

Concurring Note

Muhammad Ali Mazhar, J. Though I am in agreement with the Order dated 28.01.2025, unanimously rendered by the Constitutional Bench of this Court, whereby the orders dated 13.01.2025 and 16.01.2025, passed by the Regular Bench of this Court in Civil Petitions No.836-K to 887-K, 951-K, 1056-K, 1296-K/2020 & Civil Petitions No.741-K to 743-K/2021 and Civil Petition No.165-K of 2022 and Civil Petitions No.1143-K to 1173-K of 2024 have been recalled. However, for the sake of attending to some fine points which require amplification for the future, being one of the members of the Constitutional Bench, which has been constituted under Article 191A of the Constitution of the Islamic Republic of Pakistan, 1973 ("Constitution"), I feel it my utmost sense of duty to contribute through this concurring note.

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I. Preface

In the Sindh High Court, Civil Petition ("CP") No. D-4658/2018 (Dewan Motors (Pvt.) Ltd. and another versus Federation of Pakistan & others) was filed along with 52 other Constitution Petitions to challenge the vires of sub-section (2) of Section 221-A of the Customs Act, 1969, inserted by means of the Finance Act, 2018. The petitioners entreated for the declaration *inter alia* that: (1) the aforesaid sub-section is *ultra vires* the Constitution; (2) neither any regulatory duty could be levied, charged, or collected on imports under the Customs Act, 1969, nor was any validation thereof permissible for the period starting from the

date of commencement of the Finance Act, 2017, until the date of commencement of the Finance Act, 2018; (3) the petitioners also sought directions from the learned High Court against the respondents/petitioners to immediately refund the amount collected by them in the name of regulatory duty under Section 18 (3) of the Customs Act, 1969, as it stood until the date of commencement of the Finance Act, 2018; (4) they also sought directions against the respondents/petitioners to immediately return the security or refund the equivalent amount collected from them under the orders passed by the Court in the earlier round of litigation challenging the levy and collection of regulatory duty.

2. The learned Division Bench of the Sindh High Court comprising Mr. Justice Aqeel Ahmed Abbasi and Mr. Justice Abdul Maalik Gaddi, *vide* a consolidated judgment, dated 03.08.2020, disposed of the aforesaid bunch of Constitution Petitions in terms of paragraph 15, which is reproduced as under: -

"15. The aforesaid petitions are, therefore, disposed of in the following terms: -

(i) The impugned sub-section (2) of Section 221-A of the Customs Act, 1969, as added *vide* Finance Act, 2018, is ultra vires to the Constitution of Islamic Republic of Pakistan, 1973, as through impugned amendment the legislature has attempted to validate constitutional defect while making amendment in sub-section (3) of Section 18 of the Customs Act, 1969, and issuance of SRO 1035(I)/2017 dated 16.10.2017, through Finance Act, 2017, however, without making the required constitutional amendment.

(ii) The Regulatory Duty charged and collected pursuant to amendment in sub-section (3) of Section 18 of the Customs Act, 1969, and issuance of SRO 1035(I)/2017, through Finance Act, 2017, has already been declared by the Divisional Bench of this Court in the case of Premier Systems (Pvt) Ltd. v. Federation of Pakistan and others (2018 PTD 861), as illegal and unconstitutional in the light of judgment of the Hon'ble Supreme Court of Pakistan in the case of Mustafa Impex, Karachi & others vs. The Government of Pakistan & others, (PLD 2016 SC 808), therefore, in the absence of any constitutional amendment, cannot be validated through subsequent amendment in law, while giving it retrospective effect in respect of past and closed transaction, therefore, no Regulatory Duty can be charged, collected or recovered for the period starting from the date of commencement of Finance Act, 2017 till the date of commencement of Finance Act, 2018.

[Emphasis Applied]

3. The aforesaid consolidated judgment has been challenged by the Federation of Pakistan through the Revenue Division and the Collector of Customs *vide* CP Nos.836-K to 887-K, 951-K, 1056-K, 1296-K of 2020; CP Nos.741-K to 743-K, of 2021; CP No.165-K of 2022 and CP Nos.1143-K to 1173-K of 2024. The CP

Nos.836-K to 887 K, 951-K, 1056-K and 1296-K of 2020 were fixed in this Court on 06.05.2021, before a Bench comprising Mr. Justice Maqbool Baqar, Mr. Justice Sajjad Ali Shah, and Mr. Justice Munib Akhtar, when the Bench was pleased to pass the following order: -

“Since the question involved in the matter is, as to whether or not the impugned amendment is **ultra vires** of the **Constitution**, we find it appropriate to issue notice to learned Attorney General for Pakistan as well. Let notice be issued accordingly. To come up so soon a three member bench is available. Parties to maintain status-quo till the next date of hearing”

[Emphasis Applied]

4. Once again the Civil Petitions were fixed before this Court on 07.02.2023, before a Bench comprising the then-Chief Justice, Mr. Justice Umar Ata Bandial, Mrs. Justice Ayesha A. Malik, and Mr. Justice Athar Minallah, when the Bench was pleased to pass following order: -

“Learned Additional Attorney General submits that the basis on which Section 18(3) of the Customs Act, 1969 was struck down is for its failure to satisfy the Constitutional requirement providing for cabinet approval for delegation of taxing power which is permissible only to the Federal Government and not to the Minister In charge. In the year 2018, a validation clause in the Finance Act, 2018 is purported to correct that error and validate the past actions taken under the defective legislation that has been struck down. Submits that such validation can lawfully cure a defect and therefore cure the procedural defect in the law. There is no violation of the Constitution with respect to legislative competence or breach of fundamental rights. Therefore, the impugned judgment has misinterpreted the import of the expression "constitutional violation". He relies on the cases reported as Molasses Trading & Export (Pvt.) Limited Vs. Federation of Pakistan and others (1993 SCMR 1905) and Messrs. Khurshid Soap and Chemical Industries (Pvt) Ltd through Sheikh Muhammad Ilyas and others Vs. Federation of Pakistan through Ministry of Petroleum and Natural Resources and others (PLD 2020 SC 641). We would be assisted better if the scope and effect of validation clause in the law are explained to us with reference to case law from Pakistani and other jurisdictions. Raja Muhammad Iqbal, ASC submits that his cases involve the same point, therefore, be clubbed with these petitions in the meantime. Notices have not been issued in CPs No.740 to 743 2021 and 165-K of 2022 which involve the same point as the present civil petitions No.836-K of 2020, etc. Issue notice to the respondents. Re-list after two weeks. Status quo to continue till the next date of hearing”.

