Order Sheet

IN THE HIGH COURT OF SINDH AT KARACHI

Present:
Mr. Justice Muhammad Shafi Siddiqui, CJ
Mr. Justice Jawad Akbar Sarwana.

C.P. No.D-1590 of 2023

Attock Cement Pakistan Ltd. and others
Versus
Federation of Pakistan and others

ALONG WITH

1	C.P. No.D-1835/2023	Amreli Steel Ltd. and others v. Federation of Pakistan and others
2	C.P. No.D-1937/2023	M/s Midas Clothing Ltd. & others v. Federation of Pakistan and others
3	C.P. No.D-2050/ 2023	M/s Retex Global Pvt. Ltd. v. Federation of Pakistan and others
4	C.P. No.D-2065/2023	M/s Universal Rags Pvt. Ltd. v. Federation of Pakistan and others
5	C.P. No.D-2068/2023	M/s Power Cement Ltd. v. Federation of Pakistan & others
6	C.P. No.D-2084/2023	Steelex Pvt. Ltd. and another v. Federation of Pakistan & others
7	C.P. No.D-2095/2023	M/s Union Steel Ind. & another v. Federation of Pakistan & others
8	C.P. No.D-2124/2023	M/s Usman Global Trading & another v. Federation of Pakistan and others
9	C.P. No.D-2661/2023	MBJ Health Association v. Federation of Pakistan and others
10	C.P. No.D-2662/2023	Mulk Management v. Federation of Pakistan and others
11	C.P. No.D-2695/2023	M. Makki & Co. v. Federation of Pakistan and others
12	C.P. No.D-2717/2023	Dalda Foods Ltd. v. Federation of Pakistan and others
13	C.P. No.D-3125/2023	Paramount Tarapaulin Ind. v. Federation of Pakistan and others
14	C.P. No.D-3578/2023	Yousuf Silk & Dyeing v. Federation of Pakistan and others

Date of Hearings: 26.11.2024 and 28.11.2024

Date of Annoucement: 02.12.2024

Mr. Mayhar Kazi, Advocate for petitioners in C.P. No.D-1590/2023.

M/s. Abdallah Azzaam Naqvi and Waqar Ahmed, Advocates for petitioners in C.P. Nos.D-2661/2023, 2662/2023, 2717/2023.

M/s Sufiyan Zaman and Munib Qidwai, Advocates for petitioners in C.P. Nos.D-1937/2023, 2050/2023, 2065/2023 and 2124/2023.

Mr. Shahzad Mehmood, Advocate holds brief for Mr. Zain ul Abdin Jatoi, Advocate for petitioners in C.P. No.D-1835/2023, 2084/2023.

Mr. Shariq A. Razzak, Advocate for petitioners in C.P.Nos.D-2695/2023, 3125/2023 & 3578/2023.

Mr. Qazi Khalid Ali, Advocate for Respondents/NEPRA.

M/s. Kashif Hanif and Sarmad Ali, Advocates for Respondents/NEPRA.

Mr. Ayan Mustafa Memon, Advocate for Respondents/K-Electric.

Mr. Iftikhar Ahmed, Advocate for Respondents/K-Electric.

Ms. Zehrah Sehar Veyani, Assistant Attorney General.

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1. It is common ground between the parties that the present petitions – across all the petitions – presently only have one prayer clause seeking a declaration that Section 31(8) of the Regulation of Generation, Transmission and Distribution of Electric Power Act, 1997 (the "NEPRA Act, 1997") is ultra vires of the Constitution of the Islamic Republic of Pakistan, 1973 ("1973 Constitution"). This is the only relief sought by the petitioners, which the respondents oppose. However, at this stage, this bench of the Constitutional High Court has to decide whether or not to continue to hear this matter following the creation of a division within the High Court that the Constitution (Twenty-sixth Amendment) Act, 2024 (Act No.XXVI of 2024)(hereinafter referred to as "the 26th Constitutional Amendment")[1] has created a situation in which an assignment has been given under the 1973 Constitution to special benches (judges) of the High Court declared by the Judicial Commission of Pakistan as "Constitutional Benches" under Articles 175 and 175A read with Article 202A.

2. At the outset, the Counsel for petitioner, Abdallah Azzaam Naqvi, Advocate for petitioners in C.P. Nos.D-2661/2023, D-2662/2023, and D-2717/2023 submitted that following this Court's Order dated 11.08.2023 in CP No.1590/2023 and others, these petitions, to the extent of all prayer(s) stood dismissed <u>except the challenge to the vires of the</u>

[1] The Constitution (Twenty-sixth) Amendment Act, 2024 (Act XXVI of 2024) was enacted by the Majlis-e-Shoora (Parliament) on 21 October 2024

NEPRA Act, 1997. He contended that this "survived" challenge, which remains to be decided, may not be transferred under Article 202A(5) to the Constitution Bench of this High Court under Article 202(3), as this bench retains writ jurisdiction vested in the High Court to hear these Petitions even after the issuance of the Supreme Court of Pakistan, Press Release No.35/2004 dated Islamabad 25.11.2024, informing the general public that pursuant to the third meeting of the Judicial Commission of Pakistan constituted under the 26th Constitutional Amendment, the Commission has approved, with a majority of 11 to 4, the formation of the constitution benches in the High Court of Sindh and approved for the period of two (2) months the names of nine (ix) Learned Judges of this Court to constitute those benches in this Court as listed in the said press release. He contended that the vires of the NEPRA Act, 1997 alone is under challenge in all these petitions, which falls under Article 199(1)(a)(ii), therefore, this bench has the power to decide matters within the scope of the leftover clauses of Article 199 of the Constitution following the Constitution (26th Amendment) Act, 2024, i.e. under Article 199(1)(a)(ii). He contended that these petitions cannot be decided by the constitutional benches which exercise jurisdiction in terms of Article 199(1)(a)(i) and Article 199(1)(c) only. He argued that the similarity between the two sub-articles, i.e., Article 199(1)(a)(i) and Article 199(1)(c) is that under both said provisions, an order is sought from the High Court '*directing*', either performance of a certain act (*writ of Mandamus*), or otherwise, directing a restrain from performing a certain act (*writ of Prohibition*). He relied on *2005 SCMR 534* on page 542 (paras 11, 12).

3. Counsel for petitioners in CP No.D-1590/2023, Mayhar Kazi, Advocate, adopting the above-mentioned Petitioner Counsel's arguments, further submitted that Article 191A of the Constitution (inserted vide the 26th Amendment) also made

changes with respect to the jurisdiction of the Supreme Court and the creation of constitutional benches of the Supreme Court but the language of the said provision, especially, Article 191A(3) is vastly different from Article 202A(3). He argued that the Legislature's omission in placing "*the constitutionality of any law" (as in Article 191A(3)(b)) in the ouster applicable to High Courts was a deliberate action* and must be given effect. He further argued that the Legislature consciously decided not to place within the domain of the High Court's Constitutional Benches cases involving challenges to the constitutionality of laws. This, he contended, clarified that the High Court continued to exercise constitutional jurisdiction, and this bench could continue hearing this lis.

4. Counsel for the respondent, K-Electric, Mr. Ayan Mustafa Memon, Advocate, adopted the arguments of the Counsel for the above-named Petitioners and submitted further that Article 202A, ousts the jurisdiction of the High Court partially and confers partial jurisdiction on constitutional benches, is by its very nature an ouster clause; hence, as per settled law, the ouster has to be narrowly construed, and the Courts must jealously guard their jurisdiction. He placed reliance on PLD 1989 SC 26, 2004 YLR 1002, 2020 CLD 1260. He argued that if these cases are referred to the constitutional bench under Article 202A(3) for the exercise of its powers under Article 199(1)(a)(i) or (1)(c) under its "special jurisdiction", then the relief sought in this petition could not be considered as no power of issuing a declaration or striking down the law has been conferred thereupon expressly by Article 202A. Therefore, given the power retained by this bench of the High Court, under its normal jurisdiction under the Constitution of Pakistan, it should continue to hear the lis.

5. Counsel for NEPRA, Qazi Khalid Ali, submits that neither NEPRA nor any of the parties have filed or moved any

application for transfer of these petitions to the constitutional benches of the High Court. He submits that this bench retains the lis and ultimately decide the only point left in the petitions, i.e. the challenge to the vires of Section 31(8) of the NEPRA Act, 1997.

