Regarding Suo Motu Case No. 4 of 2022

Mr. Ishrat Ali

1. Mr. Ishrat Ali, a Federal Government employee, who was sent on deputation to the Supreme Court to work as Registrar, was '*withdrawn*' by the Federal Government *vide* notification dated 3 April 2023[1] and '*directed to report to the Establishment Division, with immediate effect.*' But, Mr. Ishrat Ali refuses to abide by the order of the Federal Government.

2. On 4 April 2023, Mr. Ishrat Ali misdescribed himself as '*Registrar*', and purported to sign and issue '*Court Roster for Tuesday 4th April, 2023*' in Suo Motu Case No. 4/2022 ('**Case No. 4**') and further purported to constitute a '*Larger Bench*' *at 2:00 p.m.*' This was stated to have been done '*By Order of HCJ*', that is, Hon'ble Chief Justice.

The illegal Circular

3. Case No. 4 was fixed before a three-member Bench[2] on 15 March 2023 and an order was announced on 29 March 2023.[3] Rather than complying with the order of the Supreme Court, Mr. Ishrat Ali (when he was still the Registrar) did something out of the ordinary; he issued a *Circular*,[4] stating that any observation made in this order of the Supreme Court '*is to be disregarded*'. I wrote to Mr. Ishrat Ali that his *Circular* '*purports to negate, undo, disobey and violate order dated 29 March 2023 of a three-member Bench of the Supreme Court, passed in Suo Motu Case No. 4 of 2022*'. He was also informed that, '*The Registrar does not have the power or authority to undo a judicial order, and the Chief Justice cannot issue administrative directions with regard thereto*'. The letter was also

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[1] No. PF.(674)/E-5(PAS) issued by the Establishment Division, Cabinet Secretariat, Government of Pakistan, from Islamabad on 3 April 2023. This order was copied to Mr. Ishrat Ali amongst others and also ordered to be published in the Gazette of Pakistan.
[2] Qazi Faez Isa, Amin-ud-Din Khan and Shahid Waheed, JJ.
[3] With a 2-1 majority, Shahid Waheed, J dissented.
[4] No. Registrar/2023/SCJ dated 31st March 2023.

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copied to the Hon'ble Chief Justice. Till date no reply has been received to my letter.

What constitutes the Supreme Court

4. The Constitution of the Islamic Republic of Pakistan ('**the Constitution**') establishes the Supreme Court, and defines it as consisting of the Chief Justice of Pakistan and Judges of the Supreme Court.[5] Order dated 29 March 2023 which was passed in Case No. 4 had pointed out the constitutional and legal position, and that the Chief Justice could not unilaterally assume all the powers of the Supreme Court. It would be appropriate to reproduce paragraphs 27 and 28 of the order dated 29 March 2023:

> '27. The Supreme Court is empowered to make makes rules attending to the aforesaid matters. The Supreme Court comprises of the Chief Justice and all Judges. The Constitution does not grant to the Chief Justice unilateral and arbitrary power to decide the above matters. With respect, the Chief Justice cannot substitute his personal wisdom with that of the Constitution. Collective determination by the Chief Justice and the Judges of the Supreme Court can also not be assumed by an individual, albeit the Chief Justice.
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> 28. The interest of citizens therefore will be best served to postpone the hearing of this case, and of all other cases under article 184(3) of the Constitution, till the matters noted hereinabove are first attended to by making requisite rules in terms of article 191 of the Constitution.'

The purported *Larger Bench* was presumably constituted when it was realized that the Circular was patently unconstitutional and illegal, and that the Chief Justice could not have given legal instructions to issue it.

Jurisdiction of the Supreme Court

5. The Constitution stipulates that, '*No court shall have any jurisdiction save as is or may be conferred on it by the Constitution or by or under any law.*'[6] The Constitution does not bestow

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[5] Constitution of the Islamic Republic of Pakistan, Article 176.
[6] Ibid., Article 175(2).