[Emphasis Applied]

5. However, on 13.01.2025, when the aforementioned Civil Petitions were fixed in this Court before a Regular Bench comprising Mr. Justice Syed Mansoor Ali

Shah, Mrs. Justice Ayesha A. Malik, and Mr. Justice Irfan Saadat Khan, the Bench was pleased to pass the following order: -

"At the very outset, the learned counsel for the petitioners submitted that the present regular bench of the Court cannot hear these cases, as they involve a challenge to the constitutionality of a law, namely, subsection (2) of Section 221-A of the Customs Act, 1969. When asked why this bench cannot hear these cases, the learned counsel referred to the provisions of Article 191A, which was added to the Constitution of the Islamic Republic of Pakistan through the 26th Constitutional Amendment. In response to the petitioners' objection regarding the lack of jurisdiction of the present bench of the Court, the learned counsel for the respondents contended that Article 191A, the basis of the objection regarding jurisdiction, is constitutionally invalid as it infringes upon the salient features of the Constitution, including the independence of the judiciary and the separation of powers among the three organs of the State. He further submitted that a constitutionally invalid amendment cannot oust the constitutionally valid conferment of jurisdiction on the regular benches of the Court.

2. When asked how the present bench of the Court can decide upon the constitutional validity of the newly added Article 191A, the learned counsel for the respondents took the position that since the objection raised and the basis thereof pertain to the jurisdiction of the present bench, it must be decided by it. In support of his stance, he referred to *Sabir Shah v. Shad Muhammad Khan* (PLD 1995 SC 66), *Fazlul Quader Chowdhry v. Abdul Haque* (PLD 1963 SC 486) and *Marbury v. Madison* (5 US 137 [1803]) and sought time to further assist the Court on this point.

3. Given the objection raised and the reply thereto, we find that it would be necessary to first decide upon the same before proceeding further in the matter at hand. Therefore, the learned counsel for the parties are granted time to prepare their arguments and assist the Court on the said points. The hearing for arguments on those points is adjourned to 16.01.2025."

[Emphasis Applied]

6. When the matter was again fixed on 16.01.2025 before the regular Bench, the following order was passed:

"These cases were heard on 13.01.2025 by a bench comprising Mr. Justice Syed Mansoor Ali Shah, Mrs. Justice Ayesha A. Malik and Mr. Justice Irfan Saadat Khan and were posted for 16.01.2025, however, the bench today cannot hear this matter, as the impugned judgment has been authored by one of us (Aqeel Ahmed Abbasi, J.). Considering that it was a part heard matter, let these cases be posted for 20.01.2025 at 01:00 p.m. before the same bench comprising Mr. Justice Syed Mansoor Ali Shah, Mrs. Justice Ayesha A. Malik and Mr. Justice Irfan Saadat Khan. Notice shall also be

issued to the Attorney General for Pakistan under Order XXVII-A of the Code of Civil Procedure, 1908 ("CPC").

[Emphasis Applied]

II. Without Prejudice

7. No doubt, various Constitution Petitions have been filed in this Court for challenging the Constitution (Twenty-sixth Amendment) Act, 2024 ("26th Amendment"), and the Constitutional Bench has also issued notices to the other side, including the Attorney General for Pakistan, under Order 27A of the Code of Civil Procedure, 1908. Without prejudice to the pleas raised in such pending Constitution Petitions, and without making any remarks on issues of maintainability or the constitutionality of constitutional amendments, whether they offend or transgress the basic features, scheme, or basic structure of the Constitution, including the newly inserted Article 191A, these matters are already *sub judice* before the Constitutional Bench of this Court. Notices have been issued, and all such matters, including applications moved for the formation of a full court and live streaming of proceedings, will be decided on their own merits. However, in the intervening time, neither can one ignore the ground reality nor turn a blind eye or a deaf ear to the present amendments made to the Constitution, which is a hard fact with its physical existence that is as clear and open as the pages of a book, and will remain in the field unless and until they are either withdrawn/omitted by Parliament through further amendments or struck down by this Court as prayed for in the pending petitions. For all intents and purposes, this additional note may be read in the context of the present controversy. However, until the final adjudication of the aforesaid pending petitions, we cannot shut our eyes to and ignore a ground reality that not only is the Constitutional Bench of this Court being assembled regularly under the current framework of the Constitution, but cases are also being fixed and heard regularly. The present proceedings are confined solely to the question of the alleged *vires* of sub-section (2) of Section 221-A of the Customs Act, 1969, inserted through the Finance Act, 2018. Therefore, neither can the Constitutional Bench in the Tax matter decide the validity or invalidity of amendments made to the Constitution, whether such amendments are *intra vires* or *ultra vires*, or whether they were made in disregard of other constitutional provisions or against the basic scheme or structure of the Constitution as it existed in its original form, nor does any such jurisdiction is otherwise vested in any Regular Bench of this Court to decide the validity of constitutional amendments or vires of any law.

