

IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

Present:

Mr. Justice Qazi Faez Isa
Mr. Justice Yahya Afridi

Civil Petition No. 3380 of 2020

Muhammad Imtiyaz. ... *Petitioner*

Versus

Ch. Muhammad Naeem and others. ... *Respondents*

For the Petitioner: Mr. M. Shahid Tasawar, ASC.
(Through video-link from Lahore)

For the Respondents: Not represented.

On Court's Call: Maulvi Anwar-ul-Haq, ASC.
Mr. Aftab Alam Yasir, ASC.

Date of Hearing: 28.02.2023.

ORDER

Qazi Faez Isa, J. This and eleven other cases were fixed before 'Regular Bench-II' comprising of Justice Qazi Faez Isa and Justice Syed Hasan Azhar Rizvi on Tuesday, 28 February 2023, and a three-member Bench was headed by Justice Yahya Afridi. However, these two Benches were reconstituted. Justice Syed Hasan Azhar Rizvi was removed from the Bench headed by Justice Qazi Faez Isa and replaced with Justice Yahya Afridi and Justice Sayyed Mazahar Ali Akbar Naqvi, who is junior to Justice Yahya Afridi, was made to head the Bench in place of Justice Yahya Afridi.

2. To ascertain the reason for this mid-week and abrupt reconstitution of Benches the Registrar, Mr. Ishrat Ali, was sent for and asked to bring the relevant record. He was asked the rationale necessitating the said changes. He stated that '*the Hon'ble Chief Justice through his Staff Officer Mr. Irshad communicated that the Benches be changed and that I should prepare a note to this effect, therefore, I prepared a note and submitted it for the formal approval of the Hon'ble Chief Justice.*' The only document shown to us in this regard is titled 'Court Roster for Tuesday 28th February, 2023' which is dated 27 February 2023 wherein the reconstituted Benches are listed and at the bottom the following words are typed, '*Submitted for approval please.*' The Registrar states that the note was approved as it was initialed by the

Hon'ble Chief Justice. However, this document does not give any reasoning let alone the necessity for the reconstitution of Benches.

3. With the assistance of the two learned counsel present in Court, namely, Maulvi Anwar-ul-Haq and Mr. Aftab Alam Yasir, and of the Registrar and Mr. Abdul Razzak, Additional Registrar (Judicial), we were informed that the relevant provisions with regard to (a) the constitution of Benches and (b) fixation of cases in the Supreme Court Rules, 1980 ('**the Rules**') are Orders XI and XIX, which we examined.

4. Order XI is titled 'Constitution of Benches' and stipulates that every case shall be heard by '*Judges to be nominated by the Chief Justice*' and enables the Chief Justice to refer any case '*to a larger Bench*' and if in any case the Judges '*are equally divided in opinion*' then to place the case for hearing '*either before another Judge or before a larger Bench to be nominated by the Chief Justice*'. This is the extent to which the Rules provide for the nomination of Judges on the Bench. The Rules do not grant any power to the Registrar or to the Chief Justice to change the judge or judges on a Bench or to reduce their number.

5. This Court¹ has held that to arbitrarily reconstitute Benches '*undermines the integrity of the system, and may have serious repercussions*'² and another member of the Bench³ in the same case held:

'9. In my opinion, a bench, once it is constituted and is seized of a matter on the judicial side, cannot be reconstituted by the Chief Justice in exercise of his administrative powers, unless a member(s) of the bench recuses or for reasons discussed above. Therefore, the reconstitution of the two-member bench and the proceedings before the said bench on 9th May, 2018 in all the cases fixed before it are void and non-est. I agree with my learned brother Qazi Faez Isa, J. that the reconstitution of the Bench by the Hon'ble Chief Justice in the present case is unwarranted and unprecedented and undermines the integrity of the system.'

The referred to *reasons* are as follows: '*Any member of the bench may, however, recuse to hear a case for personal reasons or may not be available to sit on the bench due to prior commitments or due to illness. The bench may*

¹ Human Rights Case No. 14959-K of 2018, which was a case under Article 184(3) of the Constitution.