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unlimited jurisdiction on the Supreme Court, let alone on its Chief Justice. The Constitution confers only the following jurisdictions on the Supreme Court: (1) *original jurisdiction,*[7] (2) *appellate jurisdiction,*[8] (3) *advisory jurisdiction,*[9] (4) *power to transfer cases jurisdiction,*[10] (5) *review jurisdiction,*[11] (6) *contempt jurisdiction*[12] and (7) *appellate jurisdiction with regard to decisions of administrative courts and tribunals.*[13]

Clarifying further the constitutional position

6. To further clarify the above vital point about jurisdiction, let it be assumed that the Supreme Court conducts a murder trial, and then convicts or acquits the accused. This would be of no legal effect, because neither the Constitution nor any law bestows jurisdiction on the Supreme Court to conduct a criminal trial. However, such a trial could be conducted by a Sessions Judge, who is two-steps below Judges of the Supreme Court. And, to cite a civil law example, a Family Judge presiding over a Family Court, can decide family law matters, a jurisdiction which does not vest in the Supreme Court.

***Larger Bench* and *order* dated 4 April 2023**

7. The Constitution does not confer jurisdiction on a *bench* or on Judges of the Supreme Court (no matter how many in number) to sit in appeal over an order of the Supreme Court. Therefore, the so called *Larger Bench* was wrongly constituted purportedly to hear Case No. 4. The *Larger Bench* did not constitute a (constitutional) court; it did not possess any of the abovementioned jurisdictions, and could not pass an *order*. The purported '*order*' dated 4 April 2023 cannot be categorized as an order of the Supreme Court; it is of no constitutional or legal effect. It would be legally incorrect to

[7] Ibid., Article 184.
[8] Ibid., Article 185.
[9] Ibid., Article 186.
[10] Ibid. Article 186A.
[11] Ibid., Article 188.
[12] Ibid., Article 204.
[13] Ibid., Article 212(3).

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refer to it as an order; therefore, it shall be referred to as '**the 4 April Note**.'

Could the order dated 29 March 2023 be reviewed?

8. Can then the 4 April Note be construed as an order reviewing order dated 29 March 2023? The answer is that the said *Larger Bench* could not do so. If the review jurisdiction was to be invoked then Case No. 4 would have to be listed for hearing before the same Judges who had earlier heard it on 15 March 2023[14] but this was not done.

Procedural Irregularities

9. In addition to disregarding the abovementioned constitutional provisions the following procedural irregularities were also committed:

(1) The roster was issued for the same day, which is only done when there is an extraordinary emergency, but in the instant matter there was none;

(2) The very day the case roster was issued the matter was also listed, and after court-time;

(3) No prior notice of the listing of the matter was issued;

(4) Notice was not issued to the Attorney-General for Pakistan as per Order XXVIIA of the Code of Civil Procedure, 1908;

(5) Notice to the Attorney-General had not been issued, yet the April 4 Note records that the Additional Attorney-General was '*On Court's Notice*'; and

(6) The counsel of PMDC[15] was in attendance (without prior notice), which meant he was verbally or telephonically sent for, contrary to usual practice.

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[14] Supreme Court Rules, 1980, Order XXVI, rule 8. The bench which had passed order dated 29 March 2023 comprised of Qazi Faez Isa, Amin-ud-Din Khan and Shahid Waheed, JJ, therefore, it had to be heard by this bench or before a bench of which at least the author Judge was a member.

[15] Pakistan Medical and Dental Council (PMDC) represented by Mr. Afnan Karim Kundi, ASC.

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Responsibility of senior Judges

10. Six Judges were hurriedly assembled. The learned Judge heading the *bench* and the next senior Judge[16] concluded the matter within a few minutes. Immediately, on the very same day, the 4 April Note, comprising of 8 pages, was issued. If the matter had been listed for hearing in the ordinary course as per normal procedure, sufficient notice had been given, and it was properly deliberated upon, then the four Hon'ble junior Judges may have realized that what their seniors were doing did not accord with the Constitution and the law.