III. Cases Involving the Interpretation of Constitutional Provisions by this Court Post-Supreme Court (Practice and Procedure) Act, 2023

8. Prior to the promulgation of the Supreme Court (Practice and Procedure) Act, 2023 ("Practice and Procedure Act"), the Chief Justice was the master of the roster. However, by virtue of the provision encapsulated in the Practice and Procedure Act, a collegium system was introduced whereby every cause, appeal, or matter before the Supreme Court was to be heard and disposed of by a Bench constituted by a committee comprising the Chief Justice of Pakistan and the two next most senior Judges in order of seniority. Before its amendment, for all intents and purposes, the role of regulating the roster and constitution of benches was assigned to this Committee, which would take decisions by majority vote. Although Section 4 was omitted through Act No. XXXI of 2024, dated 04.11.2024, it was significant during its lifetime. The original text of the Practice and Procedure Act provided that in the cases involving the interpretation of constitutional provisions, the Committee shall constitute a Bench comprising not less than five Judges of the Supreme Court. Being mindful of this provision, whenever any question regarding the interpretation of a constitutional provision arose in a case, the Judges of this Court unremittingly referred the matter, along with their opinions, to the Committee for the constitution of a bench comprising not less than five Judges of the Supreme Court. However, under no circumstances did a bench seized of a matter ever constitute a larger bench by its own judicial order rather than referring the matter to the Committee for consideration and further orders. It is also a matter of record that upon reference by the Court, the learned Committee constituted several five-member benches to hear such matters in terms of Section 4 of the Practice and Procedure Act, which has now been omitted.

IV. Article 191A in the Present Scheme and Framework of the Constitution

9. It is well-known that a new Article 191A has been inserted into the Constitution through the 26th Amendment, dated 21.10.2024, which pertains to the Constitutional Benches of the Supreme Court. For ease of reference, Article 191A of the Constitution is reproduced as under: -

"(1) There shall be Constitutional Benches of the Supreme Court, comprising such Judges of the Supreme Court and for such term, as may be nominated and determined by the Judicial Commission of Pakistan, from time to time:

Provided that the Constitutional Benches may comprise equal number of Judges from each Province.

(2) The most senior Judge amongst Judges nominated under clause (1) shall be the most senior Judge of the Constitutional Benches.

(3) No Bench of the Supreme Court other than a Constitutional Bench shall exercise following jurisdictions vested in the Supreme Court, namely: -

(a) original jurisdiction of the Supreme Court under Article 184;

(b) appellate jurisdiction of the Supreme Court under clause (3) of Article 185, where a judgment or order of a High Court passed under Article 199 involves constitutionality of any law or a substantial question of law as to the interpretation of the Constitution; and

(c) advisory jurisdiction of the Supreme Court under Article 186.

(4) For the purposes of clause (3), a Bench consisting of not less than five Judges, to be nominated by a committee comprising the most senior Judge 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, appeals or review applications against judgments rendered or orders passed, to which clause (3) applies, pending or filed in the Supreme Court prior to commencement of the Constitution (Twenty-sixth Amendment) Act, 2024 (XXVI of 2024), forthwith stand transferred to the Constitutional Benches and shall only be heard and decided by Benches constituted under clause (4).

(6) Notwithstanding anything contained in the Constitution but subject to law, the Judges nominated under clause (1) may make rules regulating the practice and procedure of the Constitutional Benches".

[Emphasis Applied]

10. According to the present substratum of Article 191A, the original jurisdiction of the Supreme Court under Article 184; its appellate jurisdiction under clause (3) of Article 185, where a judgment or order of a High Court passed under Article 199 involves the constitutionality of any law or a substantial question of law as to the interpretation of the Constitution; and its advisory jurisdiction under Article 186, can only be exercised by the Constitutional Bench of this Court. In all fairness, in my view, there is no room for difference of opinion: any exercise of this jurisdiction outside the Constitutional Bench at present would be *coram non judice*, a matter I will discuss in the latter part of this note.

V. Is there any ambiguity in the plain text of the present Article 191A of the Constitution that requires further interpretation?

11. It is a general principle of interpretation that courts should avoid an interpretation not envisioned by the framers and should not limit or restrict the

provisions. While interpreting the Constitution, it must be read as a whole without obliterating or annihilating other provisions to ensure harmony and should be interpreted liberally. The doctrine of pith and substance emphasizes identifying the distinct attributes of constitutional provisions, while the doctrine of purposive interpretation imposes a duty on the courts to interpret a statute or the Constitution in light of the purpose for which the provision was enacted, adopting a result-oriented approach rather than construing it in a restrictive or stringent sense. According to *Salmond on Jurisprudence* (12th ed.) by P. J. Fitzgerald, M.A., at page 132, interpretation or construction is the process by which the courts seek to ascertain the meaning or intention of the legislature through the medium of the authoritative forms in which it is expressed. When the text of the Constitution is unequivocal and unambiguous, it can be easily interpreted in its literal sense, adhering to the theory of textualism. Any variation or transformation of clear provisions through interpretation weakens the Constitution. On the contrary, the Court is duty-bound to ascertain and elucidate the present-day meaning of the Constitution through purposive interpretation rather than applying the doctrine of reading down without purpose. In my view, the benchmarks of constitutional interpretation are, for all intents and purposes, the same as the principles of statutory or judicial interpretation. The legal maxim "*a verbis legis non est recedendum*" means that there must be no departure from the words of the law. When the language of a statute is plain and unambiguous, there can be no assumption that the legislature made a mistake. No word in a statute should be treated as a surplusage or rendered ineffective or purposeless if the Court is to carry out the legislative intent fully and completely [Ref: Hardeep Singh Vs. State of Punjab (2014) 3 SCC 92]. Similarly, the legal maxim "*nemo aliquam partem recte intelligere potest antequam totum perlegit*" states that no one can properly understand a part until they have read the whole. Unless there is vagueness or ambiguity, there is no occasion to interpret a term in a way that adds meaning beyond its ordinary definition.

