc. and similarly the Interim Constitution, 1974 defines the High Court of Azad Jammu & Kashmir which is mentioned from Article 43 to 46(1-4) and Articles related to the Supreme Court and High Court provide the jurisdiction, powers, framing of rules and contempt etc. It is further contended that the Hon'ble Judges are the custodians of the Constitution and they are bound to discharge their duties under the Constitution. It is submitted that phrase

"**shall**" which has been used in Article 46(1) of the Constitution means that the High Court is only and lonely **Superintendent** and has control on all other subordinate Courts but respondent No.1 passed an {Act XXXVIII of 2017} dated 13.09.2017 namely State Judicial (Policy Making) Committee Act, 2017 through which a State Judicial (Policy Making) Committee headed by the Hon'ble Chief Justice of Azad Jammu & Kashmir has been established. It is alleged that the newly enforced Act is contempt of the Constitutional Provisions. Lastly, it is prayed for acceptance of the instant writ petition by setting aside the supra Act.

3. The instant writ petition has been resisted by the respondents by filing written statement, wherein it has been stated that the writ petition has been filed with ulterior motive and the petitioners have come to the Court with unclean hands. It is contended that the petitioners, neither have locus standi nor cause of action to file the instant writ

petition as they do not fall within the definition of aggrieved persons within the meaning of Article 44 of the Azad Jammu & Kashmir Interim Constitution, 1974. It is further contended that the impugned Act XXXVIII of 2017 was promulgated on 13.09.2017 and the petitioners have challenged the same on 14.03.2018 through the instant writ petition, which is hit by the doctrine of laches, hence, the instant writ petition is liable to be dismissed on this sole ground. It is submitted that due to enforcement of the Act, neither the constitutional provisions have been violated nor superseded, therefore, the stance taken by the petitioners is against the spirit of law. It is further submitted that the impugned Act does not affect the powers of the Hon'ble High Court in any manner regarding its superintendence and control over the subordinate judiciary, hence, the impugned Act is not against the concept of the independence of judiciary. Lastly, a prayer has been made for dismissal of the instant writ petition.

4. Mr. Fayyaz Ahmed Janjua Advocate, one of the petitioners appearing on behalf of other petitioners reiterated the facts and grounds enumerated in the petition and submitted through written arguments that under Article 46 of the Interim Constitution, 1974, the High Court has control and superintendence over the subordinate judiciary and it directly related to the Independence of Judiciary but the State Judicial (Policy Making) Act clearly reveals that the Constitution has been violated and the concept of independence of judiciary has also been violated. The learned counsel further submitted that all laws in force have to be enacted, read and interpreted in light of the Constitution. The State Judicial (Policy Making) Act which has been enacted to overrule the Constitution is contrary to the precedent [2002 SCR 455], hence, is liable to be set aside. In support of his contention, the learned counsel placed reliance on the following precedents;

2014 SCR 1180
PLJ 2015 SC AJ&K 233

2002 SCR 455

5. While controverting the arguments advanced by the learned counsel for the petitioners, the learned AAG reiterated the facts and grounds as taken in the written statement and contended through written arguments that the petitioners are not aggrieved persons and have no locus standi to file the instant writ petition, therefore, the instant writ petition is liable to be dismissed on this sole ground. He further contended that the instant writ petition is based on malice and also adversely affects the improvement in the system of administration of justice, especially according to the spirit of Constitutional Principles of policy, ensuring the inexpensive and expeditious justice. He further contended that the major function, which is required to be performed by the Committee is to harmonize judicial policy within Court system and to co-ordinate with the Law Commission constituted under Act, XXIII of 1994. He averred that it is the Committee, which can

formulate the policy, whereas, the administrative measures are vested in the respective authorities, as was the case prior to promulgation of Act, 2017. The Committee has been delegated with rule making powers, only to the extent of its business and discharge of functions. The learned AAG submitted that the aforesaid policy has not violated any of the constitutional provision, therefore, the instant writ petition is not maintainable. He referred Article 203 of the Constitution of Pakistan, 1973 and contended that each High Court shall supervise and control all the Courts, subordinate to it. He submitted that under Article 47 of the supra Constitution, Administrative Courts and Tribunals can be constituted which are not subordinate to High Court, appeal against an order of such Administrative Court or Tribunal is competent before Supreme Court of Azad Jammu & Kashmir but no such eventuality has been envisaged in Article 46, supra which implies that expression "such other Courts

