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Preface

"Unless we protect democracy, democracy cannot protect us."[1] One of the foundations of democracy is a legislature elected freely and periodically by the people. This dissent recognizes the central role of *legislature* and the principle of *separation of powers* in a constitutional democracy. Justice McLachlin[2] has rightly said that in democracies, "the elected legislators, the executive and the courts all have their role to play. Each must play that role in a spirit of profound respect for the other. We are not adversaries. We are all in the justice business, together." Separation of powers is the backbone of a constitutional system.[3] The legislature, the executive and the judiciary have no authority beyond that granted to them under the Constitution. None of them is omnipotent.

2. Separation of powers means reciprocal checks and balances between the different branches. It does not mean walls between the branches but rather bridges which balance and check.[4] Montesquieu put freedom at the core of separation of powers.[5] The concept of separation of powers is not to maximize efficiency but rather to maximize freedom.[6] The principle of separation of powers has double meaning: *First*, it means distinguishing among different branches of government, giving each branch a central and primary function. *Second*, it means that different branches have reciprocal relationship in which each checks and balances over the other branches. Thus, for example, the legislature can change the rules of the game by amending the existing law or by enacting new law, but it must do so within the framework of the Constitution. On the other hand, the judiciary is authorized to interpret the Constitution and law but it is not authorized to create, amend or rewrite the Constitution or to enact a new law.[7] Judiciary, like the other branches of the government, is also not invincible but is to function under the supreme law of the land i.e., the Constitution.

3. The primary and central function of the legislative branch is to create laws and the courts must give weight to the purpose of the law remembering that legislation promotes social policy and is a tool for

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[1] Aharon Barak. The Purposive Interpretation in Law. Princeton University Press. P.236
[2] Chief Justice of Canada (2000-2017)
[3] See Cooper v. Canada, [1996] 3 S.C.R 854, 867.
[4] Aharon Barak, The Judge in a Democracy.
[5] C. Montesquieu, The Spirit of Laws.
[6] Myers v. United States, 272 US 52, 293 (1926)
[7] Responding to Imperfection: The Theory and Practice of Constitutional Amendments (Stanford Levison ed., 1995); Aharon Barak, The Judge in Democracy.

achieving a societal goal. This subjective purpose of the statute becomes a key factor in interpreting the statute. Therefore, in the first instance, the role of the courts is to safeguard and actualize these laws in the public interest. Judges should therefore give statutes a meaning that bridges the gap between the law and the social reality. Next is the objective purpose of the statute, where it honours and protects the constitutional values, and the fundamental rights of the people. It is only when the subjective or the objective purpose of the legislature outsteps the constitutional boundary that the courts interfere and set the course right by enforcing the constitutional limits. Even in that case when the courts rule that a statute is unconstitutional and invalidates it, it does not undermine the legislature or violate the separation of powers because it is the principle of separation of powers that informs us that legislative authority does not include the authority to pass unconstitutional laws. Hence, the principle of separation of powers is the very source of judicial review.

Reasons for Dissent

4. As I have differed with the view of all my learned colleagues on this Bench, I owe an obligation to explain why I remained unable to subscribe to their opinion.

5. First and foremost, I hold the principles of separation of powers and legislative supremacy, subject to the overarching constitutional limitations, to be the bedrock of a constitutional democracy. The courts must remember that the legislation is the manifestation of the will of the people and the collective wisdom of their chosen representatives in the Parliament. Courts must therefore tread carefully to judicially review the act of the legislature. First, efforts should be made by the Court to save the constitutionality of the legislation by exhausting the interpretative tools e.g. of “reading down” or “reading out” to make the legislation constitution compliant. Only when the legislation happens to be opposed to the constitutional values and the fundamental rights and allowing such a statute to remain on the statute book would be unconstitutional, should the courts interfere. Such freedom and respect is enjoyed by the branches of the government under a prosperous and a progressive constitutional democracy. Instead of adopting this route the majority struck down the legislation and granted similar relief to the sacked employees, already granted by the

legislation, in the first place. I found myself in minority in subscribing to this constitutional construct.

6. Secondly, I could not sidestep the decision of a 7-Member Bench of this Court in *Shabbar Raza*[8] which was overlooked by the majority. Needless to mention that the declaration of law made in *Shabbar Raza* by a larger Bench of 7-Members is binding on the present 5-Member Bench. *Shabbar Raza* categorically and authoritatively holds that the original jurisdiction of this Court under Article 184(3) of the Constitution "cannot be exercised as a parallel review jurisdiction", and a judgment or an order of this Court "can never be challenged by virtue of filing independent proceedings under Article 184(3) of the Constitution". Such course has been held to be "absolutely impermissible". In utmost humility, I am at loss to comprehend how the majority after dismissing all the review petitions, and other miscellaneous applications, could go ahead and convert the proceedings of the same review petitions into proceedings under Article 184(3) of the Constitution. After dismissal of the review petitions, there remain no proceedings that can be converted into some other proceedings. I also regret my inability to understand how a judgment of this Court can be modified in exercise of the jurisdiction under Article 184(3), after the dismissal of the review petitions which also prayed for similar modification.

7. Thirdly, the initial appointments of the review petitioners were not challenged either before us or before the Bench that originally heard these cases. In this background, the assumption of jurisdiction regarding appointments by the majority on its own without specifying the jurisdiction under which it has such power to do so, in my humble view, was a jurisdictional overstepping to which I could not be a party. Further, the expression of adverse remarks against a political party in making appointments of the petitioners through executive actions and in making their reinstatement through legislative actions, without impleading that political party in the present proceedings and without providing the political party an opportunity of hearing, appears to me to be negation of the elementary principle of natural justice. Without impleading the political party, in my view, the Court could only discuss the appointment of the petitioners as an executive action of the Government and their reinstatement as a legislative action of the Parliament, and not of a particular political party.

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[8] 2018 SCMR 514

Enactment of the Sacked Employees (Re-instatement) Act 2010 and its salient features

8. The Parliament of Pakistan enacted the Sacked Employees (Re-instatement) Act 2010 **("Re-instatement Act")**, on 8 December 2010, "for the purpose of providing relief to persons who were appointed in a corporation service or autonomous or semi-autonomous bodies or in Government service during the period from the 1st day of November, 1993 to the 30th day of November, 1996 (both days inclusive) and were dismissed, removed or terminated from service during the period from the 1st day of November, 1996 to the 12th day of October, 1999 (both days inclusive)."[9] Earlier to the enactment of the Re-instatement Act, the President of Pakistan, on the advice of the Federal Cabinet, had promulgated four Sacked Employees (Re-instatement) Ordinances for the same purpose: Ordinance No. II of 2009 promulgated on 14 February 2009, Ordinance No. XI of 2009 promulgated on 11 June 2009, Ordinance No. XIII of 2009 promulgated on 30 October 2009[10] and Ordinance No. XII of 2010 promulgated on 5 February 2010.

9. Under the Re-instatement Act, the persons of the specified class were to be reinstated and regularized in service, mostly in the same scale, grade, cadre, group, post or designation from which they were dismissed, removed or terminated.[11] Only two categories of the persons, namely, (i) the persons who had earlier been appointed on permanent or temporary basis, or regular or *ad hoc* basis,[12] and (ii) the persons the structure of whose posts had been changed meanwhile,[13] were to be reinstated and regularized in service on one scale higher than the scale, grade, cadre, group, post or designation from which they were dismissed, removed or terminated. The persons who had been dismissed, removed or terminated from service on any charges or allegations were also classified into two categories: (i) the persons who were proved not guilty of those charges or allegations in enquiry conducted on directions of any administrative authority or of any court or tribunal,[14] and (ii) the persons the determination of whose guilt was either unchallenged or unsuccessfully challenged. For reinstatement and regularization of

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[9] Preamble to the Act.
[10] Retrospective effect was given to this Ordinance with effect from the 9th day of October 2009. See Section 1(3) of the Ordinance.
[11] Section 4(b) for contract employees, Section 4(c) for employees found not guilty in enquiry, Section 4(d) for trainee employees and Section 4(e) for employees given forced golden hand shake.
[12] Section 4(a).
[13] Section 11.
[14] Section 4(c).

