IN THE SUPREME COURT OF PAKISTAN
(Original Jurisdiction)

PRESENT:
MR. JUSTICE MAHMOOD AKHTAR SHAHID SIDDIQUI
MR. JUSTICE JAWWAD S. KHAWAJA.
MR. JUSTICE KHILJI ARIF HUSSAIN.
MR. JUSTICE TARIQ PARVEZ.

CONSTITUTION PETITIONS NO.10 & 18 OF 2011

Munir Hussain Bhatti Advocate and another. *(In Const.P.10 of 2011)*
Sindh High Court Bar Association & another. *(In Const.P.18 of 2011)*

… Petitioners

VERSUS

Federation of Pakistan and another. *(In both cases)*

… Respondents

For the Petitioners: *(In Const.P.10 of 2011)*	Mr. Makhdoom Ali Khan, Sr. ASC. Mr. Faisal Hussain Naqvi, ASC. Mr. Arshad Ali Ch., AOR. Mr. Khurram Hashmi, Advocate. Mr. Umair Malik, Advocate. Mr. Hyder Ali Khan, Advocate. Mr. Saad Hashmi, Advocate.
For the Petitioners: *(In Const.P.18 of 2011)*	Mr. Anwar Mansoor Khan, Sr. ASC. Mr. Abid S. Zuberi, ASC. Mr. Asim Mansoor Khan, Advocate.
For Respondent No.1:	Mr. K.K.Agha, Addl.A.G for Pakistan. Mr. M.S. Khattak, AOR.
For Respondent No.2:	Mr. Iftikharullah Babar, *Acting Secretary, Senate.*
On Court's call:	Maulvi Anwar-ul-Haq, Attorney General for Pakistan
Dates of Hearing:	24.2.2011, 28.2.2011, 1.3.2011, 3.3.2011 & **04.03.2011**.

JUDGMENT

M.A.SHAHID SIDDIQUI, J.- These two Constitutional Petitions, bearing Nos. 10 and 18 of 2011, have been filed under Article 184 (3) of the Constitution of Pakistan, 1973 challenging the two specific decisions of the

Parliamentary Committee, constituted under Article 175A, whereby it refused to confirm the nominations made by the Judicial Commission, also constituted under the aforementioned Article, for the extension in the tenure of four additional judges of the Lahore High Court and two additional judges of the Sindh High Court. Since they involved similar constitutional and legal issues, they were heard and decided together and a short order was announced on 04.03.2011. These are the detailed reasons for the same.

2. Constitutional Petition No. 10 of 2011 has been preferred by Mr. Munir Hussain Bhatti, an Advocate and member of the Lahore High Court Bar Association and Mr. Kamran Murtaza, a former Senator, former Vice Chairman of the Balochistan Bar Council and an Advocate of this Court. Constitutional Petition No. 18 of 2011 has been filed by the Sindh High Court Bar Association, Karachi through its General Secretary Mr. Abid S. Zuberi and Mr. Anwar Mansoor Khan / President. The prayer in Constitution Petition No.10 of 2011 is as under:-

> *"It is, therefore, respectfully prayed in the interests of justice that this Hon'ble Court may be pleased to accept this petition, quash the recommendations of the Parliamentary Committee in respect of the four learned Judges of Hon'ble Lahore High Court, Lahore, named above and direct the Respondents to implement the recommendations of the Judicial Commission and issue a Notification in consonance therewith."*

3. Whereas the prayer made by Sindh High Court Bar Association in Constitution Petition No.18 of 2011 is as under:-

> *"It is prayed on behalf of the petitioners above named that this Hon'ble Court may be pleased to restrain the respondents from issuing any notification in pursuance of the decision made by the Parliamentary Committee dated 22.02.2011 or interfering in any manner*

whatsoever in the performance of all judicial functions by the two additional judges namely Mr. Justice Muhammad Tasnim and Mr. Justice Salman Hamid of Sindh High Court and extend their tenure as recommended by the Judicial Commission till disposal of this petition by the Hon'ble Supreme Court."

4. Mr. Makhdoom Ali Khan, learned Sr. ASC, without touching the vires of Article 175A of the Constitution, argued that the nominations/recommendations made by the Judicial Commission regarding the competence, eligibility and suitability of judges for appointment/extension of tenure is exclusively within the domain of the Judicial Commission. The members of the Judicial Commission, before making recommendations had scrutinized in detail, both reported and unreported decisions of the said judges and considered in depth their judicial conduct while holding court. Therefore, the Parliamentary Committee cannot be allowed to assume the same functions and come to a conclusion different from that held by the members of Judicial Commission. Assuming otherwise, according to him, will put the Judicial Commission, which consists of, amongst others, the Chief Justice of Pakistan, four senior most judges of this court, the Chief Justice of the concerned High Courts, Federal Minister for Law, Justice and Parliamentary Affairs, Attorney General for Pakistan and representatives of the Bar, in a subordinate position to that of the Parliamentary Committee; making its recommendation subject to review by the Committee whose domain of expertise is completely different.

5. He further argued that in the setup prior to the 18th and 19th amendment, the CJP, as repeatedly held by this court, was the *pater familias* of the judiciary and so the recommendation of a commission headed by him in respect of the competency and ability of judges could not be reviewed or rejected by the Executive Head/Parliamentary Committee.

6. Learned counsel for the petitioner, confining himself to the judicial aspect of the recommendations, also described the action of the Parliamentary Committee as *corum non judice* and without jurisdiction. Therefore, he prayed, that the reasons given by the Parliamentary Committee, for rejecting the recommendations of the Judicial Commission, were to be held as illegal and *void ab initio.* Lastly, he argued that the constitutional requirement of giving reasons, makes the decisions of the Parliamentary Committee automatically subject to judicial review and its recommendations cannot be sustained if they do not meet the test of independent judicial scrutiny.

7. Mr. Anwar Mansoor Khan learned Sr. ASC and Mr. Abid S. Zuberi, ASC, took up the stance that the unanimous recommendations for extending the tenure of the two judges of Sindh High Court were binding on the Parliamentary Committee and its rejection without assigning valid and cogent reasons was opposed to the principle of independence of judiciary.

8. Mr. K.K.Agha, learned Additional Attorney General, on the other hand, first objected to the maintainability of these petitions on the ground that the jurisdiction of this Court under Article 184(3) of the Constitution was not attracted. On this score, I have had the benefit of seeing the concurring opinion of my learned brother Jawwad S. Khawaja, J. and I am in full agreement with his reasoning and conclusions on the question of maintainability and the other issues raised in these petitions.

9. Now we consider another objection of the AAG. He was somehow of the view that the Parliamentary Committee represented the will of the Parliament and thus had supremacy over all other bodies. He also argued that its decision could not be subject of judicial review as the Parliament was the supreme law making institution and its decisions could not be reviewed by any court.

10. We have considered this argument in detail and find this view to be utterly against the newly added provisions of the Constitution itself. We cannot comprehend how this "*Parliamentary Committee*", constituted under Article 175A, can even remotely be considered as a part of the legislature or how, for that matter, any question relating to the supremacy of Parliament is involved in this case. The Judicial Commission and the Parliamentary Committee are two limbs of one constitutional mechanism created by the newly added Article 175A. Both of them owe their existence to Article 175A and not to the provisions relating to the Legislature or the Executive in the Constitution. As such, they are entirely new authorities constituted under Article 175A of the Constitution of Pakistan, 1973. Any authority created under a Constitutional provision is bound to act within its specified mandate as per Article 4 of the Constitution of Pakistan. There is thus no immunity from judicial scrutiny reserved for the Committee under the Constitution of Pakistan, 1973 and Article 69 has no application in the instant case. Indeed, none was claimed before us by the Federation.

11. Article 175A (16) further cements the intention that the Committee was not to have any connection or even semblance of relevance to the Legislature or any form of parliamentary attribute. It was meant simply to be a Committee working under the mandate of Article 175A, owing its existence to the said provision of the Constitution of Pakistan 1973. Thus, its members, even if they are parliamentarians, are neither required nor permitted to participate in the proceedings of the Committee in their legislative capacity. Their background may have been imagined to make some fruitful contributions to the appointment process for judges, but their background was not to govern their mind while operating under the framework of Article 175A. To better understand this point, the Committee may in a sense be analogized to a special

committee comprising of parliamentarians constituted, under the law, to make an inquiry or to give relief to the people. Could this special committee be said to enforce the will of the Parliament, or their electorate, over and above their duty of providing justice under the law to which they owe their existence? I do admit that unfortunately some might take it so, but all norms of justice, law and fairness would say that they should act independently, fairly and in accordance with the law which has imposed a duty upon them and not with a free hand to do as they please, acting under the guise of the will of the people.

12. The logical corollary of arguing otherwise would in fact put a very damaging and unfair disqualification clause on all parliamentarians. By an admission that parliamentarians, if tasked with a special duty, under any law, cannot shed their electoral inclinations could be a basis for their disqualification under such law. We felt that the learned AAG need not have put the matter in this manner, conveying to us a sense of essential, eternal and assertive political agenda in the performance of a solemn Constitutional duty.