12. In Hamza Rasheed Khan Vs. Election Appellate Tribunal (PLD 2024 Supreme Court 1028), while the main judgment was authored by then-Chief Justice, Honorable Mr. Justice Qazi Faez Isa, Honorable Mr. Justice Mansoor Ali Shah also contributed a separate note, which was concurred with by five other members of the Bench, including the then Chief Justice and myself. In this regard, the relevant excerpt from paragraph 9 of the Note is quite relevant, which is reproduced as under: -

9. We are fully cognizant of, and also agree with, the well-settled approach of this Court in the matter of interpreting the constitutional provisions, i.e., while interpreting constitutional provisions, the judicial approach should be dynamic rather than static, pragmatic rather than pedantic and elastic rather than rigid. Courts are to interpret the constitutional provisions broadly so that they may meet the requirements of an ever-changing society. The doctrine of progressive interpretation, which is also referred to as the doctrine of living constitution, is one of the means by which the Constitution adapts to the changes in society. What this doctrine stipulates is that the meaning of the constitutional provisions is not frozen in time but carries in it the flexibility to continuously adapt to new conditions. This doctrine is premised on the belief that a constitution must be relevant to the society it governs, which inevitably evolves over time. With their progressive approach, the courts look to the purpose or intent behind a constitutional provision to guide its application in modern contexts. It is a necessary tool for ensuring the Constitution remains relevant and capable of protecting the rights of citizens and the governmental structure in changing societal contexts, ensuring the Constitution remains a living document that evolves alongside societal changes. It is, however, important to underline that there is a marked difference between progressive interpretation and amendment of the Constitution. By way of progressive interpretation, as observed in M. Q.M., "a particular provision, a term or word" of the Constitution is "interpreted dynamically and purposively with a view to achieve the constitutional intent". Courts cannot, under the guise of progressive interpretation, amend the Constitution and read that into it which is not enshrined in any provision of the Constitution. Progressive interpretation is rooted in constitutional text viewed through a lens of contemporary social, economic and political values but any interpretation that does not have any textual mooring or is not entrenched in or flows from any constitutional provision passes for a constitutional amendment by unwarranted reading into the Constitution and is beyond the permissible scope of the judicial act of interpreting the Constitution.

[Ref: M.Q.M. v. Pakistan PLD 2022 SC 439; Khurshid Industries v. Federation of Pakistan PLD 2020 SC 641; Sindh Revenue Board v. Civil Aviation Authority 2017 SCMR 1344; LDA v. Imrana Tiwana 2015 SCMR 1739; Province of Sindh v. M.Q.M. PLD 2014 SC 531; Reference by the President of Pakistan PLD 2013 SC 279; Aamer Raza v. Minhaj Ahmad 2012 SCMR 6; Al-Raham Travels v. Ministry of Religious Affairs 2011 SCMR 1621; Arshad Mehmood v. Government of Punjab PLD 2005 SC 193; Pakistan Tobacco Company v. Govt. of N.W.F.P. PLD 2002 SC 460; Elahi Cotton Ltd. v. Federation of Pakistan PLD 1997 SC 582; Government of Balochistan v. Azizullah Memon PLD 1993 SC 341 and Peter W. Hogg, Constitutional Law of Canada, (South Asian Edition-2017), Vol-I, 15.9(f).]

[Emphasis Applied]

VI. Jurisdiction of Regular Bench and Constitutional Bench within the Present Framework and Scheme of the Constitution

13. At this juncture, I would like to quote Article 175 of the Constitution, reproduced as follows:

(1) There shall be a Supreme Court of Pakistan, a High Court for each Province and a High Court for the Islamabad Capital Territory and such other courts as may be established by law.

Explanation. - Unless the context otherwise requires, the words "High Court" wherever occurring in the Constitution shall include "Islamabad High Court."

(2) No court shall have any jurisdiction save as is or may be conferred on it by the Constitution or by or under any law.

(3) The Judiciary shall be separated progressively from the Executive within fourteen years from the commencing day.

[Emphasis Applied]

14. The term '*jurisdiction*' in legal parlance refers to the authority conferred upon the courts by law and the Constitution to adjudicate matters between parties. The jurisdiction of every court is delineated and established to ensure adherence to the law and the issuance of legal orders. Transgressing or exceeding the boundaries of its jurisdiction and authority annuls and invalidates the judgments and orders. It is clear from the orders passed by this Court dated 06.05.2021, which explicitly reflect that the Bench seized of the above cases observed that the question involved was whether the impugned amendment is *ultra vires* to the Constitution. Accordingly, notice was issued to the learned Attorney General for Pakistan, and the parties were directed to maintain the *status quo* until the next date of hearing. Subsequently, on 07.02.2023, another Bench recorded the submissions of the learned Additional Attorney General, who asserted that there was no violation of the Constitution regarding the legislative competence or any breach of fundamental rights. Therefore, the impugned judgment had misinterpreted the meaning of "constitutional violation". What does this indicate? It demonstrates that both the aforementioned benches were fully cognizant that in all these petitions, the moot question or dominant issue was the challenge to the *vires* of sub-section (2) of Section 221-A of the Customs Act, 1969.

