

IN THE SUPREME COURT OF PAKISTAN
(APPELLATE/ORIGINAL JURISDICTION)

PRESENT:

MR. JUSTICE GULZAR AHMED, CJ
MR. JUSTICE SARDAR TARIQ MASOOD
MR. JUSTICE FAISAL ARAB
MR. JUSTICE IJAZ UL AHSAN
MR. JUSTICE SAJJAD ALI SHAH

CIVIL APPEALS NO.353-355/2010, 130/2013, AND 176/2018, CIVIL PETITIONS NO.4750-4751/2017, CIVIL MISCELLANOUS APPLICATION NO.6310/2018 IN CIVIL MISCELLANOUS APPLICATION NO.4233/2017, CIVIL PETITION NO.3039/2015, CIVIL MISCELLANOUS APPLICATIONS NO.218, 413 AND 1718/2016 IN CIVIL PETITION NO.3039, CIVIL PETITION NO.3040/2015, CIVIL MISCELLANOUS APPLICATIONS NO.222, 219 AND 1177/2016 IN CIVIL PETITION NO.3040/2015, CIVIL PETITIONS NO.1439 AND 3280/2018 AND CIVIL MISCELLANOUS APPLICATION NO.8193/2017 IN CIVIL APPEAL NO.1163/2017

(Against the judgments dated 06.03.2009 passed by the Peshawar High Court, Peshawar in W.P. No.376 and 384/2008 and 1065/2007, 20.09.2012 passed by the Peshawar High Court, Peshawar in W.P. No.958/2009, 02.11.2017 passed by the Lahore High Court, Lahore in W.P. No.99511/2017, 27.09.2017 passed by the Islamabad High Court, Islamabad in W.P. No.3249 and 3250/2016, 08.10.2015 passed by the Peshawar High Court, Peshawar in W.P. No.931-P and 3378-P/2015, 22.03.2018 passed by the Lahore High Court, Lahore in W.P. No.10229/04/2017 and 28.06.2018 passed by the Islamabad High Court, Islamabad in W.P. 856/2018)

Gul Taiz Khan Marwat v. The Registrar, Peshawar High Court, Peshawar & others CA 353-355/2010

Asif Hameed Qureshi v. Provincial Judicial Selection Board through Registrar, Peshawar High Court and others CA 130/2013

Syed Awais Ashraf Gillani v. Administrative Committee of Lahore High Court, Lahore through Registrar & others CA 176/2018

Amjad Ali v. Federal Shariat Court through its Registrar, Islamabad CP 4750/2017

Amjad Ali v. Federal Shariat Court through its Registrar, Islamabad CP 4751/2017

Shahzada Aslam & others v. Ch. Muhammad Akram & others CMA 6310/2018 in CMA 4233/2017

Kiran Ayub Tanoli v. Registrar Peshawar High Court, Peshawar & another CP 3039/2015, CMA 218, 413, 1718/2016

Faisal Khan v. Registrar Peshawar High Court, Peshawar & another	CP 3040/2015, CMA 222, 219, 1177/2016
Director General Punjab Judicial Academy, Lahore v. Sumaira Naheed & another	CP 1439/2018
Amjad Iqbal v. Hon'ble Islamabad High Court, Islamabad through Registrar, Islamabad & others	CP 3280/2018
Abida Safdar v. The Registrar, Peshawar High Court, Peshawar & others	Const.P 4/2016
Muhammad Shafiq v. The Registrar, Peshawar High Court, Peshawar & others	Const.P 12/2016
Syed Hamid Mohy-ud-Din and others v. Govt. of K.P.K. and others	Const.P 143/2012
Muhammad Kashif v. Ch. Hammayun Imtiaz and others	Crl Org 125/2019

For the Appellants/

Petitioners/Applicants: Mr. Saleem Ullah Ranazai, ASC
a/w Appellant in-person
(in CA 353-355/2010)

Mr. Abdul Lateef Afridi, ASC
Mr. Khalid Anwer Afridi, ASC
a/w Mr. Asif Hamid Qureshi, appellant in-person
(in CA 130/2013)

Mr. Amjad Ali, petitioner in-person
(in CP 4750 & 4751/2017)

Mr. Fawad Saleh, ASC
(in CP 3039/2015 and CMA 218, 413 & 1718/2016)

Nemo
(in CP 3040/2015)

Ch. Faisal Fareed, Addl. AG Punjab
Zohaib Alam, PA for Addl. Dir.
(in CP 1439/2018)

Dr. G. M. Chaudhry, ASC
(in CP 3280/2018)

Mr. Muhammad Munir Paracha, ASC
(in Const.P. 4/2016)

Mr. Abdur Rashid Awan, ASC
(in Const.P. 12/2016)

Mr. Amjad Ali, ASC
(in Const.P. 143/2012)

Mian Shah Abbas, ASC
(in Crl.O.P. 125/2019)

For the Respondents: Mr. Khalid Rehman, ASC
(appeared on behalf of PHC w/o POA in CA 353/2010, etc.)

Mr. Shumail Ahmed Butt, AG KPK
Barrister Qasim Wadood, Addl. AG KPK

Mr. Khalid Javed Khan, Attorney General
Ch. Aamir Rehman, Addl. Attorney General

Ch. Faisal Fareed, Addl. AG Punjab
Khalid Mehmood

Mr. Ayaz Khan Swati, Addl. AG Balochistan

Barrister Shabbir Shah, Addl. AG Sindh
(appeared via video-link from Karachi)

Mr. Mohammad Kassim Mirjat, AOR for Sindh

Mr. Niaz Ullah Khan Niazi, AG Islamabad

Mr. Muhammad Akran Gondal, ASC
(on behalf of FSC in CP 4750 & 4751/2017)

Mr. Faiz Rasool Jalbani, ASC
(on behalf of Respondent No.1 in CP 1439/2018)

Date of Hearing: 16.03.2020

...

JUDGMENT

IJAZ UL AHSAN, J.- The basic question involved in these cases is whether the executive, administrative or consultative actions of the Chief Justices or Judges of a High Court are amenable to the constitutional jurisdiction of a High Court under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 ("Constitution").

2. As various cases are involved in the matter, their facts shall be discussed separately. In Civil Appeals No.353 to 355/2010, the appellant, an employee of the Peshawar High Court, filed three writ petitions: (i) challenging his removal from service; (ii) seeking amendment in the Peshawar High Court Ministerial Establishment (Appointment & Condition of Service) Rules, 1989 to provide Court employees a remedy of appeal; and (iii) seeking issuance of directions to the Registrar, Peshawar High Court to grant the appellant TA/DA for certain periods in relation to his posting. Vide consolidated judgment dated 06.03.2009, the learned Peshawar High Court dismissed all three writ petitions as being not maintainable against the order(s) of the Chief Justice of the Court.

Aggrieved, the appellant filed the instant appeals in which leave was granted *vide* order dated 19.04.2010 in the following terms:

"Inter alia contends that the Peshawar High Court Ministerial Establishment (Appointment and Conditions of Service) Rules, 1989, do not provide any right of appeal and the learned High Court of Peshawar has dismissed petitioner's constitution petition without adverting to this aspect; that although petitioner was in the Ministerial Staff of the High Court but he was posted in the office of District & Sessions Judge Kohistan; that the said District is at a distance of 800 miles from D.I. Khan; that the alleged absence without leave is relatable to that period; that petitioner had sent his application in time but that reached to the Competent Authority late; that petitioner was under stress as his son was mentally disabled and without considering the applications for leave and the circumstances alluded to above, petitioner has been awarded major penalty of compulsory retirement from service although he had an unblemished record of service stretching over a period of 25 years. He added that the remaining two charges were not serious enough to warrant the said penalty.

2. Having heard petitioner's learned counsel at some length, leave is granted to consider whether the petitioner could have been awarded major penalty in the circumstances to which reference has been made above..."

3. The facts of Civil Appeal 130/2013 are that the appellant sought a writ against the Peshawar High Court and the members of its Administrative Committee for re-evaluation of his written test for the post of Additional District and Sessions Judge ("**ADJ**") advertised by the Peshawar High Court which was dismissed *vide* impugned judgment dated 20.09.2012 on the ground that a writ was barred against the administrative orders of a High Court under Article 199(5) of the Constitution. Aggrieved, the appellant filed the instant appeal in which leave was granted *vide* order dated 22.01.2013 which reads as under:

"The petitioner impugns the judgment of the High Court dated 20.09.2012 whereby W.P.No. 958/2009 filed by the petitioner has been dismissed. The reason given is that the petition is not maintainable in view of the ratio in the case titled Muhammad Iqbal and another vs Lahore High Court through Registrar and others (2010 SCMR 632).

2. It is contended by the learned counsel for the petitioner that the precedent is distinguishable because in the present case the question of appointment of the petitioner had arisen based on his better performance in the examination for selection of Additional District Judges for

appointment to the Provincial Judicial Service. It is submitted that the reasoning that a writ could not be issued to a Judge of the High Court, was not attracted.

3. To consider the above question leave to appeal is granted..."

4. In Civil Appeal No.176/2018, the appellant filed a writ against the Administrative Committee of the Lahore High Court against deferral of the appellant's promotion, his posting as an officer on special duty and notice for retirement. It was held *vide* impugned judgment dated 02.11.2017 that decisions of the Administrative Committee of a High Court are the decisions of the High Court itself which is not a 'person' under Article 199(5) *ibid* thus the writ was not maintainable. Aggrieved, the appellant filed the instant appeal in which leave was granted *vide* order dated 25.01.2018 in the following terms:

"The applicants had earlier challenged the judgment of this Court dated 26.9.2016 passed in Constitution Petition No.3 of 2014 reported as Ch. Muhammad Akram Vs. Registrar, Islamabad High Court and others (PLD 2016 SC 961) through a Review Petition No.474 of 2016 which was dismissed *vide* judgment dated 20.1.2017. Now this application has been filed under Section 12(2) of the Code of Civil Procedure, 1908 (CPC) challenging both the aforesaid judgments. After hearing the learned counsel for the applicants, we find that the application is absolutely incompetent and not maintainable because a person having lost a case in review does not have any right to file any application under Section 12(2) of the CPC, particularly when absolutely no element of fraud misrepresentation or lack of jurisdiction is claimed to vitiate the judgment. Also the applicants cannot challenge the judgment under Article 184(3) of the Constitution of the Islamic Republic of Pakistan, 1973. Rather if any judgment is *per incuriam*, then for the purpose of laying down the correct law, it is this Court which in the exercise of its own inherent jurisdiction can correct any error in the law that is noticed or pointed out in any matter which comes before the Court. In light of the above, this application under Section 12(2) of the CPC is dismissed.