13. We now turn to the facts of the case. In the case of Lahore High Court, the Hon'ble Chief Justice of the High Court initiated and sent nominations to the Chairman of the Commission for convening a meeting of the Commission. The Hon'ble Chief Justice of Pakistan, Chairman of the Commission, called a meeting of the Commission which was held on January 22, 2011. All the members duly attended the said meeting. It is necessary to reproduce paragraph No. 2 of the minutes of the meeting in order to appreciate the issues at hand. It stated as follows:-

> *" 2. The Chairman requested the Chief Justice, Lahore High Court to brief the members of the Commission about the nominations initiated by him . The Chief Justice, Lahore High Court stated that he had*

> *recommended two persons for confirmation, namely Mr. Justice Asad Munir and Mr. Justice Ch. Muhammad Tariq (Sr. No. 1 and 13) who are going to retire on attaining the age of superannuation before the end of the year 2011 while the Additional Judges at serial No. 3,5,7,14,16,18,19 , 21, 33 , & 34 above have been recommended to be dropped. For rest of the Additional Judges, he has recommended that their tenure may be extended for a period of one year".*
>
> (***The underlining is ours***)

14. The Commission discussed the matters in detail. The findings of the Commission are contained in paragraph 3, relevant portions of which are also reproduced here:-

> *" 3. The Commission had in–depth discussions about their professional caliber, legal acumen, judicial skills, quality and quantum of judgments, commitment/devotion to duty, efforts made for expeditious disposal of cases, number of reserved/pending judgments, and also examined their antecedents and decided as under:-*
>
> *A. …*
>
> *B. The additional Judges at serial No. 2, 4, 6, 8 to 12,15, 17,20 and 22 to 32 require further grooming/improvement, therefore, their tenure may be extended for a period of one year with effect from the date their present tenure expires .*
>
> *C. The tenure of the Additional Judges at serial No.1 and 13 be extended from the date of expiry of their present tenure till the date of their superannuation".* (T**he underlining is ours**)

15. The Secretary of the Judicial Commission forwarded the unanimous nominations of the Commission to the Parliamentary Committee, in

accordance with Article 175A(8) thereof, through letter dated 22-1-2011, which also contained the nominations of the four judges under discussion . It must be stressed here that the Chief Justice of the Lahore High Court had also recommended these four judges for extension while completing the Proforma discussed below, and had not at all made any recommendations for their names to be dropped; and after making various observations in different columns of the *"proforma"*, required to be prepared for the initiation of this process, the Hon'ble Chief Justice of the Lahore High Court still decided to recommend them for an extension as per his noting at the end of the *"proforma"*.

16. After receiving the nominations for extension of tenure of the Additional Judges of the Lahore High Court, the meeting of Parliamentary Committee was held on 2nd of February 2011. The Committee confirmed all other nominations of the Commission except for the four judges namely Mr. Mamoon Rashid Sheikh, J., Mr. Muhammad Farrukh Irfan Khan, J., Mr. Syed Mazahar Ali Akbar Naqvi, J. and Mr. Muhammad Yawar Ali, J. Paragraphs 4 and 5 of the minutes of the aforementioned meeting contained the reasons for their refusal to confirm the nominations, as conveyed to the Judicial Commission of Pakistan by the Principal Secretary to the Prime Minister through letter dated 17-2-2011. In the case of Mamoon Rashid Sheikh, J., the Committee reasoned that the views of the Chief Justice of the High Court contained in the columns of "General Reputation in Public, bench and bar", "Disposition of quick disposal" and "Outlook" of "PROFORMA FOR INITIATION OF NOMINATION FOR APPOINTMENT AS JUDGE OF THE LAHORE HIGH COURT LAHORE" were material and therefore his proposal for extension was not justified. In the case of Muhammad Farrukh Irfan Khan, J., the Committee reasoned that the views of the Chief Justice of the High Court contained in the columns of "General Reputation in Public, bench and bar",

"Disposition of quick disposal" and "knowledge of laws" of the same proforma were also material and therefore his proposal for extension was also not justified. For similar reasons, the Committee further rejected the proposals of the Commission in relation to Syed Mazahar Ali Akbar Naqvi, J. and Muhammad Yawar Ali, J.

17. In the case of the High Court of Sindh, the Hon'ble Chief Justice of the High Court initiated and sent the nominations to the Chairman of the Commission for convening a meeting of the Commission in terms of Rule 3(2) of the Judicial Commission of Pakistan Rules, 2010. The Hon'ble Chief Justice of Pakistan/Chairman of the Commission called a meeting of the Judicial Commission of Pakistan which was held on February 19, 2011. All the members duly attended the said meeting. It is necessary to reproduce paragraph No.2 of the minutes of the meeting in order to appreciate the issues at hand:

> *" 2. The Chairman requested the Chief Justice, High Court of Sindh to brief the members of the Commission about the nominations initiated by him. The Chief Justice, High Court of Sindh stated based on their performance and behavior/conduct he has duly recommended the Additional Judges at serial no. 3,4,7 & 9 for extension in their tenure whereas the Additional Judges at serial No. 1,2,5,6 and 8 are to be dropped".*
>
> (***The underlining is ours***)

18. The Commission discussed the matters in detail. The findings of the Commission are contained in paragraph 3, relevant portions of which are also reproduced here:

> *" 3. The Commission had in–depth discussions about professional caliber, legal acumen, judicial skills, quality and quantum of judgments, commitment/devotion to duty, efforts made for expeditious disposal of cases, number of*

> *reserved/pending judgments of each of the aforesaid Additional Judges, and also examined their antecedents. As regards Additional Judges at serial No.6 and 8, the members of the Commission observed that they are professionally competent, therefore, their names may also be recommended for extension. As regards their conduct/behavior, reported in the performa, it was observed that given their capabilities and potential to prove good judges they would be able to overcome such shortcomings with proper coaching and guidance to be provided to them by the Hon'ble Chief Justice/senior judges of the High Court of Sindh. The Commission therefore, unanimously decided as under:-*
>
> *A. The Additional Judges at serial No.1, 2 and 5 are dropped as their performance has not been found up to the mark together with their other antecedents and as such their cases are not recommended for confirmation or extension.*
>
> *B. The Additional Judges at serial No.3, 4, 6 to 9 have been found efficient and competent but require further grooming/improvement, therefore, it is recommended that their tenure be extended for a period of one year with effect from 18.02.2011".* (**The underlining is ours**).

19. The Secretary of the Judicial Commission forwarded the unanimous nominations of the Judicial Commission to the Parliamentary Committee through letter dated 19-2-2011, which also contained the nominations of the two judges under discussion namely Mr. Muhammad Tasnim, J. and Mr. Salman Hamid, J. After receiving the nominations for an extension of tenure of the Additional Judges of Lahore High Court the meeting of Parliamentary Committee was held on 22nd of February 2011. The Parliamentary Committee confirmed all other nominations of the Commission except for the aforesaid two judges. The paragraphs 4 and 5 of the minutes contained the reasoning for this refusal, as conveyed to the Judicial

Commission of Pakistan by Acting Principal Secretary to the Prime Minister through letter dated 24-2-2011. In case of Muhammad Tasnim, J., the Committee reasoned that the views of the Chief Justice of the High Court contained in the columns of "General Reputation in Public, bench and bar" and column of "General Remarks" of the "PROFORMA FOR INITIATION OF NOMINATION FOR APPOINTMENT AS JUDGE OF THE HIGH COURT OF SINDH, KARACHI" were material and therefore his proposal for extension was not justified. Similarly, in the case of Salman Hamid, J., the Committee reasoned that the views of the Chief Justice of the High Court of Sindh contained in the columns of "General Reputation in Public, bench and bar", and column of "General Remarks" of the same "PROFORMA", were material and therefore his proposal for extension was also not justified.

20. After having considered the facts of this case, we must now advert to the most important question raised before us. Whether the Committee has the power to reject the approved nominations of the Judicial Commission? Or alternatively, does the Committee have unbridled and arbitrary power to review the decisions of the Commission? It has been urged before us that while coming to the conclusions, which are the bone of contention in this case, the reasoning adopted by the Committee was irrelevant, unjustified and improper under the law; therefore, it is without legal force or constitutional sanctity. We agree. The Committee ignored its own constitutional boundaries and by doing so stepped over the rightful constitutional jurisdiction of the Commission.

21. It is clear from a preliminary reading of the minutes of the aforementioned meetings that the entire reasoning of the Committee is focused on no material other than that which had already been thrashed out and discussed in depth by the Judicial Commission. The Committee instead of giving its own reasons for not confirming the nominations, merely opted to

usurp the territory reserved for the Commission by the Constitution; and in doing so they again passed judgment on the professional caliber, legal acumen, judicial skill and quality and the antecedents of the Judicial nominees. As noted above, this exercise had already been done by the Commission. The Parliamentary Committee neither had the expertise nor the Constitutional mandate to reverse the reasoning and findings of the Commission on these grounds; doing so would negate the purpose for creating a Commission as envisaged in Article 175A.

22. The constitution of the Judicial Commission itself and the members comprising five sitting judges of the Supreme Court, one former judge of Supreme Court, the Chief Justice and the most senior Judge of the High Court, Federal Minister for law and Attorney General of Pakistan, Law minister of the concerned province and two senior advocates/ members of the Bar, gives us a clear insight into the reasons for the creation of the Commission. It comprises of people having an immense background and stature in the field of law and the judicial system. The purpose then was that the discretion in making judicial appointments should not be the forte of one man, as in the old system, but should rather be devolved to a body comprised of people who could be trusted to make a just evaluation on the professional caliber, legal acumen, judicial skill and all other related criteria relevant for the appointment of a person as a judge of the High Court. We are thus unable to see how the technical expertise, judged by a Commission comprising of people having spent decades in the legal field, could be better judged, or worse, reversed by the Parliamentary Committee. If this was intended by the legislature then there was simply no need to even constitute a Judicial Commission.

23. Another issue which is relevant to note is that Article 175A itself has not provided for the Chief Justice of a High Court to have any special role

in the appointment process. He is just another member of the Judicial Commission and by the above said rules he has merely been provided the role to initiate the nominations. His duty is to initiate and send the nominations to the Chairman of the Judicial Commission. This act, of initiating and sending nominations, cannot be taken to be the "recommendation" itself, but is rather to be considered as an act of mere procedure. This is so because the whole object of the new legislation is to take away the powers of one person and make the process a collective effort. So, for instance, if the Rules are changed by the Commission and any other member of the Commission is given the task of setting the process of the Judicial Commission in motion, then that would not give this member a special place which is not envisaged for any other member in Article 175A. Therefore, even if a Chief Justice of the High Court is of the view that certain persons are not fit to be judges of the High Court, it is possible that the Judicial Commission, by a majority, may come to the conclusion that they are and thus make such recommendation to the Committee. These recommendations would be valid and in accordance with the letter and spirit of Article 175A.