persons belonging to category (ii), a Review Board was established.[15] The Review Board was to make, on the review petitions of such employees,[16] a fresh enquiry into facts and pass an order of reinstatement and regularization if it was satisfied that they were not guilty of the charges or allegations.[17] As to the date of regularization and seniority of the reinstated employees, the Re-instatement Act provided that an employee reinstated under the Act in a post, scale, grade, cadre, group or designation would be regularized as a permanent employee in that post, scale, grade, cadre, group or designation with effect from the day of enactment of the Act and would be placed at the bottom of the seniority list effective as on the date of enactment of the Act.[18]

Disputes under the Re-instatement Act in the cases decided by the judgment under review

10. In the course of implementation of the Re-instatement Act, the disputes started arising between the persons claiming their reinstatement and regularization under the Re-instatement Act and persons working as regular employees at the time of enactment of the Re-instatement Act, in Government departments, corporations or bodies. The disputes between the former were regarding the entitlement of such persons to the relief provided under the Re-instatement Act, while the disputes between the latter were regarding the issue of seniority arising from the reinstatement and regularization of such persons on one scale higher than the scale, grade, cadre, group, post or designation from which they had been dismissed, removed or terminated. These two types of disputes also arose in the cases decided by the judgment under review, and were stated in para 2 of the judgment:

> 2. There are a number of groups of cases, in which appellants/petitioners have impugned the appointments/ promotions under the Sacked Employees (Reinstatement) Ordinance Act, 2010...Those groups can be divided into two categories, i.e. (i) those employees who were the regular employees of the organizations/departments, whose seniority has been affected by the employees inducted under the Act of 2010; and (ii) those persons who have not been extended the benefit of the Act of 2010.

It was in the backdrop of these disputes that this Court took up and decided the question of constitutional vires of the Re-instatement Act. The Court, by the judgment under review, held that the Re-instatement Act is *ultra vires* the Constitution with the following findings:

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[15] Section 12.
[16] Section 11.
[17] Section 13.
[18] Section 4(f).

> 52...The Act has extended undue advantage to a certain class of citizens thereby violating the fundamental rights under Article 4, 9, and 25 of the employees in the Service of Pakistan and being [sic – is] void under Article 8 of the Constitution.
>
> 53. The Legislature also lacked the legislative competence to enact The Act of 2010 as it has wrongfully attempted to circumvent the jurisprudence of this Court and Article 240 and Article 242 of the Constitution for which reason we are inclined to hold the Act to be ultra vires of the Constitution.

Contentions of the petitioners

11. To persuade the Court to recall its judgment under review, the learned Attorney-General for Pakistan and other learned counsel for the petitioners made the following main contentions: (i) that the question of vires of the Re-instatement Act had neither been raised before, nor decided by, the forums below, therefore, the Court should not have taken up and decided the said question, for the first time in the appeals/petitions filed against the judgments of the forums below; (ii) that the substantial question as to the interpretation of constitutional law that concerns the Federal Government was involved in the cases decided by the judgment under review, therefore, the Court could not have proceeded to determine the question without giving notice to the Attorney-General for Pakistan, as mandated by Rule 1 of Order XXVII-A of the Code of Civil Procedure 1908 ("CPC"); (iii) that the persons likely to be affected by the decision of the Court on the question of constitutionality of the Reinstatement Act were neither issued notice nor heard before passing the judgment under review, thus, the Court breached their right of hearing guaranteed by the principles of natural justice; (iv) that the Court wrongly held that the "sacked employees", as per the definition given in Section 2(f), fell into the definition of either a "civil servant" or a person in the "service of Pakistan", for major portion of the reinstated employees were employees of the corporations and other autonomous or semi-autonomous bodies, thus, they did not fall under either of the said two categories: (v) that the Court misconstrued and misapplied Articles 240 and 242 of the Constitution for judging the constitutionality of the Reinstatement Act; (vi) that the Court overlooked the important aspect of the case that the employees reinstated under the Reinstatement Act belonged to a distinct class of employees who suffered "political victimization", in the matter of their dismissal, removal or termination during the relevant period, and the Parliament (Legislature) had enacted the Reinstatement Act for the benefit of this distinct class of employees, therefore, the said Act did not offend Article 25 of the

Constitution; and (vii) that the Court instead of declaring the whole Reinstatement Act to be ultra vires the Constitution may have declared only those provisions of the Reinstatement Act which infringed the fundamental rights to 'status' of the regular employees, guaranteed under Article 9 of the Constitution, by applying the rules of severance and reading down.

12. No one appeared before us to oppose the review petitions, and defend the judgment under review that has declared the Reinstatement Act to be ultra vires the Constitution. The Court, however, cannot decide the questions of law either way by consent of parties or on concession made at the Bar, or on the ground that there is no contesting respondent before it. We, therefore, must proceed to determine the questions arising out of the contentions of the petitioners on their merits irrespective of no-contest.

Constitution of larger bench for hearing review petitions

13. It would be pertinent to mention here that it was because of the importance of the contentions/questions (ii), (iii), (iv), (v) and (viii) raised by the learned Attorney-General, noted in order dated 11.11.2021, that the three member Bench hearing these review petitions referred the matter to the Hon'ble Chief Justice of Pakistan for constitution of a larger Bench, and this larger Bench of five members was thus constituted.

Short Order

14. After hearing and considering the contentions of the petitioners, I allowed the review petitions vide my short order dated 17 December 2021, in the following terms:

> i. The judgment under review is recalled;
>
> ii. The following Sections and part of Sections of the Sacked Employees Reinstatement Act 2010 are declared ultra vires the Constitution:
>
> > a) Sections 4(a) and 10 to the extent of reinstatement and regularization on "one scale higher", which give an undue advantage to the reinstated employees to the detriment of the rights of the already working regular employees and thus violate their fundamental rights. The provisions of the said Sections, except the words "one scale higher", shall however remain operative with effect from the date of enactment of the Act, and be read to mean the reinstatement and regularization in the same or restructured, as the case may be, scale, grade, cadre, group, post or designation.
> >
> > b) Sections 2(f)(vi), 11, 12 and 13, which deal with and provide for reinstatement and regularization of such sacked employees who had been dismissed, removed or terminated from service on account of absence from duty, misconduct, mis-appropriation of

> Government money or stock, or unfitness on medical grounds, and the determination of their guilt or medical unfitness attained finality by being unchallenged or unsuccessfully challenged. Such employees fall outside the class of sacked employees who suffered "political victimization," envisaged by the Act for a beneficial treatment, and they by themselves do not constitute a distinct class having an intelligible differentia, which bears a reasonable relation to the object and purpose of the Act.
>
> iii. All the employees terminated from service on the basis of the judgment under review, stand restored in the service with effect from the date they were so terminated, and shall be paid the pay of the intervening period treating the said period as an extraordinary leave with pay; and
>
> iv. The cases decided by the judgment under review, which now stands recalled, shall be deemed pending and decided on their own merits by the regular Bench(es) of this Court in accordance with the provisions of the Sacked Employees Reinstatement Act 2010, subject to the declaration made at No. ii above.

In this discourse, I proceed to deal with the contentions of the petitioners and record my reasons for the above short order.

Discussion and decision on the contentions of the petitioners

(i) Question of vires of the Re-instatement Act, not raised in the forums below

15. So for as the contention that the Court should not have taken up and decided the question of constitutional vires of the Re-instatement Act as the said question had neither been raised before nor decided by the forums below, is concerned, it is true that in petitions filed for leave to appeal under Article 185(3) of the Constitution, this Court generally does not permit to raise those questions of law that have not been urged before the forum below.[19] In the present case, the leave granting Benches of this Court permitted to raise the question of constitutional vires of the Re-instatement Act and granted the leaves to appeal to consider the same, despite that the question had neither been raised before nor decided by the forums below, i.e., High Courts and Service Tribunal, and that too without explaining the circumstances that justified departure from the general practice of the Court. However, none of the respondents in those petitions filed any review petition to recall that leave granting order(s), nor was any such objection raised before the Bench that heard the appeals and decided the question. It is now too late in the day to make such contention before this Bench hearing review petitions against the judgment that decided the question, and not hearing the review petitions against the orders that granted the leaves to

[19] Zak Re-Rolling Mills v. Appellate Tribunal 2020 SCMR 131.

appeal to consider the question. The contention is, therefore, now untenable.