15. I am also fortified by the judgment authored by Honorable Mr. Justice Syed Mansoor Ali Shah in Mian Irfan Bashir Vs. Deputy Commissioner (D.C.), Lahore (PLD 2021 Supreme Court 571). In this case, while speaking for the Bench, his lordship quoted Chief Justice John Marshall, who states that judicial power is never exercised for the purpose of giving effect to the will of the judge; but always for the purpose of giving effect to the will of the legislature; or in other words, to the will of the law. Additionally, his lordship referenced an excerpt from the

chapter "The Rehnquist Court and "Conservative Judicial Activism" in the book *That Eminent Tribunal: judicial supremacy and the constitution* authored by Christopher Wolfe (American Political Scientist), and held as under:

"5. It is one thing for a judge to progressively interpret the law because of human rights considerations about which he has substantial information. It is quite another to change or ignore the law for economic or social or political reasons based on polycentric considerations beyond the judge's expertise. According to Chief Justice John Marshall, judicial power is never exercised for the purpose of giving effect to the will of the judge; but always for the purpose of giving effect to the will of the legislature; or in other words, to the will of the law. When courts exercise power outside the Constitution and the law and encroach upon the domain of the Legislature or the Executive, the courts commit judicial overreach.

6. Judicial overreach is when the judiciary starts interfering with the proper functioning of the legislative or executive organs of the government. This is totally uncharacteristic of the role of the judiciary envisaged under the Constitution and is most undesirable in a constitutional democracy. Judicial overreach is transgressive as it transforms the judicial role of adjudication and interpretation of law into that of judicial legislation or judicial policy making, thus encroaching upon the other branches of the Government and disregarding the fine line of separation of powers, upon which is pillared the very construct of constitutional democracy. Such judicial leap in the dark is also known as "judicial adventurism" or "judicial imperialism." A judge is to remain within the confines of the dispute brought before him and decide the matter by remaining within the confines of the law and the Constitution. The role of a constitutional judge is different from that of a King, who is free to exert power and pass orders of his choice over his subjects. Having taken an oath to preserve, protect and defend the Constitution, a constitutional judge cannot be forgetful of the fact that he himself, is first and foremost subject to the Constitution and the law. When judges uncontrollably tread the path of judicial overreach, they lower the public image of the judiciary and weaken the public trust reposed in the judicial institution. In doing so they violate their oath and turn a blind eye to their constitutional role. Constitutional democracy leans heavily on the rule of law, supremacy of the Constitution, independence of the judiciary and separation of powers. Judges by passing orders, which are not anchored in law and do not draw their legitimacy from the Constitution, unnerve the other branches of the Government and shake the very foundations of our democracy."

[Emphasis Applied]

16. In the Additional Opinion contributed by Honorable Mr. Justice Syed Mansoor Ali Shah in the case of Hamza Rasheed Khan (supra), while discussing the question of jurisdiction, his lordship went on to hold that:-

"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. The same is the position with the claim of plenary jurisdiction in favour of any court; no court has plenary, i.e., unlimited or indefinite, jurisdiction. Some courts may be called the courts of general jurisdiction because of the general terms in which the jurisdiction is conferred on them by any law, such as the civil courts on which Section 9 of the Code of Civil Procedure 1908 confers jurisdiction in general terms; but such general jurisdiction is also limited and defined in terms of the relevant provisions of the law. Therefore, in order to assert that a particular court has the jurisdiction to make the declaration mentioned in Article 62(1)(f) that any person is not sagacious, righteous, non-profligate, honest and ameen, it is imperative to identify the provision in the Constitution or under any law that confers such jurisdiction".

[Ref: Justice Qazi Faez Isa v. President of Pakistan PLD 2022 SC 119; Badshah Begum v. Additional Commissioner 2003 SCMR 629; Masjid Bilal v. Wali Muhammad 2006 CLC 1757; Zeeshan Zaidi v. State 1988 PCr.LJ 843; Sindh Employees' Social Security v. Adamjee Cotton Mills PLD 1975 SC 32; Brother Steel Mills v. Ilyas Miraj PLD 1996 SC 543; Hitachi Limited v. Rupali Polyester 1998 SCMR 1618 and Khalid Mehmood v. Chaklala Cantonment Board 2023 SCMR 1843].

[Emphasis Applied]

17. I reiterate that the challenge to the 26th Amendment is *sub judice* before the Constitutional Bench of this Court, along with certain Civil Miscellaneous Applications filed by the petitioners. Therefore, in deference to judicial restraint and to avoid prejudicing such pending cases, I wish to express, without any contradiction in words and deeds and without any hesitation, that in the current scenario, no bench of this Court, except the Constitutional Bench, can exercise: (i) the original jurisdiction of the Supreme Court under Article 184; (ii) the appellate jurisdiction of the Supreme Court under clause (3) of Article 185, where a judgment or order of a High Court passed under Article 199 involves the constitutionality of any law or a substantial question of law regarding the interpretation of the Constitution; and (iii) the advisory jurisdiction of the Supreme Court under Article 186. The exactitude of clause (5) of Article 191A dictates that all petitions, appeals, or review applications against judgments rendered or orders passed, to which clause (3) applies, pending or filed in the Supreme Court prior to commencement of the 26th Amendment forthwith stand transferred to the Constitutional Benches and shall only be heard and decided

by Benches constituted under clause (4). The phrase “forthwith stand transferred” is explicit and well-articulated, leaving no room for any misunderstanding or bewilderment. This phrase cannot be equated with a mere deeming clause that establishes a legal fiction by treating something as if it were different from its actual state or declaring that certain facts are to be taken as established. With all humility at my command and with due reverence, if any regular bench, despite the clear and unambiguous constitutional provisions, over-ambitiously assumes jurisdiction or undertakes to decide the alleged controversy based solely on the respondent’s counsel’s argument in a tax matter without self-realization, it would not only constitute a wrongful exercise of jurisdiction but also amount to a violation of Article 191A of the Constitution. Judges have taken an oath to preserve, protect, and defend the Constitution. Moreover, the Code of Conduct for Judges of the Supreme Court and High Courts, framed by the Supreme Judicial Council under Article 128 (4) of the Constitution of the Republic of Pakistan, 1962 (“1962 Constitution”) and subsequently amended under Article 209 (8) of the Constitution of the Islamic Republic of Pakistan, 1973, implies complete submission to the Constitution and, under it, to the law.