24. Given this discussion, we do not understand how the Committee could consider that its function was to redo the entire exercise conducted by the Commission while determining the professional caliber, judicial skill, legal acumen and personal conduct, required as a judge, of the nominees. More so, how could they arrive at a conclusion, that the entire exercise of the Commission was flawed, based on the piecemeal views of one member of the Commission? And it might be added here that even these views did not last - the Commission passed the nominations unanimously. Let us assume, however, that the unanimity present in these decisions of the Commission was not there. Let us further assume, for the sake of argument, that the Attorney

General of Pakistan objected to a particular nomination and the Judicial Commission still, by a majority of its total membership, as mandated by clause (8) of Article 175A, decided to nominate that person to the Parliamentary Committee. Could the Parliamentary Committee reject this nomination simply on the reason that they trust the evaluation of the Attorney General of Pakistan and not of the other judges? We strongly believe that such is neither the function of the Parliamentary Committee, nor its mandate under Article 175A, and would amount to an incorrect and unconstitutional decision.

25. The technical evaluation of a person's caliber as judge has to be made by the Commission, and once evaluated the recommendations of the Commission are to be looked as one. The views of the individual members of the Commission thus no more exist before the Committee. What the Commission has already assessed and held can not be overturned on the basis of a dissenting view, note or discussion of any individual member. If this was allowed, it would render the whole working of the Judicial Commission as futile and make it nugatory under the Constitution. Doing so would be akin to refusing to recognize a resolution of the Parliament, or any law passed by it, on the basis of the minority view in the House. Such reasoning will lead to a deliberate breakdown of our Constitutional mechanisms and procedures.

26. Therefore, the Parliamentary Committee, on receipt of a nomination from the Commission, can either confirm the nominee by a majority of its total membership within fourteen days, failing which the nomination shall be deemed to have been confirmed, or reject the nomination on grounds falling within its domain for very strong reasons which shall be justiciable. This is the clear direction of clause (12) of Article 175A.

27. Since in the present case, as already discussed above, the Committee has tried to assume the jurisdiction of the Commission, there is no option but to come to the conclusion that the Committee failed to perform its functions in terms of clause (12) of Article 175A. The consequence of this failure has been prescribed by the Constitution itself. The Committee must act within a period of fourteen days of receiving the nominations, "failing which the nomination shall be deemed to have been confirmed". So, while in any other case of failure to exercise jurisdiction, we might have been required to send the issue back to the authority for consideration in accordance with law, here the Constitution leaves us with no such option because of a deeming provision.

28. The mandatory consequence of the deeming clause mentioned above is that the name of the nominee confirmed by the Committee or "*deemed to have been confirmed*" shall be forwarded to the President for appointment. The effect of a deeming provision has been laid down time and again by the Courts and it has generally been held that it requires the court to believe that something exists and has happened, though it may neither exist nor may have occurred in reality. It thus creates a legal fiction. Reference in this regard may conveniently be made to judgments of this court in *Elahi Cotton Mills Ltd Vs. Federation of Pakistan* (PLD 1997 SC 582 at page 677) and *Federation of Pakistan Vs. Mian Muhammad Nawaz Sharif* (PLD 2009 SC 644 at page 687).

29. Moreover the court, in such cases, is required to see for what purpose this deeming device has been used by the legislature. In the present there can be little doubt that the purpose was the completion of this exercise as early as possible and the Constitutional time period of fourteen days sheds great light on the matter. Therefore, the failure of the Committee to perform its functions in accordance with its mandate results in the nomination "*deemed to have been confirmed*".

30. In such circumstances, we are inclined to issue a direction to the Federation to notify the appointments on the recommendations received, in accordance with Article 175A, within a period of fourteen days. Such directions, to notify, have been given in the past and reference may be made to the *Malik Asad Ali Case* (PLD 1998 SC 33).

31. At this stage, it would also be appropriate for us to note that the contention of the AAG-that earlier judgments on the issue of appointment of judges are irrelevant- is a bit misconceived. The change in the appointment process has merely diversified decision making amongst the many members of the two new collegiate bodies, but essentially the roles of these bodies, looked at collectively, remains the same. So as such the principles of law enunciated in earlier judgments such as Al-jehad Trust Case, Malik Asad Ali and several others would continue to apply to the new mechanism with full force. In fact, these principles can be said to be applicable even more strongly after the introduction of the newly constituted bodies under Article 175A.

32. The recommendations of the Judicial Commission are now on greater footing than the recommendations of the Chief Justice alone in the earlier system. These cannot be superseded for any extraneous considerations as already discussed above. Therefore, the Parliamentary Committee cannot simply brush aside the recommendations of the Commission without its own sound reasons. The Committee is to confine itself to the purpose for which it has been constituted, which is evidently the thrashing out of issues not related to the domain of the Commission. The Committee can, based on factual data and reasons, for instance, declare that a nominee is corrupt or is affiliated / partial making him a controversial choice, but judging the caliber of a nominee as a judge rests with the Commission.

33. These, read together with the reasons set out in the concurring opinion of Jawwad S. Khawaja, J. are the reasons for our short order dated 4.3.2011, which is reproduced below for ease of reference:-

> *"We have heard these two constitutional petitions at great length. These petitions relate to the functions of two institutions newly introduced into our Constitution namely, the Judicial Commission of Pakistan and the Parliamentary Committee. These two bodies have been created in the newly added Article 175A of the Constitution.*
>
> *2. Very briefly stated the petitioners have challenged inter alia, the two decisions of the Parliamentary Committee one in respect of four Additional Judges of the Lahore High Court and the other in respect of two Additional Judges of the Sindh High Court. The Judicial Commission had made recommendations for extension in tenure of these six Judges as Judges respectively of the Lahore and Sindh High Courts. The Parliamentary Committee has, however, disagreed with the recommendations of the Judicial Commission and has decided not to recommend the names of these six Judges for appointment as Judges respectively of the Lahore and Sindh High Courts.*
>
> *3. During extensive arguments advanced by learned counsel for the parties including the preliminary objection raised by the learned Additional Attorney General objecting to the maintainability of these petitions, we have examined the newly added constitutional provisions and more specifically Article 175A of the Constitution. We have also considered the case law copiously cited before us. We have, however, consciously confined our consideration of these petitions and arguments advanced, to the specific facts and circumstances of these cases. Having considered the same, for detailed reasons to be recorded later, these petitions are allowed in the following terms:-*
>
> *a) We declare that the decision of the Parliamentary Committee, whereby the names of the aforesaid six Judges were not confirmed for extension in their tenure, are not in accordance with the provisions of the Constitution;*
> *b) as a result of the above, we set aside the decision of the Parliamentary Committee dated 2.2.2011 in respect of four Additional Judges of the Lahore High Court namely, Justice Mamoon Rashid Sheikh, Justice Muhammad Farrukh Irfan Khan, Justice Syed Mazahar Ali Akber Naqvi and Justice Muhammad Yawar Ali and the decision of the Parliamentary Committee dated 22.2.2011 in respect of two Additional Judges of the Sindh High*

Court namely, Justice Salman Hamid and Justice Muhammad Tasnim;

c) *consequently, we direct the respondents to implement the recommendations of the Judicial Commission in respect of the four above named Judges of the Lahore High Court and the recommendations of the Judicial Commission in respect of the two above named Judges of the Sindh High Court and to issue notifications for the appointment of the said Judges in consonance with the recommendations of the Judicial Commission*".

Sd / -

JUDGE

I have added a concurring opinion setting out my additional reasons in support of the Order of 04.03.2011.

Sd / -

JUDGE

I agree with the opinion recorded by my learned brother Khawaja, J.

Sd / -

JUDGE

I have had the benefit of going through the detailed reasons given by my learned brothers Mr. Justice Mehmood Akhtar Shahid Siddiqui and Mr. Justice Jawwad S. Khawaja. I am in agreement with the opinion and reasons recorded by my learned brothers. However, I withhold my comments to that part of the reasoning of Mr. Justice Jawwad S. Khawaja, which deals with the status of the Parliamentary Committee with reference to Article 69 of the Constitution of Islamic Republic of Pakistan for the reason that this issue is subjudice before 17-member bench of this Court seized of challenge made to 18th Amendment of the Constitution.

Sd / -

JUDGE

APPROVED FOR REPORTING.

Jawwad. S. Khawaja, J. I have had the benefit of going through the reasoning of my learned brother M.A. Shahid Siddiqui, J. in support of the short order dated 4.3.2011. I am in agreement with his conclusions but am adding this concurring opinion setting out my additional reasons in support of the aforesaid order dated 4.3.2011.

2. These two constitutional petitions concern the functioning of two institutions newly introduced into our Constitution: the Judicial Commission of Pakistan ("Commission") and the Parliamentary Committee ("Committee"). The petitions are being heard and decided together because they raise similar legal and constitutional issues.

3. The Commission consists of, among others, the Chief Justice of Pakistan, the four senior-most Judges of this Court, the Chief Justice of the concerned High Court, the Federal Minister for Law & Parliamentary Affairs, the Attorney General for Pakistan and the representatives of the legal fraternity [Article 175A(2)]. The Committee consists of eight parliamentarians divided equally between the Treasury Benches and the Opposition Benches [Article 175A (9) and (10)]. Both, the Commission and the Committee were created under Article 175A of the Constitution which assigned specified functions to the two Constitutional bodies through the Constitution (18th Amendment) Act, 2010 as amended by the Constitution (19th Amendment) Act, 2010. These constitutional amendments changed the earlier process for making judicial appointments in the Supreme Court, the Federal Shariat Court and the High Courts. Article 175A alongwith certain other provisions in the Constitution are separately subject to challenge in a number of Constitutional Petitions which have been heard, and are still under consideration before a larger seventeen-member Bench of this Court.

4. In the present cases, however, the petitioners have not questioned the *vires* of these constitutional amendments. Therefore, the validity of these amendments, which created the Commission and the Committee, is assumed. The challenge in these petitions is directed instead at the functioning of the Committee. In particular, two specific decisions of the Committee have been assailed by the petitioners. In brief, these decisions relate to the refusal of the Committee to confirm the nominations made by the Commission for the renewal of tenure of four additional Judges of the Lahore High Court and two additional Judges of the Sindh High Court. By means of a short order dated 4.3.2011, we have allowed these petitions and, as a consequence, have set aside the impugned decisions. This opinion provides my reasons in support of the short order.