6. Counsels for the remaining petitioners, respondents, and the learned Assistant Attorney-General have no objections to this constitution bench continuing to hear these petitions. Their consent still does/did not confer jurisdiction, hence this Order.

7. Heard Counsels. When the High Court was established in terms of the 1973 Constitution under Article 175, which conferred power to all its benches (judges) of the High Court, the said Constitutional Court commenced performing its designated work. The High Court's constitutional jurisdiction has thus far been governed by Article 199 of the 1973 Constitution, which was amended from time to time, and its current version as of 28.11.2024 (following the 26th Amendment) reads as hereinunder:

> "**199. Jurisdiction of High Court**.--(1) Subject to the Constitution, a High Court may, if it is satisfied that no other adequate remedy is provided by law,__
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> (a) on the application of any aggrieved party, make an order—
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> (i) directing a person performing, within the territorial jurisdiction of the Court, functions in connection with the affairs of the Federation, a Province or a local authority, to refrain from doing anything he is not permitted by law to do, or to do anything he is required by law to do; or
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> (ii) declaring that any act done or proceeding taken within the territorial jurisdiction of the Court by a person performing functions in connection with the affairs of the Federation, a Province or a local authority has been done or taken without lawful authority and is of no legal effect; or
> (b) on the application of any person, make an order—
>
> (i) directing that a person in custody within the territorial jurisdiction of the Court be brought before it so that the

Court may satisfy itself that he is not being held in custody without lawful authority or in an unlawful manner; or

(ii) requiring a person within the territorial jurisdiction of the Court holding or purporting to hold a public office to show under what authority of law he claims to hold that office; or

(c) on the application of any aggrieved person, make an order giving such directions to any person or authority, including any Government exercising any power or performing any function in, or in relation to, any territory within the jurisdiction of that Court as may be appropriate for the enforcement of any of theFundamental Rights conferred by Chapter 1 of Part II.

(1A) For removal of doubt, the High Court shall not make an order or give direction or make a declaration on its own or in the nature of suo motu exercise of jurisdiction beyond the contents of any application filed under clause (1).

(2) Subject to the Constitution, the right to move a High Court for the enforcement of any of the Fundamental Rights conferred by Chapter 1 of Part II shall not be abridged.

(3) An order shall not be made under clause (1) on application made by or in relation to a person who is a member of the Armed Forces of Pakistan, or who is for the time being subject to any law relating to any of those Forces, in respect of his terms and conditions of service, in respect of any matter arising out of his service, or in respect of any action taken in relation to him as a member of the Armed Forces of Pakistan or as a person subject to such law.

(4) Where

(a) an application is made to a High Court for an order under paragraph (a) or paragraph (c) of clause (1), and(b) the making of an interim order would have the effect of prejudicing or interfering with the carrying out of a public work or of otherwise being harmful to public interest or State property or of impeding the assessment or collection. of public revenues, the Court shall not make an interim order unless the prescribed law officer has been given notice of the application and he or any person authorised by him in that behalf has had an opportunity of being heard and the Court, for reasons to be recorded in writing, is satisfied that the interim order

(i) would not have such affect as aforesaid; or

(ii) would have the effect of suspending an order or proceeding which on the face of the record is without jurisdiction.

(4A) An interim order made by a High Court on an application made to it to question the validity or legal effect of any order made, proceeding taken or act done by any

> authority or person, which has been made, taken or done or purports to have been made taken or done under any law which is specified in Part I of the First Schedule or relates to, or is connected with, State property or assessment or collection of public revenues shall cease to have effect on the expiration of a period of six months following the day on which it is made:
>
> Provided that the matter shall be finally decided by the High Court within six months from the date on which the interim order is made.
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> (5) In this Article, unless the context otherwise requires, "person" includes any body politic or corporate, any authority of or under the control of the Federal Government or of a Provincial Government, and any Court or tribunal, other than the Supreme Court, a High Court or a Court or tribunal established under a law relating to the Armed Forces of Pakistan; and "prescribed law officer" means
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> (a) in relation to an application affecting the Federal Government or an authority of or under the control of the Federal Government, the Attorney-General, and
>
> (b) in any other case, the Advocate-General for the Province in which the application is made."

8. The question before this bench essentially involves an analysis of Article 199(1)(a)(i) and (ii), Article 199(1)(b), and Article 199(1)((c). Article 199(1)(a) of the 1973 Constitution is split into two parts, i.e. 199(1)(a)(i), which covers the High Court's power to issue writs, which for the moment, may be labelled as writs of mandamus and prohibition and also directions, and 199(1)(a)(ii) which covers the power of the Court to issue what may be presently labelled as the writ of certiorari and also issue declarations. The High Court also has the power to issue a writ of habaes corpus under Article 199(1)(b)(i) and to issue a writ of quo warranto under Article 199(1)(b)(ii). Finally, the High Court also has jurisdiction in relation to fundamental rights to the relief/remedy provided under Article 199(1)(c). This may be expressed in tabular form as follows:

	Article	**Nature of Jurisdiction**
1.	Art.199(1)(a)(i)	Similar to *writ of Mandamus* **directing** for the performance of a certain act, or similar to *writ of Prohibition* **directing** an authority / person to stop

		and cease the performance of an act, which said authority / person could not do
2.	Art.199(1)(a)(ii)	Similar to *writ of Certiorari* to review and consequently **declare** that an act, decision, proceeding etc., of any authority / person that the same has been done without lawful authority or in an unlawful manner
3.	Art.199(1)(b)(i)	Similar to *writ of Habeas Corpus* **directing** the production of a detenu so that the Court may satisfy itself as to the legality and validity of such
4.	Art.199(1) (b)(ii)	Similar to *writ of Quo Warranto* **inquiring** and effectively directing a person to show under what law he claims to hold office
5.	Art.199(1)(a)(ii)	Similar to *writ of Mandamus* and/or *writ of Prohibition* and almost identical to Art. 199 (1) (a) (i) **directing** for the enforcement of any of the Fundamental Rights conferred under Chapter I of Part II[2]

9. It is pertinent to mention that the English writs of "mandamus", "prohibition", "certiorari", "habeas corpus", and "quo warranto" had their genesis in English Common Law, and these generic terms could be found in the Constitution of Pakistan until the 1962 Constitution removed them.[3] Therefore,

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[2] Article 8 to Article 28 of the Constitution

[3] A tabular depiction of the five writs under English Law is given hereinbelow.

	Name of Writs	Nature of Writs
(i)	*Writ of Mandamus*	**Directing** for the performance of a certain act, which an authority / person was bound to perform
(ii)	*Writ of Prohibition*	**Directing** an authority / person to stop and cease the performance of an act, which said authority / person could not do
(iii)	*Writ of Habeas Corpus*	**Directing** a detaining authority / person to produce the detenu and **direct** for the release of the detenu if such detention is illegal
(iv)	*Writ of Quo Warranto*	**Inquiring** against a person who claims or usurps a public office and **restrain** them to hold office if not entitled
(v)	*Writ of Certiorari*	Review and consequent **declare** that an act, decision, etc., of any authority / person that the same is correct and/or incorrect, hence void

there is no mention of these writs after the coming into force of the 1962 Constitution and in the 1972 Constitution. The contours of the writs available to the High Court are described in the Articles themselves, and these Articles neither label nor describe themselves as equivalent to those writs comparable to the practice of conferring judicial review jurisdiction in terms of the English Common Law. As articulated by Chief Justice Cornelius in *Mian Jamal Shah v. The Member Election Commission, Government of Pakistan, Lahore and Two Others*, PLD 1966 SC 1, the English cases are no longer relevant for the application of Article 199, "which is worded in clear terms and must be applied according to its terms." Consequently, the Courts' power, authority, and jurisdiction concerning judicial review are codified and are now entrenched in the written constitutional law.

10. Article 199(1)(a)(i) consists of two subparts. The first subpart confers jurisdiction upon the High Court to make an order directing a person performing functions in connection with the affairs of the Federation, a Province or local authority to refrain from doing anything he is not permitted by law to do. This is comparable to the English writ or order of prohibition. The second subpart confers jurisdiction upon the High Courts to make an order directing such a person to do something he is required by law to do; this is comparable to the English writ or order of mandamus.