VII. Role of Two Committees

18. After the 26th Amendment certain provisions of the Practice and Procedure Act were omitted and substituted by Act No. XXXI of 2024. The radical changes made in Section 2 and the newly inserted Section 2A are as follows: -

“2. Constitution of Benches. (1) Every cause, matter, petition, appeal or review application before the Supreme Court, other than those falling within clause (3) of Article 191A of the Constitution of the Islamic Republic of Pakistan, hereinafter referred to as the Constitution, shall be heard and disposed of by a Bench constituted by the Committee comprising the Chief Justice of Pakistan, the most senior Judge of the Supreme Court and the most senior Judge of the Constitutional Benches:

Provided that until the most senior Judge of the Constitutional Benches is nominated, the Committee shall comprise the Chief Justice of Pakistan and the most senior Judge of the Supreme Court:

Provided further that if either the Chief Justice or the most senior Judge of the Supreme Court or both are nominated to the Constitutional Benches, the next most senior Judge of the Constitutional Benches shall be the member of the Committee: Provided also that if a member declines to sit on the Committee, the Chief Justice may nominate any other Judge of the Supreme Court

or a member of the Constitutional Benches, as the case may be, as a member of the Committee.

(2) As soon as may be expedient, after the commencement of this Act, the Committee constituted under sub-section (1) shall immediately hold its first meeting and shall formulate its procedure for regulating the working of the Committee:

Provided that, till such time the procedure is formulated under this sub-section, the meeting of the Committee for the purposes of sub-section (1) shall be convened by the Chief Justice.

(3) The decisions of the Committee shall be by majority”.

“2A. Practice and procedure of Constitutional Benches. – (1) Where a question arises as to whether a cause, matter, petition, appeal or review application falls within clause (3) of Article 191A of the Constitution and is to be heard and disposed of by a Constitutional Bench or another Bench of the Supreme Court, the committee constituted under clause (4) of Article 191A of the Constitution shall, through a speaking order, determine the question and if it decides that a matter –

(a) falls within clause (3) of Article 191A of the Constitution, assign it to a Constitutional Bench for hearing and disposal; or

(b) does not fall within clause (3) of Article 191A of the Constitution, send it to the Committee constituted under section 2 for disposal by another Bench.

(2) The Registrar of the Supreme Court of Pakistan shall provide the requisite administrative and sectorial support to the Constitutional Benches.

(3) Subject to the availability of Judges, Constitutional Benches shall comprise equal number of Judges from each Province”.

[Emphasis Applied]

19. A survey and analysis of Section 2 and 2A of the Practice and Procedure Act (omitted and substituted by Act No XXXI of 2024), *vis-à-vis* the role assigned to the “Two different Committees” demonstrates that the first Committee, under Section 2, is responsible for handling and fixing cases before this Court (regular benches) other than those falling within clause (3) of Article 191A of the Constitution. In contrast, the Committee under Section 2A has been vested with jurisdiction to determine whether a case falls within clause (3) of Article 191A. If it does, it should be heard by the Constitutional Bench; if not, it may be referred to the Committee constituted under Section 2 for fixation and disposal by another bench. One important aspect that cannot be overlooked is that both Committees are provided for under the Act. However, the second Committee is also protected under clause (4) of Article 191A of the Constitution, a recognition not accorded to the first Committee. It is also clear beyond any shadow of doubt

that both Committees have been assigned distinct roles and responsibilities, with neither overlapping nor overriding the jurisdictional boundaries of the other, except for the common factor that the most senior judge of the Constitutional Bench is also an ex-officio member of the Committee constituted under Section 2 of the Practice and Procedure Act. Presently, if a case falls within clause (3) of Article 191A of the Constitution, the first Committee has no jurisdiction to fix such a case before a regular bench. The wrongful fixation of a case meant for the Constitutional Bench before a Regular Bench, or *vice versa*, does not create or expand jurisdiction, as the clear distinction has already been established under Article 191A of the Constitution. This supreme law is not subservient and docile to the rules or judicial orders passed under any misconception regarding case fixation.

20. In my view, instead of taking cognizance or assuming jurisdiction or passing any judicial order for fixation, the best course of action would have been to refer the matter to the Committee constituted under Section 2 of the Practice and Procedure Act. Had the Committee found the matter beyond the jurisdiction of a regular bench, it could have referred to the Committee formed for the determination of whether a matter is to be sent to the Constitutional Bench. Even said Committee on its own motion may refer the matter to the Committee of Constitutional Benches for consideration. On the face of it, the matter was wrongly or inadvertently fixed by the office, leading to the regular bench taking cognizance of a jurisdictional issue that is already well-defined and expressed in the plain language of the Constitution. Under the dictates of the present scheme of the Constitution, the judges in the Constitutional Benches of the Supreme Court may be nominated from time to time, as may be determined by the Judicial Commission of Pakistan, with the rider that such a Bench may comprise equal number of Judges from each Province. It is also a matter of record that following the introduction of constitutional amendments and the constitution of the Constitutional Bench, the Regular Benches and the Constitutional Bench, through mutual cooperation, and being two branches of one tree, transferred cases between them for hearing in accordance with their respective jurisdictions, as demarcated under the present constitutional scheme. For ease of reference, some details are provided below:

I. Cases Transferred from the Regular Bench to the Constitutional Bench:

1. *Saeed Ahmed Khoso etc. Vs. Federation of Pakistan* (CPLA No. 670/2023, CPLA 671/2023, CPLA 850/2023 to CPLA 854/2023):
The bench headed by Justice Mansoor Ali Shah, comprising Justice

Ayesha A. Malik and Justice Aqeel Ahmed Abbasi, transferred the case to the constitutional bench on 23.10.2024.