5. To facilitate understanding, the reasons in this opinion have been divided into sections. The first relates to the maintainability of these petitions; the second section sets out the relevant rules of Constitutional interpretation; the third section deals with the question of justiciability and the basis for exercising our power to review the decisions of the Committee; and the fourth and final section states the ground on which we exercise review and applies all the constitutional principles discussed in the earlier sections, to the circumstances in which these petitions have arisen, justifying the short order of 4.3.2011.

MAINTAINABILITY

6. We must first address a preliminary objection against the maintainability of these petitions, which has been raised by the learned Additional Attorney General on behalf of the Federation. The petitioners have invoked the jurisdiction vested in this Court under Art. 184 (3) of the Constitution. Mr. K.K.

Agha, learned Additional Attorney General for Pakistan has argued that the jurisdiction of this Court under the said Article can only be invoked where *"a question of public importance with reference to the enforcement of any of the fundamental rights"* is involved. He submitted that no such question arises in these petitions; and the same are, therefore, not maintainable. For facility of reference, Article 184 (3) of the Constitution is reproduced as under:-

> *"**184. ….***
>
> *(3) Without prejudice to the provisions of Article 199, the Supreme Court shall, if it considers that a question of public importance with reference to the enforcement of any of the Fundamental Rights conferred by Chapter 1 of Part II is involved, have the power to make an order of the nature mentioned in the said Article".*

7. The learned Additional Attorney General further argued that an issue could only be agitated before this Court, under the aforesaid Article, if "public importance" in relation to such issue had been proved by the overt demonstration of interest therein by the general public; either by people openly demonstrating their interest, possibly by coming out on the streets, or by engaging in animated debates in the print and electronic media. And, since, according to the learned Additional Attorney General, the impugned decisions of the Parliamentary Committee have not generated any such demonstrations of public interest, this matter may not be considered as one which involves "*public importance*".

8. To begin with, the factual veracity of this claim made on behalf of the Federation is questionable. The nominations made by the Judicial Commission and the refusal of the Parliamentary Committee to confirm the same appear to have generated considerable public interest, providing a great deal of material for debate in the public, the media and the legal fraternity. The Bar Associations

of the High Courts in the country have also debated the impugned decisions of the Committee. The Sindh High Court Bar Association, which is itself a petitioner in Constitution Petition No.18 of 2011, has placed on record its resolution dated 23.2.2011 "condemning" the action of the Committee. The proceedings in these petitions and the short order of 4.3.2011 have also made headlines in the print and the electronic media. More so, critical comments on our order dated 4.3.2011 have been carried prominently in the media. We, therefore, find little substance in the factual assertion advanced by Mr. K. K. Agha.

9. More importantly, however, under the law, this factual claim is quite irrelevant for answering the present question, which is: does the case before us involve "*a question of public importance with reference to the enforcement of any of the Fundamental Rights*"? Article 184 (3) *ibid* empowers this Court to exercise jurisdiction thereunder whenever the Court considers a matter to: (i) be of public importance and (ii) that it pertains to the enforcement of fundamental rights. The determination on both these counts is to be made by this Court itself, keeping the facts of the case in mind. That this case involves a question which relates to the "*enforcement of fundamental rights*" has not been seriously questioned. The learned Additional Attorney General acknowledged that only an independent Judiciary can enforce the fundamental rights enshrined in our Constitution. He also conceded that without an independent mechanism for enforcing fundamental rights, the contents of Chapter 1 (Fundamental Rights) of Part-II of the Constitution would become meaningless. A wealth of jurisprudence is also available on this subject. The issue, therefore, which has to be addressed while deciding the respondent's preliminary objection is whether or not these petitions raise issues of public importance.

10. Furthermore, in making this determination, the Court is not to be swayed by expressions of public sentiment nor is it to conduct an opinion poll to determine if the public has any interest in an issue being agitated before the Court under Article 184 (3) of the Constitution. Instead, a whole range of factors need to be kept in mind, which have, over the years, been expounded in numerous precedents of this Court. It is important to keep these precedents in view because, as noted in an earlier judgment, "*[i]t is through the use of precedent that the contours of the law are constantly defined. The Constitution of Pakistan, through Article 189, recognizes the significance of judicial precedent in the acknowledged tradition of a Common Law jurisdiction.*" (Re: Suo Motu Case No.10 of 2009 reported as 2010 SCMR 885, 921). A review of the precedents that enunciate the scope of Article 184(3) makes it clear that contrary to the import of Mr. Agha's submission, "overt expression of public interest" or "street demonstrations and vigorous media debate" have not been considered necessary factors for the exercise of jurisdiction over a case under the said Article.

11. The precedents which were referred to, in this regard, by Mr. Makhdoom Ali Khan, learned counsel for the petitioners, can now be briefly adverted to. In the first Al-Jehad case reported as *Al-Jehad Trust through Raeesul Mujahideen Habib-ul-Wahabb-ul-Khairi and others versus Federation of Pakistan and others* (PLD 1996 SC 324) a five member Bench of this Court observed that the process of making judicial appointments was inextricably linked with the independence of the Judiciary; and since the latter was a matter of public importance, in the circumstances, it was held that the petitioner had *"rightly invoked the jurisdiction of this Court under Article 184 (3) of the Constitution"*. Therefore, questions which require the interpretation of newly added

provisions in the Constitution relating to judicial appointments would quite clearly be matters of public importance.

12. The fact that independence of the judiciary is a matter of public importance has also been firmly established in our jurisprudence. In one of the more recent cases on the issue, Khalil ur Rehman Ramday, J., expressed this point eloquently as follows: *the judiciary was... an affair of the public; any offence to its independence would be an encroachment on the right of the people to access justice and finally that the security of service and of the tenure of the judges was critical for the said independence.* (Chief Justice of Pakistan v. President of Pakistan, PLD 2010 SC 61 at page 121). Similar views have been expressed *inter alia,* in *Watan Party versus Federation of Pakistan and others* (PLD 2006 SC 697), *Malik Asad Ali and others versus Federation of Pakistan and others* (PLD 1998 SC 161 at page 247 para 55) and *Sindh High Court Bar Association & another versus Federation of Pakistan & others* (PLD 2009 SC 879 at page 1143, 1185).

13. Here we may also refer to an academic comment on this Court's past precedents, dealing with the interpretation of Art 184(3). The well researched and referenced comment in *'Public Interest Litigation in Pakistan* (Alam, Rafay; ed. Minski, Alam & Raza, Platinum and Pakistan Law House 2000) reproduced below demonstrates that cases dealing with judicial appointments have consistently been considered matters of public importance:

> "*[the] Supreme Court has decided [in], Shahida Zahir Abbasi v. President of Pakistan, PLD 1996 SC 632, at p.659, per Saiduzzaman Siddiqui J, that matters of public importance may be deduced on a case-by-case basis… However, even on a case-by-case basis, some general principles still emerge. Matters relating to the judiciary have regularly been held to be of public importance. This was, for example, already held by Ajmal Mian CJ (as he then was) in Sharaf Faridi v. Federation of Pakistan, PLD 1989 Kar. 404, at p. 425. In Abdul Matin Khan v. N.W.F.P., PLD 1993 SC 187, at p.191, it was held by Muhammad Afzal Zullah CJ that an issue that could considerably damage 'the very fabric of independence*

and separation of judiciary' amounted to a matter of great public importance. This position was confirmed more recently in Al-Jehad Trust v. Federation of Pakistan, PLD 1996 SC 324, p. 425 by Sajjad Ali Shah CJ, holding that questions of interpretation of the Articles of Constitution relating to the judiciary were undoubtedly a matter of pubic importance."(ibid. 55)

14. In response, the learned Additional Attorney General has submitted that the case law cited by the learned counsel for the petitioners is not applicable in the present case because it relates to the previous process for appointment of Judges; and, therefore, after the 18th and the 19th Amendments, it is no longer relevant. This contention is misconceived. There has been no change or amendment made in Article 184 (3) of the Constitution. Thus, precedents which examine and pronounce upon the scope of the said Article remain relevant. Therefore, in line with Article 189 of the Constitution, the principles of law enunciated by this Court in respect of Article 184 (3) of the Constitution provide the surest guidance that these petitions raise issues which must be decided by this Court in the exercise of its jurisdiction under the said Article. Thus, under Art 184(3) of the Constitution, not only is this Court possessed with the power to adjudicate this matter, but it must, as a matter of duty, exercise jurisdiction over this case,

15. In addition to the above considerations, we would like to note that judicial appointments in two provinces, namely the Punjab and Sindh, have been so far called in question in these two petitions. This is, therefore, a fit occasion for this Court to interpret Article 175A of the Constitution, as amended; thereby enabling Constitutional bodies such as the Commission and the Committee (and their respective functionaries) to perform their roles in accordance with the Constitution.

16. Before parting with our discussion on the maintainability of these petitions we may note that there have been cases where this Court has declined

to exercise jurisdiction under Article 184 (3) of the Constitution. Mr. K.K. Agha referred to the case titled *Jamat-e-Islami through Amir and others versus Federation of Pakistan and others* (PLD 2008 SC 30) wherein exercise of jurisdiction had been declined. Mr. Makhdoom Ali Khan provided us a list of six other reported cases (referred to below) where the Supreme Court decided that the circumstances did not warrant exercise of jurisdiction under Article 184 (3) *ibid* as the petitions in those cases did not meet the dual criteria of (a) public importance and (b) enforcement of fundamental rights. These cases are *Munir Bhatti versus Federation of Pakistan* (Constitutional Petition No. 10 of 2011), *Manzoor Elahi versus Federation of Pakistan* (PLD 1975 SC 66 at page 79, 128,144 & 159), *Shahida Zaheer Abbasi versus Federation of Pakistan* (PLD 1996 SC 632 at page 659 & 662 sideline G & H), *Syed Zulfiqar Mehdi versus PIAC* (1998 SCMR 793 at page 799, 800, 801 sideline A,B,C & D), *Watan Party versus President of Pakistan* (PLD 2003 SC 74 at page 81, sideline D & E), *Mian Muhammad Shahbaz Sharif versus Federation of Pakistan* (PLD 2004 SC 583 at page 596 para 18-19, page 597, 598 para 22) and *APNS versus Federation of Pakistan* (PLD 2004 SC 600 at 619W, 621AA). None of these seven cited cases, however, related to the independence of the Judiciary or to the process of judicial appointments, the same are distinguishable on this ground alone.

