

IN THE SUPREME COURT OF PAKISTAN
(Review Jurisdiction)

Present:

Justice Qazi Faez Isa, CJ
Justice Amin-ud-Din Khan
Justice Jamal Khan Mandokhail
Justice Naeem Akhtar Afghan
Justice Mazhar Alam Khan Miankhel

Civil Review Petition No. 197/2022

in

Constitution Petition No. 2 of 2022

(For review of the short order dated 17.05.2022 and judgment of this Court passed in Constitution Petition No. 2/2022, Reference No.1/2022 and Constitution Petition No. 9/2022)

*Supreme Court Bar Association of Pakistan
through its President.*

... *Petitioner*

Versus

Federation of Pakistan, Islamabad and others.

... *Respondents*

For the Petitioner:

Mr. Shahzad Shaukat, President SCBAP
Mr. Muhammad Ahsan Bhoon,
Ex-President SCBAP
Syed Ali Imran, Secretary
Mr. Naseeb Ullah Kasi, ASC
Mr. Qasim Chohan, ASC
Ms. Neelam Azra, ASC
Ch. Muhammad Younas, ASC
Mr. Abdul Qadir, ASC
Syed Asim Ali Bokhari, ASC
Barrister Taha Shaukat
Barrister Maaz Abdur Rehman

For the Federation:

Ch. Aamir Rehman,
Additional Attorney-General for Pakistan
Rana Asadullah,
Additional Attorney-General for Pakistan
Malik Javed Iqbal,
Additional Attorney-General for Pakistan
Raja Shafqat Abbasi,
Deputy Attorney-General for Pakistan
Mr. Saad Junaid, Advocate
Ms. Maryam Rashid, Advocate

For Respondent No. 3:

Nemo

For Respondent No. 5:

Mr. Haris Azmat, ASC
Ms. Faiza Asad, Advocate
Mr. Awais Anwar, Advocate

For PPPP: Mr. Farooq H. Naek, Sr. ASC
Syed Qaim Ali Shah, Advocate
Mr. Muhammad Waseem Abro, Advocate
Mr. Ammar Noonari, Advocate

Amicus Curiae: Syed Ali Zafar, ASC

Date of Hearing: 03.10.2024

JUDGMENT

Qazi Faez Isa, CJ. Constitution Petition No. 2 of 2022 was filed by the Supreme Court Bar Association of Pakistan through its President (**'the Bar Association'**) under Article 184(3) of the Constitution of the Islamic Republic of Pakistan (**'the Constitution'**) and it sought to ensure that the members of the National Assembly (**'MNAs'**) were not prevented from coming to the National Assembly to vote on the vote of "no-confidence" which had been presented against the then Prime Minister, Mr. Imran Ahmed Khan Niazi. Copies of the resolution, submitted under Article 95(1) of the Constitution, by 102 MNAs, and the requisition calling upon the Speaker to summon the National Assembly, under Article 54(3) of the Constitution, were attached with the petition. Article 95(4) of the Constitution stipulates that if a no-confidence resolution, *'is passed by the majority of total membership of the National Assembly the Prime Minister shall cease to hold office'*.

2. Constitution Petition No. 2 of 2022 (**'Constitution Petition No. 2'**) was filed on 17 March 2022 and when it came up for hearing on 19 March 2022 before a two-member Bench of this Court, comprising of Chief Justice Umar Ata Bandial and Justice Munib Akhtar, it was ordered that:

'The petitioner, Supreme Court Bar Association, is before us in aid of public interest to assure that the rights of Parliamentarians are exercised in accordance with the Constitution and the law. The Attorney-General for Pakistan has assured us of the Federal Government's commitment to the process under Article 95 of the Constitution to be followed strictly in accordance with law.'

The said Bench also recorded the statement of Mr. Khalid Javed Khan, the then Attorney-General, as under:

'He [Attorney-General] also informs us that the Federal Government is filing a Reference under Article 186 of the Constitution of Islamic Republic of Pakistan ("Constitution")

seeking delineation of the scope and meaning of certain provisions contained in Article 63A of the Constitution.'

Before the reference was filed their lordships had decided to entertain it and had directed that if and when it is filed the reference should be fixed for hearing with Constitution Petition No.2, as under:

'To come up for hearing of this petition along with a Reference, if any, that is filed under Article 186 of the Constitution.'

It is not known how, before the reference was filed, its contents would be known and that these would be the same as Constitution Petition No. 2.

3. Article 186 of the Constitution provides that the President of Pakistan may refer a '*question of law*' to the Supreme Court for '*its opinion*' under its '*advisory jurisdiction*'. However, Constitution Petition No. 2 had been filed in the Court's '*original jurisdiction*' under Article 184(3) of the Constitution. When this Court exercises jurisdiction under Article 184(3) it passes '*an order*', whereas when it is submitted a question under Article 186 it '*reports its opinion*' to the President. Despite the delineated jurisdictions the said two Hon'ble Judges directed that Constitution Petition No. 2 (filed under Article 184(3)), be heard with the reference, which may be filed (under Article 186).

4. Unless any provision of the Constitution specifically empowers the President to act on his own volition he must act on advice as provided by Article 48(1) of the Constitution, which states that, '*In the exercise of his functions, the President shall act on and in accordance with the advice of the Cabinet or the Prime Minister*'. The President may only act, '*in his discretion in respect of any matter in respect of which he is empowered by the Constitution to do so*' (clause (2) of Article 48). The reference submitted to this Court was under the signature of '*Dr. Arif Alvi, President, Islamic Republic of Pakistan*'. The reference did not attach, nor refer to, any decision/resolution of the Cabinet nor the advice of the Prime Minister authorizing its filing. Given that the said two Hon'ble Judges had already directed that the reference should be entertained and that it be fixed for hearing in Court, the Registrar's office could not record any objection it may have had to its filing. The reference was filed on 21 March 2022 and,

on the same very day, it was numbered as Reference No. 1 of 2022 ('**the Reference**').