11. Article 199((1)(a)(ii) confers upon the High Court jurisdiction to make an order declaring that any act done or proceeding taken had been done or taken "without lawful authority" and is "of no legal effect". This article is comparable to the "writ of certiorari", but not exactly. This is because the scope of Article 199(1)(a)(ii) is to be understood in the context of the words used therein, that is, "without lawful authority" and "of no legal effect". These words were used for the first time in Article

98 of the 1962 Constitution and have to be read as a matter of statutory interpretation of the said constitutional provision.

12. The expressions "without lawful authority" and "of no legal effect" it has been said in *Muhammad Hussain Munir and Others v. Sikandar and Others,*[4] are expressions of art and refer to jurisdictional defects as distinguished from a mere erroneous decision whether on a question of fact or even of law. In *Reg. v Secretary of State for the Home Department ex-parte Fire Brigades Union,*[5] the House of Lords observed: "If a Minister's action is challenged by applicant with sufficient locus standi, it is the court's duty to determine whether the Minister has acted lawfully, that is to say, whether he has acted within the power conferred on him by Parliament. If the Minister has exceeded or abused his powers, then it is the ordinary function of the court to grant appropriate discretionary relief. . ." The constitutional basis of the court's power to quash in England thus is that the impugned decision "is unlawful on the grounds that it is ultra vires".

13. Thus, according to Justice (Retd.) Fazal Karim, in his 3-volumes treatise, "*Judicial Review of Public Action*" (Second Edition, 2018), in the field of judicial review, the word "lawful" has acquired a technical meaning, that is, it has become a term of art; when it is said that a person has acted lawfully it means that he has acted within the powers conferred on him by law; and when it is said that a person has acted unlawfully, it means that he has acted out with the powers conferred on him by law, i.e. without jurisdiction. A person acts unlawfully when he exceeds his powers or lacks powers.[6]

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[4] PLD 1974 SC 139
[5] [1995] 2 AC 513
[6] Lord Morris in Hoffmann – La Roche v. Secretary of State (1974) 2 All ER 1128, 1143

14. In Government of West Pakistan v. Begum Agha Abdul Karim Shorish Kashmiri,[7] the Supreme Court was concerned with the ascertainment of the true expression "without lawful authority" and in an unlawful manner as they occur (2)(b)(i) of article 98 of the 1962 Constitution which responds to clause …1(b)(i) of Article 199 of the 1973 Constitution it was held that in without lawful authority will be comprised all questions of vires of the statutes itself as also of the person or persons acting under the Statute, i.e. there must be a competent law authorizing the detention and the officers issuing such an order must have been lawfully vested with the power."

15. In Rahim Shah v. Chief Election Commissioner, PLD 1973 SC 25, Justice Muhammad Yaqoob Ali held that:

> "Under article 201 (predecessor of Article 199) certiorari will issue to any person performing. . .functions in connection with the affairs of the Center, Province or local authority. It is not necessary that the person acts in a judicial or quasi-judicial capacity, High Court will interfere if the act done or the proceedings under taken is in violation of law or any established principle of law. The term "law" is not confined to statute and in holding the Inquiry the Superior courts are not restricted to an examination of record of the case. The Court may even record evidence to determine the legality of the act done or the proceedings undertaken."

16. Justice Kaikaus in the Jamal Shah case observed that the phrase "of no legal effect" is a well-known expression with a well known meaning that "a simple finding that an act is without lawful authority is insufficient. It must be further be found that an act or proceeding is "of no legal effect". When we say that something is of no legal effect, we mean that it is a nullity, it has no existence in the eye of the law." To amount to a nullity, observed Justice

[7] PLD 1969 SC 14, 31

Hamood Ur Rahman, CJ, in *Nawab Syed Raunuq Ali, etc. v. Chief Settlement Commissioner and Others*, PLD 1973 SC 236, "an act must be non-existent in the eye of law, that is to say, it must be wholly without jurisdiction or performed in such a way that the law regards it as a mere colorable exercise of jurisdiction or unlawful usurpation of jurisdiction".[8]

17. When the court holds that an act is without lawful authority, it declares that it is without jurisdiction or ultra vires; an act without jurisdiction or ultra vires is a nullity and is, therefore, of no legal effect. Thus, an act is without lawful authority and of no legal effect when the person doing it had no authority (that is, jurisdiction, power or right) to do it under the law under which he purported to act; it is an act ultra vires and without or in excess of jurisdiction, both in its original and wider concept.[9]

18. In the case at hand, the petitioners seek a declaration that Section 31(8) of the NEPRA Act, 1997 is ultra vires. Parties Counsel conceded that the words "without lawful authority" and "is of no legal effect" amounted to "ultra vires". Based on the exposition of law discussed above, we agree with Counsel that a challenge against an act of Parliament, as raised by the petitioners herein, is a challenge to legislative competency on the ground of it being "without lawful authority" and "is of no legal effect". However, these words "without lawful authority" and "is of no legal effect" have to be read in the context of Article 199(1)(a)(ii) and to this end, Counsel did not submit either any reported or unreported case law that the challenge of declaring a section in a legislative instrument to be "without lawful authority" and "is of no legal effect" could be sustained under Article 199(1)(a)(ii). Meanwhile, we found two reported judgments of the Supreme Court of Pakistan that the remedy by

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[8] PLD 1973 SC 236, 261

[9] *Abdul Sami v. Abdul Ghafoor*, PLD 1990 Lah. 378, 383

way of an English writ of certiorari was inappropriate for setting aside an administrative or executive order.[10] Still, both these judgments of the Supreme Court of Pakistan were in relation to Pakistan law as it stood before the coming into force of the 1962 Constitution, which (for the first time) introduced the words "without lawful authority" and "is of no legal effect" in Article 98 of the 1962 Constitution. Further, the said judgments relied on interpreting English writs under English Common Law, but Article 199(1)(a)(ii) is to be read and interpreted statutorily. Therefore, applying the principles of English Common Law concerning English writs would not be correct, and, both these judgments of the Supreme Court are distinguished and cannot be relied upon.

19. We now turn to the High Court's jurisdiction determination under Article 199 following the 26th Amendment. Article 199 now has to be read with Article 202A, which reads as hereinunder:

> "**202A. Constitutional Benches of High Courts**.
>
> (1) There shall be Constitutional Benches of a High Court comprising such Judges of a High Court and for such term as may be nominated and determined by the Judicial Commission of Pakistan as constituted under clause (5) of Article 175A,from time to time.
>
> (2) The most senior Judge amongst Judges nominated under clause (1) shall be the Head of the Constitutional Benches.
>
> (3) No Bench of a High Court other than a Constitutional Bench shall exercise jurisdiction vested in the Court under subparagraph (i) of paragraph (a) and paragraph (c) of clause (1) of Article 199.
>
> (4) For the purposes of clause (1), a Bench, to be nominated by a committee comprising the Head of the Constitutional Benches and next two most senior Judges from amongst the Judges nominated under clause (1), shall hear and dispose of such matters.
>
> (5) All petitions under sub-paragraph (i) of paragraph (a) and paragraph (c) of clause (1) of Article 199 or appeals therefrom, pending or filed in a High Court prior to

[10] *Province of West Pakistan v. S. I. Mahbub, I.S.E. Chief Engineer*, PLD 1962 SC 433 and *Tariq Transport Company v. Sargodha-Bhera Bus Service and others*, P L D 1958 S C (Pak) 437

> commencement of the Constitution (Twenty-sixth Amendment) Act, 2024 (XXVI of 2024), subject to clause (7), forthwith(6) Notwithstanding anything contained in the Constitution but subject to an Act of Majlis -e- Shoora (Parliament) in respect of the Islamabad High Court and an Act of Provincial Assembly in respect of other respective High Courts, a High Court may make rules regulating the practice and procedure of the Constitutional Benches.
>
> (7) This Article shall come into force, if in respect of–
>
> (a) the Islamabad High Court, both Houses of Majils-e-Shoora (Parliament) in the joint sitting; and
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> (b) a High Court, the respective Provincial Assembly, through a resolution passed by majority of the total membership of the joint sitting or the respective Provincial Assembly, as the case may be, give effect to the provisions of this Article stand transferred to the Constitutional Benches and shall only be heard and decided by Benches constituted under clause (4).