17. Based on the foregoing discussion and review of precedents, we are not left in any doubt that these cases are eminently suitable for the exercise of jurisdiction under Article 184 (3) of the Constitution.

CONSTITUTIONAL INTERPRETATION:

18. Having decided the question of maintainability, we must now proceed to the task of interpreting Article 175A, which is the subject of contention in the present petitions. A great deal of stress was placed by the learned Additional Attorney General representing the Federation, on the decontextualised wording

of this Article. His argument has been separately dealt with in a later part of this opinion, but can be summarized here. According to him, because Article 175A does not provide for the justiciability of the decisions of the Committee, and to this extent, deviates from the Order dated 21.10.2010 (considered below) passed by a seventeen-member Bench of this Court, we should construe Article 175A as ousting the jurisdiction of this Court and its power to call in question the decisions of the Committee. The learned Additional Attorney General's submission, however, finds no force in our constitutional jurisprudence, where it is by now well settled that the Constitution has to be read holistically as an organic document. For this we need to go no further than the opinion expressed in the Al-Jehad case *supra*:

> *"a written Constitution is an organic document designed and intended to cater the need for all times to come. It is like a living tree, it grows and blossoms with the passage of time in order to keep pace with the growth of the country and its people. Thus, the approach, while interpreting a constitutional provision should be dynamic, progressive, and oriented with the desire to meet the situation, which has arisen, effectively. The interpretation cannot be a narrow and pedantic. But the Court's efforts should be to construe the same broadly, so that it may be able to meet the requirements of ever changing society. The general words cannot be construed in isolation but the same are to be construed in the context in which, they are employed. In other words, their colour and contents are derived from their context."* [*Al-Jehad Trust case* (*PLD 1996 SC 324* at page 429)].

19. Here it may also be added that notwithstanding the reliance of the learned Additional Attorney General on Article 175A as a stand-alone provision, the Attorney General in his written submissions made before the above-referred larger Bench, acknowledged as a well settled legal rule "*that the Constitution is to be read as a whole and that it is the duty of the Court to have recourse to the whole instrument in order to ascertain the true intent and meaning of any particular provision*".

20. But what does the word 'organic' connote when referring to the Constitution? Although the term has been repeatedly used in various precedents from our own jurisdiction, the meaning, implication and rationale of requiring the Constitution to be read as an 'organic document' has not been explained fully. It is thus necessary to define this concept in order to examine and interpret Article 175A which has now been added in the Constitution.

21. We have been guided by precedent to follow the rule that individual Articles or clauses of the Constitution, if read in isolation from the rest of the Constitution, may mislead the reader. This is so because the meaning of the Constitution is to be gathered from the Constitution as an integrated whole, based on reason. The logic and wisdom of this approach should be self evident, but can be highlighted for the edification of those inclined to a contrary view focussed solely on an insular reading of Article 175A. This can be done by narrating a simple tale from the enlightened tradition of our sages. In his *Masnavi* Maulana Jalaluddin Rumi recounts the story of five men on a dark night who, groping and touching different parts of an elephant's anatomy, construct an image of the animal variously as a fan (by the one who managed to touch only its ears), a tree trunk (by the other getting a feel of its leg), a gargoyle (by yet another who touched and felt its snout) and so forth. The inability of each man to look at the elephant holistically is obvious. As the Maulana says, these men in the dark did not have a lamp to show them that the elephant was one composite organism, whose constituent components were to be seen together if the whole was to be understood, without errors of perception. The Greek ancient, Hippocrates (quoted by Eduardo Galeano in his book "Mirrors"), in the same vein, said that "*the nature of the parts of the body cannot be understood without grasping the nature of the organism as a whole*". It is, therefore, crucial for us, consistent with reason, to look at the Constitution as a whole if

we are to make sense of Article 175A 'organically'. Looking at the Constitution any other way would lead the reader astray.

22. The rationale for this rule is also universal and transcends the divide between the various prevalent systems of law. Thus it is that we have common law constitutionalists such as Laurence Tribe and Michael Dorf warning us against *"approaching the Constitution in ways that ignore the salient fact that its parts are linked into a whole - that it is a Constitution, and not merely an unconnected bunch of separate clauses and provisions with separate histories that must be interpreted."*(Tribe, Lawrence H.; Dorf, Micheal C., *"Chapter 1: how not to read the Constitution*" on reading the Constitution, Harvard University Press, Cambridge, 1991). This very same logic also informs the comment of a scholar like Dr. Conrad from the European Civil Law tradition, who reminds judges and lawyers *"that there is nothing like safe explicit words isolated from a general background of understanding and language. This is particularly so in the interpretation of organic instruments like a Constitution where every provision has to be related to the systemic plan, because every grant and every power conferred is but a contribution to the functioning of an integrated machinery… it will not do to discuss such concepts as [mere] 'political theory' irrelevant to textual construction".* (*"Limitation of Amendment Procedures and the Constituent Power;*" the Indian Yearbook of International Affairs, 1967. P.375)

23. Undeniably, Article 175A fits into, and has to be read as part of, the larger Constitutional scheme and not as an insular *"bunch of separate clauses and provisions",* or as a self-contained island within the Constitution, unconnected with its other parts. The importance of reading the Constitution as an organic whole, in the context of these petitions, will become more apparent in the succeeding sections of this opinion.

JUSTICIABILITY

24. Having set out the basic principle of Constitutional interpretation, we can now proceed to consider if this Court is empowered to judicially review the decisions of the Parliamentary Committee. The petitioners in these cases have argued that the decisions of the Committee are justiciable while the Federation's stance is that this Court has no power to review such decisions. As a fall-back, it was submitted by the learned Additional Attorney General that even if the Court concludes it has the power, it should exercise restraint in these cases and decline to interfere in the two decisions being assailed by the petitioners.

25. To resolve the first contention raised above, we must start by examining the text of the Constitution itself, as amended by the 18th and 19th Amendments, because the text suggests an answer to the question before us. To facilitate understanding, Article 175A as originally worded (to the extent relevant to our discussion), is juxtaposed alongside the Article as amended by the 19th Amendment.

EIGHTEENTH AMENDMENT	**NINETEENTH AMENDMENT**
175A	**175A**
Appointment of judges to the Supreme Court, High Courts and the Federal Shariat Court:	**Appointment of judges to the Supreme Court, High Courts and the Federal Shariat Court**
(1) ... (2) ... (3) ... (4) ... (5) ... (6) ...	(1) ... (2) ... (3) ... (4) ... (5) ... (6) ...

(7) ...	(7) ...
(8) ...	(8) ...
(9) The Parliamentary Committee, hereinafter in this Article referred to as the Committee, shall consist of the following eight members, namely:- i. four members from the Senate; and ii. four members from the National Assembly.	(9) The Parliamentary Committee, hereinafter in this Article referred to as the Committee, shall consist of the following eight members, namely:- i. four members from the Senate; and ii. four members from the National Assembly. Provided that when the National Assembly is dissolved, the total membership of the Parliamentary Committee shall consist of the members of the Senate only mentioned in paragraph (i) and the provisions of this Article shall, *mutatis mutandis* apply.
(10) ...	(10) ...
(11) ...	(11) ...
(12) The Committee on receipt of a nomination from the Commission may confirm the nominee by majority of its total membership within fourteen days, failing which the nomination shall be deemed to have been confirmed: Provided that the Committee may not confirm the nomination by three fourth majority of its total membership within the said period, in which case the Commission shall send another nomination.	(12) The Committee on receipt of a nomination from the Commission may confirm the nominee by majority of its total membership within fourteen days, failing which the nomination shall be deemed to have been confirmed: Provided that the Committee, for reasons to be recorded, may not confirm the nomination by three-fourth majority of its total membership within the said period: Provided further that if a nomination is not confirmed by the Committee it shall forward its decision with reasons so recorded to the Commission through the Prime Minister:

	Provided further that if a nomination is not confirmed, the Commission shall send another nomination.
(13) ...	(13) ...
(14) ...	(14) ...
(15) ...	(15) The meetings of the Committee shall be held in camera and the record of its proceedings shall be maintained.
	(16) ...
	(17) ...

It will be noticed that the 19th Amendment has *inter alia,* added the following two provisos to clause 12 of Article 175A:

> "*Provided that the Committee, for reasons to be recorded, may not confirm the nomination by three-fourth majority of its total membership within the said period:*
>
> *Provided further that if a nomination is not confirmed by the Committee it shall forward its decision with reasons so recorded to the Commission through the Prime Minister…"*
>
> (emphasis supplied)

Also, a new clause (15) has been added to Article 175A which states:

> *"The meetings of the Committee shall be held in camera and record of its proceedings shall be maintained."* (emphasis supplied)

26. The repeatedly emphasized imperative of maintaining a record both of the proceedings of the Committee and of the "reasons" behind its decisions, very strongly suggests that the Committee's decisions were intended to be subject to judicial review. Otherwise, if the Committee's decisions were meant

to be non-justiciable, and beyond judicial scrutiny, the insistence on recording reasons would not make much sense. It is an established rule of interpretation that Parliament does not waste words and redundancy should not be imputed to it. This principle would apply with even greater force to the Constitution - the supreme law of the land. On this point Mr. K. K. Agha was hard pressed to respond. It will be seen that even an insular reading of this Article, leaves the impression that the decisions of the Committee are subject to review. He, however, argued that even though the 19th amendment had required the Committee to give reasons for its decisions, it did not make any provision for these decisions to be challenged in a court of law.