as established by law" in Article 46(2) of the Interim Constitution, 1974 would mean Courts under supervision and control of High Court and not independent of it, whether administrative or otherwise. He also referred Article 202 of Constitution of Pakistan and contended that words "Supervise and control" mentioned in Article 203 to be interpreted in literal sense. High Court empowered to exercise judicial control over decisions of subordinate Courts. Such control, however, is limited to correction or exercise of jurisdiction or non-compliance of any statutory provision of law and does not extend to interference on merits if subordinate Court acted within its bounds. He averred that under Article 46 of the Interim Constitution, 1974, the High Court is vested with the authority to superintend and control all other Courts, which are subordinate to it. Thus, the Judges while sitting in the meeting to dilate upon administrative matters brought before them under Chapter XVIII of the High Court

Procedure Rules, 1984, are competent to take any administrative action in exercise of their authority under the rules and under Article 46 of the Interim Constitution. The learned AAG referred the following precedents in support of his contention and prayed for dismissal of the instant writ petition.

1999 SCR 01
PLD 1971 Karachi 118

6. Mr. Abdul Rasheed Abbasi Advocate, the learned Amicus Curiae advanced oral arguments. The learned Advocate while rendering his assistance to the Court contended that the Court's duty is to enforce the provisions of the Constitution and if a Court finds that a statute is in accordance with the Constitution, it must pronounce it valid. If the Court finds that it is in contravention of the Constitution or transgresses the authority vested in the Legislature, the Court must pronounce it a nullity. Laws may be unwise. If a law is unconstitutional, it is the duty of the Court to declare it void but if a law is unwise, an appeal for its removal lies not to the Court but to the electorate in a democratic form of Government. He further contended that the

guarantee of equality before law or the equal protection of laws, contained in Art. 14 of the Constitution means substantial equality of treatment under the laws. Equal treatment does not necessarily mean identical treatment. The learned Amicus Curiae submitted that the Superior Constitutional Courts of the State, being guardians of the Constitution are duty bound to vigilantly exercise their jurisdiction for upholding the supremacy of the Constitution. The learned Amicus Curiae in support of his contention referred Article 202 and 203 of The Constitution of Pakistan, 1973, Article 46 of The Azad Jammu & Kashmir Interim Constitution, 1974 and Article 227 of Constitution of India regarding supervision of judicial matters. The learned Amicus Curiae also referred Article 47 regarding Administrative Courts and Tribunals and also referred Article 47-A of The Azad Jammu & Kashmir Interim Constitution, 1974 and contended that the Supreme Court and the High Court, with the approval of the President, may make rules providing for appointment of employees of the Court and for their terms and conditions of employment. The Amicus Curiae

referred the following case law in support of his contention.

AIR 1951 Hyderabad 11
2013 SCR 929
2014 SCR 1180

7. Barrister Humayun Nawaz Khan Advocate who was also appointed as Amicus Curiae to assist the Court, advanced written as well as oral arguments and contended that the Legislative Assembly of Azad Jammu & Kashmir enacted the State Judicial (Policy Making) Committee Act, 2017 which created State Judicial (Policy Making) Committee comprising of the Chief Justice of Azad Jammu & Kashmir, the Senior Most Judge of Supreme Court, Chief Justice of High Court, the Senior Most Judge of High Court and Secretary Law prescribing same functions as prescribed under National Judicial (Policy Making) Committee Ordinance, 2002. He argued that the National Judicial (Policy Making) Committee Ordinance, 2002 was promulgated in Islamic Republic of Pakistan which created National Judicial (Policy Making) Committee comprising of Hon'ble Chief Justice of Pakistan, Hon'ble Chief Justices of Federal Shariat Court and all High Courts of Pakistan which categorically envisages its function to set a uniform judicial policy all over Pakistan

among all federating units of Pakistan. He also argued that neither any need of State Judicial (Policy Making) Committee nor such a Committee could be constituted in presence of Article 46(1) of Interim Constitution, 1974. He referred the following precedents in support of his contention.

PLD 2013 High Court (AJ&K) 34
1999 SCR 01
PLD 1971 Karachi 118

8. I have scanned the written arguments submitted by the learned counsel for the parties, heard the learned Amicus Curiae and gone through the record of the case with utmost care.