20. It is a trite proposition that all benches/judges of the High Court, inter alia, before the 26th Amendment, exercised powers without any divisions under Article 199 of the 1973 Constitution. However, following the 26th Amendment, it appears that the benches/judges of the High Courts have been split, including the subject-matter power to grant relief/remedy and to make rules regulating the practice and procedure of the benches (judges) of the High Court. The two categories of constitution benches may be described as follows: (i) the constitutional bench under Articles 199(1)(a)(ii) and (b) dealing with all nature of writs of certiorari and habeas corpus, as well as all other reliefs, remedies, powers, jurisdictions, etc. available under the 1973 Constitution excluding Articles 199(1)(a)(i) and 199(1)(c) (hereinafter referred to as "Constitution Bench "A"); and, (ii) the constitutional bench under Article 202A having limited powers dealing with restricted subject-matter relief/remedies under Articles 199(1)(a)(i) and Article 199(1)(c) only (hereinafter referred to as "Constitution Bench "B"). The following diagram well illustrates the two categories of benches (judges) in the High Court of Sindh at present:

Article 175 – High Court as a constitutional court and its constitution benches/judges

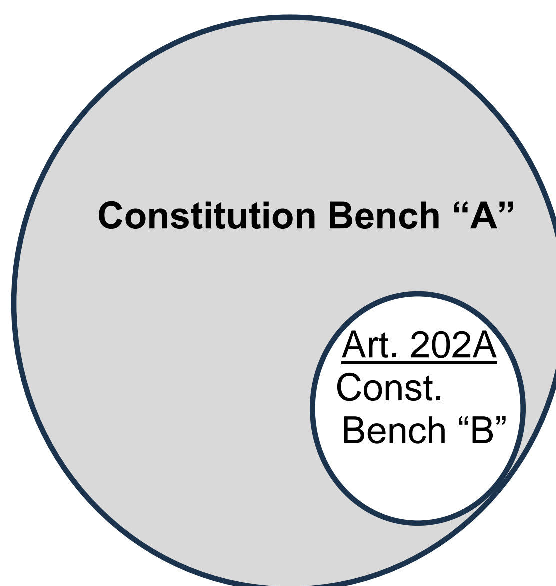

Figure #1

21. It may be noted that constitutional empowerment was not provided to this High Court by virtue of Article 202A; but it is Article 175 that has empowered and continues to empower the entire High Court, including all its benches/judges, to continue to perform their constitutional functions within the framework of the Constitution. It may be clarified that whereas the Chief Justice, as the Master of the Roll, determines the practice and procedure of the High Court, including making the Roster for the entire High Court, his/her powers to make such Roster for its benches (judges) ends as and when a petitioner arrives at the proverbial doorstep of the High Court seeking directions from the High Court under Article 199(1)(a)(i) and 199(1)(c). At this point, with the triggering of Article 202A(6), the assignment of such work, i.e. further dealing with a petition seeking remedy/relief under Article 199(1)(a)(i) and Article 199(1)(c), is to be handled by the constitution bench of the High Court created under Article 202A(3) with its bench (judges) and Roster assigned to such benches (judges) of the High Court under the machinery of Article 202A of the 1973 Constitution.

22. It may also be seen from Figure #1 above that the scope of jurisdiction of the Constitution Bench "A" under Article 199 is much wider and broader compared to the roster/assignment of the Constitution Bench "B". Constitution Bench "A" has powers to grant all reliefs, remedies, jurisdiction, etc. as shown in the grey shaded area in Figure #1, both figuratively and in fact. Constitution petitions seeking remedies/reliefs from the High Court, falling in these "grey areas", i.e. the unknowns of the Constitution concerning the unlimited powers of the High Court and the remedies/reliefs available, can only be determined by such constitution bench of the High Court vested with such powers and none else. Thus, for all purposes, the benches (judges) of the High Court, described by us herein as Constitution Bench "A", to whom the work has not been assigned under Article 202A(3) continue to exercise constitutional jurisdiction having all the powers to determine and decide, as and when a lis is placed before such bench (judge), as to how to proceed with the lis as also a constitutional bench within the contours of the Constitution. Even otherwise, as the Constitution Bench "A" of the High Court has a broader and wider scope of constitutional jurisdiction, and under the rule of ouster clauses (which we discuss next), Constitution Bench "A" is best suited to determine its jurisdiction viz. any and all petitions which arrive at the doorstep of the High Court before such petitions are transferred to the Constitutional Benches under Article 202A(5)(in this case, as we describe this to be the Constitution Bench "B"). Therefore, for efficiency and best practice, we took up this lis and are proceeding to decide the matter of jurisdiction at the outset instead of exercising our discretionary power and deciding the point of the jurisdiction in the end together with a judgment on merits. Given the current scenario, we hope that this first responder approach of taking up jurisdiction first will ultimately save the litigant public's time and align with the Legislature's

aims and objectives when they enacted the Constitution (Twenty-sixth Amendment) Act, 2024.

23. Article 202A is an ouster clause as it takes away a part of the constitutional matters of the High Court under Article 199 of the 1973 Constitution. In the present case, Constitutional Benches have been carved out of Article 199 of the 1973 Constitution by way of the 26th Constitutional Amendment. These are being referred to in this Order as Constitution Bench "B". Meanwhile, the Constitutional High Court, which continues its constitutional work, is referred to in this Order as Constitution Bench "A". Jurisdiction can only be conferred or taken away by law and the Constitution. The Legislature has ousted part of the jurisdiction of the Constitutional High Court by assigning work to Constitutional Bench "B" through subject-specific constitutional assignment and its roster. Such ouster clauses prima facie are to be construed strictly and narrowly and cannot be lightly inferred.[11] In the absence of express words, it cannot be presumed that the constitutional court's benches/judges can be deprived of a jurisdiction or powers they have previously exercised. Indeed, a comparison of the ouster clause for the Supreme Court under Article 191A and the ouster clause for the High Court under Article 202A also reveals that the High Court's ouster clause is narrower than the Supreme Court's.

24. In the case of the Supreme Court of Pakistan, the ouster clause under Article 191A is very wide as it takes away the entire substantive work/assignment vested in the Supreme Court of Pakistan and transfers it to the Constitutional Benches of the

[11] *Syed Weedhal Shah and Eight (8) Others v. Province of Sindh and Alsoora*, PLD 1978 Karachi 464, relevant pages 466, 477 (paras 6 and 7). The Courts of Indian Jurisdiction have also consistently upheld the principles detailed in *Syed Weedhal's* case, especially in the Indian cases of *Magiti Sasamal reported in* AIR 1962 Supreme Court 547, relevant passage at page 549 (paras 8, 9); the *Raja Ram Verma case reported in* AIR 1968 Allahbad 869, relevant passages at page 873-874 (paras 6 and 7), and in *Shewakram Gurdinomal reported in* AIR 1927 Sind 225, relevant passage at page 226 (Column 2), 227 (Column 1).

Supreme Court. In contrast, the High Court's ouster clause (Article 202A) is narrower because the High Court benches (judges) not covered by Article 199(1)(a)(i) and (1)(c) continue with the otherwise residual constitutional jurisdiction of the High Court. There is one more point to be made here, i.e. Courts must uphold and enforce the will of the Legislature. In Article 191A(3)(b), while Parliament has recognised that High Courts can issue judgments on the constitutionality of any law, at the same time, Parliament has not placed such cases within the ouster clause under Article 202A(3). This is all the more striking, given that the Amendment inserted both provisions simultaneously, i.e. 191A(3) and 202(3). This demonstrates the Parliament's definite intent, and it must be given effect.

