IN THE SUPREME COURT OF PAKISTAN
(Original Jurisdiction)

PRESENT:

Mr. Justice Umar Ata Bandial, CJ
Mr. Justice Ijaz ul Ahsan
Mr. Justice Syed Mansoor Ali Shah
Mr. Justice Munib Akhtar
Mr. Justice Yahya Afridi
Mr. Justice Sayyed Mazahar Ali Akbar Naqvi
Mrs. Justice Ayesha A. Malik

Constitution Petition No.24 to 26 of 2023
(Trials of Civilian under the Army Act, 1952 is violative of the Constitution)

And

C.M. Appeal No. 80 of 2023 in Const. Petition Nil of 2023
(Declaration of trial of civilians under the Army Act, 1952 as unconstitutional, void and of no legal effect.)

And

Constitution Petition No.27 and 28 of 2023
(Trials of Civilians under the Army Act, 1952 is violative of the Constitution)

Jawwad S. Khawaja
(in Const.P.24/2023)

Aitzaz Ahsan
(in Const.P.25/2023)

Karamat Ali and others
(in Const.P.26/2023)

Imran Ahmed Khan Niazi
(in C.M. Appeal 80/2023)

Zaman Khan Vardag
(in Const.P.27/2023)

Junaid Razzaq
(in Const.P.28/2023)

Petitioner(s)

Versus

Federation of Pakistan, etc.
(in Const.P.24 & 27/2023)

Federation of Pakistan through the Secretary, Ministry of Law and Justice, Islamabad and others
(in Const.P.25-26 & 28/2023)

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Federation of Pakistan through Ministry of Defence through its Secretary and others
(in C.M. Appeal 80/2023)

...Respondent(s)

For the Petitioner(s)	:	Sardar Muhammad Latif Khan Khosa, Sr. ASC (in Const.P.25/2023) Kh. Ahmad Hosain, ASC (in Const.P.24/2023) Mr. Faisal Siddiqi, ASC (in Const.P.26/2023) Mr. Hamid Khan, Sr. ASC Mr. Shoaib Shaheen, ASC Mr. Ajmal Ghaffar Toor, ASC Syed Rifaqat Hussain Shah, AOR (in C.M. Appeal 80/23) Mr. Zaman Khan Vardag, In-person (in Const.P.27/2023) (V.L. Lahore) Mr. Salman Akram Raja, ASC (in Const.P.28/2023)
For the Federation	:	Mr. Mansoor Usman Awan, Attorney General for Pakistan Ch. Aamir Rehman, Addl. AGP
For Govt. of Balochistan	:	Mr. Muhammad Ayaz Swati, Addl. AG
For Govt. of KP	:	Mr. Aamir Javid, AG Mr. Sultan Mazhar Sher Khan, Addl.AG
For Govt. of Punjab	:	Mr. Khalid Ishaq, AG Mr. Sana Ullah Zahid, Addl. AG
For Govt. of Sindh	:	Mr. Akbar Hussain, AG Mr. Saif Ullah, Addl. AG *with* Mr. Mohsin Shah, Focal Personal to Chief Secretary *(Via video link from Karachi)*
For Ministry of Defence	:	Nemo
For Imran Ahmed Khan Niazi	:	Mr. Uzair Karamat Bhandari, ASC
Date of Hearing	:	26.06.2023 (09:30 am)

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O R D E R

At the start of the hearing today, learned Attorney General for Pakistan came to the rostrum and stated on instructions that the Federal Government has raised an objection to the presence of one of us (*Syed Mansoor Ali Shah, J*) on the Bench on account of his relationship with Justice Jawwad S. Khawaja, Former Chief Justice, the petitioner in Const. Petition No.24 of 2023. Mr. Justice Syed Mansoor Ali Shah has considered the objection and has decided to recuse himself from the Bench.

2. Since the case is a part heard matter, the remaining Members of the Bench have requested the HCJ to reconstitute the Bench.

Sd/-
Chief Justice

Sd/-
Judge

I have attached my separate note.
Sd/-
Judge

Sd/-
Judge

Sd/-
Judge

Sd/-
Judge

Sd/-
Judge

Islamabad
26.06.2023
Naveed/*

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Syed Mansoor Ali Shah, J. 'It is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done.'[1] I strongly believe in this dictum of Lord Hewart and have expressed similar views in several cases that the 'foundations of the judicial institution stand on, and its real strength lies in, the public trust which gives to its decisions legitimacy and public acceptance'.[2] Anything which undermines or even tends to undermine the public trust in the integrity, impartiality and independence of the judiciary must be circumvented.