9. The 1st objection raised by the learned AAG is that the instant writ petition is not maintainable on the ground of laches. It is pertinent to mention here that the petitioners have challenged the impugned law on the basis of being ultravires to the Constitutional provisions. The apex Court of Azad Jammu & Kashmir has dilated upon the said issue in case titled "**Azad Govt. and 3 others Vs. Genuine Rights Commission AJK and 7 others**"

[1999 SCR 01]. The relevant para is reproduced as under:-

"18. We have given due consideration to the matter. Irrespective of the facts that in the instant case, the writ petitions filed by the petitioners-respondents have not been couched as writs of quo warranto, and the question whether ultimately, any violation of the Constitution is established or not, it cannot be said that the inquiry complained of was not a continuing wrong. If at all there was any injury, or that the petitioners-respondents were estopped from invoking the writ jurisdiction of the High Court for the redressal of their alleged grievance. Therefore, we are of the view that mere delay in filing the writ petitions did not justify to stay hands from going into the merits of the petitions and decide the same on merits. Therefore, we are unable to subscribe to the contention of the learned counsel for the appellants that the writ petitions entailed dismissal on the sole ground of being hit by laches. It is correct that laches may be considered as an evidence for the allegation in support of mala fide along with other circumstances in the present writ petitions but the same cannot be made basis for the dismissal of the writ petitions."

(underlining is mine)

10. The same principle has been reiterated in case titled "**Raja Waseem Younis Vs. The Chairman, Azad Jammu & Kashmir Council (Prime Minister of Pakistan) through Secretary and 6 others**" [2020 CLC 210]. The relevant segment is reproduced as under:-

"7. So far as, the other point on which the learned High Court dismissed the writ petition and forcefully raised before this Court that the writ petition was hit by the principle of laches, is concerned, it may be stated that in the writ of quo warranto laches is not always a sufficient ground for dismissal of petition rather laches combined with improper conduct would bar relief. In the case in hand as we have discussed in the preceding paragraph that nothing is available on record to show that the appellant approached the Court was not justified to apply the principle of laches. Reference may be made to a case reported as **Azad Government and 3 others v. Genuine Rights Commission and 7 others** [1999 MLD 268], wherein it has been held that:-

"Therefore, we are of the view that mere delay in filing the writ petitions did not justify to stay hands from going into the merits of the petitions and decide the same on merits. Therefore, we are unable to subscribe to the contention of the learned counsel for the appellant that the writ petitions entailed

dismissal on the sole ground of being hit by laches. It is correct that laches may be considered as an evidence for the allegation in support of mala fide along with other circumstances in the present writ petitions but the same cannot be made basis for the dismissal of the writ petitions."

11. In view of the rule and law laid down in the above referred judgments, the objection raised by the learned AAG being without substance, stands repelled.

12. Now, I would like to resolve the objection raised by the learned AAG regarding locus standi. The same principle has been laid down in case titled "**Sajjad Hussain Shah and others Vs. Azad Jammu & Kashmir Council Secretariat through Joint Secretary Council Secretariat Sector F-5/2 Islamabad and others**" [PLD 2013 High Court (AJ&K) 34]. The relevant portion is reproduced as under:-

"32. Firstly, we would like to resolve the objection raised on behalf of the respondents regarding locus standi of Fazal Mehmood Baig and others, petitioners for filing the petition. The petitioners have admitted in para.8 of the petition that the same is being filed as pro bono publico

because in their estimation, due to the adaptation of laws in question the fundamental rights enshrined in section 4 of the Interim Constitution Act have been violated. It is correct that this Court under section 44(2)(c) of the Interim Constitution Act, 1974 can be moved by an aggrieved person for enforcement of his fundamental rights but the recent trend of the judicial pronouncements reveals that the superior Courts of the subcontinent have liberally construed the question of locus standi and have not closed their doors merely on the ground that a petitioner is not directly affected from action or inaction of a public functionary or from promulgation of any law against the fundamental rights enshrined in the Constitution. In the present case the petitioners, besides being office bearers of different Bar Association, are admittedly State Subjects and their this status has not been denied by the respondents. No material has been placed on record by the respondents that petition has been filed as proxy-game or with any ulterior motive."