2. Liberty Agriculture Storage Pvt. Limited Vs. Province of Sindh (CPLA 3717/2024 to CPLA 3724/2024, CPLA 3911/2024 to CPLA 3911/2024, CPLA 4585/2024 to CPLA 4587/2024, CPLA 4723/2024, etc.): The bench headed by Justice Mansoor Ali Shah, comprising Justice Ayesha A. Malik and Justice Aqeel Ahmed Abbasi, referred the matter to the constitutional bench on 07.11.2024.

3. The State through Ministry of Finance Division Vs. Muhammad Iqbal (Criminal Review Petition No. 91/2022 in Criminal Appeal No. 373/2021): Transferred to the constitutional bench by a bench headed by Justice Amin-ud-Din Khan, comprising Justice Muhammad Ali Mazhar and Justice Ayesha A. Malik, on 09.09.2024.

4. Syed Zia ul Hassan Gillani Vs. Multi Professional Cooperative Housing Society and others (Civil Petition No. 610 of 2020): This case also referred to the constitutional bench on 24.10.2024 by a bench headed by honorable Chief Justice, Yahya Afridi, comprising Justice Syed Hasan Azhar Rizvi and Justice Shahid Waheed.

II. Cases Remitted by the Constitutional Bench to the Regular Bench:

1. On 19.11.2024, the constitutional bench concluded that Syed Zia ul Hassan Gillani Vs. Multi Professional Cooperative Housing Society and others (Civil Petition No. 610 of 2020) did not involve any constitutional interpretation questions, and the case was consequently sent back to the regular bench.

2. On 19.11.2024, the constitutional bench decided that Saeed Ahmed Khoso etc. Vs. Federation of Pakistan (CPLA No. 670/2023, CPLA 671/2023, CPLA 850/2023 to CPLA 854/2023) did not present any constitutional questions and accordingly remitted the matter to the regular bench.

3. On 27.01.2025, the Constitutional Bench transferred the case of Federation of Pakistan thr. M/o Water and Power Vs. Spencer Powergen Company of Pakistan Ltd. (CA No.751 of 2016) to the Regular Bench, since no interpretation of any of the provisions of the constitution was involved.

VIII. Due Diligence Measures

21. According to the sub-section (2) of Section 2A of the Practice and Procedure Act, the Registrar of the Supreme Court is obligated to provide the requisite administrative and sectorial support to the Constitutional Benches. This provision, in my opinion, accentuates the role of the Registrar's office including the fixture branch, in assisting the second Committee in determining jurisdiction

through a speaking order, if a case does not fall within the jurisdiction of the Constitutional Bench, it may then be referred to the Committee constituted for deciding the fixation of case before the regular benches of this Court. In my view, while letting bygones be bygones, some due diligence measures are now imperative in order to provide effective administrative and sectoral support, therefore, the Registrar must take all reasonable precautions to prevent mistakes or oversights in case fixation and concerned branch/officials may be sensitized the nitty-gritties of Article 191A of the Constitution so that they may not commit any such mistake or misadventure in future. The recklessness or inadvertence of concerned officials has created an unwarranted situation, leading to misunderstandings without just cause. Therefore, I propose (subject to the approval of the Honorable Chief Justice of this Court) that a "Case Management System" be developed with the support of the Information Technology (I.T.) department of this Court. This system should ensure proper case segregation, provide a thumbnail sketch of each case and its relief sought, and incorporate "pop up reminders" or "alerts" that appear on every computer screen of the fixture branch and the Registrar to facilitate a final verification before cause lists are released to avoid any advertent or inadvertent mistakes or slip-ups. To further ensure accuracy, meticulous vetting of all cases should be conducted by the Registrar's office, with both hard and soft copies compiled and regularly presented before the Committee constituted for the Constitutional Bench. These lists must incorporate the key features of each case, and in support of such lists and notes, the original files should also be available for administrative review. Additionally, a "Printed Form" template should be introduced, requiring the AOR/ASC to indicate the nature of each case and its appropriate jurisdiction at the time of filing. This would be particularly helpful at the initial stage. In case of any remaining confusion, case files may be put up by the Registrar before the relevant Committee for a preliminary jurisdictional determination.

IX. Effect of Cognizance without Jurisdiction

22. On 13.01.2025, when the aforementioned Civil Petitions were fixed in this Court before a Regular Bench, paragraph 2 of the Order (reproduced in the Preface) is quite significant. The Bench asked how the present Bench (their Bench) of the Court could decide upon the constitutional validity of the newly added Article 191A. The learned counsel for the respondents took the position that since the objection raised and the basis thereof pertained to the jurisdiction of the present Bench, it must be decided by it. In support of his stance, he

referred to Sabir Shah Vs. Shad Muhammad Khan (PLD 1995 SC 66), Fazlul Quader Chowdhry Vs. Abdul Haque (PLD 1963 SC 486) and Marbury Vs. Madison (5 US 137 [1803]) and sought time to further assist the Court on this point. The Regular Bench, in view of preliminary submissions, observed that it would be necessary to first decide upon the same before proceeding further in the matter at hand and granted time to the learned counsel for the parties to prepare their arguments and assist the Regular Bench on the said points. The hearing for arguments on those points was adjourned to 16.01.2025. However, the Order dated 16.01.2025 reflects that the Regular Bench, while observing that the composition of the Bench had changed, also issued directions to the office that "Considering that it was a part heard matter, let these cases be posted for 20.01.2025 at 01:00 p.m. before the same bench comprising Mr. Justice Syed Mansoor Ali Shah, Mrs. Justice Ayesha A. Malik and Mr. Justice Irfan Saadat Khan".