25. As briefly stated above, it is settled law that in the case of ousters to the Superior Courts in the Constitution, the ouster is to be construed strictly in the narrowest meaning possible. Therefore, if there are multiple possible interpretations of such an ouster, the narrowest interpretation must be applied. Reliance for the trite principles mentioned above can be placed on the 2-member bench judgement in *Federation of Pakistan v Raja Muhammad Ishaque Qamar,*[12] in which the court examines judgments on constitutional ousters. The relevant excerpt from paragraph 8 of the Judgement is provided below:

> *"8. The ratio of the above referred judgments, as has been held is that presumption against provisions regarding ouster of jurisdiction to be strictly construed and the ouster of the jurisdiction of Superior Courts and any law which has the effect of denying access to them to be narrowly construed for the reasons that these are the fora created by the people for obtaining relief from oppression and redress for the infringement of their rights. But then where the ouster clause is clear and unequivocal,*

[12] PLD 2007 SC 498 at para. 8

> *admitting of no other interpretation, the Courts unhesitatedly given effect to it. … "*

26. Similarly, a 9-member Bench of the Supreme Court in *Sabir Shah v Federation of Pakistan,*[13] reiterated that the *"provisions seeking to oust jurisdiction of the superior Courts are to be construed strictly with a pronounced leaning against ouster"* and that regardless of an ouster clause, the Superior Courts maintain jurisdiction in cases without jurisdiction, coram non judice and mala fide. Therefore, as a result of the strict interpretation of constitutional ouster, the ouster within Article 202A must be construed strictly to its narrowest possible interpretation to only include powers under Article 199(1)(a)(i) and 199(1)(c). As a consequence of the aforementioned, all the remaining powers of the Constitutional High Court – whether under Article 199 or inherently conferred – would remain with the other Benches. In other words, it is a misnomer that the exclusive constitutional jurisdiction of the High Court has now been handed to the so-called "Constitutional Benches" under Article 202A.

27. It is also now settled law that when the framers of the Constitution wanted to remove the Court's inherent powers to determine the vires of primary legislation, they inserted express ouster clauses in the Constitution. A few examples of when/where certain framers of the Constitution have incorporated certain Articles which attempt(ed) to expressly take away and/or restricted/restrict the Courts' jurisdiction are:

a. Act of high treason "*[…] shall not be validated by any Court including the Supreme Court and a High Court*";[14]

[13] PLD 1994 SC 738 at para. 15; Also see PLD 1973 SC 49 at pg. 80
[14] Article 6 (2A) of the Constitution

b. The adequacy of compensation for acquisition of property for certain purposes "*[…] shall not be called in question in any Court*";[15]

c. "*The validity of the election of the President shall not be called in question by or before any court or authority*";[16]

d. Question of whether any and what advice was tendered to the president by the Prime Minister, etc., "*[…] shall not be inquired into in, or by, any court […]*";[17]

e. No member of the parliament "*[…] shall be liable to any proceedings in any court*" in respect of anything said or vote given by him in Parliament;[18]

f. "*Courts not to inquire into proceedings of [Parliament]*";[19]

g. Question of whether any and what advice was tendered to the Governor by the Chief Minister, etc., *"[…] shall not be inquired into in, or by, any court […]*";[20]

h. "*The proceedings before the Council, its report to the President and the removal of a Judge under clause (6) of Article 209 shall not be called in question in any court*".[21]

28. As the birth of Article 202A(3) "Constitutional Benches" starts, outside the womb of the High Court, it does not enjoy all

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[15] Article 24 (4) of the Constitution
[16] Article 41 (6) of the Constitution
[17] Article 48 (4) of the Constitution
[18] Article 66 (1) of the Constitution
[19] Article 69 of the Constitution
[20] Article 105 (2) of the Constitution
[21] Article 211 of the Constitution

the powers, jurisdictions, remedies/reliefs enjoyed by its parent, the Constitutional High Court. Instead, the newly created "Constitutional Benches" inherits only the limited and narrow Roster assignment by the Constitution and powers articulated in Article 202A, limiting its legislative assignment to exercising jurisdiction in the High Court under Article 199(1)(a)(i) and Article 199(1)(c) of the 1973 Constitution only. In its infinite wisdom, the Legislature has not blessed the "Constitutional Benches" of the High Court with the entire gambit of constitutional reliefs/remedies, powers, and jurisdiction. This, the Legislature, has kept reserved for the Constitutional High Court [not including Article 199(1)(a)(i) and Article 199(1)(c)] to grant its relief/remedy based on sound judicial discretion and where there are "special and important" reasons therefore,[22] to continue to exercise its broader and wider constitutional jurisdiction. When the bench (judges) of the Article 202A(3) "Constitutional Benches" carry out their assignment as assigned by the Legislature under the Roster of the "Constitution Benches" under Article 202A(6), they do so wearing only one (1) hat, i.e. the hat of the limited relief/remedies in constitutional matters expressed in Articles 199(1)(a)(i) and Article 199(1)(c). Thereafter, only if the bench (judges) subsequently work under the Roster of the Chief Justice of the High Court, proceeding with cases assigned by the Chief Justice of the High Court, as per his/her Roster only, then such benches (judges) exercise the same powers as those available to the benches (Judges) of the Constitution High Court.

29. Important consequences flow from the above paragraph about the "Constitutional Benches". In the event of prejudicial

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[22] According to Justice (Retd.) Fazal Karim's three volumes treatise, "*Judicial Review of Public Actions*" (3rd Edition, 2018)(Pakistan Law House) in the United States, the writ of certiorari is different from English writ of certiorari. There "the writ of certiorari, which today provides the usual mode of invoking this Court's (the Supreme Court's) appellate jurisdiction. . .is not a matter of right, but of sound judicial discretion, and will be granted where there are special and important reasons therefor." [(Fay v. Noia, (1963) 372 US 391].

comments on sub-judice matters, the same are dealt with through prior restraint and/or Contempt of Court proceedings. The latter is rooted in Chapter 4, titled "General Provisions Relating to the Judicature", in Article 204 of the 1973 Constitution.[23] The Constitutional High Court, in this case, Constitutional Bench "A", reserves its inherent jurisdiction under the above constitutional provisions that whenever any bench (judges) of the Constitutional High Court is of the opinion that it is appropriate in the facts and circumstances of the case for such court to take cognizance of the matter and exercise its powers under Article 204, but apparently, this is not the case for Constitutional Bench "B". Does the Parliament's intention of deliberately not including "the *constitutionality of any law*" (as in Article 191A(3)(b) in the scope of Article 202A(3), mean that the Constitutional Bench is somehow deprived of the powers of Article 204 (not part of the scheme of powers under Article 202A)? Based on the judicial interpretation of ouster clauses, is this general provision relating to the judicature of contempt of court available to the "Constitutional Benches"? The civil courts and other courts have such powers of contempt of court; however, in the present case, the genesis of the "Constitutional Bench" is based on an ouster clause, and it is carved out of Article 199, but Article 202A, does not expressly grant it the powers available under the general provisions relating to the Judicature (Chapter 4). Chapter 4 refers to the Constitutional High Court but makes no reference to Article 202A, "Constitutional Benches".

30. Based on the reading of the ouster clause under Article 202A, the following position emerges with regard to the "Constitutional Benches" under Article 202A(3).

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[23] *In the matter of: Suo Motu Case No.28 of 2018*, PLD 2019 SC 1

(i) "Constitutional Benches" created under Article 202A(3) referred interchangeably in this Order as Constitution Bench "B" have no jurisdiction to issue declaration of illegality or unconstitutionality under Article 199(1)(a)(ii). Also, it has no jurisdiction under Article 199(1)(b)(i) to issue writ of habeas corpus or under Article 199 (1)(b)(ii) to issue a writ of quo warranto. It is important to note here that all the aforementioned writs of declaration/certiorari, habeas corpus and quo warranto may involve questions of constitutionality and/or enforcement of fundamental rights.

(ii) The constitutional assignment/roster of the "Constitutional Benches" (or Constitution Bench "B"), in relation to fundamental rights is limited to the relief/remedy under Article 199(1)(c). Article 199(1)(c) is limited to giving directions for enforcing any of the fundamental rights. As explained in various judgments[24], this specific relief for the enforcement of fundamental rights is about the issuance of positive directions, i.e. positive enforcement of fundamental rights. In other words, Article 199(1)(c) does not cover all cases of enforcement of fundamental rights but only such cases which involve such positive directions. This means that cases covered under Article 199(1)(a)(ii) or (b)(i) and (ii) [cases of declaration, habeas corpus and quo warranto] can also involve the enforcement of fundamental rights.