The Note relies on yet another earlier note

11. Paragraph 7 of the 4 April Note refers to what three of the same Judges had earlier done in a similar situation.[17] Then, I had written a 15 page note[18] trying to explain to my distinguished colleagues the different jurisdictions of the Supreme Court and that the Constitution did not grant them unlimited jurisdiction. However, and unfortunately, the 4 April Note overlooks what was pointed out earlier and the very same mistake was again committed. We learn from each other, but the authors of the 4 April Note disregarded a 15 page explanatory note that would have been helpful. Despite practicing law (as an advocate and Judge) for 40 years I still consider myself a student of law. Hubris destroys institutions.

The reasoning applied in the 4 April Note

12. The Note designates the Chief Justice of Pakistan as the '*Master of Rolls*',[19] a term not found in the Constitution, in any law or even in the Supreme Court Rules, 1980. And, on the pretext that the Chief Justice is the *Master of Rolls* and empowered to do

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[16] Ijaz Ul Ahsan and Munib Akhtar, JJ, respectively.
[17] *Suo Motu Case No. 4 of 2021*, PLD 2022 Supreme Court 306, written by Munib Akhtar, J.
[18] Dated 24 August 2021, which stated that it should be '*immediately uploaded on the Supreme court website*' but the Chief Justice had stopped it from being up-loaded. Therefore, it was circulated to my distinguished colleagues.
[19] Paragraph 7 of the Note.

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as he pleases the 4 April Note proceeds to rely on an earlier note (authored by Munib Akhtar, J), stating that it '*clearly and categorically lays down the rule that the suo motu jurisdiction of this Court can only and solely be invoked by the HCJP. The majority order also appears to be in violation of the well settled rule of law, which is axiomatic, that Chief Justice is the master of the roster.*' With respect, the Hon'ble Justice Munib Akhtar's earlier note was not a legal precedent. In any event the said reasoning is without a constitutional or legal foundation. The stated *rule of law* was not enacted pursuant to a law nor can it by its own self-serve itself to be categorized as *rule of law*, particularly when it contravenes the Constitution, which does not grant to the Chief Justice such powers.

13. The reasoning, with respect, is otherwise flawed too. The order dated 29 March 2023 had noted the lack of procedural rules with regard to cases filed or taken notice of under article 184(3) of the Constitution. However, in Case No. 4 notice under Article 184(3) of the Constitution had already been taken (with regard to the matter of grant of additional marks). Ironically, in a matter in which the so called *Larger Bench* had wrongly assumed jurisdiction the 4 April Note stated that order dated 29 March 2023 '*was therefore both without and beyond jurisdiction*'. The 4 April Note has no constitutional or legal validity as it seeks to supplant the Constitution.

The Constitution

14. The Constitution was unanimously passed with the votes of 196 members out of 200 of the National Assembly fifty years ago, on 10 April 1973.[20] Not a single vote was cast against it.[21] The Constitution's credibility and longevity rests on its democratic foundations, and it is the document which holds the Federation together.

[20] Presidential assent was given on 12 April 1973.
[21] Four Members abstained.

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The Judicature

15. The Constitution establishes the Judicature.[22] The Constitution also established the trichotomy of powers; the Legislature, Executive and Judiciary. The Judiciary is given the responsibility to decide cases in accordance with the Constitution and the law[23] and by applying due process[24] requirements. Every Judge before entering office takes oath: '*I will discharge my duties, and perform my functions, honestly, to the best of my ability, faithfully in accordance with the Constitution of the Islamic Republic of Pakistan and the law.*' Judges also swear to '*preserve, protect and defend the Constitution*'. The Constitution alone grants jurisdiction and empowers courts to decide cases, therefore, if non-existing jurisdiction is assumed then the oath to act *in accordance with the Constitution* is violated.

Islamic Injunctions

16. The Chief Justice is deserving of respect but he is not a *master;* such servitude is also alien to Islam, and the Constitution stipulates that all laws must be brought in conformity with the Injunctions of Islam,[25] the State religion of Pakistan.[26] The Constitution opens with two of the most beautiful names of the Almighty Allah (*Ar-Rahman*, the most Beneficent, and *Ar-Rahim*, the most Merciful) and stipulates that, '*sovereignty over the entire Universe belongs to Almighty Allah alone*' and the exercise of authority is a *sacred trust.*[27] Order dated 29 March 2023 required that rules in respect of the stated matters be made by Supreme Court through consultation. The Holy Qur'an also mandates consultation, '*Do that which is in agreement amongst the people*'.[28] Qur'anic exegetes[29] down the ages are unanimous in the

