

## **HIGH COURT OF AZAD JAMMU & KASHMIR**

Writ petition No. 1604/2023.

Date of Institution 18.04.2023.

Date of decision 07.06.2023.

1. Raja Zulqarnain Abid Khan, Advocate High Court of Azad Jammu and Kashmir, Member Central Bar Association, Muzaffarabad.
2. Waqar Farooq Abbasi, Advocate High Court of AJ&K, Member Central Bar Association, Muzaffarabad.
3. Syed Ali Abdullah, Advocate High Court of AJ&K, Member Central Bar Association, Muzaffarabad.

*....Petitioners*

### **VERSUS**

1. President of the State of Azad Jammu & Kashmir, through Secretary to President Azad Jammu and Kashmir, Muzaffarabad.
2. Azad Jammu and Kashmir Legislative Assembly through its Secretary Assembly, Azad Government of the State of Jammu and Kashmir, having his office at New Secretariat Muzaffarabad.
3. Speaker Azad Jammu & Kashmir Legislative Assembly, having his office at New Secretariat Muzaffarabad.
4. Election Commission Azad Jammu & Kashmir through Secretary Election Commission, Azad Jammu and Kashmir Muzaffarabad.
5. Department of Law, Justice, Parliamentary Affairs & Human Rights through its Secretary, Azad Govt. of the State of Jammu and Kashmir having his office at New Secretariat Muzaffarabad.

*.... Respondents*

6. Pakistan Muslim League N (AJ&K) through its President Shah Ghulam Qadir.
7. Pakistan People's Party Parliamentarian (AJ&K), through its President Ch. Latif Akbar.
8. Pakistan Tehrik-e-Insaf (AJ&K) through its President Sardar Tanvir Ilyas.
9. Muslim Conference (AJ&K), through its President Sardar Attique Ahmed Khan.

10. Jammu & Kashmir People's Party (AJ&K), through Hassan Ibrahim.
11. Azad Jammu & Kashmir Bar Council through Vice Chairman Azad Jammu & Kashmir Bar Council.
12. Central Bar Association through its President Central Bar Association Azad Jammu and Kashmir, Muzaffarabad.

....Proforma-respondents

### **WRIT PETITION**

**Before:- Justice Sadaqat Hussain Raja, C.J.**  
**Justice Syed Shahid Bahar, J.**  
**Justice Sardar Muhammad Ejaz Khan, J.**

### **PRESENT:**

M/s Haroon Riaz Mughal, Waheed Awan, Advocate for the Petitioners.  
 Raja Zulqarnain Abid, Waqar Farooq Abbasi, Syed Ali Abdullah, Advocates/ Petitioners in person.

***JUDGMENT: (Justice Syed Shahid Bahar, J.)***

(786)

سورة الشعراء، آیات ۸۳-۸۴:

رب ھب لی حکما والحقنی بالصالحین (۸۳) واجعل لی لسان صدق فی الاخرین  
 (۸۴)

ترجمہ

(ابراہیمؑ نے دعا کی) ”اے میرے رب، مجھے حکم عطا کر۔ اور مجھ کو صالحوں کے ساتھ ملا۔ اور بعد کے آنے والوں میں مجھ کو سچی ناموری عطا کر۔“

### **Translation**

“O my Sustainer! Endow me with the ability to judge (between right and wrong), and make me one with the righteous, and

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<sup>1</sup>. Abul Ala Maudoodi.

grant me the power to convey the truth on to those who will come after me."<sup>2</sup>

1. Petitioners through the instant petition have invoked the constitutional jurisdiction available to this Court under **Article 44** of the **Azad Jammu & Kashmir Interim Constitution, 1974 ("Constitution")** whereby they have solicited the relief tabulated infra:-

"It is most respectfully prayed that by accepting the writ petition an appropriate writ may kindly be issued in the following manner:-

- i. The consistent delays in session to avoid the poll for the office of the Prime Minister may kindly be declared illegal, unconstitutional, apparent violation of the Article 17(2) of the Interim Constitution 1974 read with rules, 1975 قواعد انضباط کار قانون ساز اسمبلی chapter 04 section 16(1).
- ii. The official respondents may kindly be directed to ensure the swift and abrupt compliance of the constitutional provision and most significantly to article 17(2) by organizing the poll for the Prime Minister forthwith.
- iii. Grant any other, further or better relief to which the petitioners may be entitled to and which the Hon'ble Court deem fit and proper to under the Article 44 of Azad Jammu and Kashmir Interim Constitution, 1974."