2. However, while considering that paragraph No.45 of the judgment under consideration may require reconsideration and be revisited, we on our own are inclined to take up this matter to consider the said paragraph wherein it has been declared that a writ would be competent against the order of a Judge of the High Court while exercising executive, administrative and consultative function/authority. Accordingly, we issue notices to all the Registrars of the High Court in this regard. Although, the application under Section 12(2) of the CPC filed by the

applicants has been dismissed but we shall hear their learned counsel Syed Iftikhar Hussain Gillani, learned Sr. ASC as *amicus curiae* in this matter. The matter to be listed for hearing later.

C.Ps. 4312 to 4317/2017

3. Leave in all these petitions is granted to consider, *inter alia*, whether in terms of Article 199(5) of the Constitution of Islamic Republic of Pakistan, 1973, the executive, administrative and consultative actions of the learned Chief Justice/Judges or the Registrar of the High Court are amenable to the Constitutional jurisdiction of the learned High Court..."

5. The petitioner in Civil Petitions No.4750 and 4751/2017 filed two writ petitions challenging: (i) his order of dismissal from service issued by the Chief Justice of the Federal Shariat Court; and (ii) the order of dismissal of appeal issued by the Departmental Appellate Authority comprised of three Judges of the Federal Shariat Court. *Vide* consolidated judgment dated 15.11.2017, the Islamabad High Court dismissed the writ petitions as being barred against administrative orders issued by the Federal Shariat Court.

6. In Civil Petition No.3039/2015, the petitioner challenged, through a writ petition, certain conditions for the post of ADJ before the Peshawar High Court, whereas in Civil Petition No.3040/2015, the petitioner sought a writ for relaxation in the age limit for the post of ADJ. In both cases, after discussing the merits of the case, the learned Court dismissed the petitions *in limine vide* separate orders both dated 08.10.2015.

7. The facts of Civil Petition No.1439/2018 are that the respondent was charged of misconduct and removed from service in the Punjab Judicial Academy after which she filed a departmental appeal and then a writ petition. *Vide* impugned judgment dated 22.03.2018, the learned Lahore High Court held the writ to be maintainable on the ground that the bar in Article 199(5) *ibid* only applied to judicial orders and not administrative, executive or consultative orders of the Chief Justice of the Lahore High Court, and reinstated the respondent.

8. In Civil Petition No.3280/2018, the petitioner, an employee of the Islamabad High Court, applied for the post of reader but did not qualify. His representation before the Chief Justice, Islamabad High

Court was dismissed. Subsequently his writ petition was also dismissed *vide* impugned judgment dated 28.06.2018 as being not maintainable by placing reliance upon the earlier consolidated judgment of the Islamabad High Court on the same issue dated 15.11.2017 (see paragraph five above).

9. In Constitution Petitions No.4 and 12/2016, the petitioners seek their appointment as ADJs by challenging the decision and notification dated 15.02.2016 issued by the Selection Committee of the Peshawar High Court appointing ADJs, while in Constitution Petition No.143/2012, the petitioner seeks, *inter alia*, a writ for the establishment of an appellate authority for High Court employees.

10. Through Criminal Original Petition No.125/2019, the petitioner prays for contempt proceedings to be initiated against the respondents comprising of various learned High Courts and its employees for non-implementation of *Ch. Muhammad Akram v. Registrar, Islamabad High Court and others* (PLD 2016 SC 961).

11. Civil Miscellaneous Application No.6310/2018 is the *suo motu* matter for reconsideration of *Ch. Muhammad Akram's* case *supra vide* order dated 25.01.2018 passed by a five member bench of this Court reproduced above in paragraph four of this opinion. Through Civil Miscellaneous Applications No.218, 413 and 1718/2016, the applicants request for impleadment in Civil Petition No.3039/2015, whereas the applicants request for impleadment in Civil Petition No.3040/2015 *vide* Civil Miscellaneous Applications No.222, 219 and 1177/2016.

12. For the sake of brevity, the arguments are broadly divided into two categories – those who have answered the question identified in the first paragraph of this opinion in the affirmative, and those who have answered it in the negative. Learned counsel for all the appellants/petitioners and the appellants/petitioners appearing in-person (except Civil Petition No.1439/2018 in which it is the respondent) and the learned Advocate General of Sindh fall within the former category and the crux of their case is as under:

- (a) The bar contained in Article 199(5) *supra* is only to the extent of judicial orders and not administrative orders. Judges acting in

their administrative capacity or as *persona designata* under the rules framed pursuant to Article 208 of the Constitution fall within the term 'authority' used in Article 199(5) *ibid* as they are exercising statutory powers which are amenable to writ jurisdiction;

- (b) The principle of comity cannot override the constitutional provisions from which two fundamental principles emerge, i.e. the power of judicial review and the power to enforce the fundamental rights;
- (c) The phrase 'unless the context otherwise requires' in the definition of 'person' contained in Article 199(5) *supra* dilutes its effect. The legislature envisaged that there will be a situation where a writ could be issued by a High Court to itself, e.g. under Article 199(2) of the Constitution for the enforcement of the fundamental right not to be left without a remedy, which forms part of the basic structure of the Constitution;
- (d) The executive and judicial sides of the armed forces have been separately excluded under Articles 199(3) and 199(5) of the Constitution respectively, and the fact that there is no equivalent of Article 199(3) *supra* for the judiciary indicates that the bar contained in 199(5) *supra* is restricted to its judicial functions only;
- (e) If this Court is of the view that an administrative order of the High Court is an order of the High Court and it is protected by virtue of Article 199(5) *supra*, then the remedy of filing a petition for leave to appeal before this Court under Article 185(3) of the Constitution would be open; and
- (f) The Federal Shariat Court is not mentioned in the definition of 'person' under Article 199(5) *ibid* therefore the orders of the Judges of the Departmental Appellate Authority of the Federal Shariat Court can be challenged in writ jurisdiction of the High Court.

13. Learned counsel for all the respondents (except Civil Petition No.1439/2018 in which it is the petitioner), the learned Attorney General

for Pakistan and the learned law officers for all the Provinces (except for Sindh) fall within the latter category. The core of their case is as follows:

- (a) 'High Court' is defined as a combination of the Chief Justice and other Judges. Therefore, the test to be applied is the 'but for' test, i.e. is this a function which was performed by the Judge as a Judge and he could not have done so 'but for' his position as a Judge? For the types of orders under challenge, the answer to the 'but for' test is an emphatic one no;
- (b) The appellants/petitioners want the word 'Court' to be read in place of 'person' in Article 199(1)(a)(i) of the Constitution. If this was the intention of the framers, they would not have used two different words;
- (c) The entire scheme of the Constitution needs to be looked at. An anomalous situation would arise should an order of the administrative committee of the Supreme Court be set aside by a Single Judge of the High Court;
- (d) The High Court of Balochistan has created a Tribunal and the relevant rules have been framed this year; and
- (e) Article 203G of the Constitution bars the issuance of writs against the Federal Shariat Court.

14. The learned *amicus*, Syed Iftikhar Hussain Gillani, Sr. ASC, while explaining the genesis of Article 199 of the Constitution, submitted that the only purpose of sub-Article (5) thereof is to protect the non-judicial actions or orders of the Supreme Court and High Courts in Pakistan which have been granted a special status as per the scheme of the Constitution. He added that the scope of Article 199(5) *supra* has been considered and dilated upon by this Court in numerous judgments which were not considered by the Bench in *Ch. Muhammad Akram's* case *supra*, therefore, the said judgment ought to be revisited.

15. We have heard the learned counsel for the parties and the learned law officers at length and perused the record. During the course of arguments, reference was made to numerous cases which shall be discussed in the later part of this opinion. The superior Courts of

Pakistan have been entrusted with the power of judicial review which is an important feature of our Constitution. Article 199 of the Constitution empowers a High Court to issue writs of *mandamus*, *prohibition*, *certiorari*, *quo warranto* and *habeas corpus* (*without using the said terms*) as long as the respective conditions contained in Article 199 *supra* are met. A similar power is conferred upon the Supreme Court of Pakistan by Article 184(3) of the Constitution, as long as the matter involves a question of public importance with reference to the enforcement of any of the fundamental rights.

16. Article 199 *supra* is quite comprehensive. A pivotal question in this regard is who can a writ be issued to by a High Court. In this regard, sub-Article (1) is germane which is reproduced below for ease of reference:

"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,-

(a) on the application of any aggrieved party, make an order-

(g) 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

(h) 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 the Fundamental Rights conferred by Chapter 1 of Part II."

[Emphasis supplied]

The key word used in this context is 'person' which has been defined in sub-Article (5) and reads as follows:

(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;

[Emphasis supplied]

For the sake of clarity, the definition of 'person' includes, but is not limited to, any:

- i. Body politic;
- ii. Body corporate;
- iii. Authority of the Federal Government or of a Provincial Government;
- iv. Authority under the control of the Federal Government or of a Provincial Government;
- v. Court or tribunal, except:
 - a. The *Supreme Court*;
 - b. A *High Court*; or
 - c. A Court or tribunal established under a law relating to the Armed Forces of Pakistan.

From a bare reading of the foregoing sub-Article, there is no cavil to the proposition that as a general rule for the purposes of Article 199 of the Constitution, the Supreme Court and High Courts have been *excluded* from the term 'person', and therefore no writ can be issued by a High Court under Article 199 *supra* to, the Supreme Court or to itself by any of the said Courts.