In para 35 of the aforesaid judgment, it has also been held in the same manner, which is as under:-

"**35.** The question of locus standi of the petitioners herein can be seen from another angle. Under Section 4 of the Azad Jammu & Kashmir Interim

Constitution Act, 1974 any law or custom or usage having the force of law, in so far as it is inconsistent with the rights conferred by this section, shall, to the extent of such inconsistency, be void. Under section 42(2) no law shall be made which takes away or abridges the rights so conferred and any law made in contravention of this subsection shall, to the extent of such inconsistency, be void. The above-stated constitutional provision not only declares the existing laws which are inconsistent with the fundamental rights void but also places a restriction on the powers of the Legislative Assembly and the Council to make any law in future which takes away or abridges the rights conferred by section 4 of the Interim Constitution Act, 1974. If any enactment comes within the ambit of section 4(2) then any State Subject can file petition for a declaration that the law so enacted is inconsistent with the fundamental rights of the State Subjects conferred by section 4(4) of the Interim Constitution Act, 1974."

Again in para 43 of the supra judgment, it was held as under:-

"**43.** In view of above it is concluded that for invoking the jurisdiction under section 44(2)(C) of the Interim Constitution Act, it is the constitutional requirement that a person who is approaching the Court must have locus standi and be aggrieved but the doors

of Court cannot be closed when any of the member of the civil society brings into the notice of the Court that fundamental rights of the State Subjects conferred by Interim Constitution Act, 1974 have been violated or curtailed due to the enactment passed by the Legislative Assembly or the Council as the case may be, however, extra ordinary jurisdiction of this Court cannot be invoked for personal gain, political motivation or oblique consideration. The Court is duty bound to judge the bona fide of the petitioner while entertaining such like petitions, as has been held in AIR 1984 SC 280."

13. In view of above stated position of law, I intend to hold that question of locus standi or aggrieved person implied in section 44(2)(C) is sine-quo-non for invoking extraordinary jurisdiction of this Court but in appropriate cases, when petition is filed in the larger interest of the society by a lawyer or a State Subject in which violation of the fundamental rights is pointed out, then, the question of locus standi can be construed liberally but subject to law laid down by the superior Courts in various pronouncements discussed hereinabove, therefore, the

aforesaid objection having no weight, is also repelled.

14. The contention of the learned counsel for the petitioners is that Article 46(1) confers jurisdiction on High Court to supervise and control the Courts, subordinate to it. It is useful to reproduce Article 46, which is as under:-

"46. High Court to superintend and control all Courts subordinate to it, etc.-(1) The High Court shall superintend and control all other Courts that are subordinate to it.

(2) There shall, in addition to the Supreme Court of Azad Jammu & Kashmir and the High Court, be such other Courts as are established by law.

(3) A Court so established shall have such jurisdiction as conferred on it by law.

(4) No Court shall have any jurisdiction which is not conferred on it by this Act or by or under any other law."

15. Whereas, through the impugned Act, such functions have been vested in the jurisdiction of SJPMC. For proper appreciation, it is necessary to reproduce the relevant Section 4 of the impugned Act, which is as under:-

"4. Functions of Committee:- The Committee shall co-ordinate and harmonize judicial policy within

the court system, and in co-ordination with the Commission, ensure its implementation. The Committee shall also perform the following functions, namely:-

- (a) Improving the capacity and performance of the administration of justice;
- (b) setting performance standards for judicial officers and persons associated with performance of judicial and quasi judicial functions;
- (c) improvement in the terms and conditions of service of judicial officers and court staff, to ensure skilled and efficient judiciary; and
- (d) publication of the annual or periodic reports of the Supreme Court, High Court, Shariat Court and courts subordinate to High Court and Administrative Courts and Tribunals."

16. Now, I would resort to differentiate the words; "**control**", "**supervise**" and "**supervisor**", separately. According to Ballentine's Law Dictionary, 3rd Edition and Black's Law Dictionary, 5th Edition for the meaning of words "Control" and "Supervise".

Ballentine's Law Dictionary

"Control" verb. To check, restrain, govern, have under command and authority. Wolfe v. Loeb 98 Ala 426, 432 Noun: A position of authority in direction and management.

"Supervise". To exercise oversight. To keep under inspection."

"Superintendence" Oversight, inspection, supervision. Moffitt Vs. Ashelville, 103 NC 237, 9 SE 695. Care and oversight for the purpose of direction, and with authority to direct. The act of superintending.