A. **FACTUAL MATRIX:**

2. The long and the short of the instant petition is that the petitioners are 1<sup>st</sup> Class State Subjects who filed this petition in the attire of **pro-bono publico** to prevent inconvenience, infringement of fundamental rights specifically *freedom of association* and with a view to enforce the rule of law,

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<sup>2</sup> Muhammad Asad.

redressing public office holder and enforcing public duty. The petitioners, who are practicing lawyers, belong to noble profession of advocacy as well as being members of Central Bar Association, Muzaffarabad, are rendering their services for the betterment of the public at large and for the concept of supremacy of law and equality before law to be prevailed in society as well as in the territory of State. They contend that when a provision of the Constitution, law and rules of the land is violated, every citizen falls within the definition of an “aggrieved person”. The petitioners aver that under clause (2) of Article 17 of the AJ&K Interim Constitution, 1974, if the Assembly is in session at the time when the Prime Minister dies or the office of the Prime Minister becomes vacant, the Assembly shall forthwith proceed to elect the Prime Minister, and, if the Assembly is not in session the President, shall, for the purpose summon it to meet within fourteen days of the death of the Prime Minister or as the case maybe, if the office becomes vacant. They fervently contend that office of the Prime Minister is vacant since the time when the Ex-Prime Minister *Sardar Tanvir Ilyas Khan* was de-notified in light of the judgment of this Court dated 11.04.2023<sup>3</sup> by Election Commission of AJ&K vide notification dated 11.04.2023. The petitioners allege that the office of Prime Minister of AJ&K is lying vacant since 11.04.2023,

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<sup>3</sup>. [PLD 2023 High Court (AJK) 75] – Robkar Adalat v. Tanvir Ilyas.

whereas the session of Assembly is ongoing for the last six days but distinguished Speaker of the Assembly has failed to conduct the election of the new Prime Minister as provided in the Constitution. The petitioners staunchly contend that AJ&K Assembly is supreme legislative body and Speaker of the Assembly is under legal obligation to conduct the election of the Prime Minister *forthwith* being an independent and natural constitutional authority deriving its mandate from the Interim Constitution to hold, organize and conduct election in AJ&K in accordance with law, besides, he is the ultimate constitutional authority to ensure compliance of Article 17 under the doctrine of *penumbra* which refers to legal principle and recognizes certain un-enumerated rights and obligations as implicit in the guarantee of the Constitution which can also be termed as constitutional penumbra. Under this doctrine, a specific provision of the Constitution should not be read in isolation rather it must be considered in the context of other relevant and connecting provisions of a Constitution or a statute as a whole. The petitioners contend that Article 30 (A) of the Constitution provides that the validity of the proceedings in the Parliament shall not be called in question on the ground of any irregularity of procedure, members of the Parliament whom powers are vested by or under the Constitution for regulating procedure or

the conduct of business or for maintaining order in the Parliament shall be subject to the jurisdiction of any court in respect of any such exercise of power by the Parliament. The petitioners further contend that it is the matter of public interest and violation of the fundamental rights, guaranteed by the AJK Interim Constitution, 1974 and the petitioners herein being members of civil society have no other alternate or efficacious remedy except to invoke an extraordinary jurisdiction of this Court through the instant petition and petitioners seeking appropriate writ to abruptly seize the acts which are evidently at odds with the constitutional provisions, laws, relevant rules and more importantly the celebrated fundamental rights enshrined in the Constitution. In support of their claim, the petitioners as well as their counsel have referred to and relied upon 1997 SCR 166, 1998 SCR 149, 2000 SCR 97, 2002 SCR 42, 2014 SCR 1385, PLD 2012 SC 774.

3. Preliminary arguments heard and record appended with the writ petition as well as relevant laws, provisions of the Constitution and case laws have also been perused.

**B. ORDER PASSED BY THIS COURT DATED 19.04.2023:-**

4. Through the short order pronounced by this Court dated 19.04.2023, the instant constitutional petition was

dismissed **in limine** on the ground of maintainability. The verbatim of the said order dated 19.04.2023 is as infra:-

“As Assembly is in session, doctrine of trichotomy of power is balancing apparatus among three main limbs of the State i.e. Legislature, Judiciary and Executive. In view of the judgments rendered by the Apex Court in the case titled “Fazal Mahmood Baig vs. The University of AJ&K and 11 others” reported in [2017 SCR 1380] and in case titled “Raja Iqbal Rashid Minhas vs. AJ&K Council and 3 others” reported in [2001 SCR 530], the instant constitutional petition is not maintainable. Protocol and pre-requisite enshrined in the Article 44 are not satisfied, thus, the petition in hand is dismissed in limine, under the doctrine of limine control. Detailed judgment will be given later on.”