(ii) Omission to give notice to Attorney-General for Pakistan, under Rule 1 of Order XXVII-A of the CPC

16. Much was argued on the point that the substantial question as to the interpretation of constitutional law that concerns the Federal Government was involved in the cases decided by the judgment under review, therefore, the Court could not have determined the question without giving notice to the Attorney-General for Pakistan, as mandated by Rule 1 of Order XXVII-A of the CPC. The reliance, in this regard, was placed on *Federation v. Aftab Sherpao,*[20] the judgment of a twelve-member Bench of this Court.

17. Careful reading of the cited case shows that the learned Judges in this case were equally divided by six to six, on the point of requirement of issuing a formal notice to the Attorney-General under Rule 1 of Order XXVII-A of the CPC and effect of its non-issuance in the circumstances of the case. The ancient rule of the common law - *semper praesumitur pro negante*, means that presumption always exists in favor of one who denies or that the presumption is always in favour of the negative. So when the Judges of an appellate Court are equally divided in their opinion, the judgment of the Court below is affirmed and maintained,[21] and the decision given *pro negante* is authoritative and binding as any other decision of the appellate Court.[22] However, the said rule is not applicable to the final decision of a case by this Court in view of the second proviso to Rule 1 of Order XI of the Supreme Court Rules 1980, which provides that "if the Judges hearing a petition or an appeal are equally divided in opinion, the petition or appeal, as the case may be, shall, in the discretion of the Chief Justice, be placed for hearing and disposal either before another Judge or before a larger Bench to be nominated by the Chief Justice." Hence, the application of the rule of *pro negante* decision is restricted to the division of opinion on a point of law decided in the judgment of this Court, notwithstanding of which there is a majority of opinion on the final decision of the case. Exactly, this happened in the *Aftab Sherpao case*. Although the learned Judges were equally divided 6 to 6 in their opinion on the point of notice under Rule 1

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[20] *PLD 1992 SC 723.*

[21] *Adalat v. Crown PLD 1956 FC 171; R v. Millis (1844)* UKHL *10* Cl & *F 534*; Magistrates of Dundee v. Presbytery of Dundee, (1861) UKHL 4 Macqueen 228 per Lord Cranworth; Smith v. Lion Brewery Company (1910) UKHL 5 TC 568.

[22] *Inland Revenue v. Scottish General Electric Power Co. (1931) UKHL 15 TC 761 per Lord Atkin.*

of Order XXVII-A of the CPC, but there was a clear majority of 8 to 4 in the final decision of the appeals, *viz*, in allowing the appeals. Thus, the rule of *pro negante* decision was applicable to the point of notice under Rule 1 of Order XXVII-A of the CPC, and it was the decision of the High Court on this point that became the *pro negante* decision of this Court, having the authority and binding effect of a decision of a twelve-member Bench of this Court.

18. We, therefore, need to ascertain what was decided by the High Court on this point, which because of equal division of opinion in appeal became the *pro negante* decision of this Court. The decision of the High Court on this point has been reproduced in the leading judgment authored by Justice Shafiur Rahman in the *Aftab Sherpao case*. The relevant portions of the decision of the High Court on the point are reproduced here also for ready reference:

> As the Federation of Pakistan is a party to these proceedings, no separate notice under the law is required to be issued to the Attorney-General and if he so chooses, he may represent the Federation in this case.
>
> The Federation is already a party in this petition and there was no hindrance in the way of the Attorney-General of Pakistan to appear and argue the case on behalf of the applicant during the hearing of this matter.
>
> Furthermore, Order XXVIIA, Rule 1, C.P.C. would normally deal with a situation where suit is filed before the Court wherein the Federation or the Province is not a party but a substantial question of Constitutional interpretation is involved concerning the Federal Government or the Provincial Government as the case may be. In such a situation it is quite obvious that either the Advocate-General of the Province or the Attorney-General of Pakistan shall assist the Court concerned. Here before us both the Province and the Federation are arraigned as parties. Due notice has been received by them. The Provincial Government has engaged a private counsel alongwith the Advocate-General of the Province to whom notice was issued by the Court on 22-8-1990. Similarly the Federal Government has decided to engage a counsel who represented it before us. If the Attorney-General had decided to represent the Federation we would, have been too happy to hear him as well. But we do not find it incumbent on us in the circumstances of the case to needlessly issue him a notice while he is busy in arguing similar cases before other High Courts and we were requested to wait for the conclusion of those cases in order to hear him.

In terms of the above observations of the High Court, the *pro negante* decision of a twelve-member Bench of this Court on the point was that Rule 1 of Order XXVII-A of the CPC deals with a situation where the Federation of Pakistan or the Province concerned is not a party to the proceedings but a substantial question as to the interpretation of constitutional law is involved in those proceedings, concerning the Federal Government or the Provincial Government, as the case may be. However, in cases where the Federation of Pakistan or the Province

concerned is already a party to the proceedings, no separate notice under the said Rule is required to be given to the Attorney-General for Pakistan or the Advocate-General of the Province, as the case may be.

19. In some of the cases decided by the judgment under review, the Federation of Pakistan was a party and represented before the Court by Mr. Sajid Ilyas Bhatti, Additional Attorney-General, and Mr. Sohail Mehmood, Deputy Attorney-General; therefore, no separate notice under Rule 1 of Order XXVII-A of the CPC was required to be given to the Attorney-General for Pakistan. The contention that the Court could not have determined the question of constitutional vires of the Re-instatement Act without giving notice to the Attorney-General for Pakistan under Rule 1 of Order XXVII-A of the CPC, thus does not hold water and is accordingly rejected. However, it may be brought on record that the Court did issue the notice to the Attorney-General for Pakistan in the main case, i.e., *Muhamad Afzal v. Secretary Establishment* (CA. 491/2012) wherein leave to appeal was granted to consider the question of vires of Section 4 of the Reinstatement Act.

(iii) Non-issuing notice to and non-hearing of the persons likely to be affected by the decision of the Court

20. So far as the next contention that the persons likely to be affected by the decision of the Court on the question of constitutionality of the Reinstatement Act were neither issued notice nor heard before passing the judgment under review, thus, the Court breached their right of hearing guaranteed by the principles of natural justice, is concerned, it does not detain us long in view of the principle of law enunciated by a fourteen-member Bench of this Court, in the case of *Justice Bhinder v. Federation*[23].

21. In *Bhinder,* the Court had held in the judgment sought to be reviewed,[24] the Proclamation of Emergency, the Provisional Constitution Order and the Oath of Office (Judges) Order of 2007 to be ultra vires the Constitution and also passed some consequential orders, including the order as to unconstitutionality of the appointments of certain Judges. Some of such Judges, in their applications seeking permission to file review against that judgment, contended that they had not been issued notice nor had they been heard before making the adverse order as to

[23] PLD 2010 SC 483.
[24] SHCBA v. Federation PLD 2009 SC 789.

their appointments, therefore, the judgment to that extent was not sustainable. The Court repelled that contention observing that a *judgment in rem* binds parties and non-parties alike as opposed to a *judgment in personam* which only affects the parties to a *lis*, and that a *judgment in rem* apply to all regardless of whether they were parties or not and a *judgment in personam* does not bind non-parties. The Court went on to hold that the judgment sought to be reviewed was a *judgment in rem* enunciating a legal principle; it, therefore, had the status of conclusiveness and finality, and no person could be allowed to challenge it merely for the reason that he was not a party in the case and had not been heard.

22. The same principle applies to the judgment that is under review in the present case. The judgment under review was also *a judgment in rem*[25] as it decided the status of the Re-instatement Act, that is, its constitutional vires; it, therefore, binds the parties and the non-parties alike. A *judgment in rem* settles the fate of the *res* by determining its status and thus operates directly on the *res* itself; it binds all persons claiming a right or interest in or under the *res*, even though pronounced in their absence. It is true that the actions (cases) brought before this Court were not originally *in rem* rather were *in personam* agitating the individual grievances, but the Court by granting leave to appeal to consider the status, i.e., the constitutional vires, of the Re-instatement Act, converted them into *actions in rem* and thus the consequent judgment under review was also delivered *in rem*. Needless to mention that in *actions in rem* it is neither practicable nor is it the requirement of law that the Court should issue a separate notice and offer an opportunity of hearing to each and every person who is likely to be affected, and bound, by the judgment. The objection that some or most of the persons affected by the judgment under review were neither issued notices nor heard before passing the judgment is, therefore, not sustainable because of the nature of the judgment under review[26] and cannot be accepted as a ground for recalling that judgment.