31. In view of paragraphs 30 (i) and (ii) above, two further characteristics of the "Constitutional Benches" or Constitution Bench "B" can be inferred. Firstly, the assignment/roster of the

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[24] *Human Rights Commission of Pakistan and Two (2) Others v. Government of Pakistan and Others*, PLD 2009 SC 507 at 527-528 and *Karamat Ali and Others v .Federation of Pakistan through Secretary, Ministry of Interior and Others*, PLD 2018 Sindh 8 at 93.

"Constitutional Benches" is not determined by the subject matter or content of the dispute before them but by the specific relief/remedy being sought through the prayer clause. In short, it is the remedy which determines the jurisdiction. Secondly, the term "Constitutional Benches" does not mean that they alone have exclusive jurisdiction on constitutional or fundamental rights matters under Article 199, but rather their jurisdiction on constitutional and fundamental rights matters is limited to matters in which the relief/remedy sought is covered by Article 199 (1)(a)(i) and Article 199 (1)(c) only. Thus, they can only examine matters to the extent of their assignment as articulated under Article 202A(3) viz. issuing directions concerning writ of mandamus and issuing directions for the enforcement of Fundamental Rights conferred by Chapter I of Part II of the 1973 Constitution.

32. In a petition where the petitioner both seeks directions of prohibitory or mandamus relief under Article 199(1)(a)(i) as well as declaratory relief under Articles 199(1)(a)(ii), then which constitutional bench of the High Court will have jurisdiction to decide the matter, i.e. either Constitution Bench "A" or "B"? An analogy can be drawn to the tests of "dominant object" and "ultimate relief" developed in jurisprudence on territorial jurisdiction. In a recent 4-member bench judgement of the Supreme Court in the case of *Taufiq Asif v General (Retd.) Pervez Musharraf*,[25] the test was laid down by the apex Court to determine the territorial jurisdiction of the High Courts. The judgement reviewed past precedents on the subject and held that *"the ratio of these cases is that it is the dominant object of the petition, i.e., the main grievance agitated and the ultimate relief sought in the petition, which determines the territorial jurisdiction of the High Courts."* The aforementioned precedent can be

[25] PLD 2024 SC 610 at para 13; Also see PLD 1997 SC 334 at para. 8

analogized in the instant issue by using a similar test to determine whether the *lis* is beyond the jurisdiction of the other benches after the 26th Amendment. Thus, in our opinion, the matter may be decided in terms of the dominant relief being sought. Is the dominant relief in the petition declaratory or directory (prohibitory or mandamus)? If the dominant relief is declaratory and the directory prohibitory or mandamus relief is merely consequential to such declaratory relief, then the Constitutional Bench "A" of the High Court, i.e. will have the Roster, but if the directory prohibitory or mandamus relief is dominant, then the Constitutional Bench "B" will deal with the assignment/work. Ultimately, the exercise may be an art rather than an exact science. For example, take the case of a petition filed for a missing person or free will. First, is the relative of the missing person seeking relief under Article 199(1)(b)(i) for directions to produce the detenu? Or, is s/he seeking positive directions under Article 199(1)(c) for enforcement of Fundamental Rights conferred under Article 8 (security of persons), Article 9 (safeguards as to arrests and detention), Article 14 (inviolability of dignity of man), etc.? What will be the dominant relief since both writs seek to issue directions from the Court? Chapter 2, Article 35 of the 1973 Constitution (protection of family, etc.) may also be in play. The dominant relief can fall in either of the two benches, i.e. the Constitutional High Court's Constitutional Bench "A", or the Article 202A "Constitutional Benches", Constitution Bench "B". In either case, the exercise will involve an examination of the petition, hearing(s), etc. or, at the very least, perusing the prayer clause of the petition, ultimately, with the view of understanding what is the dominant relief being claimed by the petitioner and which bench is best suited to hear the lis. Suffice it to say that there can be no hard and fast rules and is incapable of a complete and exhaustive protocol that comprehends all the permutations to which such protocol would apply, which in fact will vary depending upon the

facts and circumstances of the matter at the time of examination of the petition.

33. The above principle of dominant relief/remedy can be applied in this petition based on the principal relief sought by all the petitioners. The petitioners have challenged the competency of the Legislation to impose a "surcharge" for electricity under Section 31(8) of the NEPRA Act, 1997. By way of background, the legislative competence on "Electricity" is conferred within the body of the Constitution under the special head of Article 157, which reads as follows:

> "**157: Electricity.—**(1) The Federal Government may in any Province construct or cause to be constructed hydro-electric or thermal power installations or grid stations for the generation of electricity and lay or cause to be laid inter-provincial transmission lines:
>
> Provided that the Federal Government, prior to taking a decision to construct or cause to be constructed, hydro-electric power stations in any Province, shall consult the Provincial Government concerned; and
>
> (2) The Government of a Province may-
> (a) to the extent electricity is supplied to that Province from the national grid, require supply to be made in bulk for transmission and distribution within the Province:
> (b) levy tax on consumption of electricity within the Province;
> (c) construct power houses and grid stations and lay transmission lines for use within the Province; and
> (d) determine the tariff for distribution of electricity within the Province.
>
> (3) In case of any dispute between the Federal Government and a Provincial Government in respect of any matter under this Article, any of the said Governments may move the Council of Common Interests for resolution of the dispute."

34. The petitioners have argued that under Article 157 of the Constitution, the Legislature has not reposed any power, i.e. legislative, in another body or organ, to impose a levy or tax on electricity. Further, Articles 77 and 142 read with the relevant entries in Part-I of the Federal Legislative List ("FLL") of the Constitution, provide the legislative competence of the Federal

Legislature in matters of taxation but taxation on electricity is not mentioned as an item. Entries 43 to 53 of Part-I of the FLL deal with taxation, whereas entry 54 of Part-I and entry 15 of Part-II of the FLL provide for the levy of "fees" in respect of any matters in this Part. Yet again, "Electricity" is not mentioned in Part-II. Therefore, in order to answer the questions raised in the petition and now narrowed down, following the High Court's Order dated 11.08.2023 to decide these Petitions involves deciding, i.e. : (i) whether the Federal Legislature is competent to impose the impugned Surcharges through Section 31(8) of the NEPRA Act, 1997 and (ii) whether Section 31(8) of the NEPRA Act suffers from excessive delegation, whereby the legislature has surrendered its essential legislative function and policy to the Executive (the Federation). Now we (as in the capacity of Constitution Bench "A" described herein), before deciding the above issue of ultra vires on merits, must first determine whether we, as the Constitutional High Court under Article 199 read in the light of the 26th Amendment, have the power to hear and grant the relief/remedy sought by the petitioners on applying the principle of dominant relief/remedy articulated by us above.

35. The Petitions before us impugn the vires of the statute, specifically Section 31(8) of the NEPRA Act, 1997, and this is the only relief now sought by the Petitioners which is in play, as articulated by the petitioners. The challenge to ultra vires falls within the words "without lawful authority" or "of no legal effect" as found in Article 199(1)(a)(ii) and it is the principle and dominant (as well as the only) relief/remedy prayed by the petitioners. Prima facie, as the petitioners are seeking a declaration that Section 31(8) is ultra vires, in other words, the provision enacted by the Legislature "without lawful authority" and "is of no legal effect", the petitioners' dominant relief/remedy would appear to fall within the relief of declaration under Article 199(1)(a)(ii). But, on closer examination, "without lawful

authority" or "of no legal effect" according to Article 199(1)(a)(ii) normally arises out of an inquiry of whether a court or quasi-judicial body or purely executive or administrative tribunal or other bodies or officer have, in doing the act or undertaking the proceedings, acted in accordance with the law or exceeded their jurisdiction.

36. In the present case, the petitioners have sought a declaration of legislative competency, which situation is not contemplated in Article 199(1)(a)(ii). Therefore, the relief/remedy sought by the petitioners does not neatly fall within Article 199(1)(a)(ii). Further, the relief/remedy sought by the petitioners also does not squarely fall under Article 199(1)(a)(i) as this article pertains to seeking directions and the petitioners seek a declaration. Moreover, the words "without lawful authority" and "is of no legal effect", which are equivalent to "ultra vires", are not framed in Article 199(1)(a)(i) of the 1973 Constitution. Simultaneously, the petitioner's cause for a declaration cannot be substituted by a direction under Article 199(1)(a)(i) as they are not seeking any directions against the legislative competency of the section introduced in the statutory instrument through an amendment.[26] They want Section 31(8) declared ultra vires of the Constitution. They want it set aside and declared to be passed by the Legislature "without lawful authority" and "is of no legal effect". Directions are not the relief/remedy sought by petitioners.