5. As adumbrated, the petitioners, who are practicing lawyers came forward by filing the instant petition with a specific plea seeking direction, in a way to declare the delay caused by the respondents qua conducting election of Prime Minister illegal and unconstitutional as well as sought strict compliance of Article 17(2) of the Interim Constitution, 1974. It is useful to reproduce the Article 17(2) of the Constitution as infra:-

**17. Minister performing functions of Prime Minister.-**

(1) .....

(2) If the Assembly is in session at the time when the Prime Minister dies or the office of the Prime Minister becomes vacant the Assembly shall forthwith proceed to elect a Prime Minister, and if the Assembly is not in session the President shall for that purpose summon it to meet within fourteen days of the death of the Prime

Minister or, as the case may be, of the office becoming vacant.

(3) .....

(4) .....”

**C. COURT’S ARTICULATION:-**

6. Language of the Article 17(2) is crystal clear. It is astonishing state of affairs that no one turned up on behalf of the worthy members of the Legislative Assembly or for that matter political parties (having representation in the House) to knock the door of this Court by contending that command of the Constitution is flouted.

7. Thus, the petitioners who are advocates are not an aggrieved party in a sense to seek indulgence in the matter, particularly, when Assembly is in session. Our this view, breath from the verdicts of the Supreme Court of AJ&K given in the reported pronouncements i.e. **2017 SCR 1380**<sup>4</sup> and **2001 SCR 530**<sup>5</sup>.

8. No doubt that rule of law is paramount aim of the Constitution and legal fraternity is burdened with heavy duty to endeavor for rule of law and supremacy of Constitution under the **Azad Jammu and Kashmir Legal Practitioners and Bar Council Act, 1995 (Act No.XXX of 1995)** read with **Azad Jammu and Kashmir Legal Practitioners and Bar Council Rules, 1998**. As

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<sup>4</sup>, Fazal Mahmood Baig v. The University of AJ&K.

<sup>5</sup>. Raja Iqbal Rashid Minhas v. AJ&K Council.



per **Rule 120** of the said Rules of 1998, every advocate shall uphold the dignity and high standing of his/her profession at all times as well as his/her own dignity and high standing as a member thereof. In view of **Rule 138** of the Bar Council Rules, 1998 (ibid), a lawyer in his/her professional capacity shall not advocate the violation of any law. This satisfactory obligation cannot be read in isolation or for that matter it can never be construed in a manner to remove or fragile the pre-requisite of Article 44 of the Interim Constitution, 1974.

9. It seems appropriate to reproduce the verbatim of Article 44 of the Interim Constitution, 1974:-

**“44. Jurisdiction of High Court.-** (1) The High Court shall have such jurisdiction as is conferred on it by [the Constitution] or by any other law.

(2) Subject to [the constitution], the High Court [may] if it is satisfied that no other adequate remedy is provided by law.-

(a) on the application of any aggrieved party, make an order.-

(i) directing a person performing functions in connection with the affairs of Azad Jammu and Kashmir or local authority to refrain from doing that which he is not permitted by law to do, or to do that which he is required by law to do; or

(ii) directing that any act done or proceedings taken [...] by a person performing functions in connection with the affairs of the State or a local authority has been done or taken without lawful authority, and is of no legal effect; or

(b) on the application of any person, make an order, ---

(i) directing that a person in custody in Azad Jammu & Kashmir be brought before the High Court so that the Court may satisfy itself that he is not being held in custody without lawful authority or in an unlawful manner; or

(ii) requiring a person [...] holding or purporting to hold a Public office [in connection with the affairs of Azad Jammu and Kashmir] to show under what authority of law he claims to hold that office; or

(c) on the application of any aggrieved person, make an order giving such direction to the person or authority, including the Council and the Government, exercising any power or performing any function in, or in relation to, Azad Jammu and Kashmir as may be appropriate for the enforcement of any of the fundamental rights conferred by [the Constitution].

(3) An order shall not be made under [sub-Article] (2) of this [Article] on application made by or in relation to a person in the Defence Services in respect of his terms and conditions of service, in respect of any matter arising out of his service or in respect of any action taken in relation to him as a member of the Defence Services.

(4) Where, --

(a) application is made to the High Court for an order under clause (a) or clause (c) of [sub-Article (2)]; and

(2) the Court has reasons to believe that the making of an interim order would have the effect of prejudicing or interfering with the carrying out of a public work or otherwise being harmful to the public interest,

the Court shall not make an interim order unless the Advocate-General has been given notice of the application and the Court, after the Advocate-General or any officer authorized

by him in this behalf has been given an opportunity of being heard, is satisfied that the making of the interim order would not have the effect referred to in clause (b) of this [Sub-Article].