27. The above submission was augmented by Mr. K. K. Agha, by adverting to the Order of the seventeen-member Bench dated 21.10.2010 wherein it had, *inter alia,* been said that *"in case of rejection of nomination by the Parliamentary Committee … [it] shall have to state reasons which shall be justiciable".* The gist of this argument appears to be that in view of the order of the larger Bench, this Court should infer that through the 19th amendment, it was intended by Parliament that decisions taken by the Parliamentary Committee should not be subject to judicial review. Such inference was sought on the basis that the suggestion in the aforesaid Order as to justiciability was not incorporated in the amended Article. The argument of the learned Additional Attorney General, based on implication and not on the wording of Article 175A as amended, is contrary to the jurisprudence that has evolved in our jurisdiction. Furthermore, the argument ignores the legal precept explained above that the Constitution has to be construed as an organic whole.

28. There is a vast body of precedent in our legal corpus which has consistently held that the Court's jurisdiction may only be ousted through express words in a legal text. This principle of law is by now well settled. Even

Mr. Agha did not give any valid reason to question this legal principle or to show that it does not apply to the circumstances of this case. On the other hand, any number of cases can be cited in support of the argument advanced by learned counsel for the petitioners that while interpreting a legal text, ouster of jurisdiction should not be inferred. Reference, however, may be made to just a few cases decided by this Court; the first being *Additional Collector II Sales Tax versus Abdullah Sugar Mills Ltd.* (2003 SCMR 1026), wherein it was held that ouster of jurisdiction is to be seen from express words which should not be implied except where absolutely necessary. Likewise, in the case titled *Muhammad Ismail and others versus the State* (PLD 1969 SC 241 at page 246A) it was held that unless very explicit words are used in a legal provision to oust the jurisdiction of the Court, such an intention would not be normally imputed to the legislature. Maxwell on the Interpretation of Statutes was also cited wherein it has been commented that *"…a [strong] leaning now exists against construing a statute so as to oust or restrict the jurisdiction of the superior Courts"* (11th Edition page 122). This rule is applicable with even more rigour while interpreting Constitutional provisions. As was held by this Court in *Fazlul Quader Chaudhry v. Muhammad Abdul Haq* *"[t]here is need for greater strictness in a case where the bar to the jurisdiction of the courts relates to the interpretation of the provisions of the Constitution, a Constitution which by their oaths the judges are bound to protect and preserve. "(Fazlul Qauder Chaudhry v. Muhammad Abdul Haq – PLD 1963 SC 486)"*.

29. Furthermore, in line with the rationale for considering the Constitution holistically, it may, at this point, be added that our Constitution is no stranger to ouster clauses. Mr. Makhdoom Ali Khan has drawn our attention to no less than seventeen provisions in the Constitution which, through express wording purport to exclude the jurisdiction of the Court in certain matters. Some of these

provisions can briefly be adverted to, with the object of showing that whenever it has been intended to oust the jurisdiction of the Court, express provision has been made in the Constitution for this purpose. Article 41 (6) stipulates that *"the validity of the election of the President shall not be called in question by or before any Court or authority"*. Article 48 (3), *inter alia,* provides that questions relating to advice tendered to the President by the Cabinet "*shall not be inquired into in, or by, any Court …"* Article 165A (2) similarly stipulates, *inter alia,* that orders etc., made prior to the commencement of the Jurisdiction (Amendment) Order 1985 "*… shall not be called in question in any Court including the Supreme Court and a High Court, on any ground whatsoever".*

30. There are several other provisions in the Constitution such as Article 211, Article 236(2), Article 245(2) and Article 270A which contain wording purporting to expressly oust the jurisdiction of a court in respect of matters specified in these provisions. It must, however, be noted that even where such express language has been used in the Constitution, there is consistent precedent to demonstrate that such provisions have not been construed as providing for an absolute ouster of the Court's jurisdiction. In this respect, reference may be made to the cases of *Central Board of Revenue and another versus S.I.T.E.* (PLD 1985 SC 97) and *Chief Justice of Pakistan Iftikhar Muhammad Chaudhry versus President of Pakistan and others* (PLD 2010 SC 61), *Sardar Farooq Ahmad Khan Leghari and others versus Federation of Pakistan and others* (PLD 1999 SC 57) and *Federation of Pakistan and another versus Malik Ghulam Mustafa Khar* (PLD 1989 SC 26). In these cases the Court did exercise jurisdiction (though for limited purposes) notwithstanding the language purporting to oust its jurisdiction.

31. On a review of the Constitution and the ouster clauses provided for in the various Articles of the Constitution and applying the ratio of the precedents

cited above, we can only conclude that the absence of similar wording in Article 175A must be construed as reinforcing the view that Parliament did not intend to oust the jurisdiction of this Court to review the decisions of the Committee.

32. At this point it will also be useful to understand the nature of the decisions of the Committee, which have been assailed before us. As argued by the petitioners, and not contested by the learned Additional Attorney General, these decisions of the Committee are, by their nature, executive decisions. The fact that these decisions have been taken by persons who also happen to be parliamentarians, does not alter the nature of the decisions. Although this issue was not contested, we nonetheless would like to supplement our conclusion with reasons. The task which the Committee is meant to undertake is part of the process of making judicial appointments. The nature of such task has previously been the subject of contention and adjudication in this Court wherein it has been held that the matter of making judicial appointments is, in essence, an executive function. Reference in this behalf may be made *inter alia*, to the *Al-Jehad* and *Sindh High Court Bar* cases. Therefore, the Committee, for reasons to be explained shortly, must not be seen as a 'parliamentary' committee properly speaking; rather, in constitutional terms, it is a committee of parliamentarians, acting independently as a Constitutional body in an executive capacity.

33. Although the eight member Committee has been given the appellation of "Parliamentary Committee", it is important to bear in mind that the status of a constitutional body is not to be determined by the name given to it. This to be determined by the functions it performs and the place it occupies in the Constitutional order. It is important to state with clarity the status of the Committee created under Article 175A and, in the process, to allay any misconceptions about it. For this purpose, we need to look no further than the

Constitution itself. Article 50 thereof creates Parliament by stipulating that *"[t]here shall be a Majlis-e-Shoora (Parliament) of Pakistan consisting of the President and two houses to be known respectively as a National Assembly and the Senate"*. The said article and each subsequent Article of the Chapter relating to Parliament (Chapter 2 of Part III) do not envision or refer to the Committee under Article 175A. The only committees mentioned in this Chapter are the Finance Committees of the two Houses recognized under Article 88 (2) of the Constitution. Article 88(2) stipulates that *"[t]he Finance Committee shall consist of the Speaker or, as the case may be, the Chairman, the Minister of Finance and such other members as may be elected thereto by the National Assembly or, as the case may be, the Senate"*. The Finance Committees are part of the two Houses which elect them and act merely to render advice. Article 88 thus provides a very significant pointer towards the status, nature and essential features of a committee, which can properly be designated as a parliamentary committee.

34. On the other hand, Article 175A has set up an independent constitutional body having a specific role assigned to it relating to the appointment of Judges of this Court and of the High Courts. This constitutional body, as adverted to above, has been referred to as a Parliamentary Committee but it is neither part of Parliament when acting under Article 175A nor is it elected by or answerable to Parliament. An examination of the Constitution and established Parliamentary practice will further demonstrate this distinction between the Committee set up under Article 175A and a parliamentary committee. By virtue of Article 67 of the Constitution, each House of Parliament may "*make rules for regulating its procedure and the conduct of its business*". This authority has been exercised by both Houses of Parliament and as a result, rules have been framed. The upper House has framed the "Rules of Procedure and Conduct of Business in the Senate 1988" (the 'Senate Rules') while the National Assembly has

adopted its own rules known as the "Rules of Procedure and Conduct of Business in the National Assembly, 2007" (the 'Assembly Rules'). From the Senate Rules and the Assembly Rules, it is very clear that a parliamentary committee is a body elected by the respective houses of Parliament and answerable to such houses. For instance, the Assembly Rules in Rule 200, state that *"[e]xcept as otherwise provided in these rules, each Committee shall consist of not more than seventeen members to be elected by the Assembly within thirty days after the ascertainment of the Leader of the House."* Likewise, the Senate Rules in Rule 145(1) provide that *"[e]ach Committee shall consist of not less than six members and not more than twelve members to be elected by the Senate…"*

35. The use of Committees by Parliament is an old and well established practice which was adopted during the colonial era and finally was given Constitutional status under the 1973 Constitution. Legislation and parliamentary decision making are facilitated through consideration in Committee (rather than the entire House) of proposed legislation and the performance of other roles entrusted to Parliament. The role of a Parliamentary Committee is simply to examine such legislation or other proposed Parliamentary action. It is the Parliament alone which is empowered to pass legislation or exercise such functions which the Constitution entrusts to it. Thus, a Parliamentary Committee as properly understood in our Constitutional scheme simply facilitates Parliament in the performance of its legislative and Constitutional functions – acting as a mere delegate or in the case of the Finance Committee, as an advisor to the House which has elected it. Crucially though, for our present discussion, a real parliamentary committee is elected by each of the Houses of Parliament and is a subordinate sub-set of the entire House, accountable to the House it belongs to.

36. In stark contrast, the Committee established under Article 175(9) of the Constitution is comprised of eight Hon'ble Members (four from each House) who are neither elected by the houses of Parliament nor are they in any manner answerable or accountable to either of the said houses. It is in this sense that the larger Bench of this Court vide its order dated 21.10.2010 has adverted to the Committee as a "*Committee of Parliamentarians*" to distinguish this constitutional body from a parliamentary committee as understood and defined in the rules of procedure and conduct of business of the two houses. This distinction is also important to note while addressing the issues raised in these petitions.