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[22] Constitution of the Islamic Republic of Pakistan, Part VII, Articles 175 to 212.
[23] Ibid., Article 4(1).
[24] Ibid., Article 10A.
[25] Ibid., Article 227.
[26] Ibid., Article 2.
[27] Ibid., Preamble/Objectives Resolution, which Article 2A has made into a, '*substantive part of the Constitution and shall have effect accordingly*'.
[28] Al Qur'an, surah Ash-Shura (42) verse 38.
[29] To cite just two examples, the Pakistani Islamic scholar Abul A'la Maududi (1903-1979) in his *Tafhim Al-Qur'an* (vol. 4, pp. 508-510) and the great Qur'anic

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interpretation of this verse, and say that consultation is obligatory in respect of all matters pertaining to more than one person. Because: (a) no one should impose their will on others, (b) imposing one's will on others either means that one does not give importance to others or that one deems oneself to be more intelligent, both of which are morally evil and (c) deciding an issue that pertains to the people is a serious thing and one should fear Allah. They derive the following principles from this verse: (1) all requisite information be provided, (2) appointments should not be made on the basis of fear or favour, (3) leaders should seek advice from advisors, (4) advisors must give their honest and well considered opinion and (5) matters should preferably be resolved consensually, failing which through majority opinion.

17. That even Almighty Allah's prophet, Muhammad (peace and blessings be upon him), was ordained to *consult the people in their affairs.*[30] And, it is reported by his companion, '*None was more apt to seek council of his companions than the Messenger of Allah*'.[31]

Absolute Power

18. The world has also been moving away from the days when monarchs and dictators wielded absolute power. The Kingdom of Bhutan, until recently, was one of the few remaining countries ruled by a monarchy having absolute power. However, the enlightened King Wangchuk voluntarily gave up his powers, saying, '*I do not believe that a system of absolute monarchy, wholly dependent on one individual is a good system for the people in the long run…the destiny of the nation lies in the hands of the people, we cannot leave the future of the country in the hands of one person.*'[32] Bhutan now is governed by a constitution.[33] History

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exegete and hadith scholar (*muhaddith*) of Cordoba, Spain Abu Abdullah Muhammad bin Ahmad al-Qurtabi (1214-1273) in his *Al-Jami li-Ahkam Al-Qur'an* (vol. 18, pp. 586-588).

[30] Ibid., surah Al-Imran (3) verse 159.

[31] *Sunan al-Tirmidhi*, Kitab al-Jihad, Hadith No. 48, on the authority of Abu Hurairah.

[32] Inscribed on a pillar in the courtyard of the Supreme Court of Bhutan.

[33] Enacted in 2008.

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witnesses, that when in an individual power is concentrated, disastrous consequences invariably follow.

Dangers and pitfalls

19. Irreparable damage will be caused to the Judiciary and to the people of Pakistan if the legitimacy, integrity and credibility of the Judiciary is undermined, because without it the people (who it serves) will lose their trust. The surest way for this to happen is when cases are not decided in accordance with the Constitution. Pakistan was first ravaged when a bureaucrat Governor-General unconstitutionally dismissed the Constituent Assembly and the unanimous judgment of the Chief Court of Sindh[34] was set aside by the Federal Court.[35] The Federal Court's decision enabled future dictators to overthrow civilian governments. Regretfully more than once Chief Justice and Judges of the Supreme Court facilitated dictators. The country with the largest Muslim population broke apart because constitutional deviations were justified.

Conclusion

20. Since the gathering in a court of six distinguished judges was not permissible under the Constitution or under any law, the Supreme Court's order dated 29 March 2023 passed in Case No. 4 could not have been set aside by the 4 April Note. Decisions emanating from a courtroom overcast with the shadow of autocracy cannot displace the Constitution.

Islamabad,
Dated: 8 April 2023.

Senior Puisne Judge.

Approved for reporting

[34] Now High Court of Sindh.
[35] Now the Supreme Court of Pakistan.

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