(5) In this [Article], unless the context otherwise requires, 'person' includes any body politic or corporate, any authority of or under control of the Council or the Government and any Court or tribunal other than the [Supreme Court of Azad Jammu and Kashmir], the High Court or a Court or Tribunal established under a law relating to the Defence Services."

C1. **PRO BONO PUBLICO:-**

10. It is a Latin term whose literal meaning is "for the public good". These are the uncompensated free legal services performed for the indigent or for a public cause.<sup>6</sup>

C2. **SCOPE OF PUBLIC INTEREST LITIGATION (PIL):-**

11. In PIL, a litigant does not ask for loaves and fishes<sup>7</sup> but he/she has to show that he/she is litigating, firstly in the public interest and, secondly, for the public good or for the welfare of the general public.<sup>8</sup> A litigant seeking remedy under the umbrella of PIL must not have an axe to grind.

C3. **CAN A "PRO BONO LITIGANT" INVOKE CONSTITUTIONAL JURISDICTION?-**

12. No, a writ petition can be entertained only on the application of an "aggrieved person" and not by a pro bono publico litigant<sup>9</sup> as a person who seeks a command from the

<sup>6</sup>. See Black's Law Dictionary, 11<sup>th</sup> Edition @ p. 1457.

<sup>7</sup> Idiom, which means "material benefits."

<sup>8</sup> [PLD 2004 SC 482] – Javed Ibrahim Paracha v. Federation of Pakistan.

<sup>9</sup> [2001 SCR 530] – Raja Iqbal Rashid Minhas v. AJ&K Council.

High Court for enforcement of fundamental right must first show with reference to proven facts, as to how he/she is an “aggrieved person”, from what particular act or action he/she feels aggrieved and to which authority he/she wishes the writ of the High Court to be directed.<sup>10</sup>

C4. **AGGRIEVED PERSON:-**

13. Since the term “aggrieved person” is not defined in our Constitution, therefore, we have to glean its meaning from other legal sources. It is a person or entity having legal rights that are adversely affected; having been harmed by an infringement of legal rights.<sup>11</sup> A person is aggrieved when his/her interest or right is injured by an order or legislation, as such he/she has suffered a legal grievance.<sup>12</sup> An aggrieved must be a person who has suffered a legal grievance or who must be a person against whom a decision has been pronounced which has wrongly deprived him/her of something or wrongfully refused him/her something or wrongfully affected his/her title to something.<sup>13</sup> Public Interest Litigation (PIL) has come to stay as one of the species of litigation in which redress may be found from the courts of law, however, this does not confer a general or untrammelled right to indulge in frivolous litigation without

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<sup>10</sup>. [PLD 1980 SC (AJ&K) 5] – Ghiasul Haq v. Azad Government of the State of Jammu and Kashmir.

<sup>11</sup> See Black’s Law Dictionary, 11<sup>th</sup> Edition @ p. 83.

<sup>12</sup> [PLD 1985 AJ&K 95] – Jammu & Kashmir Tehrik Ammal Party v. Azad State of Jammu and Kashmir.

<sup>13</sup> [2020 SCR 591] – Azad Government v. Barrister Adnan Nawaz Khan.

any genuine cause of action and the necessity of seeking redress of some real grievance. Consequently, while recognizing such litigation, courts had taken care to add a word of caution that certain minimum conditions must be satisfied before the Court shall lend assistance to such litigation asking for relief. PIL can be initiated for public injury by a person not personally hurt.<sup>14</sup> In the above parlance, the petition in hand is pre-mature as Assembly is in session and no one turned up from Legislature in this regard. Thus, it is not justified on the part of the Court to indulge in business of Legislature at random.

C5. **INTERNAL PROCEEDINGS OF THE ASSEMBLY, EITHER OPEN TO CHALLENGE OR NOT?**

14. **Article 34, clause 1** of the AJ&K Interim Constitution, 1974 clearly says that the *validity of any proceedings in the Assembly shall not be questioned in any court*. It is pari materia of **Article 89** of the erstwhile Constitution of the Islamic Republic of Pakistan, 1956 (erstwhile Constitution). Article 89 of the erstwhile Constitution specified number of other privileges. These privileges are precisely in line with the development of the same privileges in relation to the British Parliament. The protection granted to proceedings in an Assembly against interference by the Courts is to be understood and given its full

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<sup>14</sup> [PLD 2009 Lahore 22] – Khurram Khan v. Government of Punjab.

content by reference to the historical development of that right through some six centuries of contention, in relation to the House of Commons. This provision was introduced into the Constitution with a full knowledge of the extent to which the House of Commons had succeeded in establishing its privilege against the jurisdiction of the Courts in relation to its own internal proceedings.<sup>15</sup>