17. A critical question that arises is what exactly does 'Supreme Court' or 'High Court' as used in Article 199(5) *supra* mean? In other words, does this provision only refer to the Judges of the Supreme Court and High Courts when they pass judicial orders? Or does it provide blanket immunity to *all* acts and orders of the Supreme Court and High Courts, including those of administrative, executive and consultative nature, particularly in matters pertaining to employment in the High Court or Supreme Court establishment or appointment in the lower judiciary as is the situation in the instant cases? Articles 192(1) and 176 of the Constitution describe what constitutes a High Court and the Supreme Court respectively and are reproduced below for ease of reference:

"192. Constitution of High Court.

(1) A High Court shall consist of a Chief Justice and so many other Judges as may be determined by law or, until so determined, as may be fixed by the President.

176. Constitution of Supreme Court.

The Supreme Court shall consist of a Chief Justice to be known as the Chief Justice of Pakistan and so many other Judges as may be determined by Act of Majlis-e-Shoora (Parliament) or, until so determined, as may be fixed by the President."

[Emphasis supplied]

It is clear from the aforementioned provisions that a High Court and the Supreme Court both comprise of the respective Chief Justices and Judges, therefore the reverse that there can be no Court without the Chief Justice and Judges is necessarily true. Furthermore, the definitions do not draw any distinction between the judicial orders of a Court and its administrative, executive or consultative orders.

18. Be that as it may, the judgment delivered in *Ch. Muhammad Akram's* case *supra* directly dealt with this issue. This case involved a constitution petition under Article 184(3) of the Constitution instituted by the Appellant, a practicing Advocate, challenging various appointments, absorptions and transfers made by the Administration Committee of the Islamabad High Court, claimed to have been made in violation of the Services Rules of the Islamabad High Court, in which a three member bench of this Court held as follows:

"42. ...It is our considered view that the Constitution confers judicial powers (jurisdiction) on the High Court only under Article 199 and the administrative, consultative or executive powers are conferred on the High Court by virtue of the rules framed under Article 208. Rules framed by the High Court or Supreme Court further require approval of the Governor or President as the case may be. It needs to be highlighted that Article 199(5) excludes a High Court and Supreme Court from the definition of 'person'. High Court is defined under Article 192, the relevant part of which is reproduced as under:

"192. Constitution of High Court. (1) A High Court shall consist of a Chief Justice and so many other Judges as may be determined by law or, until so determined, as may be fixed by the President."

This definition does not include the Registrar or any other officer of a High Court Establishment, who is appointed by the Chief Justice or the Administration Committee under the Rules. The executive/administrative/consultative powers conferred on the Chief Justice or an Administration Committee are drawn from the Rules; whereas the judicial powers (jurisdiction) conferred upon the High Court and exercised by the judges are embedded in Article 199 itself; hence, both the powers are different and unparalleled.

43. We, for the aforesaid reason, are of the considered view that the view of learned Lahore High Court and maintained by this Court in the cases of Asif Saeed (Supra) and Muhammad Iqbal is against the language of Article 192 and Article 199 of the Constitution. Moreover, the provisions of Article 208 which empowers the High Court or Supreme Court to frame Rules for their establishments have been completely overlooked. As a result, the judicial powers and the powers which are administrative/consultative/executive in nature have been mixed up leading to denial of remedy to an aggrieved person even in a case where codal formalities or eligibility or other mandatory requirements have been blatantly disregarded.

44. Even the plain reading of Article 199(5) leads to the conclusion that by excluding a High Court and Supreme Court from the definition of 'person', the framers of Constitution envisaged judicial jurisdiction and not the extraneous administrative/executive/consultative matters pertaining to the Establishment of the Courts. The reason obviously lies in the conferment of powers through the rules which are subject to the approval of the executive. Hence, in our view, a Judge acts in two different domains, when he performs judicial functions under Article 199 and when he performs administrative/executive/consultative functions under the Rules which cannot be mixed with each other. In other words, there is a grading of power: the parameters of judicial powers exercised by a judge under the provisions of

the Constitution are distinct from the non-judicial powers he exercises under the Rules framed under the provision of the Constitution. The judgment rendered in the case of Mohammad Iqbal (*supra*) approving the case of Asif Saeed (*supra*) being against the provisions of the Constitution is per incuriam and is not a good law.

45. We for the aforesaid reasons conclude that the provisions of Article 199(5) would bar a writ against a High Court if the issue is relatable to judicial order or judgment; whereas a writ may lie against an administrative/consultative/executive order passed by the Chief Justice or the Administration Committee, involving any violation of the Rules framed under Article 208, causing infringement of the fundamental rights of a citizen.”

[Emphasis supplied]

The learned Bench relied on Articles 199 and 208 of the Constitution to read into the Constitution a distinction between the judicial function of a Judge on one hand and the administrative, executive and consultative functions on the other, holding that only the former was immune to issuance of a writ by virtue of Article 199(5) of the Constitution whereas a writ could be issued with respect to the latter. The conclusion drawn from a comparison of both provisions that both the powers thereunder were “different and unparalleled”.

In the above context, let us consider Article 208 of the Constitution which provides as follows:

“208. Officers and Servants of Courts.

The Supreme Court and the Federal Shariat Court, with the approval of the President and a High Court, with the approval of the Governor concerned, may make rules providing for the appointment by the Court of officers and servants of the Court and for their terms and conditions of employment.”

[Emphasis supplied]

19. We differ with the view taken in the said judgment in the meaning, interpretation, scope, extent and interplay of Articles 199 and 208 of the Constitution. Keeping in view Articles 176, 192, 199 and 208 of the Constitution, and upon a harmonious interpretation thereof, in our humble opinion, no distinction whatsoever has been made between the various functions of the Supreme Court and High Courts in the Constitution and the wording is clear, straightforward and unambiguous

in this regard. There is no sound basis on which Judges acting in their judicial capacity fall within the definition of 'person' and Judges acting in their administrative, executive or consultative capacity do not fall within such definition. In essence, the definitions of a High Court and Supreme Court provided in Articles 192 and 176 *supra* respectively are being split into two when the Constitution itself does not disclose such intention. It is expressly or by implication a settled rule of interpretation of constitutional provisions that the doctrine of *casus omissus* does not apply to the same and nothing can be "read into" the Constitution. If the framers of the Constitution had intended there to be such a distinction, the language of the Constitution, particularly Article 199 *supra*, would have been very different. Therefore to bifurcate the functions on the basis of something which is manifestly absent is tantamount to reading something into the Constitution which we are not willing to do. In our opinion, strict and faithful adherence to the words of the Constitution, specially so where the words are simple, clear and unambiguous is the rule. Any effort to supply perceived omissions in the Constitution being subjective can have disastrous consequences. Furthermore, the powers exercisable under the rules framed pursuant to Article 208 *supra* form a part and parcel of the functioning of the superior Courts. In other words, the power under Article 208 *supra* would not be there *but for* the existence of the superior Courts. This 'but for' test, as mentioned by the learned Attorney General, is pivotal in determining whether or not a particular act or function carried out by a Judge is immune to challenge under the writ jurisdiction under Article 199 *supra*. This test is employed by Courts in various jurisdictions to establish causation particularly in criminal and tort law – but for the defendant's actions, would the harm have occurred? If the answer to this question is yes, then causation is not established. Similarly in the instant matter, but for the person's appointment as a Judge (thereby constituting a part of a High Court or the Supreme Court under Articles 192 and 176 *supra* respectively), would the function in issue be exercised? If the answer to this question is yes, then such function would not be immune to challenge under Article 199 *supra*. In this case with respect to the administrative, executive or consultative acts or orders in question, the answer to the "but for" test is an unqualified no, therefore such acts or orders would in our opinion be protected by Article 199(5) of the Constitution and thereby be immune to challenge under the writ jurisdiction of the High Court.

20. It is in this context that the ratio of the cases of *Abrar Hassan supra* and *Malik Asad Ali supra*, heavily relied on by the learned counsel for the appellants/petitioners and the learned Advocate General of Sindh, ought to be understood. The case of *Abrar Hassan supra* involved an appeal from the order of a Division Bench of the High Court of Sind & Baluchistan, Karachi dismissing a constitution petition filed by the Appellant, Abrar Hassan, challenging the appointment of Mr. Justice Abdul Kadir Shaikh, a Supreme Court Judge, as the Chief Justice of the High Court of Sind & Baluchistan. Though the learned High Court discussed the merits of the case, it dismissed the constitution petition as being not maintainable against the Chief Justice of the High Court. A four member bench of this Court ultimately dismissed the appeal, although split equally in terms of reasoning. The moot point in *Abrar Hassan's* case *supra* was whether a writ of *quo warranto* was maintainable against the Chief Justice of a High Court. As noted by Justice Salahuddin Ahmad in *Abrar Hassan's* case *supra*, "The present petition does not seek any writ against the act or order of a Judge of a High Court as a Court, but questions his authority or right to act as such Judge..." An interpretation of *Abrar Hassan's* case *supra* was very aptly provided in *Malik Asad Ali's* case *supra* in which a ten member bench of this Court delivered a detailed judgment in three constitution petitions filed before this Court challenging the appointment of Mr. Justice Sajjad Ali Shah as the Chief Justice of Pakistan which were ultimately allowed. Justice Saiduzzaman Siddiqui in *Malik Asad Ali's* case *supra* observed that while there was unanimity in the views of all the four learned members of the bench in the case of *Abrar Hassan supra* that the appointment of a Judge of a superior Court could be brought under challenge before a Court, it was the exact nature of proceedings which can be filed to challenge such appointment that was in question and on which the learned members of the Bench were equally divided. Chief Justice Yaqub Ali and Justice Anwarul Haq were of the view that a writ petition under Article 199 *supra* could not be filed to question the appointment of a Judge of a superior Court keeping in mind the bar contained in sub-Article (5) thereof, however it could be collaterally challenged in properly constituted proceedings. Whereas Justice Salahuddin Ahmad and Justice Muhammad Gul held that proceedings in the nature of *quo warranto* could be filed against the Judge of a superior Court under Article 199 of the Constitution to challenge the legality of

his appointment. It was in this context that Justice Salahuddin Ahmad and Justice Muhammad Gul had drawn a distinction between the judicial acts and orders of a Judge and his private acts and it is in respect of the latter that he would not enjoy immunity and be subject to the laws of the land like every other citizen, hence the oft-quoted example of a Judge illegally confining his domestic servant for misbehavior. To put it differently, but for the person's appointment as a Judge, would the domestic servant have been illegally confined? The answer is obviously yes, as it has nothing to do with the official capacity of the Judge rather has nexus to his person. Thus, such an act would not enjoy any immunity under the law and the Judge would be subject to the laws of the land as would any other citizen. Therefore, the fact that the ten member bench in *Malik Asad Ali*'s case *supra* adopted the viewpoint of Justice Salahuddin Ahmad and Justice Muhammad Gul over that of Chief Justice Yaqub Ali and Justice Anwarul Haq does not turn on anything, because the precise question as to whether the executive, administrative or consultative acts or orders of the Chief Justices or Judges of a High Court can be challenged through a writ petition was neither in issue nor examined in any detailed or meaningful manner in either case.