37. Article 199(c) of the 1973 Constitution concerns the power to issue positive directions, i.e., the positive enforcement of fundamental rights in the context of the said sub-article. In the present case, the challenge to the legislative competency is also

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[26] Section 31(8) of the NEPRA Act, 1997 was inserted by Section 4 of the Regulation of Generation, Transmission and Distribution of Electric Power (Amendment) Act, 2021 (XIV of 2021)

not based on any violation of fundamental rights such that Article 199(1)(c) can come into play. Petitioners challenge to the vires of Section 31(8) has nothing to do with fundamental rights. Moreover, the words "without lawful authority" and "is of no legal effect", equivalent to "ultra vires", are also not framed in Article 199(1)(c) of the 1973 Constitution. Only directions can be issued under Article 199(1)(c), not a declaration (except see paragraph 39 below).

38. With the petitioners knocking at the door of the Constitutional High Court for a declaration, the question arises as to how this bench of the Constitutional High Court can grant declaratory relief when "no act is done" or "proceeding taken" has occurred strictly within the framework of Article 199(1)(a)(ii). A review of the judgments of the past suggests that till the recent 26th Amendment, the jurisdiction under Article 199 of the 1973 Constitution was, most of the time, read by the High Courts as a whole without much stress on terms used in Article 199, such as, "declaration", "direction" and "without lawful authority" or is of no legal effect". The Constitutional High Court did not identify each individual sub-article of Article 199 based on which it would grant relief/remedy to the petitioner. It took a more holistic view. For example, a plain reading of Article 199(1)(c) shows that the said sub-article is restricted to "*enforcement of any of the Fundamental Rights conferred by Chapter 1 of Part II"* and not to the enforcement of any other provision of the 1973 Constitution which jurisdiction will arise either from the other sub-article(s) of Article 199 or from other provisions of the 1973 Constitution. However, the Supreme Court of Pakistan in *Benazir Bhutto (Miss) v. Federation of Pakistan*, PLD 1988 SC 416,[27] clarified that the High Court can declare a law *ultra vires* to the

[27] The *Benazir Bhutto (Miss) v. Federation of Pakistan*, PLD 1988 SC 416 was subsequently followed in *Sharaf Faridi v. Federation of Pakistan*, PLD 1989 Karachi 404 on pages 446, 447 and 449 *and subsequently approved in Government of Sindh v. Sharaf Faridi,* PLD 1994 SC 105.

fundamental rights in the exercise of its jurisdiction under Article 199(1)(c). This is inspite of the words "declaration" appearing nowhere in Article 199(1)(c). There is no detailed discussion regarding how the relief/remedy may have to be curated to fit as a good case for directions under Article 199(1)(c). After the 26th Amendment, the utility of precedents like the one in *Miss Benazir Bhutto case* (supra) has to be read in a limited context to the extent that it shows that a law can only be declared *ultra vires* for violation of fundamental rights under Article 199(1)(c). Yet, just because there is a precedent like the *Miss Benazir Bhutto* case (supra)) wherein a law has been "declared" ultra vires by the Constitutional High Court exercising power under Articles 199(1)(c) or even Article199(1)(a)(i), which sub-articles refer to "directions" only and do not deal with "declaration" that alone does not exclude the vested exercise of powers of the Constitutional High Court that in fact are obvious.

39. Another explanation of the Constitutional High Court's power to issue a declaration declaring any law enacted by Parliament as ultra vires under Article 199 of the 1973 Constitution, may be related to the definition of a "person" in the said article itself. For the purposes of Article 199, a "person" has been explained expansively in Article 199(5) as including *"any body politic or corporate, any authority of or under the control of the Federal Government or of a Provincial Government, and any Court or tribunal, other than the Supreme Court, a High Court or a Court or tribunal established under a law relating to the Armed Forces of Pakistan"*. The definition of "person" does not expressly mention "the Legislature." Yet, over the years, the Constitutional High Courts have been making declarations about legislative competency and even declaring laws as ultra vires of the Constitution under Article 199. This suggests that these declarations against a person include the Parliament or Provincial Assembly and that they would fall under the term

"body politic" or would, at the very least, be a fundamental organ thereof. As a result, acts of Parliament were and may well also continue to be, moving forward, after the 26th Amendment, subject to the declaratory powers of the High Court under Article 199. A Division Bench of the Lahore High Court in the case of *Ali Irtaza Khan v Principal, Lawrence College Ghora Gali,*[28] relied on the Black's Law dictionary definition for "*body politic or corporate*". Such a definition implies that the term holds a general meaning, which may include the state legislature. The relevant excerpt from paragraph 8 of the judgement is reproduced hereinbelow:

> *"In Black's Law Dictionary, 5th Edition at page 159, 'body politic or corporate' means:*
>
> *"A social compact by which the whole people covenants with each citizen and each citizen with the whole people, that all shall be governed by certain laws for the common good.*
>
> *Also a term applied to a Municipal Corporation, school, district, county or city"*

Based on the above, it appears that the court's power to make a declaration and also to issue a writ of certiorari against any "person" defined under Article 199(5) as including a "body politic" includes the Legislature. After all, Article 199(1)(a)(i) does not exclude giving "declaration" to a "person" under Article 199(1)(a)(i) even though the said sub-article pertains to issuing "directions" only; hence by the same token, even the assignments of giving "declaration" to the same "person" as in Article 199(1)(a)(i) under Article 199(1)(a)(ii) is not excluded. This understanding may be one way to reconcile the several reported judgments wherein the Constitutional High Courts exercising jurisdiction under Article 199 have made declarations as to legislative competency, inspite of the fact that the only

[28] 1994 MLD 2452 at para. 8

article under Article 199 which lists the power to issue "declarations", i.e Article 199(1)(a)(ii), actually limits such declarations to "acts done" or "proceeding taken" concerning matters "without lawful authority" and "is of no legal effect". This has not stopped the High Court from granting declarations under Article 199 of the 1973 Constitution. There may also be yet another explanation for this phenomenon.

40. It is well understood that the 1973 Constitution imposes on the Constitutional High Court and the Supreme Court a duty to uphold the Constitution as the supreme law and inherent judicial power of declaring sub-constitutional legislation to be in conflict with the Constitution. The origins of the reasoning for deriving this inherent power in jurisdictions with written constitutions traces back to the US Supreme Court's judgement in *Marbury v Madison*,[29] where certain provisions of the Judiciary Act of 1789 were declared unconstitutional. The relevant excerpts from pages 177, 177-178, and 179-180, respectively, are produced below:

> *"Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be, that an act of the legislature repugnant to the constitution is void. This theory is essentially attached to a written constitution, and is consequently to be considered by this court as one of the fundamental principles of our society…*
>
> *It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each. So if a law be in opposition to the constitution: if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to*

[29] Marbury v. Madison – 5 US (1 Cranch) 137 (1803)

> *the law, disregarding the constitution; or conformably to the constitution, disregarding the law: the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty…*
>
> *From these and many other selections which might be made, it is apparent, that the framers of the constitution contemplated that instrument as a rule for the government of courts, as well as of the legislature. Why otherwise does it direct the judges to take an oath to support it? This oath certainly applies, in an especial manner, to their conduct in their official character. How immoral to impose it on them, if they were to be used as the instruments, and the knowing instruments, for violating what they swear to support!"*

41. The Supreme Court of Pakistan has, in numerous instances, relied on the reasoning in *Marbury v Madison* *(supra)* as the basis for justifying and explaining the inherent and plenary judicial powers of the High Courts to declare laws to be unconstitutional, as fundamental to the duty of the High Courts duty to protect and preserve the Constitution, the supreme law. These precedents are found in cases such as in *Mubeen-us-Salam*,[30] *Fazlul Quader Chaudhry*,[31] etc. Justice Fazl Karim also adopted the doctrine and principles contained in the precedent laid down in *Marbury* while deciding the case of *Sabir Shah*[32] and called the Courts' inherent power to review primary legislation a "*Higher Law Doctrine*". Similarly, Chief Justice Muhammad Haleem in the *Fauji Foundation*[33] case observed that "*[…] the scope of judicial review is confined to the enforcement of the Constitution as supreme law.*"