² Ibid., per Qazi Faez Isa, J.

³ Ibid., per Syed Mansoor Ali Shah, J,

https://www.supremecourt.gov.pk/downloads_judgements/H.R.C._14959_K_2018.pdf.

also be reconstituted if it is against the Rules and requires a three-member bench instead of two.⁴ And, further held, that:

In the absence of a recusal by a member of the Bench, any amount of disagreement amongst the members of the Bench, on an issue before them, cannot form a valid ground for reconstitution of the Bench. Any reconstitution of the Bench on this ground would impinge on the constitutional value of independence of judiciary. The construct of judicial system is pillared on the assumption that every judge besides being fair and impartial is fiercely independent and is free to uphold his judicial view. This judicial freedom is foundational to the concept of Rule of Law. Reconstitution of a bench while hearing a case, in the absence of any recusal from any member on the bench or due to any other reason described above, would amount to stifling the independent view of the judge. Any effort to muffle disagreement or to silence dissent or to dampen an alternative viewpoint of a member on the bench, would shake the foundations of a free and impartial justice system, thereby eroding the public confidence on which the entire edifice of judicature stands. Public confidence is the most precious asset that this branch of the State has. It is also one of the most precious assets of the nation.⁵

6. In addition to the aforesaid concern we noted that all the cases which were fixed for hearing were civil petitions for leave to appeal filed in the years 2020 and 2021. Therefore, we enquired about the total number of cases pending before this Court and since when. A total of 56,285⁶ cases are pending adjudication, the breakdown of which is as follows: 9,833 civil appeals, 27,302 civil petitions for leave to appeal, 873 criminal appeals, 8,519 criminal petitions for leave to appeal and 9,758 cases in other categories. The pending civil cases, that is, civil appeals and civil petitions for leave to appeal, are as under:

Civil Appeals:

<u>Year</u>	<u>Number of cases</u>
1999	2
2001	2
2002	2
2005	5
2006	2
2007	8
2008	13
2009	54
2010	144
2011	270

Civil Petitions for Leave to Appeal:

<u>Year</u>	<u>Number of cases</u>
2005	1
2008	3
2009	6
2010	21
2011	78
2012	154
2013	236
2014	736
2015	1356
2016	1496

⁴Ibid., paragraph 6.

⁵Ibid., paragraph 7.

⁶As of 23 January 2023.

2012	376	2017	1864
2013	610	2018	2058
2014	397	2019	3092
2015	633	2020	2961
2016	945	2021	5003
2017	757	2022	8074
2018	677	2023	163
2019	910		
2020	821		
2021	1030		
2022	2146		
2023	28		

The position with other categories of cases is somewhat similar. The Constitution⁷ mentions separately those type of cases in which an appeal lies as of right.⁸ In all other cases the Constitution states that an appeal '*shall lie only if the Supreme Court grants leave to appeal*'.⁹ It is not understandable why civil petitions for leave to appeal filed in the years 2020 and 2021 took precedence over other civil cases filed decades and years earlier.

7. When the Registrar was questioned on the methodology for fixing cases he referred to Circular dated 18 January 2017. But this Circular only mentions five categories of *urgent cases*. Three categories of criminal cases: (1) bail before arrest, (2) bail after arrest and (3) where sentence is of up to ten years, and two categories of civil cases: (4) family, rent admission and service cases '*accompanied by proof of urgency*' and (5) '*stay applications accompanied by proof of urgency*'. However, none of the cases listed for hearing fell in any of the said urgent categories of cases. Therefore, we checked if any specific orders had been passed in these twelve cases requiring early/urgent hearing, but this was not the case.