21. In *Ch. Muhammad Akram*'s case *supra* it was found that the conflation of judicial powers and those that are administrative, consultative or executive in nature had led to the denial of a remedy in the form of a writ petition to an aggrieved person. With the greatest respect, we are unable to subscribe to such view. It has been held in numerous judgments of this Court, albeit in varying contexts, that the right of appeal is a creature of statute. The judgments reported as *Ibrahim v Muhammad Hussain* (PLD 1975 SC 457), *Habib Bank Ltd. v The State and 6 others* (1993 SCMR 1853), *Muhammad Yar Buttar and 4 others v Board of Governors, Overseas Pakistanis Foundation, Islamabad and another* (1999 SCMR 819), *Chairman, Central Board of Revenue, Islamabad and 3 others v Messrs Pak-Saudi Fertilizer Ltd. and another* (2001 SCMR 777), *Syed Masroor Shah and others v The State* (PLD 2005 SC 173) and *President, All Pakistan Women Association, Peshawar Cantt. v Muhammad Akbar Awan and others* (2020 SCMR 260) are relevant in this regard. Particularly in *Ibrahim*'s case *supra*, wherein the question was whether an appeal was maintainable under Section 15(1) of

the West Pakistan Rent Restriction Ordinance, 1959 against an order containing a finding about the existence of relationship of landlord and tenant, it was held that:

"It is well settled principle that right of appeal is a creature of the statute and it is not to be assumed that there is right of appeal in every matter brought before a Court for its consideration. The right is expressly given by a statute or some authority equivalent to a statute such as a rule taking the force of a statute. Therefore, existence of right of appeal cannot be assumed on any a priori ground. This is in sharp contrast with the right to sue..."

[Emphasis supplied]

In the case of *Habib Bank Ltd. supra* which involved the question as to whether an appeal/revision against an order of acquittal under the Offences in Respect of Banks (Special Courts) Ordinance, 1984 was maintainable or not, this Court held as follows:

"The right of appeal is a creature of statute and it must be specified in clear terms that the appeal against an order is competent. This right cannot be supplemented by implications. The Ordinance does not expressly give any right of appeal against the order of acquittal. Section 10 (1) of the Ordinance provides appeal against the order of Special Court to the High Court against the sentence passed by such Court. No inference can be drawn from this provision that an appeal against the order of acquittal is competent. There is no other provision in the Ordinance empowering the State or the complainant to file an appeal against the order of acquittal. The right to review the judgment of acquittal must be conferred by statute. In the absence of such right in the statute there does not exist any right."

[Emphasis supplied]

The case of *President, All Pakistan Women Association supra* involved petitions for leave against the order of the Peshawar High Court dismissing the constitution petitions filed against an interlocutory order passed by the Additional Rent Controller, Peshawar Cantt. This Court observed that:

"It is settled law that when the Statute does not provide the right of appeal against certain orders, the same cannot be challenged by invoking the constitutional jurisdiction of the High Court in order to gain a similar objective. Where a Statute has expressly barred a remedy which is not available to a party under the Statute, it cannot be sought

indirectly by resort to the constitutional jurisdiction of the High Court.”

[Emphasis supplied]

In the case of *Muhammad Ikram Chaudhry and others v Federation of Pakistan and others* (PLD 1998 SC 103) in which constitution petitions filed under Article 184(3) assailing the orders passed by other Benches of this Court were held not to be maintainable, it was observed as under:

“8. There seems to be unanimity of view among the superior Courts on the question that a High Court or the Supreme Court cannot in exercise of its Constitutional jurisdiction under Article 199 of the Constitution interfere with an order passed by another Judge or another Bench of the same Court.

9. Then it was urged that the petitioners would have no remedy against a patently illegal order. The factum that an aggrieved party may have no other legal remedy simpliciter will not bring his case within the purview of Article 199 of the Constitution if otherwise it does not fall within its compass...”

[Emphasis supplied]

Finally, in the case of *Malik Shakeel Awan v Sheikh Rasheed Ahmed and 21 others* (PLD 2018 SC 643) this Court held that:

“...we cannot read a right of appeal into the Constitution against a judgment/order passed by this Court under Article 184(3) by adding a provision to the Constitution.”

In light of the foregoing, with respect to Article 199 of the Constitution read as a whole and bearing in mind the specific bar contained in sub-Article (5) thereof, we find that the framers did not intend that the remedy of a writ be available against a High Court or the Supreme Court as mentioned above in this opinion. It cannot be assumed that there must necessarily be a right of appeal in cases involving administrative, executive or consultative acts or orders of the Judges or Chief Justice of a High Court or the Supreme Court, which right must have been expressly mentioned in clear and unequivocal terms in the Constitution if that was the intention and no inference can be drawn from Article 199 *supra* that a writ petition against the aforesaid orders is competent. For the foregoing reasons, we find that the judgment rendered in *Ch.*

Muhammad Akram's case *supra* needs to be revisited and is hereby overruled.

22. We now advert to the contention raised by the learned Advocate General of Sindh that according to the phrase "In this Article, unless the context otherwise requires" in the definition of 'person' contained in Article 199(5) *supra*, the word 'person' used in sub-Article (1)(c) is the context which requires the said definition to be diluted by removing the phrase "other than the Supreme Court, a High Court" therefrom based on Article 199(2) of the Constitution for the enforcement of the fundamental right not to be left without a remedy, which forms part of the basic structure of the Constitution. A plain reading of Article 199(5) *supra* makes it clear that the definition of 'person' given therein is to be used for the purposes of Article 199 of the Constitution, unless the context in Article 199 *supra* itself requires otherwise. In this regard it is pertinent to note that the term 'person' has been defined only twice in the Constitution. The general definition applicable to the whole of the Constitution is found in Article 260(1) thereof which reads as under:

"260. Definitions.

- (1) In the Constitution, unless the context otherwise requires, the following expressions have the meaning hereby respectively assigned to them, that is to say,

"person" includes any body politic or corporate;"

[Emphasis supplied]

At the risk of repetition, the definition of 'person' specific to Article 199 *supra* appears in sub-Article (5) which is reproduced below for ease of reference:

- (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;

[Emphasis supplied]

It is important to note that both definitions are inclusive in nature. Article 199(5) *supra* borrows the first six words ‘includes any body politic or corporate’ from Article 260(1) *supra* and adds “any authority of or under the control of the Federal Government or of a Provincial Government, and *any Court or tribunal*”, but then goes on to exclude “the Supreme Court, a High Court or a Court or tribunal established under a law relating to the Armed Forces of Pakistan” from the phrase “any Court or tribunal”.

23. The learned Attorney General argued that the phrase “unless the context otherwise requires” appearing in Article 199(5) *supra* refers to a context that appears anywhere else in the Constitution *outside* of Article 199 *supra*, and that the intention was to not read into Article 199 *ibid* the definition of ‘person’ as it would appear in other provisions of the Constitution read with Article 260(1) *supra*. As convincing as this argument may initially seem, it is pertinent to note that this interpretation does not sit well with the fact that “unless the context otherwise requires” is mentioned after “In this Article” in Article 199(5) *supra* as it renders the former phrase absolutely redundant. If the intention of the framers was that as stated by the learned Attorney General, then the opening part of sub-Article (5) would have simply read:

(5) In this Article,-

“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;

[Emphasis supplied]

According to such interpretation, there was no need to mention “unless the context otherwise requires”. This begs the question regarding the purpose of using this phrase in the said Article, and as has been held in numerous judgments of this Court, every word used by the lawmaker has to be given a meaning such that it is not rendered redundant. It appears that the submission of the learned Advocate General of Sindh that the ‘context’ needs to be found within Article 199 *supra* itself has force. However his contention that the definition of ‘person’ in Article 199(5) *supra* be diluted by removing the phrase “other than the Supreme

Court, a High Court" is misplaced. He referred to Article 199(2) *supra* in this regard to contend that the right to a remedy is a fundamental right. We find that while Article 10-A of the Constitution provides a right to a fair trial and due process, there is no fundamental right to an appeal, particularly when the Constitution or the law does not specifically provide so and there is no sound justification to read such right into the Constitution. Furthermore, it is unclear as to the basis on which he pleads to remove the phrase "unless the context otherwise requires", and not "any authority of or under the control of the Federal Government or of a Provincial Government" or "a Court or tribunal established under a law relating to the Armed Forces of Pakistan". We cannot pick and choose the parts of the definition we wish to exclude, which ought to be done in its true context. To our mind, a possible context which requires a narrower and diluted definition of 'person' can be found in Article 199(1)(b)(i):

"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,-

(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"

[Emphasis supplied]

In the foregoing provision, 'person' is undoubtedly intended to mean natural person and therefore does *not* include "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". This context in Article 199 *supra* requires a definition of 'person' other than that provided in sub-Article (5). Therefore, this contention of the learned Advocate General of Sindh is rejected.