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[30] *Mubin-ul-Islam and others versus Federation of Pakistan*, PLD 2006 SC 602

[31] *Fazlul Quader Chaudhry v Mohammad Abdul Haq,* PLD 1963 Supreme Court 486, pg. 502 and 503

[32] *Pir Sabir Shah v. Shad Muhammad Khan , Member Provincial Assembly, N.W.F.P. and Another*; PLD 1995 Supreme Court 66, relevant discussion at page 250, 253, 256

[33] *Fauji Foundation v. Shamimur Rahman*, PLD 1983 Supreme Court 457, relevant discussion at page 546

42. In *Baz Muhammad Kakar and Others v. Federation of Pakistan through Ministry of Law & Justice and Others*, PLD 2012 SC 923, on page 991 in paragraph 65, the Supreme Court of Pakistan observed that:

> "The Superior Courts, in the past, in exercise of the powers of judicial review as has been discussed hereinabove, have been examining and declaring the laws void, meaning thereby that such laws are rendered inoperative constitutionally. Thus, it is concluded that the Superior Courts, while exercising the power of judicial review are possessed with; the jurisdiction to declare a law void to the extent of inconsistency with the Fundamental Rights, the **principle of Independence of Judiciary** or **any other provisions of the Constitution**."

43. The Constitutional High Court's inherent power to declare a law void is also discussed in a 5-member bench judgement of the Supreme Court in A.K. Fazlul Quader Chaudhry v Shah Nawaz,[34] wherein the Supreme Court of Pakistan derived this inherent power from the Superior Courts' duty of keeping the other state organs, namely the Legislature and the Executive, within their respective jurisdictions. It recognised that the Constitution envisions a scheme of distribution of powers between the different organs of the state and requires Superior Courts to keep a check on the other state organs by way of judicial oversight. The relevant excerpt of the judgement from page 113 is provided below:

> *"The Constitution contains a scheme for the distribution of powers between various organs and authorities of the State, and to the superior judiciary is allotted the very responsible though delicate duty of containing all the authorities within their jurisdiction, by investing the former with powers to intervene whenever any person exceeds his lawful authority. Legal issues of the character raised in this case could only be resolved in case of doubt or*

[34] PLD 1966 SC 105 at pg. 113; Also see PLD 2013 SC 641 at para. 116

> *dispute, by the superior Courts exercising judicial review functions, assigned to them by the fundamental law of the land, viz., the Constitution which must override all other sub-constitutional laws. The Judges of the High Court and of this Court are under a solemn oath to "preserve, protect and defend the Constitution" and in the performance of this onerous duty they may be constrained to pass upon the actions of other authorities of the State within the limits set down in the Constitution, not because they arrogate to themselves any claim of infallibility but because the Constitution itself charges them with this necessary function, in the interests of collective security and stability. In this process, extreme and anxious care is invariably taken by the Judges to avoid encroachment on the constitutional preserves of other functionaries of the State and they are guided by the fullest and keenest sense of responsibility while adjudicating on such a matter. The action taken by the Speaker was clearly not sacrosanct in this case and its legality was open to challenge under Article 98 of the Constitution."*

44. The inherent nature of the power of the Constitutional High Court can be seen, as has been discussed herein, from the Superior Courts deriving this power from general constitutional principles such as the distribution of powers and the supremacy of the Constitution, as well as from the oaths for the Superior Courts in the Constitution. In *Wattan Party v Federation of Pakistan,*[35] a 9-member bench judgement of the Supreme Court held that while Article 8 of the Constitution granted the court with the power of judicial review, at the same time the court can hold a legislation to be void if it is in contradiction to any other constitutional provision. The relevant excerpts from paragraph 47 of the judgement are provided below:

> *"47. Article 8 of the Constitution grants the power of judicial review of legislation according to which this Court is empowered to declare a law void if it is inconsistent with or in derogation to the*

[35] PLD 2006 SC 697 at para. 47; Also see PLD 2012 SC 923 at para. 14 , PLD 2000 SC 869 at para. 216

> *fundamental rights. However, at the same time this Court is empowered to declare any legislation contrary to the provisions of Constitution under some of the identical provisions of the Constitution as under Article 143 of the Constitution on having noticed inconsistencies between the Federal and Provincial laws the Court is empowered to declare that which out of the two laws is in accordance with the Constitution. Besides it is an accepted principle of the Constitutional jurisprudence that a Constitution being a basic document is always treated to be higher than other statutes and whenever a document in the shape of law given by the Parliament or other competent authority is in conflict with the Constitution or is inconsistent then to that extent the same is liable to be declared un-Constitutional. . .*
>
> *. . .*
>
> *It is inherent in the nature of judicial power that the Constitution is regarded as a supreme law and any law contrary to it or its provisions is to be struck down by the Court, as the duty and the function of the Court is to enforce the Constitution."*

45. Based on the above-mentioned reported Judgments, the power of the High Court to declare a law to be unconstitutional is not derived from a singular provision of the Constitution such as Articles 184 or 199. Instead, this is an inherent power, derived from the scheme envisioned in the Constitution. In our opinion, in such circumstances, the Constitutional High Court, exercising its power as a constitutional court, can draw upon the inherent powers of the High Court to grant relief in the nature of Article 199(1)(a)(ii) when in the default position, the relief/remedy does not fit exactly within the contours of either Article 199(1)(a))(ii) or Article 199(1)(b)(i) and (ii) and the relief/remedy sought by the petitioners cannot be granted by anyone else other than the Constitutional High Court.

46. After the 26th Amendment, the Constitutional High Court and its Constitution Bench "A" alone exercises inherent and

ultimate jurisdiction and are empowered to grant relief/remedy of declaration within the constitutional framework. Since the challenge to the *vires* of a statute would fall under the inherent powers of the High Court or under Article 199(1)(a)(ii), in our opinion, the Constitutional High Court, referred to herein as "Constitutional Bench "A" alone has the jurisdiction and powers to strike down legislation on the touchstone of the Constitution. Thus, the instant petitions, which only challenge the vires of Section 31(8) of the Act, shall remain before this bench and all other like matters.

47. Our decision to continue with this lis is also consistent with sound jurisdiction discretion to intervene and grant relief without disturbing the constitutional structure. No specific Article of the 1973 Constitution can be invoked in the facts and circumstances of the case at hand to grant such relief/remedy to the petitioners. The Constitutional High Court alone has both the jurisdiction and the power to grant the relief/remedy sought by the Petitioners, if successful, that Section 31(8) is ultra vires of the 1973 Constitution. This approach is also practicable if Section 31(8), after hearing the parties at some future date, is declared ultra vires, then such declaration of the Constitutional High Court can also stand on its own. There is no need for any consequential relief, such as a direction or further direction to be granted by this Court following a declaration by the Constitutional High Court that Section 31(8) in the NEPRA Act, 1997 is illegal/unlawful/void. Our decision to continue with the hearing of this lis does not and will not disturb the independence of the judiciary and the balance of trichotomy of power.[36] Therefore, as per the provisions of the 1973 Constitution for this reason, in our opinion, the Constitutional High Court shall continue to hear and ultimately decide this lis. Last but not least, the relief/remedy

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[36] *A. K. Fazlul Quader Chaudhry v. Shah Nawaz*, PLD 1966 SC 105 on page 113. Also see plad 2013 PLD 2013 SC 641 at paragraph 116

prayed by the petitioners is not covered and cannot be granted by the “Constitutional Benches”, what we refer to here as Constitution Bench “B” under Article 202A of the 1973 Constitution.

48. Given the above, we are of the opinion that this bench, in view of the above understanding of law, has competent jurisdiction to continue to hear this matter.

49. For removal of doubt, none of the observations made by us herein will bind the parties' submissions on merits.

Office to list these Petitions during 2nd week of December 2024.

CHIEF JUSTICE

JUDGE

Announced on:
02.12.2024