37. It appears to us that the essential distinction between a parliamentary committee (elected and answerable to Parliament) and a nominated Constitutional body, not answerable to Parliament has not been kept in view in the Federation's stance before us. If this fundamental distinction is considered in the light of Article 69 of the Constitution, we will be further reinforced in our opinion that the Committee's decisions have not been put beyond the pale of judicial review. Article 69 *ibid*, for ease of reference is reproduced as under in relevant part:-

> "***69. Courts not to inquire into proceedings of [Majlis-e-Shoora (Parliament)].--- (1)*** *The validity of any proceedings in [Majlis-e-Shoora (Parliament)] shall not be called in question on the ground of any irregularity of procedure.*
>
> *(2) No officer or member of [Majlis-e-Shoora (Parliament)] in whom powers are vested by or under the Constitution for regulating procedure or the conduct of business, or for maintaining order in [Majlis-e-Shoora (Parliament)], shall be subject to the jurisdiction of any court in respect of the exercise by him of those powers".*

38. It would be obvious from a plain reading of the above provisions that the limited ouster of jurisdiction stipulated therein is in respect of, *inter alia,* the proceedings and conduct of business of the Parliament. The decisions of the Committee (even if comprised of persons who are honorable members of Parliament) cannot be considered immune from judicial scrutiny by virtue of Article 69. This conclusion necessarily follows from the fact that the Committee is a creation of the Constitution and not of the Parliament. Furthermore, it is independent of and separate from Parliament notwithstanding its composition. It performs, as noted above, an executive function relating to the Judiciary and, therefore, has been placed in the Chapter relating to the Judicature rather than in Chapter 2 [The Majlis-e-Shoora (Parliament)] dealing with Parliament.

39. The justiciability of the decisions of the Parliamentary Committee can also be approached from another angle, which would be manifest from a holistic examination of the Constitution. The governance of state organs in Pakistan is based on checks and balances where the powers of each organ are counter-balanced by some other organ of the State. Thus, executive action taken by the various administrative and executive functionaries of the State can be called in question, *inter alia,* under Articles 199 and 184(3) of the Constitution. Such executive action may additionally be subject to Parliamentary review and over-sight in our parliamentary system of governance. Legislative action can also be called in question in Court, *inter alia,* on the touchstone that it is violative of the Constitution. Likewise, decisions rendered by this Court can be modified or reversed by legislation (in recognized circumstances) and such legislation may also be retrospective. Thus we see that each organ of the State, be it the Judiciary, the Executive or the Legislature, operates under constitutional constraints which effectively make these organs of State limited in their actions.

40. If it is accepted, as urged by the learned Additional Attorney General, that the decisions of the Committee are not amenable to judicial review, a truly unique status higher than the Executive, the Judiciary and Parliament, will have to be accorded to this nominated Committee, outside the matrix of checks and balances that constrain the Parliament, the Executive and the Judiciary. This will be so because in such event, the Committee will not be subject to any check as it is already not answerable for its decisions either to Parliament or to the highest functionaries of the Executive, including the President and the Prime Minister. Such an interpretation of the Constitution, which places the decisions of the Committee beyond the pale of review by any other instrumentality or organ of the State would be contrary to the scheme of the Constitution and will, in effect, vest the Committee with untrammeled powers. Bearing in mind the assurance in Parliament that "*the fundamental principles of the Constitution are not altered*", it will not be possible to ascribe such powers to the Committee, while interpreting Article 175A of the Constitution.

41. To appreciate the above notion with clarity, we need to understand the implications of affording unbridled powers to the Committee. Here we must make note of the submission made by the learned Additional Attorney General that the Committee has the power to reject any nomination of the Judicial Commission (even one unanimously passed) for *"any reason under the sun"*, and that such a rejection must, in all cases, be deferred to by this Court. The implication of this extraordinary submission would be that even where a decision of the Committee has the effect of eroding and undermining the independence of the Judiciary, this Court will be helpless in checking such erosion. We have already noted that the Committee is not required to send its decision to the Parliament for approval and, as rightly observed by Mr. Raza Rabbani on the floor of the House during the debate on the 18th & 19th

amendments, the role and discretion of the Prime Minister and the President as previously envisioned in the Constitution *"has been taken away"*. We have not been able to find any precedent or Constitutional principle, and none was suggested by the learned Additional Attorney General, which would justify the conclusion that the eight-member nominated Committee or, rather a Committee of Parliamentarians can claim such unchecked authority. Given this, the operation of the Committee cannot be imagined, in my humble opinion, without the check of judicial review.

42. This matter may also be decided by looking at the general and historical background to our Constitution and the case-law which has emerged from it. It is our review of this aspect which helps us conclusively determine the respective roles of the various constitutional institutions involved in this case – and thus decide whether, and how far, the decisions of the Committee are subject to judicial review.

43. Historically, the independence of the judiciary and the separation of powers have been held to be two of the undeniable foundational principles of our constitutional scheme. Although, these are principles which also found a place in the 1956 and 1962 Constitutions, the same have been given unparalleled importance by the framers of the 1973 Constitution. This is demonstrated, *inter alia,* by an extract from the *aide memoire* of late Mr. Zulfiqar Ali Bhutto no less, written in defense of the Draft Constitution Bill of 1972 and presented in the process of finalizing the Constitution which was passed in 1973. It gives us a good insight into the intent of the framers. The *aid memoire* declares unambiguously that: *"the Judiciary shall be <u>completely independent</u> of the executive... Indeed, for the first time substantive provision has been made in the Constitution for the separation of the Judiciary from the executive …"* (*ibid).* These principles received recognition in various subsequent judgments of the superior

courts, amongst others, in *Sharaf Faridi v. Federation of Islamic Republic* (PLD 1989 Kar 404 at p. 427, 428)**,** wherein the Court observed that the 1973 Constitution "*contemplated the trichotomy of power between the three organs of the state, namely, the legislature, the executive, and the judiciary... it was envisaged that the judiciary would be independent and separate from the other organs of the state...".* Later, in the *Al-Jehad Trust case*, this Court dealt with these principles in detail wherein the Court observed in clear terms, *"… that the Judiciary shall be independent." (Pg. 429; para 23)* And again in *Zafar Ali Shah's case* (PLD 2000 SC 869), the Court declared: *"The independence of the judiciary is a basic principle of the constitutional governance in Pakistan."* More recently, in *Chief justice of Pakistan Iftikhar M. Chaudary v. President of Pakistan through secretary and others* (PLD 2010 SC 61): on page 173, it was held *"... that [the] independence of the judiciary was a basic and a salient feature of the constitution."*

44. Similarly, the Courts have repeatedly declared that this "independence of the judiciary" which the Constitution assures us, depends directly on the process of the appointment, removal and security of tenure of judges. In the *Al-Jehad Trust case*, this Court reiterated that *"... the independence of Judiciary is inextricably linked and connected with the Constitutional process of appointment of Judges of the superior Judiciary"* (*ibid* 429). In the *Mehram Ali case* (PLD 1998 SC 1445 at page 1477), this Court further held that the terms, conditions and security of tenure of Judges is also central to the independence of the judiciary. And, recently in the *Chief Justice's case*, it was reaffirmed that: *"security of office of judges and of its tenure was a sine qua non for the independence of judiciary..."* (PLD 2010 SC 61). Indeed it is an undisputed tenet of our Constitutional scheme that in matters of appointment, security of tenure and removal of Judges the independence of the Judiciary should remain fully secured. We are in respectful agreement with these tenets as expounded in the cited precedents.

45. If we also consider the constitutional jurisprudence of this Court which relates specifically to the issue of appointment of judges, we notice that prior to the 18th amendment, it was well settled as a principle that the executive organ of the State was obliged to give reasons for its decisions if it chose to differ with the opinion of the Chief Justice of Pakistan. It was also well settled that the reasons given by the executive organ of the State were justiciable. The touchstone and scope of justiciability and the limits of the executive authority to differ from the opinion expressed by the Chief Justice of Pakistan also came to be well defined in the context of Article 193 of the Constitution which related to the appointment of Judges of the High Courts. It is, thus, beyond doubt that the constitutional principles relating to the independence of the judiciary were already well-settled at the time the 18th and the 19th amendments were tabled in Parliament; and for reasons adverted to above and to be further explained shortly, these principles remain fundamentally unaltered even after the above-mentioned amendments, notwithstanding the changes in the procedure for making judicial appointments.

46. To appreciate the continuing relevance of the above-mentioned foundational principles in the interpretation of Article 175A, we can advert to the debate on the floor of the National Assembly during the passage of the 18th Amendment. It may be clarified in passing that in our jurisprudence, it is by now well established that Parliamentary debates can also be resorted to (in certain situations) to ascertain the meaning of any legal text. Thus, in the case titled *Hakim Khan and others versus Government of Pakistan and others* (PLD 1992 SC 595), *A & B Food Industries Limited versus Commissioner of Income Tax/Sales, Karachi* (1992 SCMR 663) & *Messrs Gadoon Textile Mills and others versus WAPDA and others* (1997 SCMR 641), the Court looked at legislative debates to ascertain the meaning of, and to resolve the issues arising from, legal provisions being

considered by the Court. Indeed, the learned Additional Attorney General also agreed, and was quite insistent, that resort should be made to such debates.

47. In the context of the present petitions, of particular significance is a speech made by Mr. Raza Rabbani, Chairman of the Special Committee of the Parliament for Constitutional Reform, given on the floor of the National Assembly. He was quite categorical in clarifying that it was not the intention of the 18th and 19th amendments to alter the fundamental principles of the Constitution. He said: *"… before I go into the details of this Article [175A], let me once again reiterate that one of the essential purposes rather two or three of the essential purposes which made up the basis for these constitutional reforms was to ensure that the fundamental principles of the Constitution are not altered. That whatever amendments are made, are made within the ambit of fundamental principles of the Constitution. And when dealing with various institutions under the Constitution, their independence is not undermined. And that their independence as ensured in the Constitution of 1973 is reassured"* (Parliamentary debates).

48. This reassurance indeed reflects the intention of Parliament and gives guidance to this Court as to the aims of Parliament in bringing about reforms in the procedure for appointment of Judges. It is precisely such reassurance which gives relevance to and enables us to draw guidance from precedents, alluded to above, that expound the principle of the independence of the Judiciary and its dependent relationship with the manner of judicial appointments. In other words, insofar as "*the fundamental principles of the Constitution are not altered,"* the precedents that explain those principles are also relevant.