24. While referring to Article 199(1)(c) of the Constitution, the learned Advocate General of Sindh submitted that in the alternative if a High Court or the Supreme Court do not fall within the definition of 'person' in the context of Article 199(2) *supra*, then they would constitute an 'authority'. Although 'authority' has not been defined anywhere in the Constitution, he contended that a Judge acting in his administrative capacity would necessarily be an 'authority' under Article 199(1)(c) of the Constitution *supra* which is different from the one under Article 199(1)(a)(i) *supra*. To our minds, where a High Court or the Supreme Court has been clearly defined and referred to as such, there is no logic or necessity to stretch the definition, scope and ambit of the word 'authority' to encompass certain administrative, executive or consultative acts or orders of the Judges of such Courts rendering them amenable to the writ jurisdiction of a High Court under Article 199 *supra*. If that were the intention, again, the language of Article 199 *supra* would have been very different and this proposition would have been specifically attended to by the framers.

25. Learned counsel supporting the appeals/petitions also argued that Judges of the High Court who pass orders pursuant to departmental appeals under the relevant rules do so as *persona designata* and according to the judgments of this Court, are amenable to writ jurisdiction under Article 199 *supra*. A few cases are worth noting in this regard. The case of *Mian Jamal Shah v The Member Election Commission, Government of Pakistan, Lahore, etc.* (PLD 1966 SC 1) pertained to an election dispute which involved important questions regarding the scope of the jurisdiction conferred upon the High Courts by Article 98 of the Constitution of the Islamic Republic of Pakistan, 1962, in relation to election disputes under Article 171 of the said Constitution, and the laws made thereunder, i.e. the National and Provincial Assemblies (Elections) Act, 1964. Although each Judge penned down his own opinion, a five member bench of this Court unanimously allowed the appeals against the order of the Full Bench of the learned High Court which had set aside the order of the Member of the Election Commission, Mr. Justice Mushtaq Hussain. Chief Justice, A. R. Cornelius was of the view that:

"The learned Judges of the Full Bench next proceeded to consider the contention raised before them that as the

Election Commission was constituted of persons having the status of Superior Judges, and as in particular the Member whose order was placed before the Full Bench for judicial review was himself a Judge of the High Court, no writ could be issued to him. The learned Judges agreed that no writ could issue to a Superior Court, and this is clearly in accordance with the direction derivable from the definitive provision in Article 98, that no order under that Article shall issue to the Supreme Court or a High Court. But they found that the Member was persona designata in the case, and did not act as a Judge of the High Court and relying on two cases from the English jurisdiction in which it was held that certiorari could issue in respect of an order of a High Court Judge acting as a Tribunal, they came to the conclusion that the Member was "subject to the control of the High Court under Article 98 and is amenable to an order passed by it under that Article". In the two decisions from the English Courts, which have been cited, there was an express provision to the effect that a decision by the Tribunal will not be deemed to be a decision by the High Court, but for the interpretation of Article 98, in respect of this question that consideration is not of appreciable weight. The learned Judges were in all probability right in considering the Member to be persona designata, and not the High Court or a Judge of the High Court, when acting under section 53, but one may be pardoned for referring here to a small observation in one of the judgments cited by the Full Bench with reference to the idea of a Superior Court issuing a writ to itself, viz.:-

"the process involves the rather ludicrous position that Judges are called upon themselves to show cause to themselves"

why their orders should not be quashed. In the present case, the order in question is made by a Single Judge of the High Court acting as the relevant authority, but it is conceivable that a statute may appoint a Tribunal of say two or three High Court Judges to adjudicate matters arising thereunder, and then indeed the aspect of 'ludicrousness' might arise if a writ were sought from a Single Judge of the High Court to avoid actions by such Tribunals. In a number of statutes in the United Kingdom express provisions are included which avoid the writ jurisdiction in relation to such adjudications, and it is a matter for consideration whether such provisions should not be made use of in Pakistan as well. Quite apart from the aspect of 'ludicrousness' there are other and more weighty considerations involved, such as the necessity of maintaining a high degree of comity among the Judges of the Superior Courts, which could be urged in support of such a provision.

The case of *Muhammad Ikram Chaudhry supra* pertained to constitution petitions challenging certain interim orders passed in the main petition involved in *Malik Asad Ali's* case *supra*. The main question that arose was how a constitution petition filed under Article 184(3) of the Constitution assailing the orders passed by other Benches of this Court in exercise of jurisdiction under the said Article was maintainable. While dismissing the constitution petition, a five member bench of this Court observed as under while making reference to, *inter alia*, the cases of *Mian Jamal Shah supra* and *Abrar Hussain supra*:

“5. We tried to impress upon them that the above facts would not attract. Article 184(3) of the Constitution if otherwise the aforesaid petitions are not sustainable in view of well-settled proposition of law, firstly, that a Bench of this Court cannot sit as a Court of Appeal over an order or a judgment of another Bench of this Court and, secondly, Article 184(3) confers jurisdiction on this Court of the nature contained in Article 199 of the Constitution, clause (5) of which excludes *inter alia* the Supreme Court and the High Courts. In other words, no writ can be issued by a High Court or the Supreme Court against itself or against each other or its Judges in exercise of jurisdiction under Article 199 of the Constitution, subject to two exceptions, namely, (i) where a High Court Judge or a Supreme Court Judge acts as persona designata or as a Tribunal or (ii) where a quo warranto is prayed for and a case is made out.

[Emphasis supplied]

The aforementioned paragraph from *Muhammad Ikram Chaudhry's* case *supra* was cited with approval by a three member bench of this Court in the judgment reported as *Suleman Ali Haideri and another v Government of Balochistan and others* (2004 SCMR 354). In the case of *Chief Justice of Pakistan Iftikhar Muhammad Chaudhry supra*, it was observed that while:

“...writs should not issue from one High Court to another High Court or from one Bench of a High Court to another Bench of the same High Court because that could seriously undermine and prejudice the smooth and harmonious working of the Superior Courts...this should never be understood to mean that no writ could ever issue to a Judge in his personal capacity or where a Judge was working as a PERSONA DESIGNATA...”

In the case of *Ahmad Farooq Khattak v Chairman, Election Tribunal and others* (Civil Appeal No.1307 and 1308 of 2015), an election dispute regarding membership of the KPK Bar Council ultimately reached the Election Tribunal presided over by a learned Judge of the Peshawar High Court which passed an unfavourable order against the appellant who challenged the same through a writ petition before the learned High Court which was dismissed on the ground of maintainability. In this context, while allowing the appeals and setting aside the impugned judgments, a three member bench of this Court held as under:

"...it is clear that when a matter is being adjudged by a forum which has been created by some special law and such forum is presided over by a learned Judge of the High Court, it is not the High Court performing its judicial function under the Constitution or under the general law of the land, such as jurisdiction of appeal, revision, review or supervisory jurisdiction of any nature or a specific jurisdiction which is conferred upon the High Court as per Article 175(2) of the Constitution, rather the jurisdiction vests in the special forum and the only prominent feature is that such forum is being presided over by the learned Judge of the High Court. In the later situation the learned Judge is not performing its function as the High Court but as the *persona designata*..."

From the above it is clear that the judgments reported as Asif Saeed Vs. Registrar, Lahore High Court and others (PLD 1999 Lah 350) and Muhammad Iqbal and others Vs. Lahore High Court through Registrar and others (2010 SCMR 632) are absolutely distinguishable on their own facts because in that case the administrative orders/acts of the Lahore High Court were questioned in the writ and while considering the definition of the "person" provided in Article 199 of the Constitution it was held that the High Court does not fall within the purview thereof. Whereas in the instant case as per Rule 3(c)(i) of the Pakistan Legal Practitioners and Bar Councils Rules, 1976 which reads as under...the High Court has not been conferred with any jurisdiction in terms of Article 175(2) of the Constitution rather a special forum (Election Tribunal) for a specific and limited purpose has been created to be presided over by a learned Judge of the High Court to be nominated by the Chief Justice; thus for all intents and purposes such learned Judge was to act as *persona designata* and not as the High Court. This therefore brings the case within the exception highlighted in the case law cited above..."

[Emphasis supplied]

26. According to the aforementioned judgments, there is no cavil to the proposition that a Judge of a High Court who acts as a *persona designata* would be subject to writ jurisdiction under Article 199 of the

Constitution. However the said cases are distinguishable. In this context, the following extract from the judgment of the Lahore High Court in *Asif Saeed's case supra* is noteworthy:

"21. Now attending to the arguments pertaining to "persona designata", it may be stated that if due to distribution of work, a Judge has been assigned duty to act as a High Court, for the purpose of section 27(C), it cannot be said that such person is "persona designata". The expression "persona designata" has not been defined in our statute books. However, according to its meaning given in "Law Lexicon with Legal Maxims" (Second Edition) page xxiv and in the Hand book of Legal Terms and Phrases, page 531, respectively it means:-

"A person pointed out or described as an individual as opposed to a person ascertained as a member of a class or as filing a particular character."

"The expression 'persona designata' means a person described in the status or legal instrument by his official designation, and the function may be judicial or otherwise. If the function is a judicial function, then he is a Court, though he is described not as Court but by official designation. There is no real antithesis between the expression 'persona designata' and 'Court' in other words, even a persona designata may be a Court. Whether he is a Court or not depends upon his power and the functions which he has to discharge."

22. In the instant cases, under section 27(c), no individual Judge has been mentioned by name or designation to act as a person for the grant of necessary approval, rather the mention of the High Court conspicuously dispels any such impression. Thus, the argument that any Judge acting on behalf of the High Court to exercise power under section 27(c), acts as "persona designata" is not impressive or well-founded.

Even from the letter issued by the Registrar of this Court, (containing different reason in each case) which reads as under:

'Sir

I am directed to refer to your Letter No. 1270 Pb.BC/Ent., dated 17-2-1998, on the subject noted above, and to say that the Chief Justice and judges have been pleased to observe:

'SHOULD ADHERE TO THE PRESCRIBED PROCEDURE BY WORKING IN A BUSY CHAMBER TO HAVE THE LICENCE AND ATTAIN EXPEREIENC. 'Enrolment file in original' and other papers are returned herewith, please acknowledge and receipt.