5. Through the Reference the President had sought the opinion of the Supreme Court on the following questions, which have been reproduced below, without correcting the language errors therein:

'Questions of Law

1. Whether keeping in view the scheme and spirit of the Constitution which enshrines democratic values, customs and norms and provides for parliamentary form of government conducted through the chosen representatives of the people being carriers of **Amanat**, which of the following two interpretations of Article 63A of the Constitution is to be adopted and implemented to achieve the constitutional objective of curbing the menace of defections and purification of the electoral process and democratic accountability namely:

- (a) Interpretation of Article 63A in a manner that **Khiyanat** by way of defections warrant no preemptive action save de-seating the member as per the prescribed procedure with no further restriction or curbs from seeking elections afresh; **or**
- (b) A robust, purpose oriented and meaningful interpretation of Article 63A which visualizes this provision as prophylactic enshrining the constitutional goal of purifying the democratic process, inter alia, by rooting out the mischief of defection by creating deterrence, inter alia, by neutralizing the effects vitiated vote followed by lifelong disqualification for the member found involved in such constitutionally prohibited and morally reprehensible conduct;

2. Where a Member engages in constitutionally prohibited and morally reprehensible act of defection, can the member nevertheless claim a vested right to have his vote counted and given equal weightage or there exist or is be **read into the Constitution** restriction to exclude such tainted votes from the vote count?

3. Where a member who could but did not hear the voice of his conscience by resigning from his existing seat in the Assembly and has been finally declared to have committed defection after exhausting the procedure prescribed in Article 63A of the Constitution including appeal to the Supreme Court under Article 63A(5), he can no longer be treated to be sagacious, righteous, non-profligate, honest and amen and, therefore stands disqualified for life?

4. What other measures and steps can be undertaken within the existing constitutional and legal framework to curb, deter and eradicate the cancerous practice of defection, floor crossing and vote buying?’

6. The Reference which was filed by President Dr. Arif Alvi on 21 March 2024 did not disclose that a resolution seeking a vote of no-confidence had been submitted in the National Assembly on 8 March 2022 against the then Prime Minister, Mr. Imran Khan.

7. The Constitution stipulates that the President is the, '*Head of State and shall represent the unity of the Republic*' (clause (1) of Article 48). Therefore, it is surprising that President Alvi entered into the political fray at a time when the then Prime Minister was facing a vote of no-confidence. Moreover, what President Alvi titled to be '*Questions of Law*' were not proper questions, let alone *questions of law* in terms of Article 186, as becomes clear when they are inspected:

- Question 1(a) stated that Article 63A should be interpreted, '*in a manner that Khiyanat by way of defections warrant no preemptive action save de-seating the member...*'. This shows President Alvi's desire cloaked in the form of a question.
- Question 1(b) told the Supreme Court to interpret Article 63A in, '*A robust, purpose oriented and meaningful interpretation... by neutralizing the effects of vitiated vote followed by lifelong disqualification...*'. Once again President Alvi's wishes were masked as a question.
- Question 2 was premised on President Alvi's personal opinion as it invited the Supreme Court '*to exclude such tainted votes from the vote count.*' Instead of seeking an opinion he had already determined that if votes were cast against the then Prime Minister by any member of Mr. Imran Khan's Pakistan Tehreek-i-Insaf ('**PTI**') they would be *tainted votes*. Having made this determination the President followed it up with a direction to the Supreme Court on what it should do.
- Question 3 began by pontificating, that members who '*did not hear the voice of his conscience*', and did not resign should no longer be treated as '*sagacious, righteous, non-profligate, honest and ameen*' (which was the language of Article 62(1) of the Constitution), and

then proceeded to instruct the Supreme Court to state that such an MNA '*stands disqualified for life.*'

- Question 4 combined medical zeal with moralism and asked the Supreme Court to suggest legislative '*measures*' to '*eradicate the cancerous practice of defection*'.

8. Article 186 of the Constitution enables the President to seek an '*opinion of the Supreme Court on any question of law which he considers of public importance*', however, instead of seeking an opinion on *questions of law* President Alvi expounded what he considered to be a moral issue, gave his own opinion and wanted this Court to concur with it. The text which accompanied the *Questions of Law* was similarly worded and expressed that those who voted against their party should be disqualified for life and in this regard relied upon the judgment of this Court in the case of *Sami Ullah Baloch v Abdul Karim Nousherwani* (PLD 2018 Supreme Court 405). However, the *Sami Ullah Baloch* decision was overruled by a larger seven-member Bench of this Court in the case of *Hamza Rasheed Khan v Election Appellate Tribunal* (2024 SCP 65, on the Supreme Court's website) wherein it was held that lifelong disqualification is not prescribed by the Constitution, and if this was done it would be '*reading into the Constitution*', which was not permissible.

9. On 10 April 2022 the no-confidence resolution presented against Mr. Imran Khan in the National Assembly succeeded with a majority of 174 votes (out of 342), and on 11 April 2022 Mr. Shehbaz Sharif was elected the Prime Minister of Pakistan. No PTI member had voted against Mr. Imran Khan. Nonetheless, on 14 April 2022 the PTI, through its chairman Mr. Imran Khan, filed Constitution Petition No. 9 of 2022 ('**Constitution Petition No. 9**'); PTI's lawyer was Mr. Babar Awan but was also represented by Syed Ali Zafar. In Constitution Petition No. 9 it was prayed that it be, '*declared any sort of defection would amount to imposing a life time ban from contesting elections, in the interest of justice*'. Apparently, this petition was filed for another purpose, which was with regard to the election of the Chief Minister of the province of Punjab (detailed below in paragraph 34).