23. But, I must add, for complying with the constitutional command of fair trial and due process to a possible extent in such cases, the Court may order, as it is usually done by the civil courts dealing with

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[25] See Federation v. Qamar Hussain PLD 2004 SC 77, wherein almost all previous cases of this Court on the subject of 'judgment in rem' has been cited and discussed.
[26] Surinder Kumar v. Gian Chand 1958 SCR 548.

actions in rem, for service of the public notice of the case through its publication in the press or any other mode deemed appropriate, for the knowledge of the persons likely to be affected by the judgment, who may then appear before the Court and seek permission to intervene and argue in the proceedings.[27] In fact, in the present case though no such public notice was served, some persons who thought them likely to be affected by the judgment on the question of vires of the Re-instatement Act did intervene and were allowed the opportunity of hearing; as they by themselves became aware of the pendency of the matter since it remained pending in the Court for a considerable period of about seven years from 2012 to 2019 for hearing.

(iv) All employees dealt with by the Re-instatement Act, not either "civil servants" or persons in the "service of Pakistan"

24. Next contention of the petitioners is that the Court wrongly held in para 44 of the judgment under review that the "sacked employees", as per the definition given in Section 2(f) of the Re-instatement Act, fell into the definition of either "civil servants" or persons in the "service of Pakistan", for major portion of the reinstated employees being employees of the corporations and other autonomous or semi-autonomous bodies did not fall under either of the said two categories. I find the contention correct, as not all the employees of the corporations and other autonomous or semi-autonomous bodies established by or under a Federal law, or owned or controlled by the Federal Government, falls within the definition of persons in the "service of Pakistan".[28] However, nothing turns on this point as to the legality of the judgment under review.

(v) Misconstruction and misapplication of Articles 240 and 242 of the Constitution

25. The petitioners have contended that the Court misconstrued and misapplied Articles 240 and 242 of the Constitution for judging the constitutionality of the Reinstatement Act. To appreciate this contention, we need to see what these Articles of the Constitution provide for in relation to the service of Pakistan concerning the Federation, as the Re-instatement Act partly relates thereto, and what the Court has held in the judgment under review as regards thereto.

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[27] SHCBA v. Federation (2007-Proclamation of emergency case) PLD 2009 SC 879 para 145 wherein a similar order was passed, and this fact was noted in Justice Bhinder v. Federation PLD 2010 SC 483 para 51.

[28] Mubeen-Us-Salam v. Federation PLD 2006 SC 602.

26. In relation to the service of Pakistan concerning the Federation, Article 240 of the Constitution provides that subject to the Constitution, the appointments to and the conditions of service of persons in the service of Pakistan shall be determined, "in the case of the services of the Federation, posts in connection with the affairs of the Federation and All-Pakistan Services, by or under Act of *Majlis-e-Shoora* (Parliament)"; while Article 242 provides that "*Majlis-e-Shoora* (Parliament) in relation to the affairs of the Federation...may, by law, provide for the establishment and constitution of a Public Service Commission" and the "Public Service Commission shall perform such functions as may be prescribed by law".

27. The Court has observed in the judgment under review that the Constitutional framework under Article 240 clearly envisions that any appointments in the service of Pakistan for the Federation shall be made under the Act of Parliament, and that in pursuance to Article 240 of the Constitution, the Parliament has enacted the Civil Servants Act 1973. The Court has further observed that Article 240 of the Constitution is supplemented by Article 242, which envisions the creation of a Public Service Commission that is intended to be the supervisory body to oversee the process of recruitments. The Court, with the said observation, has held that the legislature, by enacting the Re-instatement Act, circumvented the constitutional process envisioned under Articles 240 and 242 of the Constitution, for which reason also the Re-instatement Act is ultra vires the Constitution.[29]

28. No doubt, the appointments to and the conditions of service of persons in the service of Pakistan concerning the Federation, as per the constitutional mandate of Article 240, are to be determined by or under Act of Parliament. The Parliament (Legislature) is, thus, the only repository of the constitutional power in relation to the appointments to and the conditions of such service; the Executive has no direct and independent power in this regard and exercises such power delegated to it by or under an Act of the Parliament (Legislature).[30] However, the Parliament is not required, or bound, under Article 240, to enact only one Act for this purpose. The enactment of the Civil Servants Act 1973, therefore, does not make the Parliament *functus officio*, or divest it of its

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[29] Judgment under review, paras 20, 40 and 52.

[30] See Muhammad Saleem v. FPSC 2020 SCMR 221, wherein history of constitutional arrangements that were in place pre and post creation of Pakistan that led to enactment of Article 240 in the Constitution, has been stated.

legislative power, to enact another Act on the subject of appointment to and conditions of such service or a part of such service, and to give that Act an overriding effect against the provisions of the Civil Servants Act 1973.

29. As for selection and recruitment of persons for appointment in the service of Pakistan concerning the Federation to be made through the Federal Public Service Commission ("FPSC"), Article 242 of the Constitution by itself neither establishes the FPSC nor prescribes the functions thereof, rather leaves these matters to be done by the Parliament by enacting law. The law enacted by the Parliament on these matters, is the Federal Public Service Commission Ordinance 1977. The FPSC has been established under Section 3 of the Ordinance, and its main functions, as prescribed under Section 7 of the Ordinance, are: (a) to conduct tests and examinations for recruitment of persons to All-Pakistan Services, the civil services of the Federation and civil posts in connection with the affairs of the Federation in basic pay scales 16 and above or equivalent; and (b) to advise the President of Pakistan on matters relating to qualifications for and methods of recruitment to, the said services and posts. The status of the FPSC established under the law, not under the Constitution, is thus of a statutory body not constitutional one, and its functions are also statutory not constitutional.[31]

30. In view of the above constitutional position, the vires of one law, i.e., the Re-instatement Act, enacted by the Parliament (Legislature) cannot be examined on the touchstone of another law, i.e., the FPSC Ordinance 1977, made by the same Legislature, especially when the law enacted later in time has been given an overriding effect against all other laws on the subject, nor can the same be examined, and declared ultra vires, on the touchstone of Articles 240 and 242 of the Constitution as both these Articles only command for dealing with the matters specified therein by an Act of the Parliament, and provide for nothing more.[32] Article 240 does not provide any criterion for judging the constitutionality of an Act of the Parliament, except that the Act of

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[31] See Nazir Kasana v. Pakistan 1990 PLC (C.S.) 573, wherein object, status and roll of Public Service Commission from the Government of India Act 1935 to Constitution of Pakistan 1973 have been traced, illustrated and commented upon.

[32] See Fauji Foundation v. Shamimur Rehman PLD 1983 SC 457; LDA v. Imrana Tiwana 2015 SCMR 1739, wherein it has been held of Article 4 of the Constitution, which provides for a right to be dealt with in accordance with law, that this Article does not provide any criterion to test the vires of a law.

Parliament must relate to the appointments to and the conditions of service of persons in the service of Pakistan concerning the Federation, not concerning any Province other than All-Pakistan Service which is a service common to the Federation and the Provinces. Likewise, the constitutional limitation on the power of the Parliament to enact a law under Article 242 is that it can enact a law for the establishment of a Public Service Commission and prescribing its functions, in relation to the affairs of the Federation, not of any Province. I find that the said aspect of the provisions of Articles 240 and 242 of the Constitution was not presented by the parties before the Court, and the same thus escaped notice of the Court in applying the said Articles of the Constitution to judge the constitutional vires of the Reinstatement Act, in the judgment under review. The contention of the petitioners in this regard, therefore, sustains.

(vi) Employees reinstated under the Reinstatement Act, whether belong to a distinct class and their reinstatement does not offend Article 25 of the Constitution

31. Next comes one of the main contentions of the petitioners, that the Court overlooked the important aspect of the case that the employees reinstated under the Reinstatement Act belonged to a distinct class of employees who suffered “political victimization”, in the matter of their dismissal, removal or termination during the relevant period, and that the Parliament (Legislature) had enacted the Reinstatement Act for the benefit of this distinct class of employees, therefore, the said Act did not offend Article 25 of the Constitution.