Your obedient servant

DEPUTY REGISTRAR (ADMN.)
for REGISTRAR. "

It is clear that the power exercised under section 27(c) and the order conveyed to the petitioner through this letter, is not some personal act of an individual Judge of the High Court but an act of the Court.

25. In Writ Petition No. 14168 of 1995, the argument that as the Administrative Judge has been defined under relevant rules and the action impugned is of such Judge, therefore, he acts as *persona designata* and amenable to the writ, is also devoid of any force. Reason being that such Administrative Judge does not act in his unofficial or personal capacity, but performs function for and on behest of the Court and acts as a High Court.

26. The arguments of Mr. Hamid-Khan, learned counsel that according to the different provisions of the Legal Practitioners and Bar Councils Act, 1973, the High Court, acts as a consultative forum and not as a Court, therefore, the writ would be competent, is not well-conceived. May it be, any function of the High Court, executive, judicial, or even consultative, the basic point to be noted is, whether the act or the order is of the High Court or otherwise If it is so, irrespective of the nature of jurisdiction, no writ would lie."

We are clear in our minds that Chief Justices or Judges of a High Court exercising their executive, administrative or consultative actions in the context of the instant matters do not act as *persona designata*, rather act for and on the behest of, and as a High Court as defined in Article 192 of the Constitution and are therefore not amenable to the constitutional jurisdiction of a High Court under Article 199 thereof.

27. One of the learned counsel supporting the appeals/petitions referred to Article 199(3) of the Constitution which reads as under:

"(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."

He stated that it specifically excludes the application of Article 199(1) *supra* 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." According to him, this is an exclusion of the executive functions of the Armed Forces from the writ jurisdiction, whereas the judicial functions of the Armed Forces have been specifically excluded under Article 199(5) according to which a 'person' "includes...any Court or tribunal, other than...a Court or tribunal established under a law relating to the Armed Forces of Pakistan." He argued that since there is no equivalent to Article 199(3) *supra* with respect to a High Court or the Supreme Court, therefore the executive functions of such Courts have not been excluded from the ambit of writ jurisdiction as is the case with the Armed Forces. We find no merit in this contention. The very fact that Article 199 *supra* has not created a distinction with respect to the superior Courts meant that *all* the acts or orders undertaken or passed are to be protected and if this were not the case then as mentioned above, the framers would have mentioned so.

28. The principle of judicial comity is another reason why the question mentioned in the opening paragraph of this opinion ought to be answered in the negative. This principle has been referred to in a number of judgments albeit in varying contexts. In *Mian Jamal Shah's* case *supra*, Chief Justice A. R. Cornelius discussed the issue of comity of judges which is reproduced below for ease of reference:

"The learned Judges of the Full Bench next proceeded to consider the contention raised before them that as the Election Commission was constituted of persons having the status of Superior Judges, and as in particular the Member whose order was placed before the Full Bench for judicial review was himself a Judge of the High Court, no writ could be issued to him...The learned Judges were in all probability right in considering the Member to be persona designata, and not the High Court or a Judge of the High Court, when acting under section 53, but one may be pardoned for referring here to a small observation in one of the judgments cited by the Full Bench with reference to the idea of a Superior Court issuing a writ to itself, viz.:-

"the process involves the rather ludicrous position that Judges are called upon themselves to show cause to themselves"

why their orders should not be quashed. In the present case, the order in question is made by a Single Judge of the High Court acting as the relevant authority, but it is conceivable that a statute may appoint a Tribunal of say two or three High Court Judges to adjudicate matters arising thereunder, and then indeed the aspect of 'ludicrousness' might arise if a writ were sought from a Single Judge of the High Court to avoid actions by such Tribunals. In a number of statutes in the United Kingdom express provisions are included which avoid the writ jurisdiction in relation to such adjudications, and it is a matter for consideration whether such provisions should not be made use of in Pakistan as well. Quite apart from the aspect of 'ludicrousness' there are other and more weighty considerations involved, such as the necessity of maintaining a high degree of comity among the Judges of the Superior Courts, which could be urged in support of such a provision."

[Emphasis supplied]

In the judgment reported as *Mujibur Rahman Shami and another v A Judge of the High Court, Lahore* (PLD 1973 Lahore 778), a seven member bench of the Lahore High Court made reference to the aforementioned opinion of Justice Cornelius and observed as under:

"In Mian Jamal Shah v. The Member, Election Commission and others (PLD 1966 SC 1), while examining the question as to whether a High Court could issue writs to its own self or against decisions of its own Judges, the Supreme Court quoted with approval an observation which appeared in one of the judgments quoted by the High Court itself in Khan Nasrullah Khan v. The Member, Election Commission, Pakistan and 2 others (P L D 1966 Lah. 850), that, the process involves the rather ludicrous position that Judges are called upon themselves to show "cause to themselves". They further held that, quite apart from the aspect of 'ludicrousness', there are other and more weighty considerations involved, such as the necessity of maintaining a high degree of comity among the Judges of the Superior Courts, which could be urged in support of such a provision..."

[Emphasis supplied]

In *Abrar Hassan's* case *supra*, Chief Justice Muhammad Yaqub Ali held as under:

"Another reason why writs should not issue from one High Court to another High Court and from one Judge to another Judge of the same High Court is that such a course will destroy the traditional high degree of comity among the Judges of superior Courts which is essential for the smooth and harmonious working of the superior Courts. Observation to this effect will be found in the judgment delivered by the Court in Mian Jamal Shah v. The Member, Election Commission and others. This is one of the cases on which Mr. Mumtaz Hassan relied in the course of his address. The respect and amity which the Judges should extend to each other will certainly be diminished if they were to issue writs to each other."

[Emphasis supplied]

Concurring with the Chief Justice on the point of maintainability, Justice Anwarul Haq observed as follows:

"On behalf of the appellant it was submitted that the need for preserving comity among the Judges of the superior Courts could at best be described as a principle of law, which could not be permitted to derogate from the true meaning of the relevant constitutional provision. The reply to this argument appears to me to be two-fold:-

- (a) That the principle in question is being invoked only as an aid to interpretation, by explaining the purpose underlying the exclusion of the High Courts and the Supreme Court from the definition of 'person' as given in Paragraph (5) of Article 199 of the Constitution, and not in derogation of the true meaning of the said provision; and
- (b) That if effect is to be given to the other principle prohibiting a challenge to the position of a de facto Judge in collateral proceedings then considerations underlying that principle ought to be weighed and considered side by side with the imperatives of maintaining comity among the Judges of the superior Courts, a requirement essentially in the public interest and not for the benefit of the Judges themselves..."

[Emphasis supplied]

Justice Salahuddin Ahmad and Justice Muhammad Gul dismissed the appeal on merit but held the writ to be maintainable against the Chief Justice of the High Court. The latter was of the following opinion:

"I am also of the view and I say so with the greatest respect, that it would not be right to lay down that to preserve the

high degree of comity in the Superior Judiciary, the plain meaning of Article 199(1)(ii) of the Constitution should be curtailed or abridged. Maintenance of comity among the Superior Judiciary is at the highest, a rule of propriety and not a rule of law and therefore cannot erode a constitutional provision more so when It is germane to the jurisdiction of the High Courts..."

[Emphasis supplied]

In the judgment reported as *Federation of Pakistan v Muhammad Akram Shaikh* (PLD 1989 SC 689), the Appellant had moved a petition expressed to be under Order XXXIII Rule 6 of the Supreme Court Rules, 1980 and all other enabling provisions in this behalf, praying that "three Honourable Judges who had been affected by the judgment, dated 10-3-1989 of this Hon'ble Court and by the judgment under review, one way or the other; may not participate in the adjudication of the matter." The 12 member bench of this Court rejected the application objecting to the constitution of the Bench. Justice Abdul Kadir Shaikh, in his separate note, made the following observations:

"Now it may be noticed that the Supreme Court, as a body under the Constitution, consists of a Chief Justice and the Judges of that Court, and each Judge is vested with the judicial powers equal to any other Judge, even for that matter, the Chief Justice. There is, therefore, equal distribution of judicial power among the Judges. According to the Rules of the Court, the cases before the Court are heard and decided by a Bench consisting of not less than three Judges, to be nominated by the Chief Justice, except for certain categories of cases which may be heard and decided by a Bench of two Judges nominated by the Chief Justice. The question that has agitated my mind is whether nine out of twelve Judges of this Bench constituted by My Lord the Chief Justice should deal with the prayer that nine Judges of the Bench should direct the remaining three Judges of the Bench not to participate in the hearing of the Review Petition. I may refer to a well-settled position in law that a writ under the Constitutional jurisdiction cannot be issued by a High Court to itself, or a Judge of that Court on the principle of necessity of maintaining a high degree of comity among the Judges of the Superior Courts. This Court highlighted this principle in the case of Mian Jamal Shah v. Election Commission (PLD 1966 SC 1)."

[Emphasis supplied]

In the case of *Muhammad Iqbal and others v Lahore High Court through Registrar and others* (2010 SCMR 632) the petitioners challenged their non-selection against the post of Additional District and Sessions

Judge through writ petitions before the Lahore High Court which were dismissed as being barred under Article 199(5) *supra*. While citing with approval the judgment delivered by the Lahore High Court in the case of *Asif Saeed v Registrar, Lahore High Court and others* (PLD 1999 Lah 350), a two member bench of this Court observed as follows:

“8. If a Chief Justice of a High Court transfers a subordinate officer, so to say, in his administrative capacity and if the same is set aside by another Bench of the same High Court, one can well imagine the devastating consequences. This can be visualized about any order of the High Court and the resultant consequences thereof. It runs diametrically opposed to the principles of comity and can lead to the complete destruction of judicial as well as administrative fabric of the institution.”