8. Order XIX, rule 1 of the Rules states that appeals '*shall, as far as possible, be heard in the order in which they are set down*' which adheres to the logical rule of common parlance - *first in first out*. Undoubtedly, the same principle (*first in first out*) applies to petitions for leave to appeal. On our repeated queries regarding the methodology employed in the fixation of cases all that the Registrar had to say was they are fixed as per the directions of the Hon'ble Chief Justice exercised as per his discretion. Except for the said Circular (which only applies to certain type of cases

⁷ The Constitution of the Islamic Republic of Pakistan ('the Constitution').

⁸ Article 185(2) of the Constitution.

⁹ Article 185(3) of the Constitution.

considered to be urgent) no other circular, order, notification or memorandum has been referred to. Therefore, it emerges that cases are fixed arbitrarily and without apparent logic or reasonableness.

9. The Rules have been made pursuant to Article 191 of the Constitution, which is reproduced hereunder:

'191. Subject to the Constitution and law, the Supreme Court may make rules regulating the practice and procedure of the Court.'

No law pursuant to Article 191 has been enacted. However, the Supreme Court has made the Rules, the relevant provisions whereof with regard to (a) the constitution of Benches and (b) the fixation of cases have been noted above, however, guidance can be had from other provisions of the Constitution.

10. Article 4 of the Constitution mandates equal protection of law and to be treated in accordance with law as an inalienable right of every citizen. And Article 10A to the Constitution,¹⁰ which was added as a Fundamental Right,¹¹ mandates that, '*For the determination of civil rights and obligations or in any criminal charge against him a person shall be entitled to a fair trial and due process.*' It is noteworthy that neither Article 191 of the Constitution nor any other provision of the Constitution grants any power to the Registrar or the Chief Justice with regard to the constitution of Benches and fixing of cases. Fair trial and due process mandated by the Constitution excludes arbitrariness and the exercise of unstructured discretion.

11. In innumerable decisions this Court has castigated the arbitrary use of power. A four-member Bench of this Court in the case of *Feroze Khan v Ghulam Nabi Khan*¹² held that, discretion '*has to be exercised in accordance with the dictates of justice and not arbitrarily, or in a fanciful manner.*' In *Aman Ullah Khan v The Federal Government of Pakistan*,¹³ a five-member Bench of this Court held that, '*Wherever wide-worded powers conferring discretion exist, there remains always the need to structure the discretion and ...that the structuring of discretion only means regularising it, organizing*

¹⁰ Inserted pursuant to the Eighteenth Amendment to the Constitution in the year 2010.

¹¹ Chapter 1 of Part II of the Constitution.

¹² PLD 1966 Supreme Court 424, p. 431.

¹³ PLD 1990 Supreme Court 1092, p. 1147U.

it, producing order in it so that decision will achieve the high quality of justice. The seven instruments that are most useful in the structuring of discretionary power are open plans, open policy statements, open rules, open findings, open reasons, open precedents and fair informal procedure. Somehow, in our context, the wide-worded conferment of discretionary powers or reservation of discretion, without framing rules to regulate its exercise, has been taken to be an enhancement of the power and it gives that impression in the first instance but where the authorities fail to rationalise it and regulate it by Rules, or policy statements or precedents, the Courts have to intervene more often than is necessary, apart from the exercise of such power appearing arbitrary and capricious at times.' If this Court holds others to such standards, can there be any justification to absolve itself of the same?

12. In *Chairman Regional Transport Authority Rawalpindi v Pakistan Mutual Insurance Company Limited, Rawalpindi*¹⁴ this Court held that, 'In exercising discretionary powers, one has to deal without discrimination, fairly, justly and reasonably.' In another case the Supreme Court held that, 'This Court, time and again, has insisted upon public functionaries to adhere to the principle of transparency in the performance of their duties.'¹⁵ In *Sabir Iqbal v Cantonment Board, Peshawar*,¹⁶ this Court categorically observed that, 'The courts will quash exercises of discretionary powers in which there is not a reasonable relationship between the objective which is sought to be achieved and the means used to that end... .' This Court loses credibility and public confidence if it fails to adhere to the same directions it imposes on others.