10. The Registrar (and not the Court) ordered that Constitution Petition No. 9 be fixed with Constitution Petition No. 2 and the Reference, even

though the latter had already been heard on 24, 28 and 29 March and 4, 5, 6 and 12 April, 2022. Thereafter, all three matters were heard on 18, 19, 20, 21 and 22 April and then on 9, 10, 11, 16 and 17 May, 2022.

11. A 'short order' was announced on 17 May 2022 by the then Chief Justice Umar Ata Bandial, Justice Ijaz UI Ahsan and Justice Munib Akhtar ('**short order**' or '**the majority's short order**'). The detailed 'judgment' was issued after nearly five months on 14 October 2022 ('**the judgment**' or '**the majority's judgment**'). These are respectively reported as *Supreme Court Bar Association v Federation of Pakistan*', PLD 2022 Supreme Court 488 and PLD 2023 Supreme Court 42. The Bar Association has sought the review of the majority's short order and the majority's judgment.

12. We heard the submission of all the learned counsel. The learned Syed Ali Zafar had initially represented PTI and Mr. Imran Khan but later was instructed not to do so, however, he agreed to become *amicus curiae* and was also heard in such capacity. Learned Mr. Shahzad Shaukat represented the Bar Association as its President, learned Senior Advocate Mr. Farooq H. Naek represented Pakistan Peoples Party, learned Mr. Haris Azmat represented the Speaker of the National Assembly and the learned Ch. Aamir Rehman, the Additional Attorney-General ('**AAG**') for Pakistan, represented the Federation of Pakistan.

13. On 3 October 2024 we announced the following order:

'For reasons to be recorded later, Civil Review Petition No. 197 of 2022 is unanimously allowed and the majority order dated 17 May 2022 and detailed judgment of the majority are set aside.

2. We would like to record our appreciation of the manner in which the learned counsel conducted the case, and particularly of the learned Syed Ali Zafar, who stated that his client wants to withdraw from the proceedings, but was kind enough to accept to act as *amicus curiae*.'

14. Learned Syed Ali Zafar primarily objected to the constitution of this Bench. He submitted that it should have included Justice Munib Akhtar, who was the author of the majority's judgment. He stated that the committee constituted under the Supreme Court (Practice and Procedure) Act, 2023 as amended by Ordinance XXVI of 2024 ('**the Committee**') was

reconstituted, which was improper. He referred to the letters dated 30 September 2024 written by Justice Munib Akhtar and to letter dated 23 September 2024 written by Justice Syed Mansoor Ali Shah all of which were addressed to the Registrar of the Supreme Court. He also contended that this Civil Review Petition No. 197 of 2022 ('CRP') was fixed for hearing out-of-turn and hurriedly.

15. When this five-member Bench was first constituted it had included Justice Munib Akhtar, however, his lordship expressed his *inability* to attend the hearing, despite the fact that he was attending Court (Bench-III, a three-member Bench, headed by him and which had heard cases till 11 am). The five-member larger Bench was to convene on 30 September 2022 at 11.30 am. Therefore, Justice Munib Akhtar's stated *inability* was not because the timings of the two Benches clashed; in any event the work of a larger Bench always takes priority. The remaining four members on the Bench did not proceed to hear the CRP. Instead, an effort was made to ensure Justice Munib Akhtar's participation on the Bench by calling upon his lordship through a written request to join the Court. However, the request was not accepted by Justice Munib Akhtar who through his letter dated 30 September 2024 repeated his inability to do so. Therefore, his lordship was substituted on the Bench with another Judge of the Supreme Court by the Committee. Learned Syed Ali Zafar conceded that the law (Ordinance XXVI of 2024) had to be followed.

16. The Court re-convened on 1 October 2024. The CRP was filed over twenty-seven months ago on 23 June 2022, therefore, to allege that it was hurriedly fixed is completely baseless. It may be mentioned that during the entire tenure of Chief Justice Umar Ata Bandial the CRP was not fixed for hearing, and if it had escaped his attention Justice Munib Akhtar never reminded him that it be fixed for hearing. The *review* jurisdiction is created by the Constitution and it may be invoked in respect of an order already made or judgment already pronounced, therefore, by its very nature a review petition should be fixed for hearing earlier than other cases. This is also because the Judges who had passed the order or judgment may not be available later; as in the instant case, Chief Justice Umar Ata Bandial retired and Justice Ijaz ul Ahsan resigned.

17. Chief Justice Umar Ata Bandial, however, did constitute a Bench, which he headed, and which included Justice Ijaz ul Ahsan and Justice Munib Akhtar, to suspend the Supreme Court (Practice and Procedure) Act, 2023 (**'the Act'**) when it was still in the form of a Bill and extended the suspension when the Act was enacted. The majority judgment, except the retrospective grant of appeal in cases already decided under Article 184(3), held that the legislature could enact the said law, which included curtailing the powers of the Chief Justice. Justice Munib Akhtar agreed with the minority who wanted to retain the unfettered discretion and power of the Chief Justice, including in the formation of Benches. However, in his two letters dated 30 September 2024 Justice Munib Akhtar questioned the reconstitution of the Committee, to which the third Judge from amongst the Judges of the Supreme Court, had been appointed by the Chief Justice in his place. In doing so the Chief Justice did not have to offer an explanation but since his decision was questioned he responded *vide* his letter dated 25 September 2024 setting out the reasons for replacing Justice Munib Akhtar on the Committee.