"The word seems probably to imply the exercise of some authority or control over the person or thing subjected to oversight." Dantzler v. De Bardeleben Coal & Iron Co. 101 Ala. 309, 14 So 10.

Black's Law Dictionary

"Control": V. To exercise restraining or directing influence over. To regulate; restrain; dominate; curb; to hold from action; overpower; counteract; govern.

"Control": N. Power or authority to manage, direct, superintend, restrict, regulate, govern, administer, or oversee.

The "**Control**" involved in determining whether "**principal and agent relationship**" is involved must be accompanied by power or right to order or direct. Mid-Content Petroleum Corporation v. Vicars, 221 Ind. 387, 47 N.E. 2 d 972."

"**Supervise**". To have general oversight over, to superintend or to inspect. See Supervisor.

"**Supervisor**". A surveyor or overseer. Also in some states, the chief officer of a town; one of a board of country officers.

In a broad sense, one having authority over others, to superintend and direct.

The term "**Supervisor**" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such

authority is not of a merely routine or clerical nature, but requires the use of independent judgment. National Labour Relations Act S. 2(11).

17. Keeping in view the aforesaid dictionary meanings, it is hold that the supervision and control over the subordinate judiciary vested in the High Court under Article 46 of the Constitution, is exclusive in nature, comprehensive in extent and effective in operation. It comprehends the administrative powers as to the working of the subordinate Courts and all the matters relating to performance standards, including disciplinary jurisdiction over the subordinate judicial officers. In this view of the matter, any provision in an Act or any rule or a notification empowering any executive functionary to have administrative supervision and control over the subordinate judiciary will be violative of Article 46 of the Constitution.

18. The learned AAG raised another point that in Islamic Republic of Pakistan,

National Judicial (Policy Making) Committee Ordinance, 2002, NJPMC is also functioning headed by Hon'ble Chief Justice of Pakistan in presence of *Articles 202 and 203 of Islamic Republic of Pakistan*. It is advantageous to reproduce **Articles 202 and 203 of Islamic Republic of Pakistan, Article 46 of the Interim Constitution, 1974 and Article 227 of Constitution of India**, separately regarding supervision of judicial matters, which are as follows:-

"Article 202 of The Constitution of the Islamic Republic of Pakistan:-

Rules of Procedure:- Subject to the Constitution and law, a High Court may make rules regulating the practice and procedure of the Court or of any Court subordinate to it.

Article 203:- High Court to superintend subordinate courts:- Each High Court shall supervise and control all courts subordinate to it.

Article 46 of AJ&K Interim Constitution, 1974:

"46. High Court to superintend and control all Courts subordinate to it, etc.-(1) The High Court shall superintend and control all other Courts that are subordinate to it.
(2) There shall, in addition to the Supreme Court of Azad Jammu & Kashmir and the High Court, be such other Courts as are established by law.

(3) A Court so established shall have such jurisdiction as conferred on it by law.

(4) No Court shall have any jurisdiction which is not conferred on it by this Act or by or under any other law."

Similar provision is also included in Constitution of India in the following manners:-

Article 227 of Constitution of India:-

Art.227: [(1). Every High Court shall have superintendence over all Courts and tribunals throughout the territories in relation to which it exercises jurisdiction.]

(2). Without prejudice to the generality of the foregoing provision, the High Court may-

(a) call for returns from such courts;

(b) make and issue general rules and prescribe forms for regulating the practice and proceedings of such courts; and

(c) prescribe forms in which books, entries and accounts shall be kept by the officers of any such courts.

(3) The High Court may also settle tables of fees to be allowed to the sheriff and all clerks and officers of such courts and to attorneys, advocates and pleaders practising therein:

Provided that any rules made, forms prescribed or tables settled under clause (2) or clause (3)

shall not be inconsistent with the provision of any law for the time being in force and shall require the previous approval of the Governor.

(4) Nothing in this article shall be deemed to confer on a High Court power of superintendence over any court or tribunal constituted by or under any law relating to the Armed Forces."

19. A bare reading of Article 202, supra authorizes a High Court to make rules to regulate practice and procedure of that High Court or any other court, subordinate to it. Under the aforesaid article, the High Court is empowered to make rules relating to the practice and procedure of the courts including the filing of writ petitions and the ancillary proceedings.