In the seminal judgment reported as *Chief Justice of Pakistan Iftikhar Muhammad Chaudhry v President of Pakistan through Secretary and others* (PLD 2010 SC 61), a thirteen member bench of this Court made the following observations albeit vis-à-vis the jurisdiction of the Supreme Court under Article 184(3) of the Constitution and the bar contained in Article 211 thereof:

“101. As has been mentioned above, the principle of maintaining comity among the Judges of the Superior Courts was also canvassed to screen the proceedings before the S.J.C. from scrutiny by this Court. A passing reference to this principle was made by this Court in MIAN JAMAL SHAH'S CASE (PLD 1966 SC 1 at 38). But then it was subsequently clarified that the said principle could never be stretched to deprive people of what was due to them. What emerges from the provisions of clause (5) of Article 199 of the Constitution as also from some precedent cases is that writs should not issue from one High Court to another High Court or from one Bench of a High Court to another Bench of the same High Court because that could seriously undermine and prejudice the smooth and harmonious working of the Superior Courts. But this should never be understood to mean that no writ could ever issue to a Judge in his personal capacity or where a Judge was working as a PERSONA DESIGNATA...

102. Having thus looked into the question of jurisdiction of this Court vis-a-vis the Supreme Judicial Council, I would conclude as under...

(e) that the principle of comity among Judges of the Superior Courts is only a rule of propriety and could never be considered an impediment in the way of providing justice to an aggrieved person.”

[Emphasis supplied]

In *Asif Naz v Government of Punjab and others* (PLD 2017 Lah 271), the petitioner had challenged an order passed on behalf of the Registrar, Lahore High Court, Lahore and notification containing the names of the Civil Judges-cum-Magistrates appointed at the Lahore High Court, Lahore through a writ petition which was dismissed *in limine* by the learned Single Judge of the Lahore High Court on the following grounds:

"It is also added that propriety demands that a decision of the Hon'ble Chief Justice or the Administrative Committee be challenged in a higher forum that is before the august Supreme Court of Pakistan because invoking Article 199 of the Constitution of Islamic Republic of Pakistan, 1973 against Senior Coordinate Judges of this Court will affect the comity and concordance amongst the Judges and upset their administrative working. Hence the august Supreme Court of Pakistan in the case cited at *Abrar Hassan v. Government of Pakistan and another* (PLD 1976 SC 315) has held that all actions and orders taken by the High Court or has been that order by any Judge thereof in exercise of functions and powers of his office are not amenable to writ jurisdiction."

[Emphasis supplied]

An Implementation Bench comprising of three members of this Court passed the following order in the case of *Water and Sanitation Agency, Lahore through M.D. v Lottee Akhtar Beverages (Pvt.) Ltd. Lahore and others* (2019 SCMR 1146):

"2. The LDA notification dated 18.01.2019 levies a water tariff in the purported compliance of the directions contained in our order dated 06.12.2018. The private respondents are aggrieved by the tariff charged under the LDA notification. However, instead of bringing their objections before the Implementation Bench, the respondents chose to file Writ Petitions before the learned Lahore High Court to express their misgivings. By the impugned order dated 28.02.2019 the learned High Court suspended the LDA notification. We consider that any flaws or deficiencies in the steps taken by the Provincial Governments for the enforcement of this Court's directions are to be highlighted in the proceedings of SMC No.26 of 2018 before the Implementation Bench of this Court. By entertaining and adjudicating such a challenge to the LDA notification, the learned High Court has surprisingly and to our disappointment assumed jurisdiction over a lis that is sub judice before this Court. Such course of action clearly offends the settled norms of judicial propriety and comity, which is disapproved.

[Emphasis supplied]

29. It was contended by the learned Advocate General of Sindh that while comity of judges is a well-settled principle, it cannot be placed at a higher pedestal than the constitutional provisions itself. In this regard he referred to the cases of *Abrar Hassan* and *Chief Justice of Pakistan Iftikhar Muhammad Chaudhry supra* reproduced hereinabove. At this juncture it would be pertinent to discuss the case of *Asif Saeed supra* in which the Petitioners had applied for a licence to practice as an Advocate in the Lahore High Court, under the provisions of Section 27(c) of the Legal Practitioners and Bar Councils Act, 1973 which was declined by the Punjab Bar Council for the reason that the Lahore High Court in terms of the aforementioned provisions had not granted the requisite approval which was a condition precedent. Alongside, one of the petitioners who was a junior clerk in the High Court Establishment challenged the order compulsorily retiring him from service. The petitioners challenged the orders/actions of the High Court as being administrative in nature and hence amenable to writ jurisdiction. A three member bench of the Lahore High Court, with Mian Saqib Nisar, J (as he was then) as the author, highlighted the importance of the principle of comity in our judicial system:

"14. The contention from the petitioners' side that the administrative function of the High Court can be subjected to writ, can lead to ludicrous situations which can be well illustrated..."

It is clear that the Supreme Court of Pakistan has also been excluded from the definition of the word "person" clubbed, together with the High Court. Undoubtedly, it is inconceivable that the order of the Supreme Court on its judicial side can be challenged before the High Court in writ, irrespective of sub-Article (5). Now if the interpretation of the petitioners that administrative order of the High Court can in writ be challenged is accepted, the same rule would also apply to the Supreme Court, situation may arise where a full Court of the apex forum takes a non-judicial decision than on the basis of above reasoning a Single Judge of this Court may issue writ to quash the same which would be just preposterous. This also applies to the administrative decision taken by the Full Court of a High Court, particularly, when the same Judge/Judges are party to such a decision. There can be numerous examples cited to show fallacy of such an interpretation. If the same rule is allowed to prevail, rules made by the Supreme Court, under Article 191 and by the High Courts, under Articles 203, and 208 are not safe from

attack and may become subject of every day's litigation leading to a hazardous situation."

[Emphasis supplied]

This principle, albeit informal and discretionary, is essentially the respect and deference that one Court (or a Judge thereof) shows to another. Although commonly adopted as an international law concept, it is also employed, to a great extent, amongst State Courts in the United States of America. Its purpose is to stimulate a national interest in the finality of judicial decisions through a concerted effort by the judiciary of maintaining their hierarchy. This instills faith in the public regarding the judiciary and in turn bolsters the rule of law, which is essential for the functioning of any democratic society. The importance of this principle cannot be understated. Moreover we find it pertinent to point out that this principle is, in the words of Justice Anwarul Haq in *Abrar Hassan's* case *supra*, "being invoked only as an aid to interpretation, by explaining the purpose underlying the exclusion of the High Courts and the Supreme Court from the definition of 'person' as given in Paragraph (5) of Article 199 of the Constitution, and not in derogation of the true meaning of the said provision."

30. An argument was made that since the Federal Shariat Court is not excluded from the definition of 'person' given in Article 199(5) *supra*, therefore the administrative acts or orders of the Judges of the Federal Shariat Court are amenable to the writ jurisdiction of the High Court under Article 199 of the Constitution. In this regard it is pertinent to note two judgments. In the case of *Amjad Ali v Federal Shariat Court through Registrar* (PLD 2016 SC 767), a three member bench of this Court held as follows:

"The impugned judgment passed by the Federal Shariat Court had been passed in two service appeals filed by the present appellant and the said judgment has been assailed by the appellant before this Court by invoking Article 203-F(2B) of the Constitution of the Islamic Republic of Pakistan, 1973. We have gone through the provisions of Article 203-F of the Constitution as a whole and have found that in the said Article different remedies have been provided which include an appeal before this Court against a judgment or order passed by the Federal Shariat Court in its jurisdiction pertaining to Islamization of laws, an appeal before this Court in respect of a judgment, final order or sentence passed by the Federal Shariat Court in the matter of

convictions, acquittals and sentences in cases of Hudood laws and it has been provided in Article 203-F(2B) that where an appeal does not lie to this Court as provided in the other clauses of Article 203-F there an appeal may lie to this Court after obtaining leave to appeal. According to our understanding of Article 203-F of the Constitution no appeal lies before this Court against a judgment or order passed by the Federal Shariat Court in service matters of its employees and likewise the matter of leave to appeal contemplated by the provisions of Article 203-F(2B) of the Constitution is also not relevant to the judgments or orders of the Federal Shariat Court passed in the service matters of its employees. The appellant appearing in person has drawn our attention towards Article 212 of the Constitution and we have noticed that the said Article provides for establishment of administrative courts or tribunals but clauses (a), (b) and (c) of Article 212(1) of the Constitution deal with specific subjects or areas regarding which an administrative court or tribunal may be established. We do not find an administrative court or tribunal established for administrative matters of the employees of the Federal Shariat Court to be falling within any of the said clauses of Article 212(1) of the Constitution and, thus, from a judgment or order passed in a service appeal by the Federal Shariat Court no appeal or petition for leave to appeal lies before this Court even by invoking clause (3) of Article 212 of the Constitution. Be that as it may clause (3) of Article 212 of the Constitution may even otherwise not be attracted because the case of the appellant essentially raises issues which are purely factual and personal to the appellant and the same do not involve any substantial question of law of public importance.”

