IN THE SUPREME COURT OF PAKISTAN
(Original Jurisdiction)

PRESENT:

Mr. Justice Umar Ata Bandial, CJ
Mr. Justice Ijaz ul Ahsan
Mr. Justice Munib Akhtar
Mr. Justice Sayyed Mazahar Ali Akbar Naqvi
Mr. Justice Muhammad Ali Mazhar
Mrs. Justice Ayesha A. Malik
Mr. Justice Syed Hasan Azhar Rizvi
Mr. Justice Shahid Waheed

CONSTITUTION PETITIONS NO. 6 TO 8 OF 2023

(Setting aside the Supreme Court (Practice and Procedure) Bill, 2023)

Raja Amer Khan and another
(in Const. P. 6 of 2023)

Chaudhry Ghulam Hussain and another
(in Const. P. 7 of 2023)

Muhammad Shafay Munir, Advocate High Court, Lahore
(in Const. P. 8 of 2023)

...Petitioner(s)

Versus

The Federation of Pakistan through the Secretary Law and Justice Division, Ministry of Law and Justice Islamabad and others **...Respondent(s)**
(in all cases)

For the petitioner(s)	:	Mr. Imtiaz Rashid Siddiqui, ASC Mr. Shehryar Kasuri, ASC (in Const.P. 6/23)
		Mr. M. Azhar Siddiqui, ASC Mr. Tariq Aziz, AOR Kh. Tariq A. Rahim, Sr. ASC (in Const.P. 7/23)
		Mr. M. Hussain Chotya, ASC (in Const. P. 8/23)
Federation	:	Mr. Mansoor Usman Awan, Attorney General for Pakistan
Date of hearing	:	13.04.2023.

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O R D E R

There are before the Court three petitions under Article 184(3) of the Constitution. They challenge the constitutionality of federal legislation, being the Supreme Court (Practice and Procedure) Bill, 2023 ("Bill"). The Bill is on its way to becoming an Act of Parliament in terms of clause (3) of Article 75 of the Constitution. The legislation is assailed on various grounds. Mr. Imtiaz Rashid Siddiqui, learned counsel appearing in CP 6/2023, led the case for the petitioners.

2. Learned counsel submitted that the independence of the judiciary was a principle of fundamental constitutional importance, deeply grounded in the structures of the Constitution. It was an unassailable fundamental right. Referring in particular to the Supreme Court, learned counsel emphasized the centrality of the position of the Chief Justice of Pakistan to the Court. Referring to the Bill itself learned counsel read out the various clauses thereof. It was submitted that in terms of the legislative process, with particular reference to Article 75(3), the Bill had travelled beyond the stage of being at the legislative stage. It had, rather, taken the position of a proposed Act that was bound to come into being with the efflux of time. Therefore, the Bill itself could be considered and the constitutionality or otherwise of its provisions examined by the Court. The present petitions were maintainable and could not be faulted as premature. It was submitted that the passage of this legislation was defective at both the executive stage, when the Bill was conceived and approved by the Cabinet, and thereafter at the legislative stage in terms of its passage through the two Houses of Parliament and then, after its return by the President, its reconsideration in joint sitting. The reasons given by the President for returning the Bill were not properly considered. It was submitted that the legislation was a fraud on the Constitution.

3. Learned counsel submitted, referring to clauses 2 to 4 of the Bill, that a basic objection to the constitutionality thereof was that it sought to displace the Chief Justice and place the powers that lay with him alone with another body, the committee sought to be set up in terms thereof. It was submitted that the rule making power of the Court under

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Article 191 had been exercised and could not now be displaced by legislation of the sort contemplated. In this context learned counsel also referred to the power of each organ of the State, i.e., the legislative, executive and judicial branches, to exclusively regulate its own internal matters and procedures. It was submitted that the Bill was an intrusion into a sphere made exclusive to the Court and hence was ultra vires the Constitution. That field already stood occupied by the Supreme Court Rules, 1980 and therefore could not now be entered into upon by the legislature. As regards the appellate jurisdiction sought to be conferred on the Court, learned counsel submitted that it was beyond the competence of Parliament to do so, either in terms of Article 191 or entry No. 55 of the Federal Legislative List. Learned counsel also prayed for interim relief by way of either the suspension of the Bill, or a direction to the President not to assent to it and/or an order to the Law Ministry not to notify the Act.

4. In order to properly appreciate the issues before the Court, the necessary background may be set out. On or about 29.03.2023, the Federal Cabinet gave its approval for legislation in the shape of the Bill aforementioned. The Bill was swiftly introduced in the National Assembly, and passed the same day. On transmission to the Senate it was passed without amendment the next day, i.e., 30.03.2023. The Bill was then presented to the President for his assent.