32. The Preamble to the Re-instatement Act simply states that the Act is enacted “for the purpose of providing relief to persons who were appointed in a corporation service or autonomous or semi-autonomous bodies or in Government service during the period from the 1st day of November, 1993 to the 30th day of November, 1996 (both days inclusive) and were dismissed, removed or terminated from service during the period from the 1st day of November, 1996 to the 12th day of October, 1999 (both days inclusive).” It does not specifically mention that the said persons have suffered “political victimization” in the matter of their dismissal, removal or termination from service. Nor any statement of objects and reasons for enactment of the Re-instatement Act has been presented by any of the petitioners before us; we, therefore, assume that there is no such statement. To show that the said persons had suffered

"political victimization" and the Re-instatement Act was enacted by the Parliament for the purpose of providing relief to them, learned counsel for some of the petitioners have referred to certain parliamentary debates made by the parliamentarians who had presented the Bill for enactment of the Re-instatement Act in two Houses (National Assembly and Senate) of the Parliament and who had supported the same.

33. It hardly needs reiterating that the parliamentary debates, especially the speech made by the mover of the Bill or by the chairman or member(s) of the Standing Committee that considered the Bill, explaining the reason for introducing the Bill can be referred to for ascertaining the mischief sought to be remedied by the legislation and the object and purpose for which the legislation was enacted.[33] Therefore, it would be expedient to quote here some parts from the parliamentary debates relating to the objects and reasons of the enactment of the Re-instatement Act, made by the parliamentarians who were member(s) of the Standing Committee that had considered and approved the Bill as well as by the other parliamentarians who had supported the same:

Debates in the National Assembly of Pakistan (25th Session) dated 7 October 2010[34]

Syed Khurshid Ahmad Shah:

یہ وہ لوگ ہیں جن کی سفارش وہ اپوزیشن کے بھی MNAs رہے ہیں کہ ان لوگوں کو بحال کرو۔ یہ ہماری ایک commitment تھی کہ جن لوگوں کے ساتھ زیادتی ہوئی ہے جو victimize ہوئے ہیں ان کو بحال کریں گے۔... اگر اس ضمن میں اپوزیشن یہ سمجھتی ہے کہ ان بچوں کو نکالنے میں ان کی حکومت کا ہاتھ تھا تو اس وجہ سے ان کو oppose کرنا ہے تو یہ ناانصافی ہے۔... یہ اس ملک کے ان نو ہزار خاندانوں کا مسئلہ ہے جو بیروزگار ہو گئے تھے اس میں صرف سندھ کے لوگ نہیں ہیں۔ اس میں پنجاب کے لوگ نہیں ہیں۔ اس میں پختونخوا کے لوگ نہیں ہیں اس میں بلوچستان کے نہیں ہیں سارے ملک کے لوگ ہیں۔ سارے پیپلز پارٹی کے نہیں ہیں۔... میاں نواز شریف صاحب کے زمانے میں یہ لوگ نکلے اور میں سمجھتا ہوں کہ یہ بڑے دکھ سے کہنا پڑتا ہے۔... آپ اس بات پر بضد ہیں کہ یہ نو ہزار لوگوں کو ہم نے reinstate کیا ہے کیونکہ میاں نواز شریف کی حکومت نے ان کو نکالا تھا۔... وہ نو ہزار لوگ نہیں ہیں وہ نو ہزار نہیں ہیں وہ نوے ہزار خاندان ہیں ایک خاندان کے ساتھ نو خاندان جڑے ہوئے ہیں۔...

English Translation: This was our commitment that we would reinstate the persons who had suffered victimization.....If the Opposition thinks that it was their Government that sacked these persons, therefore, they have to oppose it, then it is unjust.....It is the problem of nine thousand families of persons who had been sacked. They do not belong only to Sindh, Punjab, Pakhtunkhwa or Baluchistan; they belong to

[33] Mubeen-Us-Salam v. Federation PLD 2006 SC 602; Benazir Bhutto v. Federation PLD 1988 SC 416 per Nasim Hassan Shah, J.; Pepper v. Hart (UKHL) 1993 SCMR 1019; K. P. Varghese v. ITO, Ernakulam AIR 1981 SC 1922.

[34] Available on the official website of the National Assembly of Pakistan for public information at https://na.gov.pk/uploads/documents/1458191159_596.pdf

whole Pakistan. They all do not belong to Peoples Party....I say it with great regret that these persons were sacked in the regime of Mian Nawaz Sharif.... You are adamant to oppose it as these nine thousand persons reinstated by us were sacked by the Government of Mian Nawaz Sharif...They are not just nine thousand persons, they are ninety thousand families: Nine families are linked with one family.

Iqba Muhammd Ali Khan:

وہ لوگ تھے جن کو گولڈ میڈلز دیئے گئے تھے جس کو بنکنگ کے اندر سرٹیفکیٹ دیے گئے تھے پرفارمینس کے ان کو بھی صبح لیٹر دے دیا گیا۔ یہ اس وقت ایک زیادتی ہوئی تھی۔

English Translation: Those who had been given gold medals and performance certificates in banking, were given letter [of their termination] one morning; it was a victimization at that time.

Riaz Fatiana:

اس ملک میں کلچر رہا ہے کہ ایک حکومت جب جاتی ہے اور دوسری حکومت آتی ہے تو پہلے بھرتی شدہ تمام لوگوں کو اٹھا کے باہر پھینکا جاتا رہا ہے۔

English Translation: It has been a culture in this country that when one Government comes and other goes, all persons recruited [in one Government] are sacked.

Mian Riaz Hussain Pirzada:

پہلے یہ روایتیں رہی ہیں کہ جن لوگوں کو بھرتی کیا جاتا تھا تو جیسے حکومت چلی جائے ان کو نکال دو۔

English Translation: There have been traditions of sacking the persons employed in a Government, at the end of term of that Government.

Rahmat Ullah Kakar:

تمام coalition partners اس بات پر committed تھے کہ جن لوگوں کے منہ سے نوالا چھینا گیا ہے political victimization پر... اس کی دوری کے لیے نو ماہ تک جو کمیٹی بنائی گئی تھی اس نے شب و روز محنت کر کے اور میرٹ کو دیکھتے ہوئے ان تمام ملازمین کی بحالی کا جو وعدہ کیا تھا وہ اس کو پورا کیا۔

English Translation: All the coalition partners were committed on this that the persons who had been deprived of their livelihood on political victimization [were to be reinstated]... for this purpose a Committee had been constituted, which had fulfilled the promise of reinstatement of such employees by its hard work day and night in nine months on merits.

Debates in the Senate of Pakistan (65th Session) dated 10 November 2010[35]

Senator Mian Raza Rabbani:

اس دور کے اندر جس کے لیے یہ bill لایا گیا اس دور کے تمام orders کو اگر آپ اٹھا کر دیکھ لیں without exception نہ ان میں ان لوگوں کو show cause notice دیا گیا اور نہ ان لوگوں سے کوئی explanation مانگی گئی۔ صبح کے وقت ایک blanket order ان کے handover کر دیا گیا کیونکہ آپ کی appointment

[35] Available on the official website of the Senate of Pakistan for public information at https://senate.gov.pk/uploads/documents/debates/1433745226_928.pdf

پاکستان پیپلز پارٹی کے دور میں ہوئی ہے لہذا اس لئے آپ کو terminate کیا جارہا ہے because you have been appointed on political grounds and this is a matter of record۔

English Translation: During that period for which this bill has been introduced, all orders [of termination] without exception were made without issuing show cause notice to those persons, nor were any explanation called from them. A blanket order was handed over to them on one morning [stating] that because your appointment have been made in the period of Pakistan Peoples party, you are therefore being terminated; because you have been appointed on political grounds, and this is a matter of record.