2. The petitioner in one of these petitions, namely, Jawad S. Khawaja, the former Chief Justice of Pakistan, is my relative. The legal fraternity, I believe, knew it and for those who did not I disclosed this fact at the first hearing of these petitions in open court on 22 July 2023 and asked whether anyone had any objection to my hearing these petitions including the learned Attorney-General for Pakistan. Counsel for the petitioners in all these petitions and the learned Attorney-General for Pakistan replied that they had no objection.

3. Article IV of the CODE OF CONDUCT TO BE OBSERVED BY JUDGES OF THE SUPREME COURT OF PAKISTAN AND OF THE HIGH COURTS OF PAKISTAN[3] mandates that a "Judge must decline resolutely to act in a case involving his own interest, including those of persons whom he regards and treats as near relatives or close friend." The said petitioner has, however, filed the petition in the public interest, not involving any interest of his own as he is not to be personally affected by the decision of these cases in either way. I, therefore, was of the view that the said Article was not applicable in this case, still I thought it right to ask the parties, at the start of the hearing, whether they

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[1] Rex v. Sussex Justices. McCarthy, Ex parte. [1924] 1 KB 256, per Lord Hewart.
[2] Justice Isa v. President of Pakistan 2022 SCP 140 (CMA.1243/2021 for livestreaming court proceedings); Justice Isa v. President of Pakistan PLD 2021 SC 1 (Const.P.17/2019 challenging constitutionality of Presidential Reference); SMC.1/2023 Regarding Elections in Punjab and Khyber Pakhtunkhwa 2023 SCP 87; Nusrat Yasmeen v. Peshawar High Court PLD 2019 SC 719 and Hasnain Raza v. Lahore High Court PLD 2022 SC 7.
[3] Dated 2nd September 2009.

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had any objection to my sitting on the Bench and hearing these petitions. Further, I did not recuse myself from hearing these petitions on my own, as I thought that my recusal without any objection from any of the parties may amount to abdication of my duty to 'preserve, protect and defend the Constitution' in a matter of constitutional significance and public importance involving the question of enforcement of the fundamental rights to life, liberty, dignity, due process and fair trial. With this understanding, despite having serious reservations about non-constituting the Full Court Bench of all judges of this Court presently available in Pakistan for hearing these petitions[4], I remained part of the Bench and continued hearing the case.

4. Today, at the very outset, the learned Attorney-General for Pakistan came up to the rostrum and stated that though personally he has no objection as expressed by him on the first day of hearing, but on instructions of the Federal Government which he has obtained now, he submits that I may consider recusing from hearing these petitions.

5. Although in a constitutional court, it is only for the judge concerned to decide according to his own conscience whether to recuse himself from hearing a case or not, he must in so deciding consider that his decision should not undermine the public trust in the impartiality of the court. For the appearance of his partiality would not only demean his reputation but also that of the institution of which he is a part. The insistence on the appearance of impartiality in the dispensation of justice 'is not some artificial attempt to mask imperfection in the judicial process, but rather an essential means of ensuring the reality of a fair adjudication. Both the appearance and reality of impartial justice are necessary to the public legitimacy of judicial pronouncements and thus to the rule of law itself.'[5] Judicial impartiality upholds public trust, engenders predictability in the law, ensures fair trial, upkeeps the rule of law, and safeguards democracy. The principle of judicial impartiality, therefore, is not

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[4] See my note dated 22.06.2023 in this case.
[5] Williams v. Pennsylvania 579 U.S. 1 (2016) per Justice Anthony Kennedy (Majority view).

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merely a moral imperative but a practical necessity to ensure justice, uphold democratic values, protect citizens' rights, and maintain societal order.

6. It may, however, be underlined here that judges should not readily accede to the request for their recusal from hearing a case and decide the matter of their recusal after properly weighing the ground agitated for making such request. Where it is apparent that the perception of impartiality is being created for some ulterior motive without any sound basis, the judge must not yield to such strategy and abdicate performance of his duty. But if such a request is based on some reasonable ground which may genuinely raise doubt in the mind of a common person about the impartiality of the judge, the safest course for the judge is to accept such request in the larger interest of upholding public trust in the integrity and impartiality of the Court. In the present case, as the said petitioner is admittedly my relative, a common person may not understand the difference between a petition filed in the public interest and a petition filed for personal interest. I, therefore, in the present case, find it preferable to accept the request and recuse myself from hearing the case.

7. Keeping in view the above principles and reasons, in order to safeguard the public trust in the integrity and impartiality of the Court, I recuse myself from hearing these petitions on the objection raised by the learned Attorney-General for Pakistan on instructions from the Federal Government.

Sd/-
Judge

Islamabad,
26th June, 2023.
Approved for reporting.
Sadaqat

Kismat Khan Zimri
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