15. Parliamentary privilege was originated in the United Kingdom when House of Commons<sup>16</sup> passed the “**Bill of Rights Act, 1688**”. The freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any Court or place out of Parliament.<sup>17</sup> Now, the question of vital importance arises as to whether immunity enjoyed by one of the three limbs of the State (i.e. Legislature) is absolute or not: In this regard, aid is sought from the supreme law of the land (i.e. Constitution) which restricts the worthy members of Legislative Assembly to discuss anything with respect to the conduct of any Judge of the Supreme Court or the High Court in the discharge of his duties.<sup>18</sup>

16. Bare reading of Article 34(1) may erroneously infer that the absolute Parliamentary privilege enjoyed by the

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<sup>15</sup> [PLD 1958 SC 397] – Pakistan v. Ahmad Saeed Kirmani.

<sup>16</sup> Lower House of the Parliament of the United Kingdom.

<sup>17</sup> Article IX of the Bill of Rights 1688.

<sup>18</sup> Article 30-A of the AJ&K Interim Constitution, 1974.

members of the House of Commons is also in vogue in AJ&K. At this juncture, it is pertinent to mention that a provision of the Constitution cannot be interpreted in isolation.<sup>19</sup>

C6. **THE RULE OF ORGANIC CONSTRUCTION:-**

17. In our jurisprudence, it is by now well settled that the Constitution has to be read organically and holistically. Individual Articles or clauses of the Constitution, if read in isolation from the rest of the Constitution, may mislead the reader. This is so because the meaning of the Constitution is to be gathered from the Constitution as an integrated whole not, it may be said, as a mechanical deduction, but based on reason. It is the ancient but simple wisdom of sage wise men which has been distilled through the logic and deductive reasoning of precedent, leading to the rule of interpretation requiring the Constitution to be read as an ‘organic whole’.<sup>20</sup>

18. The rationale for the rule is universal logic and transcends the divide between the various prevalent systems of law. Thus we have common law constitutionalists such as Lawrence Tribe and Michael Dorf warning us against “approaching the Constitution in ways that ignore the salient fact that its parts are linked into a whole that it is a Constitution, and not merely an unconnected bunch of separate clauses and

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<sup>19</sup> PLD 2015 SC 401] – District Bar Association, Rawalpindi v. Federation of Pakistan.

<sup>20</sup> [PLD 2013 SC 829] – Begum Nusrat Ali Gonda v. Federation of Pakistan.

provisions with separate histories that must be interpreted.” It is this very logic which informs the comment of a Civil Law Scholar like Dr. Conrad who remind lawyers “that there is nothing like safe explicit words isolated from a general background of understanding and language. This is particularly so in the interpretation of organic instruments like a Constitution where every provision has to be related to the systemic plan, because every grant and every power conferred is but a contribution to the functioning of an integrated machinery....it will not do to discuss such concepts as [mere] political theory irrelevant to textual construction”.<sup>21</sup>

19. The same undeniable logic comes from the wisdom of such savants as Maulana Jalaluddin Rumi in his parable of elephant in the dark of night or the Greek ancient Hippocrates. The wisdom and logic of this should be self-evident, but we can advert briefly to Munir Hussain Bhatti’s case (*ibid*), wherein was recounted the story of five men and an elephant on a dark night who, groping and touching different parts of an elephant’s anatomy, constructed an image of the animal which is disjointed and wholly inaccurate. One, touching its ear thinks it is like a fan, the other likens it to a pipe by feeling its trunk and so forth depending on the part each has touched. That the inability of

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<sup>21</sup> [PLD 2011 SC 407] – Munir Hussain Bhatti v. Federation of Pakistan.



each man to look at the elephant holistically is obvious. As the Maulana says, these men in the dark did not have a lamp to show then that the elephant was one composite organism, whose constituent components were to be seen together if the whole was to be understood, without errors of perception. The Greek ancient, Hippocrates<sup>22</sup> in the same vein, said that “the nature of the parts of the body cannot be understood without grasping the nature of the organism as a whole.” It is, therefore, crucial for us, consistent with reasons, to look at the Constitution as a whole if we are to make sense of its provisions “organically”. Looking at the Constitution any other way would lead the reader astray.

20. This indeed is an irrefutable logic which impels us to the view that Article 34(1) of the Constitution has to be read as being one small cog in the Constitutional machinery and has little significance as a stand alone provision because the Constitution has to be read holistically as an organic document.

C7. **SEPARATION OF POWERS:-**

21. Separation of powers, also known as ‘**Trias Politica**’, is the idea that the government must be based on “three separate branches” where power is wielded, so they can keep a check on each other. This idea was proposed by **Charles De**

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<sup>22</sup> Quoted by Edurado Galeano in his book “Mirrors”.