20. No doubt, the Constitution of Pakistan also confers supervisory jurisdiction upon each Court to supervise and control the subordinate Courts. It is worthwhile to mention here that in Article 203 of the Islamic Republic of Pakistan and Article 227 of the Constitution of India, the words "**each High Court**" have been used, whereas, these words are not used in Article 46 of the Azad Jammu & Kashmir

Interim Constitution, 1974. Section 4 of the National Judicial (Policy Making) Committee Ordinance, 2002 clearly speaks that NJPMC was promulgated to harmonize and coordinate the judicial system of Pakistan. Article 203 supra, empowers each High Court of Pakistan to frame judicial policy and other matters relating to subordinate Courts which may cause conflict in policy in judicial system among all the units of federation of Pakistan but in Azad Jammu & Kashmir, no such eventuality arises as there is only single High Court in Azad Jammu & Kashmir. Hence, the aforesaid argument of the learned AAG is also repelled.

21. Article 203, supra empowers the High Court to supervise and control all courts subordinate to it. The power is meant to enable the High Court to discharge its duties as a superior court towards fair and proper administration of justice. The High Court has the authority to check and prevent dereliction of duty and to stop as well as correct violations of law.

"Superintendence" includes the powers to guide, advise and encourage the Judges of the subordinate Courts. Supervision and control is for making and keeping the administration of justice transparent, pure and impartial and not to help any particular party. It is not contemplated in the terms of the Article, supra that the High Court should issue an order against a party to a cause as such.

22. The aforesaid Article 203 conferred the general power upon the High Court, without any limits, fetters or restrictions to supervise and control all Subordinate Courts in all administrative as well as judicial matters, and has made the High Court the custodian of justice within its territorial jurisdiction. In cases, where there is a total absence of jurisdiction or the manifest excess of jurisdiction, the High Court will not refrain in exercising its powers under the supra Act by remedying the error, mistake, wrong or illegality committed by a subordinate Court.

23. Article 46 of the Azad Jammu & Kashmir Interim Constitution, 1974 and Article 203 of the Islamic Republic of Pakistan confer the powers upon the concerned High Court and supervisory jurisdiction as well. It is worthwhile to mention here that in these articles, different words have been used by the Legislature. In Article 203 of Islamic Republic of Pakistan, the word "**each High Court**" has been used, whereas in Article 46 supra, these words have not been used in the legislation.

24. A bare reading of Section 4 of the impugned Act clearly reveals that powers of superintendence and control, which have been vested in the High Court under Article 46(1) have been transferred to SJPMC, which is contrary to above referred Constitutional Provision.

An identical proposition came before this Court in case titled "**Ghulam Mustafa Mughal, Advocate Supreme Court Muzaffarabad and others Vs. Azad Govt. &**

others" [PLJ 1998 AJ&K 140], which is as under:-

(a) "33. The constant views of the Supreme Court of Azad Jammu & Kashmir, the Supreme Court of Pakistan, Federal Shariat Court of Pakistan and the High Court of Azad Jammu & Kashmir are that any provision of law that takes away the jurisdiction of the High Court or any provision of law which is found against the Quran and Sunnah or the teachings and requirements of Quran and Sunnah is ultra vires of the Constitution and the superior Courts are bound to declare them so. The view otherwise taken in the case of "Raja Muhammad Niaz Khan v. Azad Government" (PLD 1988 SC AJ&K 53), the above referred authorities of the Supreme Court have neither been distinguished, reviewed nor held to be not applicable and overruled; and in view of difference of opinion in the case of "Azad Government v. Muhammad Younas Tahir" (1994 SCR 341) on the point decided in Raja Niaz's case, I respectfully follow the view that this Court is competent to declare a provision of law found against the Constitution or Quran and Sunnah as unconstitutional, and is bound to follow Shariah, as Holy Quran says:

"Whose judgeth not by that which Allah hath revealed: such are disbelievers."