18. We inquired from the learned Syed Ali Zafar whether a Judge can himself ask for the Supreme Court to determine the validity of a law or that it be determined by the Full Court (on the administrative side), and he candidly stated that this could not be done. Incidentally, the CRP was placed before the Committee in its 18th meeting held on 1 August 2024 when Justice Munib Akhtar was its member and he and the Hon'ble senior most (puisne) Judge did not agree with the Chief Justice to fix it '*for hearing in the next ten days*' nor agreed with the Bench proposed by the Chief Justice (Committee minutes are available on the Supreme Court's website). Neither Justice Munib Akhtar nor the Hon'ble most senior (puisne) Judge could arrogate to themselves the power to nominate the third member on the Committee, which the law had granted to the Chief Justice, nor could insist that Justice Munib Akhtar be on the Committee. Whether it behoves a Judge to insist on being on the Committee, or to be on any committee, we need not dilate upon.

19. A President may seek an opinion from the Supreme Court on a *question of law* under the *advisory jurisdiction* of this Court and this Court gives its *opinion* on such question. The Constitution does not state that the *opinion* given by this Court must be abided by nor does it state that if

two or more opinions are given which one should be accepted. This Court has held that the '*Opinion of the Supreme Court is just opinion with explanation on the question of law and is not of binding nature and it is up to the President or the Federal Government to act upon it or not*' (*Al-Jehad Trust v Federation of Pakistan*, PLD 1997 Supreme Court 84, 114C). An *opinion* is also not executable, however, an *order* passed by the Supreme Court (on a petition filed under Article 184(3) of the Constitution) is binding (Article 189 of the Constitution), and it is also executable. Therefore, if a *decision* (in terms of Article 189) contradicts this Court's *opinion* (under Article 186) this Court's *decision* (and not the *opinion*) will prevail.

20. The review of '*any judgment pronounced or any order made*' by the Supreme Court can be sought under Article 188 of the Constitution, but this provision does not state that review of an *opinion* of this Court can also be sought. However, since the two Hon'ble Judges (Chief Justice Umar Ata Bandial and Justice Munib Akhtar) had ordered that Constitution Petition No. 2 should be fixed for hearing with the Reference the difficulty/problem whereby both an *opinion* and *decision* of this Court were given in the majority's short order and the majority's judgment arose. The majority's short order had also stated that, '*This short order disposes of pending matters under Article 186 as well as Article 184(3)*', and that it, '*is to be read and understood as a simultaneous exercise of (and thus relatable to) both the jurisdictions that vest in this Court under the said provisions, read also in the case of the latter with the jurisdiction conferred by Article 187.*' Therefore, we have no option but to hear and decide them in this CRP.

21. Article 188 of the Constitution creates a constitutional right to seek review of any judgment or order of the Supreme Court, as under:

'The Supreme Court shall have power, subject to the provisions of any Act of Majlis-e-Shoora (Parliament) and of any rules made by the Supreme Court, to review any judgment pronounced or any order made by it.'

The matter of *review* is further attended to in the Supreme Court Rules, 1980 in its Order XXVI. Rule 1 of Order XXVI states that a review may be filed '*on grounds similar to those mentioned in Order XLVII, rule I of the Code*', that is, the Code of Civil Procedure, 1908, which stipulates that

a review may be filed if there is '*some mistake or error apparent on the face of the record, or for any other sufficient reason*'.

22. To consider whether a case for reviewing the majority's short order and the majority's judgment is made out, it needs to be considered whether clauses (1) to (5) of Article 63A of the Constitution, reproduced hereunder, were disregarded, misconstrued and/or wrongly interpreted:

'63A. Disqualification on the ground of defection, etc.

(1) If a member of a Parliamentary Party composed of a single political party in a House-

- (a) resigns from membership of his political party or joins another Parliamentary party; or
- (b) votes or abstains from voting in the House contrary to any direction issued by the Parliamentary Party to which he belongs, in relation to-
 - (i) election of the Prime Minister or the Chief Minister; or
 - (ii) a vote of confidence or a vote of no-confidence; or
 - (iii) a Money Bill or a Constitution (Amendment) Bill;

he may be declared in writing by the Party Head to have defected from the political party, and the Party Head may forward a copy of the declaration to the Presiding Officer and the Chief Election Commissioner and shall similarly forward a copy thereof to the member concerned:

Provided that before making the declaration, the Party Head shall provide such member with an opportunity to show cause as to why such declaration may not be made against him.

Explanation.— "Party Head" means any person, by whatever name called, declared as such by the Party.

(2) A member of a House shall be deemed to be a member of a Parliamentary Party if he, having been elected as a candidate or nominee of a political party which constitutes the Parliamentary Party in the House or, having been elected otherwise than as a candidate or nominee of a political party, has become a member of such Parliamentary Party after such election by means of a declaration in writing.

(3) Upon receipt of the declaration under clause (1), the Presiding Officer of the House shall within two days refer,

and in case he fails to do so it shall be deemed that he has referred, the declaration to the Chief Election Commissioner who shall lay the declaration before the Election Commission for its decision thereon confirming the declaration or otherwise within thirty days of its receipt by the Chief Election Commissioner.

(4) Where the Election Commission confirms the declaration, the member referred to in clause (1) shall cease to be a member of the House and his seat shall become vacant.

(5) Any party aggrieved by the decision of the Election Commission may, within thirty days, prefer an appeal to the Supreme Court which shall decide the matter within ninety days from the date of the filing of the appeal.'