**Montesquieu**, a French Philosopher (1689-1755). In essence, there are three organs in a State, entrusted with specific functions under the Constitution: - Legislative, Executive and Judiciary. The scheme of our Constitution is based on trichotomy and in the system of trichotomy, the Judiciary has the right to interpret, the Legislative has only to legislate and the Executive has to implement.<sup>23</sup> Under the doctrine of separation of powers, a system of check and balance establishes to avoid tyranny and abuse of power.<sup>24</sup> This doctrine is adopted in the light of the fact that a single institution holding all power may act arbitrarily as it would not be accountable to anyone for its actions, which may affect the State negatively. Trichotomy is the linchpin of democracy in which functions of all organs of the government are clearly defined aimed at ensuring their seamless functioning in the service of the people and the State.

C8. **PARLIAMENTARY SOVERIGNTY: NOTION:-**

22. It is the theory propounded by the Constitutional Scholar A.V Dicey in relation to the British Parliament. It holds that the legislative body has absolute sovereignty and is supreme over all other institutions i.e. Executive and Judiciary. British Parliament has the power of 'omnipotence' as their Constitution is in an unwritten form whereas AJ&K has a 'written

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<sup>23</sup> [2006 SCMR 606] – Nazar Abbas Jaffri v. Secretary to Government of the Punjab.

<sup>24</sup> Alishba Fazal, "Separation of Powers in Pakistan"; published in ZU-BLAWGS, August 10, 2021.

Constitution’ where functions of the State are distributed amongst various organs of the State and their respective powers are defined by the Constitution. Even powers of Legislature are to be derived from and to be circumscribed within the four corners of the written Constitution.<sup>25</sup> Archaic notion of Parliamentary Supremacy propounded by A.V Dicey in 19<sup>th</sup> Century has lost currency even in the soil of its inception (i.e. United Kingdom) as the European Convention on Human Rights as incorporated into UK law by the Human Rights Act, 1998, created a new legal order. The classic account given by Dicey of the doctrine of the supremacy of Parliament, pure and absolute it was, can now be seen to be out of place in the modern United Kingdom.<sup>26</sup> To all intents and purposes, where Constitution is in an unwritten form, Legislative organ of the State is supreme but where Constitution is in written form, Constitution stands supreme. Even Courts are creatures of the Constitution, they derive their powers and jurisdiction from the Constitution and must confine themselves within the limits made by the Constitution.<sup>27</sup>

23. Our Constitution circumscribes the limits of jurisdiction and authority available to each of the three limbs of the State under the doctrine of trichotomy of powers. Whilst

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<sup>25</sup> [PLD 1973 SC 49] – State v. Zia-ur-Rehman.

<sup>26</sup> [(2005) UKHL 56] – Jackson v. Attorney General.

<sup>27</sup> [PLD 1996 SC 632] – Mrs. Shahida Zahir Abbasi vs. President of Pakistan.

Courts will ordinarily exercise restraint and not enter into the domains of Legislature and the Executive, they will intervene when either of these branches overstep their constitutionally prescribed limits as judicial restraint in its substantial approach urges Judges considering constitutional questions to give deference to the views of the elected branches and invalidate their actions only when constitutional limits have clearly been violated.<sup>28</sup>

C9. **CONCEPT OF JUDICIAL REVIEW:-**

24. Judicial review is a process under which Executive, Legislative and Administrative actions are subject to review by the Judiciary. In *AJ&K*, it takes breath from Article 4 clause (1) and (2) of the Constitution, 1974. The conjunctive reading of the said clauses make it crystal clear that any law, custom or usage, if abridges or takes away the fundamental rights guaranteed by the Constitution to the subjects of the State or any law is made in contravention of fundamental rights, the same shall be declared void. Judicial review is one of the checks and balances under the doctrine of trichotomy of powers i.e. trias politica (propounded by Montesquieu), wherein, the Judiciary supervises the other two organs i.e. Legislature and Executive,

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<sup>28</sup> [PLD 2020 SC 1] – *Jurists Foundation v. Federal Government*.

when the latter perform their authority ultra vires the Constitution and law.

C<sub>10</sub>. **ORIGIN OF JUDICIAL REVIEW:-**

25. In the year 1803, the U.S Supreme Court established the principle of judicial review in the United States by declaring the Act of Congress<sup>29</sup> unconstitutional.<sup>30</sup> The said verdict was authored by their Chief Justice (as then he was) John Marshall.