5. Article 75 of the Constitution provides in clause (1) that in the case of a Bill other than a Money Bill the President shall, within 10 days of its presentation either assent thereto or return it to Parliament “with a message requesting that the Bill, or any specified provision thereof, be reconsidered and that any amendment specified in the message be considered”. The President, on or about 08.04.2023, returned the Bill to Parliament for it to be reconsidered. The reasons for the request were shared with the nation.

6. Clause (2) of Article 75 provides that if a Bill is returned to Parliament, it shall be reconsidered in joint sitting and if there passed (with or without amendment) by the requisite majority, “it shall be

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deemed for the purposes of the Constitution to have been passed by both Houses and shall be presented to the President, and the President shall give his assent within ten days, failing which such assent shall be deemed to have been given". It appears that Parliament in joint sitting reconsidered the Bill on 10.04.2023 and the same day passed it, it seems with some amendments. The Bill so passed has been or is being presented to the President for his assent. Clause (3) of Article 75 provides as follows: "When the President has assented or is deemed to have assented to a Bill, it shall become law and be called an Act of Majlis-e-Shoora (Parliament)".

7. The first point to note is that the Bill has, in terms of the legislative processes set out above, reached the stage when it can be said with complete certainty that it reflects in entirety the ensuing Act of Parliament, the short title of which will be the Supreme Court (Practice and Procedure) Act, 2023 ("Act"). The reason is grounded in clauses (2) and (3) of Article 75. The march towards becoming a statute, and the passage from Bill to Act, is (at most) merely a matter of time. Neither the President nor (so it would seem) Parliament itself can change its content in the slightest nor divert this course.

8. It follows that though the Bill is not yet law it is nonetheless, with exactitude, that what will have the force of law, when the Act comes into being. Therefore, it can be considered and examined even at this stage. It is possible even now, as the Bill moves seamlessly through time towards becoming the Act, to consider whether what Parliament seeks to do passes muster constitutionally. We are of the view that such a consideration can be carried out prima facie and tentatively.

9. The Bill prima facie seems to be open to question on the constitutional plane on several grounds which, inter alia, raise issues of a serious nature in relation to the independence of the judiciary. Such independence is deeply rooted in the fabric of the Constitution and forms an integral part of the structure of fundamental rights. Indeed, it is itself one such right. Any legislative effort that interferes with, or impinges on, the same should be subjected to close scrutiny. The Bill on

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its face expressly states that it has been enacted in terms of Article 175(2) and Article 191. Article 191 provides as follows: "Subject to the Constitution and law, the Supreme Court may make rules regulating the practice and procedure of the Court". At first impression (subject to what is stated below), it seems that whatever can be done by legislative endeavor under Article 191 is something that the Court can itself do in exercise of the rule-making power conferred by the same Article. This is one of the contexts in which we are called upon to examine various provisions of the Bill.

10. The Bill, in clauses 2 to 4 (set to become correspondingly numbered sections), seeks to regulate the manner in which causes, matters or appeals before the Court are to be heard and, in particular, the Benches that are to hear and decide the same. On first impression the Bill appears to be premised on the approach that Article 191 purportedly sets up a hierarchy in relation to the practice and procedure of the Court. On this view the Constitution is obviously at the top, followed by "law" and then the rules made by the Court itself. This hierarchical structure prima facie subordinates the rules made by the Court to "law" and therefore, the Supreme Court Rules, 1980 ("Rules") to the incoming Act. The regulation of the matters laid out in clauses 2 to 4 purports to trump anything contained in the Rules. The Bill seeks to reinforce this in clause 8 (soon to become s. 8) by giving overriding effect to its provisions over not only any "rules" but also any judgment of any court, including this Court. Prima facie, this approach is a serious encroachment upon, interference with and intrusion into the independence of the judiciary.