23. The abovementioned clauses of Article 63A are self-executory and stipulate that if a member of a Parliamentary Party votes contrary to its direction or abstains from voting then its Party Head may elect to proceed against such member. If the Party Head elects to do so the first requirement is to provide the member '*with an opportunity to show cause as to why such declaration may not be made against him*', that is, a declaration that the member had defected. If the member offers a valid justification, or even in its absence, the Party Head may not want to proceed against the member. It is within the exclusive jurisdiction of the Party Head to *declare in writing* if a member has defected, but the Hon'ble Judges (in majority) entered into the political domain by divesting the Party Head of such discretion and bestowing it upon themselves. The declaration of defection if issued by the Party Head is then sent to the Presiding Officer (the Speaker of the National Assembly, the Chairman of the Senate or the Speaker of the Provincial Assembly, as the case may be), with a copy thereof to the Chief Election Commissioner. The Presiding Officer is also required to send the said declaration to the Chief Election Commissioner, '*who shall lay the declaration before the Election Commission for its decision thereon confirming the declaration or otherwise within thirty days of its receipt by the Chief Election Commissioner.*' The said Hon'ble Judges, therefore, had also appropriated to themselves the adjudicatory jurisdiction vesting in the Election Commission, in contravention of clauses (3) and (4) of Article 63. They also took away the right of *appeal* to the Supreme Court, provided by clause (5) of Article 63A.

24. Clauses (1) to (5) of Article 63A of the Constitution are unambiguous. They are clear, exact and manifestly evident. They did not require any interpretation. The procedure stipulated therein may be summarized, as under:

- (1) If a member of the Parliamentary Party does not vote as per its directions, or abstains from voting, the Party Head may decide to proceed against such member;
- (2) The member must be provided with an opportunity to show cause if the Party Head elects to proceed against such member;
- (3) The member's explanation may be accepted by the Party Head, or the Party Head may elect to do nothing, which would conclude the matter;
- (4) The Party Head may issue a declaration of defection in respect of the member (after providing an opportunity to show cause);
- (5) The Party Head then sends the declaration of defection to the Presiding Officer, with a copy thereof to the Chief Election Commissioner;
- (6) The declaration sent to the Chief Election Commissioner is submitted to the Election Commission;
- (7) The Election Commission decides the matter of defection;
- (8) Any party aggrieved with the decision of the Election Commission may prefer an appeal to the Supreme Court; and
- (9) The Supreme Court decides the appeal, which concludes the matter of defection.

Article 63A does not state that the votes of any member should not be counted nor that a member who does not vote or abstains from voting contrary to the Parliamentary Party's direction would automatically be de-seated, but this is what the Hon'ble Judges (in majority) did.

25. The clearly enumerated steps in Article 63A of the Constitution were disregarded and the Hon'ble Judges (in majority) also nullified three separate jurisdictions unequivocally stipulated in Article 63A, which were: (a) the jurisdiction of the Party Head who may or may not issue the declaration of defection, (b) the jurisdiction of the Election Commission to decide the matter of defection and (c) the appellate jurisdiction of the Supreme Court. The majority did what was not permissible. Neither a

court nor a judge can take away jurisdiction given by the law, let alone that which is conferred by the Constitution.

26. The decisions of the larger Benches of the Supreme Court, including the decision of the Full Court (comprising of 17 Judges) in the case of *District Bar Association, Rawalpindi v Federation of Pakistan* (PLD 2015 Supreme Court 401), wherein Article 63A was considered was also disregarded by the said three Hon'ble Judges. The *District Bar Association, Rawalpindi* case had held, that:

'Article 63A has a safeguard mechanism before disqualifying a member. Firstly, the Party Head has to provide an opportunity to show cause why a declaration that he/she has defected from the party may not be made. Secondly, the declaration is sent to the Presiding Officer of the concerned House and copied to the Election Commission. Thirdly, the Election Commission is required to decide it. Fourthly, any party aggrieved by the decision of the Election Commission can file an appeal in the Supreme Court. The decision of the Party Head therefore is justiciable before two forums. There are thus ample safeguards against an apprehension of a vindictive or unreasonable Party Head. Therefore, the said provision cannot be categorized as undermining any of the "principles of democracy" mentioned in the Preamble to the Constitution or any of the stated Fundamental Rights of the chosen representatives of the people.'

(para. 34, pp. 1177-1178)

The *District Bar Association, Rawalpindi* decision had also referred to the case of *Wukala Mahaz Barai Tahafaz Dastoor v Federation of Pakistan* (PLD 1998 Supreme Court 1263) and that, '*Article 63A was held to be intra vires the Constitution*' (page 712). The three Hon'ble Judges could not have invalidated the provisions of Article 63A but they effectively did so.