Senator Colonel ® Syed Tahir Hussain Mash'hidi:

ان کا ایک ہی قصور تھا کہ unfortunately ان کو پاکستان پیپلز پارٹی کے دور میں نوکریاں ملی تھیں۔ یہ میری پارٹی نہیں ہے اس لیے میں بالکل ایمانداری سے بات کر رہا ہوں۔ ان کا ایک قصور تھا کہ ان کو نوکریاں پاکستان پیپلز پارٹی کے دور میں ملیں اور جب دوسری حکومت آئی، پاکستان مسلم لیگ (ن) کی تو انہوں نے بغیر investigate کیے ہوئے کہ کس کی political affiliation ہے یا سفارش ہے، یا سفارش نہیں ہے، کیا ان کو میرٹ پر نوکری ملی ہے؟ کیا انہوں نے bottom سے up کوئی نہ کوئی post لی ہے؟ ان کو صرف اس وجہ سے نکال دیا گیا تھا کہ ان کو اس پیریڈ میں، پاکستان پیپلز پارٹی کے پیریڈ میں employment ملی تھی۔ یہ ایک political victimization آپ کہہ سکتے ہیں۔

English Translation: Their only fault was that they had unfortunately been employed during the period of Pakistan Peoples Party. It is not my party; therefore, I am making statement with all honesty. It was their only fault that they had got jobs during the period of Pakistan Peoples Party. And when the Government of Pakistan Muslim League (N) came in power, they were sacked without investigating whether who had political affiliation, who had got job on reference or not, whether they got the job on merit. They were sacked on because they had got job during the period of Pakistan Peoples Party. You can say, it was a political victimization.

Senator Molana Gul Naseeb Khan:

پاکستان کی تاریخ میں ہم ایک ایسے دور سے بھی گزر چکے ہیں کہ جہاں پر سیاسی جماعتیں انتقامی سیاست کرتی تھیں اور اسی وجہ سے ایک دوسرے کے خلاف اور ایک دوسرے کی حکومتوں کے خلاف اقدامات بھی کرتیں۔... جو ملازمین 1997 میں نکالے گئے ہیں یہ بھی اسی انتقام کے نتیجے میں نکالے گئے ہیں۔... اس سے پہلے ادوار میں اکا دکا واقعات ہوئے ہیں۔ اکا دکا واقعات ہوتے رہے ہیں لیکن مجموعی سطح پر اگر کوئی اقدام اٹھایا گیا ہے تو اس وقت ہمارے سامنے یہی اقدام ایسا ہے جو مجموعی طور پر اٹھایا گیا ہے۔

English Translation: We have lived in such period in the history of Pakistan when political parties used to pursue vindictive politics, and for this reason they used to indulge in activities against each other and also against each other's Government... The employees sacked in the year 1997 were also sacked because of that vindictiveness...Earlier to that period some individual incident [of this kind] had happened, and had been happening; but if any general action had been taken that is only this which is before us.

Senator Syed Nayyer Hussain Bokhari:

اس میں بنیادی بات یہ ہے کہ victimization ہوئی ہے اور probably I think which irritates somebody is the period which is specific کہ اس period میں وہ لوگ جن کو ملازمتوں سے نکالا گیا، جن کو politically victimize کیا گیا۔

English Translation: The basic thing is that there was victimization in this, and I think which irritates somebody is probably the period, which is specific, during which the persons sacked from their employments were politically victimized.

The above extracts from the parliamentary debates that took place on the floor of the two Houses of the Parliament provide a valuable insights into the objects and reasons for which the Bill for enactment of the Re-instatement Act was introduced. A plain reading of the extracts of the debates supports the contention of the petitioners and makes it clear that the reason for choosing the persons appointed in and dismissed from service during the specified period, for the beneficial treatment of reinstatement and regularization in service notwithstanding any other law on the subject, was that they had suffered "political victimization" in the matter of their dismissal, removal or termination from service, at the hands of the Government (Executive) during that period, and the object of the enactment of the Re-instatement Act was that the Parliament (Legislature) intended to provide relief to such persons, statedly nine thousands.

34. I fully recognize that there is a distinction between the fact that a particular statement was made by a parliamentarian, which narrates certain objects and reasons for enactment of an Act of the Parliament, and the truth of any matter of fact stated in that statement. The former is itself a fact relevant for ascertaining the objects and reasons for enactment of an Act of the Parliament and need no further proof other than the authentic record of such statement; while the latter, if disputed, is to be proved aliunde, that is, by evidence apart from the fact that a statement about it was made in the parliamentary debates.[36] In the present case, it is a question of fact whether or not the persons going to be reinstated under the Re-instatement Act had suffered "political victimization", in the matter of their dismissal, removal or termination from service; the correctness of which, if disputed, is to be proved by evidence other than the above quoted statements of the parliamentarians. However, nobody has disputed, before us, the correctness of that factual statement made by the parliamentarians, nor

[36] Lok Shikshana Trust v. Commissioner of Income Tax AIR 1976 SC 10 per M. H. Beg, J.

does that statement of fact appear to be inherently improbable; it is, rather, supported by the circumstance that a large number of employees, not a few, were sacked during the specified period. Therefore, the Court is to proceed on assuming that undisputed statement of fact to be correct.

35. Needless to mention that Article 25(1) of the Constitution which declares, and guarantees as a fundamental right, that all citizens are equal before law and are entitled to equal protection of law, does not prohibit reasonable classification for equal treatment, that is, "equality among equals", which is based on intelligible differentia, distinguishing persons or things that are grouped together from those who are left out, and has a rational nexus to the object sought to be achieved by law.[37] And a classification having a reasonable basis does not offend against fundamental right to equality, merely because it is not made with mathematical nicety or because in practice it results in some inequality. Further, when the classification made by a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed, and the one who assails the classification must carry the burden of showing that it does not rest upon any reasonable basis but is essentially arbitrary. [38]

36. In the present case, after accepting the undisputed statement of fact that the persons going to be reinstated under the Re-instatement Act had suffered "political victimization", in the matter of their dismissal, removal or termination from service, there remains no difficulty to hold that they formed a distinct class, and their classification was based on intelligible differentia, distinguishing them from those who had been left out, and had a rational nexus to the object sought to be achieved by the Re-instatement Act. Therefore, only their reinstatement and regularization under the Re-instatement Act as such did not offend the fundamental right to equal treatment, guaranteed by Article 25(1) of the Constitution, of other employees sacked in other durations as well as of regular employees appointed under the general laws relating to the

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[37] Jibendra Kishore v. East Pakistan PLD 1957 SC 9; Fauji Foundation v. Shamimur Rehman PLD 1983 SC 457; I. A. Sharwani v. Govt. of Pakistan 1991 SCMR 1041; Govt. of Balochistan v. Azizullah Memon PLD 1993 SC 341.

[38] Schwartz, Constitution of the United States, Vol. II, p. 501 and Willis, Constitutional Law of the United States, pp. 579-580 approvingly cited in Fauji Foundation v. Shamimur Rehman PLD 1983 SC 457.

appointments to and terms of conditions of the service concerned.[39] This aspect of the Re-instatement Act, it appears, escaped notice of the Court at the time of passing the judgment under review. The contention of the petitioners in this regard, therefore, sustains.

(vii) Application of the principles of reading out and reading down, to uphold the constitutionality of the Re-instatement Act

37. The next main contention of the petitioners is that instead of declaring the whole Reinstatement Act to be ultra vires the Constitution, the Court may have declared only those provisions of the Reinstatement Act which had infringed the fundamental right to 'status' of the regular employees, guaranteed under Article 9 of the Constitution, by applying the rules of severance (reading out) and reading down.

38. To begin with on this contention of the petitioners, I would cite here the two cardinal principles of construction of statutes: (i) that there is always a presumption in favour of the constitutionality of a legislative enactment (a law); and (ii) that a law enacted by a competent legislature is to be construed in such a manner that its constitutional validity may be saved rather than destroyed.[40] It is because of these principles that the courts lean in favour of upholding the constitutionality of laws and are reluctant to strike them down by declaring them as unconstitutional. The one who challenges the constitutionality of a law bears the burden to show that the law is violative of any of the constitutional provisions, and when two opinions as to the construction of a law are possible, the courts prefer to adopt that which upholds the constitutionality of the law, over that which does not. The courts, therefore, construe a law in such a manner that saves the law than destroys it, and declare it unconstitutional only when it clearly contravenes any constitutional provision and cannot be read as constitution compliant by applying any of the methods, techniques or tools of rule of constitution complaint construction, e.g., reading out or reading down. Declaring the law unconstitutional is thus one of the last resorts taken by the courts.