13. The aforesaid precedents of long standing were reiterated in a recent decision in *MQM (Pakistan) v Pakistan*¹⁷ where this Court castigated the application of arbitrary discretion. 'We may note that the Constitution does not envisage unstructured, uncontrolled and arbitrary discretion being conferred by legislature on State functionary or holder of a public office; even if some discretion is conferred by law on a State functionary or on holder of a public office, the same has to be exercised justly, honestly, fairly, and transparently. There has to be a structured policy in the interest of

¹⁴PLD 1991 Supreme Court 14, p. 26-27F.

¹⁵Human Rights Case No. 4668 of 2006, 2010 PLD Supreme Court 759.

¹⁶PLD 2019 Supreme Court 189.

¹⁷PLD 2022 Supreme Court 439.

*uniformity, even handedness, probity and fairness.*¹⁸ These observations against the use and application of unstructured, uncontrolled and arbitrary discretion are equally applicable to the Supreme Court in the (a) constitution of Benches and (b) fixation of cases to ensure uniformity, even handedness, probity and fairness.

14. It will not be out of place to mention that different Benches of this Court¹⁹ and Judges have also from time to time highlighted and called for structuring such discretion and acting transparently. The Case Management Committee of the Supreme Court of Pakistan²⁰ was setup to opine on how best to attend to the large number of cases which had accumulated. It submitted a Report on 1 March 2022. The Registrar informs us that the said Report was sent for the approval of the Hon'ble Chief Justice on 22 July 2022 and his lordship's approval is awaited.

15. We can also not be unmindful of various provisions of the 'Code of Conduct to be observed by the Judges of the Supreme Court and Judges of the High Courts of Pakistan'²¹ (**the Code of Conduct**). The Code of Conduct requires Judges to '*present before the public an image of Justice of the nation*'²² and of '*a standard of justice worthy of the nation*'.²³ It prescribes that, '*equality should prevail in all things*'.²⁴ The Code of Conduct also requires, '*To ensure that justice is not only done, but is also seen to be done...*'.²⁵ To maintain '*the integrity of the institution of justice*'²⁶ is another requirement of the Code of Conduct. Every Chief Justice and Judge takes an oath²⁷ which requires him/her to '*abide by the code of conduct issued by the Supreme Judicial Council*' and to '*do right to all manner of people, according to law, without fear or favour, affection or ill-will*'. Giving preference to some cases over others and/or fixing cases out of turn and doing so without justification may demonstrate *affection/favour* to one party and *ill-will* to others. There may also be situations where a party who

¹⁸ Ibid., p. 461C.

¹⁹ Order dated 2 April 2021 passed in Civil Petition No. 1564/2020 and order dated 15 August 2022 passed in Civil Appeal No. 1537/2016.

²⁰ Under the Chairmanship of Syed Mansoor Ali Shah, J and comprising of Munib Akhtar, J and Mr. Abdul Razzak, Additional Registrar (Judicial) as Members and Dr. Abid Hussain, Director Information Technology as Secretary.

²¹ Notification No.F.SECRETARY-01/2009/SJC dated 2 September 2009 made by the Supreme Judicial Council, in its meeting of 29 August 2009 pursuant to Article 209(8) of the Constitution.

²² Ibid., Preamble.

²³ Ibid.

²⁴ Article-I, Code of Conduct.

²⁵ Article-IV, Code of Conduct.

²⁶ Article-IX, Code of Conduct.

²⁷ In the Third Schedule to the Constitution.

filed the case no longer wants it to be heard having had the operation of the impugned decision suspended pending the decision of this Court.

16. The Venice Commission²⁸ on a similar issue, provided its opinion, as under:

'24. The rules on allocation of cases are important, both as method for a balanced distribution of work among judges and for the organisation and management of the workload of the court, as well as an instrument to guarantee impartiality and independence of judges, preventing the risk of manipulation or arbitrariness in the allocation of a case to a specific judge.