27. The well settled rules of interpretation of the Constitution were also disregarded by the said Hon'ble Judges. A five-member Bench had reiterated these rules in the case of *Muhammad Ismail v State* (PLD 1969 Supreme Court 241), and held that this Court can only interpret, and not legislate:

'The purpose of construction or interpretation of a statutory provision is no doubt to ascertain the true intention of the Legislature, yet that intention has, of necessity, to be gathered from the words used by the Legislature itself. If those words are so clear and unmistakable that they cannot be given any meaning other than that which they carry in their ordinary grammatical sense, then the Courts are not concerned with the consequences of the interpretation

however drastic or inconvenient the result, for, the function of the Court is interpretation, not legislation.' (p. 247)

Another five-member Bench of this Court in the case of *Baz Muhammad Kakar v Federation of Pakistan* (PLD 2012 Supreme Court 923) had emphasized the importance of the words which were used and that words must be given their plain meaning, as under:

'The literal rule of interpretation of the Constitution and statutes, also known as the golden rule of interpretation, is that the words and phrases used therein should be read keeping in view their plain meaning. Reference in this behalf may be made to the case of *Syed Mukhtar Hussain Shah v. Mst. Saba Imtiaz* (PLD 2011 SC 260), *Mumtaz Hussain v. Dr. Nasir Khan* (2010 SCMR 1254), *Kamaluddin Qureshi v. Ali International Co.* (PLD2009 SC 367), *Pakistan through Secretary Finance v. M/s Lucky Cement* (2007 SCMR 1367), *Federation of Pakistan through Secretary, Ministry of Finance v. Haji Muhammad Sadiq* (PLD 2007 SC 67), *Mushtaq Ahmed v. Secretary, Ministry of Defence* (PLD 2007 SC 405), *Syed Masroor Shah v. State* (PLD 2005 SC 173), *Federation of Pakistan v. Ammar Textile Mills (Pvt.) Ltd.* (2002 SCMR 510), *World Trade Corporation v. Excise & Sales Tax Appellate Tribunal* (1999 SCMR 632) and *State Cement Corporation of Pakistan Ltd. v. Collector of Customs, Karachi* (1998 SCMR 2207).' (para. 36, pp. 966-7)

The three Hon'ble Judges, however, did not apply the plain meaning of the words used in Article 63A.

In the case *Regarding Pensionary benefits of the Judges of Superior Courts* (PLD 2013 Supreme Court 829), this Court (comprising of five Judges) reiterated, that:

'e. Intention to be gathered from the language of the enactment, otherwise known as the 'plain meaning rule'.'

And, that:

'g. It is a cardinal rule of construction of statutes that no words are to be added or omitted or treated as surplusage or redundant.' (para. 69, p. 945)

However, the plain language of Article 63A of the Constitution was ignored and substituted by the personal opinions of the three Hon'ble Judges.

28. Another five-member Bench of this Court in the case of *Gul Taiz Khan Marwat v Registrar, Peshawar High Court* (PLD 2021 Supreme Court

391), enumerated how the Constitution is to be interpreted, which was as under:

'... a settled rule of interpretation of constitutional provisions that the doctrine of *casus omissus* does not apply to the same and nothing can be "read into" the Constitution.' (para.19, p. 407D)

'... something which is manifestly absent is tantamount to reading something into the Constitution which we are not willing to do. In our opinion, strict and faithful adherence to the words of the Constitution, specially so where the words are simple, clear and unambiguous is the rule. Any effort to supply perceived omissions in the Constitution being subjective can have disastrous consequences.' (para.19, p. 407E)

The above decision was authored by Justice Ijaz ul Ahsan, however, just a year later his lordship did not hear the alarm which he had himself sounded and the dangers of '*reading something into the Constitution*', which to use his words would have '*disastrous consequences*'. Instead, he agreed with the judgment authored by his junior colleague, Justice Munib Akhtar.

29. In the case of *Hamza Rasheed Khan v Election Appellate Tribunal* (above), a seven-member Bench of this Court had considered another provision of the Constitution – Article 62(1)(f), and if it was attracted whether it would result in lifelong disqualification. A smaller Bench of the Supreme Court in an earlier decision (*Sami Ullah Baloch v Abdul Karim Nousherwani*, above) had imposed a lifelong disqualification on those who were not *sagacious, righteous, non-profligate, honest and amen*, which was overruled by the said larger Bench of this Court. It was further held that in disqualifying someone for life amounted to conferring jurisdiction upon the Supreme Court which it did not possess:

'11. Article 175(2) of the Constitution declares it in unequivocal terms 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. The opinions of different Benches of this Court, asserting the competence of various courts to make the declaration mentioned in Article 62(1)(f) without referring to any provisions of the Constitution or any law that confers such jurisdiction upon those courts, completely lack a legal basis. This approach amounts to conferring such jurisdiction on courts by judicial decision which is not conferred on them by the Constitution or by or under any law in terms of Article 175(2) of the Constitution and is thus intrinsically unconstitutional.' (para. 11)

'12. Any court, including this Court, cannot by a judicial order confer jurisdiction on itself or any other court, tribunal or authority. The power to confer jurisdiction is legislative in character; only the legislature possesses it. No court can create or enlarge its own jurisdiction or any other court's jurisdiction. Nor any court has any inherent or plenary jurisdiction. Because of the constitutional command in Article 175(2) of the Constitution, the courts in Pakistan do not possess any inherent jurisdiction on the basis of some principles of common law, equity or good conscience and only have that jurisdiction which is conferred on them by the Constitution or by or under any law.' (para. 12)

'No jurisdiction vested in Supreme Court and High Courts to make the declaration.' (para. 13)

'In no way can the court proceed to make the 'declaration' mentioned in Article 62(1)(f) itself in exercise of its quo warranto jurisdiction. Therefore, in quo warranto proceedings the Supreme Court and the High Courts do not have the jurisdiction to make the 'declaration' mentioned in Article 62(1)(f) of the Constitution.' (para. 18)

'... conferring the jurisdiction, vesting the right of action, specifying the acts and providing the procedure would clearly amount to legislating rather than interpreting law.' (para. 26)

In the present case Article 63A is under consideration, however, the above principle, that the Supreme Court cannot confer jurisdiction, is equally applicable. The Party Head's jurisdiction to issue a declaration of defection has instead been conferred upon the Supreme Court by the majority's judgment. The Election Commission was also divested of its jurisdiction, and even the appellate jurisdiction of the Supreme Court under clause (5) of Article 63A was effectively abolished. If a Court confers jurisdiction upon itself it vitiates the Fundamental Right of fair trial and due process, as held in *Hamza Rasheed Khan* case as under:

'... any determination made in such proceedings shall have the effect of curtailing a fundamental right of the person in respect of whom such declaration is sought, the right to a fair trial and due process guaranteed by Article 10A shall also be available to such person.' (para. 24)

30. Article 63A, unlike Article 62(1)(f), is a self-executory provision of the Constitution. A self-executory provision was explained in the case of *Hamza Rasheed Khan* (above) to be:

'... a constitutional provision is self-executory if it does not require legislation to put it into effect ...' (para. 30)

The language of Article 63A was '*simple, clear and unambiguous*' and was patently self-executory. It did not require interpreting, however, this was done and in its place a new Article emerged.

31. Voting on the resolution on the vote of no-confidence against the then Prime Minister was to take place on 3 April 2022 but Mr. Qasim Suri, the then Deputy Speaker, did not permit it and thus violated Article 95(2) of the Constitution. The Constitution clearly mandates that once a resolution of no-confidence against a Prime Minister is submitted the Prime Minister can no longer advise dissolution of the National Assembly (*Explanation* to clause (1) of Article 58). President Alvi *dissolved* the National Assembly on the *advice* of Mr. Imran Khan. Three constitutional office holders who had sworn to act in accordance with the Constitution did not abide by it.

32. The Supreme Court had to intervene and it set aside the abovementioned *ruling* of Mr. Suri (occupying the Speaker's chair), the *advice* of the Prime Minister and the *dissolution* of the National Assembly by the President (*Pakistan Peoples Party Parliamentarians (PPPP) v Federation of Pakistan*, PLD 2022 Supreme Court 290 and 574). This Court further directed that the resolution of no-confidence against the Prime Minister be tabled and voted upon without curtailing any member's right to vote, and this Court did not state that the vote of any member, howsoever he voted or did not vote, should not be counted. The five-member Bench in the *PPPP* case had included the said three Hon'ble Judges.

33. The majority of the members (174) of the National Assembly on 10 April 2022 voted Mr. Imran Khan out of the office of the Prime Minister, and this was done without the vote of a single PTI member, and since all those who wanted to vote had voted Constitution Petition No. 2 and the *questions* sent for opinion in the Reference were rendered moot and irrelevant, and these matters became infructuous. However, and inexplicably, on 14 April 2022 Constitution Petition No. 9 was filed by PTI and Mr. Imran Khan even though no one from PTI had voted against Mr.

Imran Khan's premiership. Apparently, it was filed to attend to matters in the Punjab Assembly.

34. Mr. Usman Buzdar had resigned as the Chief Minister of Punjab and a new Chief Minister had to be elected. On 16 April 2022 Mr. Hamza Shahbaz was elected as the Chief Minister having secured 197 votes, though only 186 votes were required. A number of votes were cast in his favour by Members of the Provincial Assembly ('MPAs') belonging to PTI. The majority's short order of 17 May 2022, which was in respect of the National Assembly, came to determine who would be the Chief Minister of Punjab. The short order was passed in matters which had become infructuous but it still decided that if votes were cast against the Parliamentary Party's direction these will not be considered and this '*would [also] constitute a declaration of defection*'. The short order effectively invalidated Mr. Hamza Shahbaz's election as Chief Minister. The votes cast in his favour by PTI members were discarded and they were also de-seated, but they were not issued notices by this Court; in the said three matters their Fundamental Right of *fair trial and due process*, guaranteed by Article 10A of the Constitution, stood nullified.

35. Interestingly, on 23 July 2022 another petition, Constitution Petition No. 22 of 2022, was directly filed in this Court by Mr. Parvez Elahi, the then Speaker of the Punjab Assembly. In the petition it was contended that the Deputy Speaker had wrongly recognized Chaudhry Shujaat Hussain to be the Party Head of PML(Q), therefore, his direction to PML(Q) members to vote for Mr. Hamza Shahbaz was invalid. The petition was filed during this Court's summer vacations and the very day it was filed (23 July 2022) it was also fixed in Court. It was heard by Chief Justice Umar Ata Bandial, Justice Ijaz ul Ahsan and Justice Munib Akhtar. Constitution Petition No. 22 of 2022, which was filed on 23 July 2022 was decided in just a few days on 26 July 2022, during the Court's summer vacations. A short order was issued on 26 July 2022 and the detailed reasons came after almost eleven months, on 23 June 2023.

36. Civil Review Petition No. 324 of 2022 seeking review of the decision in Constitution Petition No. 22 of 2022 was filed on 12 August 2022, but it was never fixed for hearing during the tenure of Chief Justice Umar Ata Bandial, whereafter, it effectively became infructuous.

37. The author of the decision (in the abovementioned petition which was filed by Mr. Parvez Elahi) was Chief Justice Umar Ata Bandial, however, his lordship resiled from his own stated position in the case of *District Bar Association, Rawalpindi* (above). He did this by stating that, '*if a Judge has unconsciously followed an incorrect view of the law, he has by conscious application of mind the freedom to adopt the correct view of the law subsequently.*' Without commenting on his lordship's state of mind (whether *unconscious* or *conscious*), it is settled law that a smaller Bench cannot decide contrary to what a larger Bench has already decided.