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[39] See Prabodh Verma v. State of U.P. AIR 1985 SC 167 and Amarendra Kumar v. State of Orissa AIR 2014 SC 1716, wherein the Supreme Court of India has interpreted and applied the concept of 'reasonable classification' under Article 14 of their Constitution which is similar to Article 25 of our Constitution, in the matter of appointment to and regularization in civil service, in upholding the constitutional validity of the challenged laws.

[40] SSGCL v. Federation 2018 SCMR 802 (Almost all previous relevant cases are cited in it).

39. The primary purpose of applying these techniques, methods or tools, like, reading out or reading down, is to endeavor for saving the constitutional validity of the statute, to a possible extent, and the main reason for applying them in preference to declaring the law unconstitutional is that their application makes the process of judicial review of legislative actions less intrusive than invalidating the whole law, as "the court should not strive officiously to kill [a law] to any extent greater than it is compelled to do"[41]. The principle of constitutional compliant construction of laws has been recognized by our Constitution itself in its Article 268(6), and this Court has been applying the methods of "reading out" (severance)[42] and "reading down"[43], with certain conditions, for the purpose of construing the provisions of a law as constitution compliant and to save it, as much as possible, from being declared ultra vires the Constitution. The primary condition for applying these methods for a constitution compliant construction is to see whether the Legislature would have enacted the law in the form that remains or turns out to be after application of any of the said methods. Further, in case of applying the method of reading out (severance) the court is to see whether after reading out (severing) the invalid part, the remaining provisions of law would remain operative within the scope of the object of the law.[44] Therefore, when confronting a constitutional flaw in a statute, court should try to limit the solution to the problem - severing the flawed portion while leaving the remainder intact. Because the unconstitutionality of a part of a statute does not necessarily defeat or affect the validity of its remaining provisions. If after severing the flawed part, the remaining provisions of law would remain fully operative, court must sustain those provisions unless it is evident that the Legislature would not have enacted those provisions independently of that which is invalid.[45]

40. In the light of the above principles of statutory interpretation, I proceed to examine the contention of the petitioners as to declaring the Re-instatement Act invalid partially, instead of as a whole.

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[41] Dunkley v. Evans [1981] 1 W.L.R. 1522 per Ormrod, LJ.
[42] Haroon-Ur-Rashid v. LDA 2016 SCMR 931. See also Baz Muhammad Kakar v. Federation PLD 2012 SC 923, wherein the principle of severance was recognized, but found not applicable to the particular features of the law under challenge.
[43] Haroon-Ur-Rashid case ibid.
[44] Baz Muhammad Kakar v. Federation PLD 2012 SC 923; Province of Sindh v. M.Q.M. PLD 2014 SC 531.
[45] Free Enterprise Fund v. Public Co. Accounting Oversight Board, (2010) 561 U.S. 477.

41. In the judgment under review,[46] the Court formulated the proposition for decision on the question of constitutional vires of the Re-instatement Act, thus:

> Whether the law [i.e., the Re-instatement Act] has placed the regular employees, who remained in service, at a disadvantageous position in terms of seniority and other benefits to reinstated employees. If so, then the [re-instatement] Act of 2010 would be violative of right enshrined under Article 9 and Article 25 of the Constitution, of the regular employees.

And for answering the question in affirmative, the Court reasoned:[47]

> The legislature has, through the operation of The [Re-instatement] Act of 2010, attempted to extend undue benefit to a limited class of employees. This legislation has a direct correlation to the right enshrined under Article 9 of the Constitution for employees currently serving in the departments falling under section 2(d) of The [Re-instatement] Act of 2010. Under Article 9 of the Constitution, a civil servant has been extended the right to 'status' and 'reputation'. The right to 'status' and 'reputation' are not mutually exclusive and are encompassed by the wider umbrella of Article 9 of the Constitution. Upon the 'reinstatement' of the 'sacked employees', the 'status' of the employees currently in service is violated as the reinstated employees are granted seniority over them. This is an absurd proposition to consider as the legislature has, through legal fiction, deemed that employees from a certain time period are reinstated and regularized without due consideration to how the fundamental rights of the people currently serving would be affected.
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> (Underlined for emphasis)

A careful reading of the above quoted observations of the Court shows that the Court declared the Re-instatement Act to be violative of the right to 'status' enshrined in fundamental 'right to life', guaranteed under Article 9 of the Constitution, of the regular employees serving in the relevant departments at the time of promulgation of the Re-instatement Act, for the only reason that "Upon the 'reinstatement'...the reinstated employees are granted seniority over them." While the Court did not specify the relevant provisions of the Re-instatement Act, in the judgment under review, which grants the seniority to the reinstated employees over the then working regular employees, those provisions are that of Sections 4(a) and 10 which provide for reinstatement of certain categories of sacked employees and their regularization on "one scale higher" than the scale, grade, cadre, group, post or designation from which they were dismissed, removed or terminated. Both these Sections are reproduced here for ready reference:

> **Section 4(a)**: a sacked employee appointed on permanent or temporary basis or regular or ad hoc basis or otherwise in any corporation or Government service against a regular or temporary post shall be reinstated and regularized in regular service of the employer on **one**

[46] Para 31.
[47] Para 34.

> **scale higher to** his substantive scale, grade, cadre, group, post or designation, whatever the case may be, held by the sacked employee at the time of his dismissal, removal or termination from service or at the time forced golden hand shake was given to the sacked employee;
>
> **Section 10:** In cases where any change in structure of any scale, grade, cadre, group, post or designation, whatever the case may be, has been made by the competent authority or employer after the 1st day of November, 1996, the sacked employee on re-instatement shall be placed in service of the employer on **one scale higher than** the scale, grade, cadre, group or designation, whatever the case may be, from which he was dismissed, removed or terminated from service or given forced golden hand shake.

It is very pertinent to mention here that only the above two categories of the sacked employees were to be reinstatement and regularized on "one scale higher", while all the rest of the categories of the sacked employees, i.e., contract employees [Section 4(b)], employees found not guilty in enquiry [Section 4(c)], trainee employees [Section 4(d)] and employees given forced golden hand shake [Section 4(e)], were to be reinstated and regularized against a regular post of the same scale, grade, cadre, group, post or designation, whatever the case may be, from which they had been dismissed, removed or terminated from service or given forced golden hand shake. And as per Section 4(f), all the employees Re-instated under the Re-instatement Act were to be regularized from the day of enactment of the Re-instatement Act (not from the date of their initial appointment) and were to be placed at the bottom of the seniority list effective on the date of enactment of the Re-instatement Act. Section 4(f) is also reproduced here for ease of reference:

> **Section 4(f):** a sacked employee re-instated under this Act shall be regularized in the service of the employer in post, scale, grade, cadre, group or designation, whatever the case may be, on which he is re-instated under the Act, as a permanent and a regular employee, **with effect from the day of enactment of this Act**, at par with other regular employees of the employer concerned and **shall be placed at bottom of the seniority list**, effective as on the date of enactment of this Act, for scale, grade, cadre, post, group or designation, whatever the case may be, in which the sacked employee is re-instated in accordance with the provisions of this Act;

It is thus evident that the issue of seniority that affected the right to 'status' enshrined in fundamental 'right to life' of the regular employees serving in the relevant departments, had arisen only in cases of employees reinstated and regularized on "one scale higher", under Sections 4(a) and 10. Their reinstatement and regularization on "one scale higher" had made them senior to those regular employees who were senior to them even as per their date of initial appointments and were serving in the same grade and post in which they had been appointed prior to the initial appointment of the reinstated employees, because of

the slow channel of promotion.[48] Therefore, to the extent of reinstatement and regularization of some sacked employees, under Sections 4(a) and 10, on "one scale higher", I fully agree with, and reaffirm, the observation made in the judgment under review that such reinstatement and regularization was violative of the right to 'status' enshrined in fundamental 'right to life' of the regular employees serving in the relevant departments at the time of promulgation of the Re-instatement Act, and add that it was also violative of the fundamental 'right to dignity' guaranteed under Article 14 and fundamental 'right to equality before law' guaranteed by Article 25 of the Constitution as it gave an undue advantage to the reinstated employees to the disadvantage of the rights of the already working regular employees.