11. Prima facie there is another and more fundamental aspect that ought, even at this preliminary stage, be kept in mind for understanding Article 191. The principle involved may be explained by adapting for present purposes a dictum from one of the most famous cases of American constitutional law (*McCulloch v Maryland* 17 US 316 (1819)): the power to regulate involves the power to destroy. The thing susceptible to destruction here is the independence of the judiciary. Can the legislature, in the shape of a power claimed in terms of Article 191, have any such competence? The very existence of any such power needs

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to be determined, and not simply its application to this or that situation. It is not a matter of the power, in a given case, being exercised benignly or for purposes claimed as salutary (as appears to be professed for clauses 2 to 4). That is not the essence of the matter. For the next interference (i.e., regulation) may be less benign, and the next even more removed from benignity, while the next may slip positively into hostility. "A question of constitutional power can hardly be made to depend on a question of more or less." And this is all the more so when it is a matter of fundamental rights, as it is with the independence of the judiciary. Such an approach would be antithetical to the very concept of the fundamental right, potentially striking at its very root. Interference with fundamental rights is kept beyond legislative and executive incursion unless expressly permissible (in the shape of articulated reasonable restrictions). Any intrusion in the practice and procedure of the Court, even on the most tentative of assessments, would appear to be inimical to the independence of the judiciary, no matter how innocuous, benign or even desirable the regulation may facially appear to be. Prima facie therefore, when the Bill and the Act that is soon to come into being, is examined on the anvil of the most fundamental principles that underpin the Constitution, it can be regarded as seriously wanting in constitutional competence.

12. The Bill also (in clause 5, soon to become s. 5) purports to confer a new appellate jurisdiction on the Court in exercise of legislative power under Article 191. However, it is highly doubtful whether Parliament can do this, since a right of appeal is not merely a matter of practice or procedure but is a substantive right. It would therefore seem, at first sight, that the appellate jurisdiction now sought to be conferred is beyond any competence conferred by Article 191, whether on the Court itself or any "law'' purported to be made by Parliament. If the conferment of appellate jurisdiction is considered in terms of a legislative competence available otherwise to Parliament one must turn to entry No. 55 of the Federal Legislative List ("List"). On a tentative examination of this constitutional grant it would seem that it, firstly, expressly excludes this Court from the power of Parliament to legislate as regards the "jurisdiction and powers" of courts in relation to the List, and secondly, allows for the enlargement of the jurisdiction of the Court only

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if it is "*expressly* authorized by or under the Constitution". There appears to be no authorization by or under the Constitution, let alone an express one, as allows Parliament to confer an appellate jurisdiction on the Court of the sort now sought to be created.

13. We are here concerned with the independence of the judiciary, and in particular this Court, in institutional terms and according to the mandate of the Constitution. Issues of public importance with regard to the enforcement of fundamental rights are involved which require consideration and decision by the Court.

14. This brings us to the question whether it would be appropriate to make any interim order in relation to the present matter. In *Dr. Mobashir Hassan and others v. Federation of Pakistan and others* PLD 2010 SC 265 the Full Court (17 member Bench) observed (at para 164, pg. 451) that "*ordinarily* the provisions of a law cannot be suspended because this Court can only suspend a particular order, judgment or action, etc...." (emphasis supplied). In our view, the facts and circumstances presented here are extraordinary both in import and effect. Prima facie the contentions raised disclose that there is a substantial, immediate and direct interference with the independence of the judiciary in the form of multiple intrusions, in the guise of regulating the practice and procedure of this Court and conferring upon it a jurisdiction that appears not to be permissible under any constitutional provision. Such intermeddling in the functioning of the Court, even on the most tentative assessment, will commence as soon as the Bill becomes the Act. Accordingly, in our view an interim measure ought to be put in place, in the nature of an anticipatory injunction. The making of such an injunction, to prevent imminent apprehended danger that is irreparable, is an appropriate remedy, recognized in our jurisprudence and other jurisdictions that follow the same legal principles and laws. It is therefore hereby directed and ordered as follows. The moment that the Bill receives the assent of the President or (as the case may be) it is deemed that such assent has been given, then from that very moment onwards and till further orders, the Act that comes into being shall not have, take or be given any effect nor be acted upon in any manner.

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15. Notices be issued to the respondents in all three petitions. Notice also to the Attorney General for Pakistan under O. 27A CPC. Notices also to the Supreme Court Bar Association through its President and the Pakistan Bar Council through its Vice Chairman. Notices also be issued to the following political parties who may, if they so desire, appear through duly instructed counsel: Pakistan Muslim League (N) (PML (N)), Pakistan Peoples Party Parliamentarians (PPPP), Pakistan Tehreek e Insaf (PTI), Jamiat Ulema e Islam (JUI), Jamaat e Islami (JI), Awami National Party (ANP), Muttahida Qaumi Movement (MQM), Balochistan Awami Party (BAP) and Pakistan Muslim League (Q) (PML (Q)).

16. To come up on **02.05.2023 at 11:30 a.m.**

Sd/-
Chief Justice

Sd/-
Judge

Sd/-
Judge

Sd/-
Judge

Sd/-
Judge

Sd/-
Judge

Sd/-
Judge

Islamabad
13.04.2023

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