C<sub>11</sub>. **RATIO DECIDENDI OF MARBURY V. MADISON:-**

- i. The Constitution established a government of limited powers;
- ii. The Constitution is the supreme law of the land. It is superior to legislative enactments;
- iii. The Court cannot close its eyes to an unconstitutional act. Marshall stated: "It is emphatically the province and duty of the judicial department to say what the law is; and
- iv. Judges take an oath to uphold the Constitution. It would be immoral for them to give effect to an unconstitutional act.

26. The Constitution contains a scheme for the distribution of powers between various organs and authorities of the State, and to the superior Judiciary is allotted the very responsible though delicate duty of containing all other authorities within their jurisdiction by investing the former with powers to intervene whenever any person exceeds his/her lawful authority. The Judges of the Superior Courts are under a

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<sup>29</sup> America's Parliament comprising of "Senate" or the 'Upper House' and 'House of Representatives' or the 'Lower House'.

<sup>30</sup> [5 U.S. 137] – William Marbury v. James Madison.

solemn oath to “preserve, protect and defend the Constitution.”<sup>31</sup>

C12. **PARLIAMENTARY PRIVILEGE: UPTO WHAT EXTENT :-**

27. It goes without saying that the worthy members of the law-making limb of the State i.e. Legislature enjoy freedom of speech in Legislative Assembly and no member of the Legislature shall be liable to any proceedings in any Court in respect of anything or any vote given by him/her in Legislative Assembly,<sup>32</sup> as has been discussed earlier at paragraph No.14 of the judgment in hand. This privilege has been bestowed to the worthy law-makers by the Constitution when they are in Assembly’s precincts. In spite of this privilege, interpretative limb of the State i.e. Judiciary derives the power of judicial review from the supreme law of the land when Article 30-A of the Constitution, 1974 is flouted<sup>33</sup> or when Assembly at any stage endeavors to transgress its limits by infringing upon the jurisdiction of other organs bestowed by the Constitution upon them.<sup>34</sup> The validity of internal proceedings cannot be scrutinized in Courts as the internal proceedings of Legislative Assembly come within the ambit of “Parliamentary Privilege” albeit where the said proceedings are ultra-vires the Constitution, writ jurisdiction of the High Court could be

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<sup>31</sup> [PLD 1966 SC 105]- Fazalul Quader Chowdhury v. Shah Nawaz.

<sup>32</sup> Article 34 of the AJ&K Interim Constitution, 1974.

<sup>33</sup> [PLD 1988 Karachi 309] – Karachi Bar Association v. Abdul Hafeez Pirzada.

<sup>34</sup> [PLD 1998 SC 823] – Masroor Ahsan v. Ardeshir Cowasjee.

resorted to<sup>35</sup> as the Constitution has empowered the superior Courts to examine and adjudicate the validity of proceedings in Legislative Assembly if these contravene the substantive or procedural provisions of the Constitution.<sup>36</sup> If the internal proceedings are “irregular” not “illegal”, then the said proceedings are intra-vires the “proceedings” enunciated under Article 34 of the Interim Constitution, 1974<sup>37</sup> but when the internal proceedings of the Assembly are ‘illegal’, then the said proceedings are ultra-vires the Constitution and the same may be impeached on the sole ground.<sup>38</sup>

#### **D. DEDUCTION:-**

28. Election of the office of Premier is internal business of the House, definitely which is to be carried on and finalized in accordance with the commandment of the Constitution, in case of little bit deviation, delay or procrastination, esteemed members of Legislative Assembly and main stream political parties (having representation in the House) are directly aggrieved parties as internal proceedings of the Assembly are manned by “formal transaction of business”.<sup>39</sup> In our estimation legal fraternity may come forward to perform its statutory duty,

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<sup>35</sup> [PLD 1958 SC 397] – Pakistan v. Ahmad Saeed Kirmani.

<sup>36</sup> [PLD 2022 SC 574] – Pakistan Peoples Party Parliamentarians v. Federation of Pakistan.

<sup>37</sup> [PLD 1999 Karachi 54] – Asif Ali Zardari vs. Federation of Pakistan.

<sup>38</sup> [2007] 3 SCC 184]- Raja Ram Pal v. Honorable Speaker, Lok Sabha; and [(2010) 4 SCC 1] Ramdas Athawale v. Union of India.”

<sup>39</sup>. [PLD 1970 SC 98] – Farzand Ali v. Province of West Pakistan.

through their recognized association or Bar Council or after obtaining permission from the Bar Council, when they opt to come as an advocate, otherwise they may come as a State Subject and they have to satisfy the conscious of the Court pertaining to their specific grievance as envisaged under Article 44 of the AJ&IK Interim Constitution, 1974 as it will help to check the bona-fides of the litigants at the earliest.