38. The majority's judgment in the instant matter held that if a member voted against the dictates of his political party the member's vote would not be counted and the member shall be immediately disqualified. This also contradicted what Justice Umar Ata Bandial and Justice Ijaz ul Ahsan, had earlier held in the case of *Imran Khan Niazi v Ayesha Gulalai* (2018 SCMR 1043). Mr. Imran Khan had challenged the decision of the Election Commission which did not disqualify Ms. Ayesha Gulalai, despite the declaration of defection issued by Mr. Imran Khan, the Party Head of PTI. Therefore, he filed Civil Appeal No. 1559 of 2017 under clause (5) of Article 63A of the Constitution in this Court, which was entertained, however, it was dismissed on merits; the Election Commission's decision was upheld. The judgment was written by Justice Ijaz ul Ahsan and it was agreed to by Chief Justice Mian Saqib Nisar and Justice Umar Ata Bandial. The divergent views taken by the said two Hon'ble Judges in respect of the same constitutional provision (Article 63A) are irreconcilable.

39. In the majority's judgment which held that a member who votes contrary to the direction of the Parliamentary Party the vote of such member is not to be counted negated not only the express provisions of Article 63A but also the following provisions of the Constitution: (a) Article 91(7), whereunder a Prime Minister may be called upon to obtain a vote of confidence from the National Assembly, (b) Article 95, under which a resolution is submitted seeking a vote of no-confidence, (c) Article 130(7), whereunder a Chief Minister is called upon to obtain a vote of confidence from the Provincial Assembly and (d) Article 136, which requires voting on a resolution of no-confidence against a Chief Minister. These

constitutional provisions were rendered redundant. Another consequence of the majority's judgment would be that once a Prime Minister and Chief Ministers are elected they can never then be removed either by their own party or by the majority membership of the concerned assembly. Nothing can be more undemocratic; the majority's judgment has opened the way to transform the leader of a political party into a dictator, simply because the party's leader can never be challenged.

40. The Hon'ble Judges in the majority, with great respect, had also not noted the particular language which was used in the Constitution. In clause (4) of Article 63A the word *cease* is used and it is stated that a member '*shall cease to be a member*' whereas the word *disqualify* is used in Article 63 - '*disqualifications for membership.*' *Ceasing* to be a member (on account of defection) is not mentioned in Article 63, let alone that the defector is *disqualified* or suffers *disqualification*. To state the obvious, *cease* means to stop, to come to an end or to forfeit whereas *disqualification* or *disqualify* means to render ineligible, to be unfit or to disentitle. The words and the language used in the Constitution, its placement and context was overlooked by the three Hon'ble Judges.

41. The majority's judgment interestingly referred to decisions from a number of countries and forums, including from the United States of America, Canada, United Kingdom, India and the Privy Council. Foreign legal books and authors were also quoted. But, this appears to have been done, without first ascertaining the law in the respective countries regarding defections, and the consequences thereof.

42. We had sought the assistance of counsel to brief us on the international position on defections and its consequences. Learned senior counsel Mr. Farooq H. Naek and the learned AAG have submitted documents through applications showing the prevalent worldwide practice (CMAs No. 10233 and 10234 of 2024). They state that voting, or abstaining to vote, contrary to the party or its leader's direction does not result in automatic disqualification in any country of the world. The learned AAG pointed out that an automatic disqualification law was enacted in Papua New Guinea, but its Supreme Court (in Reference No. 11 of 2008) struck it down (copy of the judgment has been filed with CMA No.10234/2024). The Supreme Court referred to the privileges of the

members of parliament and relied on their freedom of speech and debate, which would be curtailed if they were not allowed to vote freely and this may also *'be viewed as a possible infringement of members' independence.'* In India the matter is attended to in the Tenth Schedule of the Constitution of India, read with its Articles 102(2) and 191(2); these provisions are similar to Article 63A of our Constitution. In only a few countries of the world, including Pakistan, a member who votes or abstains from voting, contrary to the party's direction can be declared to have defected, and his seat, only after complying with the stated necessary preconditions, is vacated. The majority's judgment substituted its wisdom with that of the makers of the Constitution, and adopted a course not followed anywhere in the world.

43. Substituting constitutional provisions with personal likes and moralisms must be avoided. What a particular Judge considers to be right or wrong, or ethical or unethical, is neither the law nor the Constitution. While law makers may transform moral precepts into law, however, the courts are concerned with what is *lawful* or *unlawful*. Parliament makes the law which the courts apply, and if there is any ambiguity in the law a judge interprets it, but this too must be done within the parameters of the law and as per the well settled rules of interpretation.

44. Instead of a constitutional or legal basis the majority's judgment has a surfeit of moralisms and non-legal terminology, such as *healthy* (41 times), *unhealthy* (5 times), *vice* (9 times), *evil* (8 times), *cancer* (8 times), *menace* (4 times), etc.

45. The majority's judgment also reflects a complete distaste for parliamentarians (in its paragraph 106) as it proclaims that in the history of Pakistan and its Parliament only once did a parliamentarian come close to becoming a *'conscientious objector who took the path of defection and de-seating under Article 63A.'* The expression of such contempt for politicians and parliamentarians is regrettable. Let us not forget that Pakistan was achieved by politicians who had gathered under the banner of the All India Muslim League and its Quaid (leader), M. A. Jinnah, who strictly followed the constitutional path.

46. Therefore, for all the aforesaid reasons, the majority's short order and the majority's judgment are set aside as they are against the clear language and mandate of the Constitution and are also contrary to the decisions of the larger Benches of this Court. The conclusions arrived at by the Judges who were in the minority are sustained. These are the reasons for our short order dated 3 October 2024.

Chief Justice

Judge

Judge

Judge

Judge

Islamabad
10.10.2024
(Farrukh, Tauseef,
Neha Makhdoom)

Approved for reporting