[Emphasis supplied]

In the case of *M. R. Najmi v The Registrar, Federal Shariat Court, Islamabad* (PLD 1992 Lah 302), against abolition of his post in the Federal Shariat Court, the Petitioner addressed an appeal to its Registrar under Rule 11(2) of the Federal Shariat Court (Terms and Conditions of Service of Staff) Rules, 1982. Since the Registrar did not place the appeal of the petitioner either before Hon'ble Chief Justice of the Court or a three member bench of the Court for hearing, despite reminders, the Petitioner filed a writ petition before the Lahore High Court seeking a direction compelling the Registrar to place the appeal as required by law. The Lahore High Court held as follows:

“Upon principle, authority and propriety, I feel reluctant to issue a writ of a commanding nature to the Federal Shariat Court or in respect of its working. Provisions regarding Federal Shariat Court; its constitution; jurisdiction, binding nature of its judgments in the field allotted to it, under the

Constitution and appeals from its judgments to Shariat Appellate Bench of the Supreme Court; its revisory jurisdiction from the cases decided by the Criminal Courts dealing with any law relating to enforcement of Hudood are provided in Chapter 3-A of the Constitution of Islamic Republic of Pakistan. Article 203-G provided for a bar of jurisdiction including the Supreme Court and the High Court. Article 203-GG observed that decision of the Federal Shariat Court in exercise of its jurisdiction under Chapter 3-A shall be binding on the High Court, and, on all Courts subordinate to the High Court. Article 203-A provided a non-obstante clause in the Constitution regarding Chapter 3-A. Writ jurisdiction conferred on the High Court is subject to the Constitution and availability of other adequate remedy for regulating the exercise of writ jurisdiction by the High Court. In sub-Article (5) of the Article 199 of the Constitution, definition of "person" excluded Supreme Court, High Court or a Court or Tribunal established under a law relating to Armed Forces of Pakistan. There, is neither doubt nor dispute that the High Court cannot issue a writ unto itself, nor to the Supreme Court. It is not only clear from the language in Article 199 of the Constitution, but is supported by the high authority of Supreme Court in case of Mian Jamal Shah reported as PLD 1900 Supreme Court 1, and number of other judgments, which in view of an absolute clarity, on the point is unnecessary to make a reference to. As said above, Chapter 3-A of the Constitution was a later amendment to it. There was no corresponding amendment in sub-Article (5) of Article 191 of the Constitution for excluding Federal Shariat Court from the purview of the Constitutional jurisdiction of the High Court. However, upon harmonious construction of the various parts of the Constitution; status of Federal Shariat Court in it and amenability of its decisions to appeal before the Shariat Appellate Bench of Supreme Court only, leads to an inevitable corollary that a writ of mandamus ought not to issue from the High Court to it in regard to the sphere earmarked for it by the Constitution of Pakistan. Service rules regarding the staff of the Court were framed under Article 208 of the Constitution. Rule 11 provided for imposition of the penalties on any officer or servant on the staff attached to the Federal Shariat Court. In case, penalty was imposed by Honourable, the Chief Justice of the Court, sub-rule (2) provided that appeal shall lie to a Bench of not less than three Judges of the Federal Shariat Court. Appeal was addressed to the Registrar of Federal Shariat Court. Registrar is not an appellate authority. Appellate Authority was a Bench of Federal Shariat Court. Presumably, constitution of the appellate Bench lay in the decision of Honourable, the Chief Justice of Federal Shariat Court. Direction sought from this Court in reality was either a direction to Honourable, the Chief Justice of the Federal Shariat Court or the Appellate Bench of the Federal Shariat Court to hear the service-appeal. Petitioner intended to achieve the goal indirectly which directly he could not reach. In view of comity between the Judges of the superior Courts set up under the Constitution, I do not think that this Court should make a direction of the kind sought from it. Though,

this Court is not expected to educate the petitioner who had the privilege of being attached to a superior Court in one form or another, on his remedies, yet it could not be helped observing that a simpler way is to address the appeal, subject to its availability, under the Rules, to the Federal Shariat Court, which in due course may reach its proper place. I entertain no doubt that the Registrar, who is the principal staff Officer of the Federal Shariat Court shall not be an impediment to the hearing of the appeal of the petitioner by the appellate Bench. Having regard to the aforesaid, writ is denied and petition for it is dismissed in limine."

31. In order to avoid running the risk of repetition, we fully endorse the foregoing view of the learned Lahore High Court. Furthermore, it is a fact that the definition of 'person' in Article 199(5) *supra* curiously fails to mention the Federal Shariat Court. An understanding of the historical background of the provisions pertaining to Article 199(5) *supra* and the Federal Shariat Court is necessary in order to understand this omission. When the Constitution was enacted and brought into force in 1973, Article 199(5) thereof, as it reads today, was a part of it. However, the Federal Shariat Court did not exist in the Constitution as originally passed and that explains why such Court did not find mention in Article 199(5) *supra*. Chapter 3A originally titled 'Shariat Bench of Superior Courts' was inserted into Part VII of the Constitution (The Judicature) on 07.02.1979 through Constitution (Amendment) Order, 1979 (President's Order No. 3 of 1979). However, a separate Federal Shariat Court was not created, rather it provided for a Shariat Bench to be created at the High Court level that was empowered to examine and decide the question as to whether or not any law or provision of law was repugnant to the injunctions of Islam as laid down in the Holy Qur'an and the Sunnah of the Holy Prophet. Thus the Shariat Bench, being a bench of a High Court, would still be covered by Article 199(5) *supra*. The original Chapter 3A was substituted a little over a year later on 26.05.1980 through Constitution (Amendment) Order, 1980 (President's Order No. 1 of 1980) with the version that exists today. Interestingly, Constitution (Amendment) Order, 1980 also added sub-Articles (3A), (3B) and (3C) to Article 199 of the Constitution, which were subsequently omitted in 1985. However, there was no corresponding amendment in Article 199(5) of the Constitution. Bearing in mind the scheme of the Constitution particularly Chapter 3A, Part VII of the Constitution as provided by the learned Lahore High Court in *M. R.*

Najmi's case *supra*, the hierarchy of Courts in Pakistan, the fact that the Federal Shariat Court along with the Supreme Court and High Courts forms part of the superior judiciary, and the principle of judicial comity as highlighted above is fully applicable thereto, we consider the failure to add 'the Federal Shariat Court' in Article 199(5) *supra* to be of no real significance considering the meaning, scope and purpose of the said Article discussed above and also to avoid an absurd situation where the Supreme Court and High Courts are excluded from the definition of 'person' under Article 199(5) *supra* and therefore immune to the writ jurisdiction of the High Court, but not the Federal Shariat Court which is also a superior Court for all intents and purposes. It is pertinent to note that interpretations of this nature to avoid absurdities and harmonizing various provisions of the Constitution by the superior judiciary which is *not* tantamount to lawmaking has been recognized in the judgment reported as *Lt.-Col. Nawabzada Muhammad Amir Khan v The Controller of Estate Duty, Government of Pakistan, Karachi and another* (PLD 1962 SC 335) in which Justice Fazle-Akbar observed that:

"It was first contended that this Court in interpreting section 57 of the Estate Duty Act, 1950 as amended by Estate Duty (Amendment) Act, 1953 exceeded the proper limit of interpretation and assumed for themselves power of legislation. The Estate Duty Act was amended in 1953. Due to slip of the draftsman consequential amendments were not made in section 57 of the Act. This Court after referring to Maxwell's Interpretation of Statutes and other decided cases held that it had jurisdiction to modify section 57 so as to rectify the draftsman's mistake. If, further, authority is needed for this proposition it will be found In the case of *Ram Kissendas Dhanuka and others v. Satya Charan Lal* (PLD 1949 PC 339). In the above case, it was held that "the omission to make such cross-references as may be required to reconcile two textually inconsistent provisions is a common defect of draftsmanship. In such cases, the cross references have to be implied In order to remove the inconsistency". I am, therefore, of opinion that there is no substance in this contention."

[Emphasis supplied]

The foregoing case made reference to *Ram Kissendas Dhanuka and others v Satya Charan Law and others* (PLD 1949 PC 339), the relevant extract whereof reads as under:

"The first of these to be considered is article 126 itself. Two points in it fall to be noticed : (a) the power is expressed to

be subject to section 83 A (1) of the Indian Companies Act which provides that 'every company shall have at least three directors'; and (b) the power extends to altering the qualification and making a change in the order of rotation of the increased or reduced number. Now if, as the High Court has held, article 126 only allows an ordinary resolution to operate between the limits of four and three prescribed by article 109, the following consequences would result: (a) The reference to section 83 A (1) would, as the articles stand, be unnecessary. The reason of this is that if according to the argument, the minimum of three laid down by article 109 can only be altered by a special resolution it could not in any event be altered by an ordinary resolution which is the kind of resolution with which article 126 is dealing. (b) The power to alter qualification and change the order of rotation, if, as article 126 provides, it is to be exercised by ordinary resolution, must involve a departure from the provisions of articles 112, 121 and 122. Those articles are not expressed to be "subject to article 126" nor are these powers in article 126 expressed to be given "notwithstanding anything in articles 112, 121 and 122". Some such words must therefore be implied in one place or the other in order to remove the inconsistency. The omission to make such cross-references as may be required to reconcile two textually inconsistent provisions is a common defect of draftsmanship. There is thus no insuperable difficulty in reconciling article 109 with article 126 either by implying in the former some such opening words as "subject to article 106" or implying in the latter some such opening words as "notwithstanding anything contained in article 109".

[Emphasis supplied]

We therefore hold that there is absolutely no basis or reasonable justification for the Federal Shariat Court to be treated differently when it undoubtedly forms part of the superior judiciary.

32. In light of the foregoing discussion, the matters detailed in paragraphs 2 to 11 above are decided as under:

- (a) All the appeals and civil petitions are dismissed, except for Civil Petition No.1439/2018 which is converted into an appeal and allowed and the impugned judgment is set aside (and the short order of even date is amended accordingly);
- (b) Constitution Petitions No.4 and 12/2016 are dismissed as they involve personal grievances and no question of public importance with reference to the enforcement of any fundamental rights is made out;

- (c) Constitution Petition No.143/2012 is dismissed as the prayers sought for are decisions to be taken by the relevant authorities, in which we do not wish to interfere at this stage;
- (d) As the case of *Ch. Muhammad Akram supra* has been overruled, therefore Criminal Original Petition No.125/2019 is dismissed as having been rendered infructuous; and
- (e) Since all the main appeals and petitions have been finally decided, therefore the civil miscellaneous applications are dismissed as having been rendered infructuous.

33. The foregoing are the detailed reasons for our short order of even dated which reads as follows:

"We have heard the learned counsel for the parties in all these appeals and petitions and have also gone through the record of the case. For the reasons to be recorded later, the appeals as well as the petitions are dismissed."

CHIEF JUSTICE

JUDGE

JUDGE

JUDGE

JUDGE

Islamabad, the
16th of March, 2020
Not Approved For Reporting
ZR/*