29. Before parting with the judgment, we would like to observe that Constitution is a social contract and sacred document based upon will of the people. It is the skeleton of a nation and a paramount law on the basis of which the State makes laws and regulates its authority.<sup>40</sup> Even legislature cannot deviate or bypass the Constitution without bringing necessary amendment. Deviation and disobedience to the Constitution leads the entire society towards anarchy and lawlessness, by introducing culture of club law, which as per the renowned aphorism is called “MIGHT IS RIGHT” which in Urdu is translated as:-

”جسکی لاشی اس کی بھینس“

30. Proper fora for resolution of political vendetta and such like connected matters are liable to be resolved on the floor of the House by the chosen representatives or politicians,

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<sup>40</sup> Mian Allah Nawaz, “How to Strengthen the Fundamentals of the Judiciary”



and High Court under the scheme of Constitution is not supposed to thrust its nose into such like matters, but so far as enforcement of Constitutionally fundamental rights and implementation of laws are concerned, High Court as a guardian of the Constitution is zealous to protect the Constitution as the Judges of the Superior Courts (Supreme Court and High Court) are under a solemn oath to “preserve, protect and defend the Constitution.” (emphasis supplied)

31. Doctrine of trichotomy of power demands activism of all the three pillars of troika in their constitutionally demarcated and allotted spheres, any organ from said troika cannot step in and transgress in the allotted sphere of other organ.

32. In the landmark judgment delivered by the Supreme Court of Pakistan in the case titled District Bar Rawalpindi vs. Federation of Pakistan<sup>41</sup> while dilating upon the doctrine of trichotomy of power by referring the case titled “M. Azhar Siddique vs. Federation of Pakistan”<sup>42</sup> it was held as infra:-

”ریاست کے تمام ستون ایک دوسرے سے ہم آہنگی قائم رکھیں اور عوام کے خادم کی حیثیت سے کام کریں“ ہماری آئینی ترجیحات میں اس بات کا سوال ہی پیدا نہیں ہوتا کہ کوئی ایک ستون دوسرے پر بالادستی حاصل کرنے کا دعویدار ہو۔ جہاں تک منیر حسین بھٹی کے مقدمہ میں نوٹ کیا گیا تھا کہ ”جہاں تک آئینی نکات پر اختلاف رائے کا تعلق ہے جمہوری حدود میں رہتے ہوئے یہ اختلافات غیر از معمول نہیں ہوتے خاص طور پر نئے قانون وضع کرتے ہوئے ایسے اختلافات پیدا ہونا عین ممکن ہے۔ ایسے امور کو آئینی حدود میں رہتے ہوئے سلجھایا جاتا ہے۔“

<sup>41</sup> PLD 2015 SC 401

<sup>42</sup> PLD 2012 SC 774

33. Similarly in another splendid judgment rendered by the Apex Court of Pakistan in the case of “Dr. Mobashir Hassan vs. Federation of Pakistan,”<sup>43</sup> it was held as under:-

”توانین بشمول آئینی ترامیم منظور کرنے کے پارلیمانی اختیارات لامحدود نہیں ہیں۔ عوام کے لیے کیا اچھا ہے اور کیا برا آئین کی رو سے یہ طے کرنا عوام کے منتخب نمائندگان پر چھوڑ دینا مناسب ہے لیکن اس اختیار کی حدود بھی ہیں جو کہ آئین میں متعین کر دی گئی ہیں۔  
 ”آئین میں صاف بتایا گیا ہے کوئی بھی رکن پارلیمان ایوان میں فرائض منصبی کی انجام دہی سے پہلے یہ حلف لے گا کہ وہ دستور کو برقرار رکھے گا اور اس کا تحفظ اور دفاع کرے گا۔“

34. Thus, as members of Legislative Assembly are under oath to go with the Constitution and protect the same, hence no little bit deviation can be expected from the clear cut command and demand of the Constitutional provisions. Abhorred, discarded and ugly law of necessity cannot be allowed to frustrate and fragile the plain wording of the Constitution. Any express or implied attempt to bypass the Constitution in guise of any necessity or expediency is tantamount to welcome the Dragon of law of necessity and if entry of said witch is allowed then it means that the concept of rule of law is impliedly divorced.

**(underlining is ours)**

35. Healthy democratic system can only progress and flourish by remaining under the umbrella of the Constitution as

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<sup>43</sup> PLD 2010 SC 265.

Constitution is the soul of the will of the people. Ergo, let this soul be energized.

36. For the foregoing reasons, the petition in hand is not maintainable, thus, the same is dismissed in limine.

(Constitutional petition stands dismissed).

Muzaffarabad,  
07.06.2023.<sup>(A\*)</sup>

**CHIEF JUSTICE      JUDGE      JUDGE**

**Approved for reporting**

**CHIEF JUSTICE      JUDGE      JUDGE**