25. In a case titled "**M. Yousaf Haroon V. Competent Authority & 4 others**" [2014 SCR 1180], the apex Court has held that the High Court has complete control and

superintendence over the subordinate Courts and in the matters relating to the High Court and subordinate judiciary, it is only the High Court, which has control in all matters. The relevant para is reproduced as under:-

"22. According to the legislative developments all the rules relating to the terms and conditions of service and the persons who are the subject of the Judicial Service Rules, referred hereinabove, are made by the Government. The promulgation of these rules does not mean that in any way, the superintendence and control of the High Court on the Courts subordinate to it has been affected. As the powers of appointment, posting, transfers and all the matters relating to performance of judicial functions remain in the control of the High Court. The application of Act, 2001, does not in any way adversely affect these constitutional powers, because the competent authority remains the High Court. Under the provisions of Act, 2001, the competent authority has been defined as follows:-

"2. (A) "**Competent Authority**" means, the Prime Minister and where in relation to any person or class of persons, the Prime Minister authorizes any Officer or Authority to exercise the powers of competent authority under this Act, that officer or authority, and, in relation to an employee of a Court or tribunal functioning under the Government, the appointing authority or the Chairman or

Presiding Officer of the Court or the Tribunal.”

26. It is significant to mention here that “The National Judicial (Policy Making) Committee Ordinance, 2002 was promulgated in Islamic Republic of Pakistan which created the aforesaid policy comprising of Hon’ble Chief Justice of Pakistan and Hon’ble Chief Justice of Federal Shariat Court along with Hon’ble Chief Justice of all High Courts of Pakistan, which, categorically visualized its function to set a uniform judicial policy all over Pakistan among all federating units of Pakistan.

27. Moreover, the Legislative Assembly of Azad Jammu & Kashmir promulgated the State Judicial (Policy Making) Committee Act, 2017 which created State Judicial (Policy Making) Committee comprising of the Hon’ble Chief Justice of Azad Jammu & Kashmir, Senior Most Judge of Supreme Court, Hon’ble Chief Justice of High Court, Senior Most Judge of High Court and Secretary Law prescribing same functions as

prescribed under National Judicial (Policy Making) Committee Ordinance, 2002 without mentioning any reason that what sought of co-ordination and harmonization is required, when, only one High Court is functioning in the State of Azad Jammu & Kashmir and the exclusive powers of superintendence and control conferred upon the High Court of Azad Jammu & Kashmir under Article 46(1) of Interim Constitution, 1974, have been snatched and thrust upon the JPMC, whereas in Constitution of Pakistan under pari materia provision i.e Article 203 of Constitution of Islamic Republic of Pakistan, 1973 has been adapted and each High Court has the same powers within its own provincial jurisdiction (which might not have harmony with other provinces) giving rise to a genuine need for a forum, which could oversee and harmonize the judicial policy for the whole country, leaving no room for complaint regarding enforcement of fundamental and constitutional rights of general public of whole country

irrespective of their place of residence/province.

28. Article 46 of the Azad Jammu & Kashmir Interim Constitution, 1974 empowers the High Court with two types of supervisory jurisdiction i.e **Judicial and Administrative. Judicial supervision** is carried out by hearing appeals, revisions etc. whereas, in administration supervisory jurisdiction. The High Court is empowered to make rules for service of the lower judiciary and make judicial policy etc. whereas, according to Section 4 of the State Judicial (Policy Making) Committee Act, 2017, these functions have been assigned to Judicial (Policy Making) Committee. Another alarming aspect of this case is that Article 46 of the Azad Jammu & Kashmir Interim Constitution, 1974 confers supervisory jurisdiction upon the High Court and not to the Hon'ble Chief Justice of High Court. It is very astonishing that these constitutional powers have been snatched from the High Court, which is clear cut encroachment of law.

29. It is worthwhile to mention here that the functions entrusted to the supra committee under the Act, 2017, in-fact are constitutional functions of High Court of Azad Jammu & Kashmir and through the subordinate legislation, has practically amended the Constitution and the supreme legislation is not permissible under law and Constitution, hence, the State Judicial (Policy Making) Committee Act, 2017 is not sustainable on this sole ground. So, in this state of affairs, in my considered view, there is no need of the aforesaid committee nor such a committee could be constituted in presence of Article 46(1) of the Interim Constitution.

30. The precedents referred to and relied upon by the learned counsel for the respondents have no conformity with the facts of the present case, therefore, need not to be discussed.

31. Before parting with the judgment, I would like to appreciate and place on record the assistance rendered by the learned Amicus Curiae.

In the light of what has been stated above, the instant writ petition is hereby accepted and the impugned Act known as "The State Judicial (Policy Making) Committee Act, 2017 [Act XXXVIII of 2017]" dated 13.09.2017 being contrary to constitutional provisions, is hereby set-aside. However, actions taken in furtherance of the above Act stand protected and validated.

Muzaffarabad,
05.11.2020

(Sd)
JUDGE