27. Furthermore, pursuant to a recommendation by the Council of Ministers, "The allocation of cases within a court should follow objective pre-established criteria in order to safeguard the right to an independent and impartial judge. It should not be influenced by the wishes of a party to the case or anyone otherwise interested in the outcome of the case."²⁹

17. The opening words of the Constitution state that the people submit to, and affirm, the sovereignty of Almighty Allah, and that authority under the Constitution is to be exercised as a *sacred trust*.³⁰ Almighty Allah directs that when judging between persons one should judge in truth and justice.³¹ Muslim jurists applied a saying³² of Prophet Muhammad (peace and blessings be upon him) to conclude that, '*the judge is to call the cases in their order of filing*'.³³ The immense responsibility placed upon a Judge can be gauged from a saying of the Prophet (peace and blessings be upon him) that, '*Whoever is appointed as a judge has been slaughtered without a knife*'.³⁴

²⁸ An advisory body of the Council of Europe composed of independent experts in the field of constitutional law, which included Mr. Paola Carozza (Professor of Law, University of Notre Dame), Antonio Henriques Gaspar (former President of the Supreme Court of Portugal), and Ms. Katerina Simackova (former Judge of the Constitutional Court of the Czech Republic and the European Court of Human Rights).

²⁹ Council of Europe, Recommendation on judges: independence, efficiency and responsibilities, CM/Rec(2010)12, para 24.

³⁰ The Objectives Resolution /Preamble to the Constitution, which Article 2A of the Constitution has 'made substantive part of the Constitution and shall have effect accordingly.'

³¹ Al-Qur'an surah Sad (38) verse 26, فَاحْكُم بَيْنَ النَّاسِ بِالْحَقِّ

³² "الْمُبَاخ لِمَن سَبَقَ إِلَيْهِ".

³³ Including by the famous Hanafi jurist Abu Bakr bin Mas'ud al-Kasani (died 1191 CE / 587 AH) in *Bada'i' al-Sana'i' fi Tartib al-Shara'i'*, Book LIII, translated by Professor Imran Ahsan Khan Nyazee, Islamabad: Advanced Legal Studies Institute, 2007, p. 84.

³⁴ Narrated by Abu Hurairah, *Sunan*, Abu Dawud, chapter on judgments, hadith number 3572, *Sunan al-Tirmidhi*, Abu Isa Muhammad bin Isa al-Tirmidhi, chapter on rulings, hadith number 1325.

18. The Constitution mandates that '*the independence of the judiciary shall be fully secured.*'³⁵ If the Registrar, a Judge or even the Chief Justice selects particular case(s) for early hearing, without following predetermined, reasonable and fair criteria with regard to the fixation of cases, the principle of independence of the judiciary may be undermined. And, if Benches are changed arbitrarily for no justifiable reason, it creates doubts. The public may also raise question on the fairness of a system that arbitrarily favours certain citizens over others.

19. We must not be unmindful of the fact that the Judiciary has been established for one and only one purpose; to decide cases, which it must do efficiently, fairly and transparently. And the people have every right to know how the administration of justice is undertaken; Article 19A of the Constitution gives the people '*the right to access to information in all matters of public importance.*' This is a Fundamental Right. Transparency is concomitant with accountability.

20. Therefore, since there was no reason for the sudden change of Benches and a Judge junior to Justice Yahya Afridi was preferred over him to head a Bench, it became imperative for us to address this matter which has assumed criticality. To those whose cases were listed for hearing on Tuesday, 28 February 2023, but could not be heard, we apologize.³⁶

21. The maintenance of the rule of law, transparency and fairness in the constitution of Benches and fixation of cases must be established to retain the independence, integrity and prestige of this Court.

Judge

I respect the views of my learned brother Justice Qazi Faez Isa.

Judge

Islamabad,
1 March 2023.
Approved for Reporting
(M. Tauseef)

³⁵ Preamble, the Constitution.

³⁶ It was announced in Court on 28 February 2023 that this Order would be written out and uploaded on the website later the same day but delay occurred as some information and references were being searched, and to do the needful at the earliest Qazi Faez Isa, J elected not to sit in Court on 1 March 2023 and instead do Chamber work.