23. What I gather from the Order, passed by the Regular Bench on 13.01.2025, is that it moved ahead on the plea of the respondent's counsel to decide the jurisdictional issue and cited the case of Sabir Shah, Fazlul Quader Chowdhry, and Marbury (*supra*). I have carefully examined the minutiae of the aforementioned cited cases, but with great trepidation and a sense of duty, I neither find these dictums advantageous nor do they provide any assistance in deciding the already well-demarcated jurisdiction of the Regular and Constitutional Benches in terms of Article 191A of the Constitution. In my humble view, the matter is like an open book and does not require any further deliberation or endeavors within the present features and scheme of the Constitution.

24. The dictum laid down in the Fazlul Quader Chowdhry (*supra*) case, was focused on the question of whether the President's Order No. 34 of 1962, amending constitutional provisions, was valid under Article 224(3) of the 1962 Constitution. This Court held that the amendments introduced by the order were unconstitutional because they exceeded the President's powers under Article 224 (3), which were meant to address procedural difficulties rather than make substantive changes to the Constitution. In Pir Sabir Shah (*supra*), the matter pertained to the *vires* of Section 8-B of the Political Parties Act, 1962, and whether it was *ultra vires* the Constitution due to its conflict with Article 63 regarding the forum for determining the disqualification of members of Parliament. This Court declared Section 8-B of the Political Parties Act, 1962, unconstitutional and void to the extent it conflicted with Article 63 of the

Constitution. Whereas in Marbury (*supra*), the case reflects that William Marbury was appointed as a justice of the peace by President John Adams during his final days in office. However, Marbury's commission was not delivered before Thomas Jefferson's inauguration. Jefferson instructed his Secretary of State, James Madison, to withhold the commission. Marbury petitioned the Supreme Court to issue a writ of mandamus compelling Madison to deliver the commission. The Supreme Court established its power of judicial review, declaring that it could invalidate laws that conflict with the Constitution.

25. Let us assume for a minute that any substantial issue arose in the mind; the matter could have been referred by the Regular Bench to the Committee for deciding where these tax matter should be fixed rather than insisting that the matter should be fixed before the same Bench without realizing the crucial question of jurisdiction. I am also staunch believer of the concept that the role of a constitutional judge is different from that of a monarch, who is free to exert power and pass orders of his choice over his subjects. However, a constitutional judge, must always remain mindful that they, too, are bound by the very Constitution they are entrusted to interpret and enforce, and therefore are first and foremost subject to the Constitution and the law.

26. The expression '*coram non judice*' means an act done by a court that has no jurisdiction [Ref: *Secrest v. Galloway Co.*, 30 N.W. 2d 793, 797, 239 Iowa 168]. It also stands for a legal principle that if the Court lacks jurisdiction, any decision or judgement rendered without jurisdiction shall be considered null and void. This doctrine also draw attention to the significance of taking cognizance by courts that are legally equipped and empowered to handle cases under the law and the Constitution. At the same time, the acquiescence of any party to the *lis* should not be permitted to confound and overturn the legislative instrument, which here is Article 191A of the Constitution. I am at a loss to understand how the case law cited by the learned counsel for the respondent could provide any assistance to the Regular Bench in evading the clear issue of jurisdiction as differentiated in the Constitution. Whereas the doctrine of '*per incuriam*' accentuates that a decision of a Court becomes *per incuriam* when it is rendered in ignorance of a statute or a rule having the force of statute [Ref: Rupert Cross & J.W. Harris, *Precedent in English Law* 149 (4th ed. 1991); *Black's Law Dictionary* (Ninth Edition)]. According to C.C.K. Allen in *Law in the Making* (Page No. 246), '*per incuriam*' means '*per ignorantiam*', that is, ignorance of a statute or of a rule having statutory effect that would have affected the decision had the Court been aware of it.

27. Moreover, I want to quote a Latin maxim, "*sublato fundamento cadit opus*" which translates to "remove the foundation and the structure falls," being an indispensable foundational legal doctrine for preserving the consistency and firmness of the legal system. This Court, in the case of Yousuf Ali Vs. Muhammad Aslam Zia (PLD 1958 SC 104), laid down that where the Legislature clothes an order with finality, it always assumes that the order declared to be final is within the powers of the authority making it. No party can plead as final an order made in excess of the powers of the authority making it, as in the eyes of the law, such an order is void and non-existent. If, based on a void order, subsequent orders have been passed, either by the same authority or by other authorities, the entire series of such orders, together with the superstructure of rights and obligations built upon them, must fall, unless some statute or principle of law recognizes the changed position of the parties as legal. Similarly, in the case of Justice Qazi Faez Isa and others Vs. President of Pakistan (PLD 2022 SC 119), this Court reiterated the well-settled principle that when the basic order is without lawful authority, then the entire superstructure built upon it falls to the ground automatically. It was further held that any proceedings taken, orders passed, or actions made in pursuance of the impugned directions, being a superstructure built on those directions, lose their legal status and effect, when their very foundation, i.e., the impugned directions, is found to have been laid without lawful authority, therefore, they have no legal status and effect. In this regard, reference can also be made to the cases of Executive District Officer (Education), Rawalpindi Vs. Muhammad Younas (2007 SCMR 1835) and Rehmatullah Vs. Saleh Khan (2007 SCMR 729).

28. The Constitutional Bench, on 28.01.2025, rightly recalled the Orders dated 13.01.2025 and 16.01.2025, passed by the Regular Bench of this Court, being without jurisdiction and obviously on recalling such orders, the superstructure built thereon also collapsed, thus, any proceedings taken, orders passed, or actions made in pursuance of the aforesaid orders lose their status and effect.

Judge

Islamabad:

Dated: 07.02.2025

Approved for reporting