42. The proper course, however, in my humble view was that the Court should have declared only that part of the provisions of Sections 4(a) and 10 of the Re-instatement Act that had the said offending effect, i.e., the reinstatement and regularization on "one scale higher". And this could have easily been done by reading out (severing) the words "one scale higher to" from the provisions of Section 4(f) and the words "one scale higher than" from the provisions of Section 10 of the Re-instatement Act, and reading down those provisions to mean that the sacked employees mentioned in those Sections were to be reinstated and regularized in the same or restructured, as the case may be, scale, grade, cadre, group, post or designation from which they had been dismissed, removed or terminated from service, for the purpose of saving the constitutional validity of those provisions and construing them as constitution compliant. Because from the reasons and objects of the enactment of the Re-instatement Act, it is more than clear: (i) that the Legislature would have enacted the law, i.e., Sections 4(a) and 10, in the form that remains or turns out to be after application of methods of reading out and reading down, (ii) that it cannot be said that the Legislature would not have enacted those provisions independently of the part that is invalid, and (iii) that after reading out (severing) the invalid part, the remaining provisions of the law, i.e., Sections 4(a) and 10, remains operative within the scope of the object of the law, i.e., providing relief to persons who had suffered "political victimization".

[48] This issue was agitated in the main case (C.A 491/2012) of employees of I.B. department, decided by the judgment under review.

43. The next reason that prevailed with the Court, in the judgment under review,[49] for declaring the Re-instatement Act ultra vires the Constitution was that the sacked employees had not opted for remedy available to them under the law upon their termination from service within the limitation-period provided therefor, thus, they had forgone their right to be reinstated by availing the due process of law. I am afraid, this reason was not plausible. It escaped the notice of the Court that the sacked employees were seeking their reinstatement, under a new law, i.e. the Re-instatement Act, enacted by a competent Legislature, and not under the laws that were in force at the time of their termination form service. Therefore, the question of forgoing the right to be reinstated by not availing the remedy under the laws in force at the time of orders of their termination from service and of expiry of limitation-period under those laws, was not relevant.

44. It could also not be appreciated in the judgment under review that the administrative orders of termination from service passed without any charge of misconduct, inefficiency or unfitness and the judicial orders passed on such a charge, under the relevant law, have different bearing on the legislative power of the Legislature: the former can be undone by the Legislature by any means, but the effect of the latter can only be neutralized by changing the relevant law, with retrospective effect, on the basis of which they have been passed[50]. Thus, only those provisions of the Re-instatement Act that have the effect of nullifying, or give the power to the Executive to nullify, the judicial orders passed on charge of misconduct, inefficiency or unfitness that had attained finality by being unchallenged or unsuccessfully challenged, and that too without changing the law under which those orders had been passed, would have the effect of interference into the functioning and independence of the judicial organ of the State, and thus be violative of the provisions of Articles 175 and 212 of the Constitution. A careful reading of the Re-instatement Act identifies that Sections 2(f)(vi), 11, 12 and 13, which deal with and provide for reinstatement and regularization of such sacked employees who had been dismissed, removed or terminated from service on account of absence from duty, misconduct, mis-appropriation of Government money or stock, or unfitness on medical grounds, and the determination of their guilt or medical

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[49] Para 37.

[50] Tofezzel Hossain v. East Pakistan PLD 1963 SC 251; State v. Zia ur Rahman PLD 1973 SC 49; Mamukanjan Cotton Factory v. Punjab Province PLD 1975 SC 50.

unfitness had attained finality by being unchallenged or unsuccessfully challenged, have such effect. Such employees, even, do not fall within the class of the sacked employees who had suffered "political victimization," envisaged by the Act for a beneficial treatment. The said Sections of the Re-instatement Act are, therefore, ultra vires the Constitution.

45. The Court, in the judgment under review, has inadvertently relied upon Article 4 of the Constitution also to declare the Re-instatement Act to be ultra vires the Constitution, as the attention of the Court was not invited to its previous judgments in the cases of *Fauji Foundation v. Shamimur Rehman*[51] and *LDA v. Imrana Tiwana*[52], wherein it has been held of Article 4 of the Constitution, which provides for a right to be dealt with in accordance with law, that this Article does not provide any criterion, and thus cannot be a touchstone, to test the vires of a law.

46. The Court, in the judgment under review,[53] has declared the Re-instatement Act to be ultra vires the Constitution mainly on the touchstone of Articles 4, 9 and 25 of the Constitution, as discussed above, and quoted[54] those Articles of the Constitution and discussed[55] the rights guaranteed thereunder, but neither cited nor discussed the specific provisions of the Re-instatement Act which had, in view of the Court, violated those rights. The attention of the Court was not invited, nor did it adhere, to the principle, as based upon in *LDA v. Imrana Tiwana*,[56] that a Court examining the constitutional vires of a law is to put down the provisions of the law under examination next to the fundamental rights guaranteed by the Constitution and state why the two cannot be reconciled, before striking them down. I find that the attention of the Court was not invited to the methods of "reading out" and "reading down" for construing the *ex facie* invalid provisions of the Re-instatement Act as constitution complaint, and the same thus escaped notice of the Court. I am sure that had this aspect been considered by the Court, the decision would have been otherwise.

47. The contention of the petitioner as to upholding the constitutionality of the Re-instatement Act by applying the methods of

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[51] PLD 1983 SC 457.
[52] 2015 SCMR 1739.
[53] Para 52.
[54] Para 29.
[55] Paras 34-37.
[56] 2015 SCMR 1739.

constitution complaint construction, i.e., reading out (severance) and reading down, to the *ex facie* unconstitutional provisions of that Act is therefore accepted as a valid ground for making review of the judgment under review. For misconstruction of law,[57] and non-consideration of an important aspect of the matter which if had been considered the decision would have been otherwise, [58] amount to errors apparent on the face of the record and are thus well-established grounds for making review of a judgment or order.

48. These are my reasons for the above-cited short order.

Providing equal opportunity to all citizens and ensuring transparency in the process for appointment to the public employment

49. However, before parting with the judgment, I think it appropriate to underline that I have taken the above view on the premise that there was no violation of Articles 25 and 27 of the Constitution, in the process of initial appointments of the sacked employees, as no one has alleged before us, and produced any evidence, of such violation, nor was the initial appointment of the sacked employees was under challenge before the Court in the cases decided by the judgment under review.

50. Article 25 of the Constitution, which commands for ensuring equality of all citizens before law and their entitlement to equal protection of law, by necessary implication forbids the State, its organs and instrumentalities, to deny to any citizen such equality and equal protection. This constitutional guarantee is of very wide import and amplitude, encompassing within its comprehensive scope different shades, facets and implications as 'equality' is a dynamic concept with many aspects and dimensions. Equality is antithetic to discrimination and arbitrariness. Article 27 of the Constitution, which safeguards against discrimination in appointments in the 'service of Pakistan', also guarantees 'equality' to all citizens in respect of such appointments; it is therefore an instance of the application of 'equality' commanded by Article 25, in respect of appointments in the 'service of Pakistan'. The appointments to the posts or services in any organ or instrumentality of the State (such as, corporations, organizations, or bodies established under law or controlled by Government) that do not fall within the 'service of Pakistan', as defined in Article 260 of the Constitution, are

[57] Land Acquisition Officer v. Gul Muhammad PLD 2005 SC 311.
[58] Amir Khan v. Controller of Estate Duty PLD 1962 SC 335 Per Kaikaus, J; Suba v. Fatima Bibi 1996 SCMR 158; Abdul Ghaffar v. Asghar Ali PLD 1998 SC 363; Barkat Ali v. Qaim Din 2006 SCMR 562.

covered under the wide import and amplitude of 'equality' guaranteed under Article 25 of the Constitution. Therefore, such appointments are also to be made by providing equal opportunity to all citizens by public advertisement and ensuring maximum transparency in the selection process to dispel any impression of favouritism and nepotism.

(Syed Mansoor Ali Shah)
Judge

Islamabad,
17th December, 2021.
Approved for reporting

➤صداقت➤