49. Once this is understood, our task of interpreting the newly added provisions of the Constitution becomes relatively simple. We recognize at once that since the decisions of the Committee have a direct bearing on the practical

manifestation of our foundational constitutional principles, this Court cannot possibly abdicate its jurisdiction and not examine their meaning. At the same time, however, we remain cognizant that Parliament has, while adhering to the fundamental principles of the Constitution, made changes which should be given effect in furtherance of these principles. Looked at in this light, it is clear that the essence of the amendments is to bring about changes in the process of making judicial appointments, rather than in the structure and underlying values of the Constitution such as the independence of the Judiciary and one of its supporting pillars namely, judicial appointments.

50. In order to properly interpret the provisions of Article 175A and the principles upon which this Article is based, it is also necessary to have a closer look at the historical circumstances and the reasoning which informed the earlier precedents of this Court. This context will help us appreciate the reasons why the two new institutions - the Commission and the Committee - were created and what roles were envisaged for these constitutional bodies in the 18th and 19th Amendments.

51. Previously, there were a very small number of constitutional functionaries (judicial and executive) who, through a process which was not very open, made decisions relevant to the appointment of Judges of this Court and of the High Courts. Instances in our constitutional history, therefore, tended either to create a tussle between the judicial consultees and the executive functionaries of the State or, as happened in certain cases, the judicial consultees felt over-whelmed, over-awed or ignored by the executive functionaries responsible for making and notifying judicial appointments. Since this situation was not consistent with the independence of the Judiciary, the matter was agitated, among others, in the *Al-Jehad case*. It is through elaborate reasoning in the said case and examination of the fundamentals of our

constitutional scheme, that a division of functions between the judicial consultees and the executive functionaries was delineated by this Court.

52. In brief, it was held that the judicial consultees are best suited to determine the caliber, competence, legal acumen and over-all suitability of a person for appointment to a tenured judicial office under the Constitution. The executive functionaries on the other hand were considered more suitable for ascertaining the antecedents of judicial appointees. A reasonably clear demarcation between the different roles, respectively, of the judicial consultees and the executive functionaries of the State was thus drawn. And with the passage of time this demarcation was further refined. In the latest pre-amendment judicial pronouncement on the question of appointment of Judges, made in the case of *Sindh High Court Bar Association and another versus Federation of Pakistan and others* (PLD 2009 SC 879), for instance, it was held that the opinion of the Chief Justice of Pakistan in respect of the suitability of a person to be appointed to constitutional judicial office had primacy and that this opinion was subjective and not open to challenge through judicial review.

53. It is in the foregoing context that the creation of the Commission and the Committee must be understood. It is quite possible that Parliament may have concluded that the Constitution as interpreted in the foregoing precedents, had concentrated in one person *viz*. the Chief Justice of Pakistan, enormous discretionary powers in the matter of making judicial appointments. Such concentration, although tempered by consultation with the Chief Justice of the High Court in which a particular appointment was to be made, could have been seen by Parliament as having the potential of leading to error of judgment or, possibly, even abuse. These, or similar concerns, can be of immense interest for the chosen representatives of the people. Such concerns legitimately and eminently fall within the domain of Parliament which may, therefore, decide to

bring about a balance in the respective roles of the judicial and executive functionaries responsible for making judicial appointments, subject always to the avowed objective and the Constitutional imperative of having an independent Judiciary whose independence is to be "fully secured".

54. Therefore, apparently guided by this object, in the new dispensation, instead of one person, namely the Chief Justice, or at best two, namely the Chief Justice of Pakistan and the Chief Justice of the concerned High Court, taking a decision on the competence and suitability of a potential judicial appointee, the decision-making power has been diffused and spread over a collegium comprised of thirteen persons. A similar diffusion appears to have been intended for the executive role in judicial appointments by constituting the Parliamentary Committee. This, however, will be examined shortly.

55. In this light, if we consider further the composition of the Commission, it will lead us closer to understanding the role envisaged for it. It is clear that each member of the Commission is directly and substantially connected with the Courts in one way or another. The members of the Commission thus have the occasion of assessing first hand, the legal abilities and performance of persons who potentially could be appointed as Judges. In the *ex Officio* appointments of the Minister of Law and Parliamentary Affairs and of the Attorney General for Pakistan, the Judicial Commission now also has the additional ability to make an assessment as to the antecedents of a nominee through access to the information and executive resources of the State which otherwise, may not be available to the other members of the Judicial Commission. What is also worth noting is that barring the one former Judge of this Court and the advocates who are members of the Commission, all others are *ex Officio* Constitutional functionaries making the Commission a continuous body with changing

membership, the preponderant majority whereof, being *ex Officio,* is not dependent on any separate process for their own appointment.

56. This composition of the Commission immediately highlights two things. Firstly, that the expertise and core competence of the members of the Commission will facilitate the identification and nomination of appointees to judicial office based on caliber, competence, legal acumen, antecedents and over-all suitability of a person for appointment as a Judge. Secondly, the composition of the Commission will ensure diverse inputs on account of the diversity and the continuous changing nature of its membership, thus tending to make the Commission's nominations more objective and not dependent on the personal opinion of one or, at best, two individuals. It does not take a great deal of imagination or a leap of logic to conclude that the role (as defined by precedent) which was assigned previously to the judicial consultees is now to be performed by the Commission as a collegiate body.

57. We can now come to the erstwhile role of the other functionaries involved in the appointment process. It will be seen that in the original Articles 177 and 193, a Judge of the Supreme Court and Judges of a High Courts were to be appointed by the President after consultation with the Chief Justice of Pakistan and other consultees mentioned in Article 177 and Article 193 (1) respectively. These provisions, in relevant part, have been replaced by Articles 177 (1) and 193 (1), as amended, which stipulate, *inter alia,* that Judges of the Supreme Court and the High Courts shall now be appointed by the President in accordance with Article 175A. When clause (1) of Article 175A is considered, a bare reading of the same shows that the Commission has been created for the appointment of Judges of the Constitutional Courts. Thus, while the President previously made the appointments on the advice of the Prime Minister, both have now been left with nominal ministerial roles and their powers, in the

words of Mr. Raza Rabbani, *"have been taken away"*. The Prime Minister is now obliged to simply forward the confirmation made or deemed to have been made by the Committee to the President and the President equally is obliged to make the appointment on the basis of such confirmation. The Prime Minister and President, under the new constitutional dispensation, thus have no power or authority to differ with the decision of the Parliamentary Committee. The role which they were performing in the previous legal setup, as examined above, is now, logically, to be performed by the Committee. It is, therefore, evident that the purpose – the *raison d' etre* – of the Commission and the Committee is the appointment of Judges albeit in accordance with the procedure laid down in Article 175A.

58. Given this dispensation and the above referred historical context, the Committee cannot (without eroding judicial independence) be seen as a superior body sitting in appeal over the recommendations of the Commission with the ability to set aside or reverse the well considered opinion of the members of the Commission. The fact that Parliament was fully aware of the state of the law, as judicially interpreted, and yet did not define or demarcate the respective roles *inter se* of the Commission and the Committee, provides very strong manifestation of the intention of Parliament *"that the fundamental principles of the Constitution are not altered"*. The distinction between the legal acumen and suitability of an appointee, and his antecedents is so well recognized in our constitutional jurisprudence that it is not possible to assume that it was not in the mind of Parliament when it decided to amend the Constitution. From the absence of role-definition in Article 175A, in respect of the Commission and Committee, it can safely be inferred that Parliament intended to preserve the delineation of powers in the previous dispensation, but vest the roles in more diffused bodies than was previously the case.

59. In view of the foregoing discussion, we may conclude that it is the constitutional mandate of this Court to exercise judicial review over the decisions of the Committee, which, after all, are executive decisions that have great bearing on the independence of the judiciary and the separation of powers between the different State organs.

60. Before moving on to the next section of this opinion, we may also address a number of arguments made on the issue of justiciability by the learned Additional Attorney General. He argued, firstly, that the question of justiciability of the decisions of the Committee had yet to be decided by the seventeen-member larger Bench of the Court in the petitions filed to challenge the *vires* of the 18th Amendment. On this basis, he submitted that this Bench should await the decision of the larger Bench and, in the meanwhile, put the adjudication of these petitions on hold. The learned Additional Attorney General was of the view that the present petitions were a back-door attempt to challenge the role of the Committee and to undermine such role even before the full Court has had the opportunity of deciding the petitions challenging the 18th Amendment. We have considered these submissions and reiterate that the scope of these petitions is materially different from the scope of the petitions being heard by the larger Bench. We are clear, as stated earlier, that the present petitions assume the validity of the 18th and 19th amendments. The petitioners only seek judicial interpretation of these amendments for the purpose of their challenge to the two aforementioned decisions taken by the Committee. Put simply, while the present petitions seek judicial review of decisions of an executive body, purported to be taken under Article 175A of the Constitution, the petitions before the larger Bench challenge the very authority of Parliament to make the amendments challenged in such petitions. It is, therefore, evident that any adjudication in these petitions will relate only to the impugned

decisions of the Committee and not to the validity of the amendments in the Constitution.

61. Mr. K. K. Agha, the learned Additional Advocate General then argued that public airing of, and debate on, the reasons given by the Committee for rejecting a nomination would undermine the sanctity of the judicial office. Also, if the decisions of the Committee were set aside and the Judges concerned were called upon to perform their judicial functions, they would be confronted with an unsavory working environment; always haunted by the cloud of allegations which found favour with the Committee. According to the learned Additional Attorney General, public examination of such reasons would further create friction between the Chief Justice of the High Court and the Judges concerned, which would not be conducive to the effective and independent administration of justice. Moreso, such an environment would generate, amongst the litigating public, a lack of confidence in the fairness and competence of the concerned Judges. These submissions raise issues of propriety rather than legality and appear to have been made in support of the plea that the Court should exercise restraint and decline to exercise jurisdiction, even if it decides it has the power to review the decisions of the Committee.

62. There may be some justification for the foregoing submissions. We are, however, cognizant, as was the learned Additional Attorney General himself, that during the period of transition from the previous to the present system of judicial appointments, some issues will surely arise. We are confident, though, that very soon conventions and precedents will develop which will evolve into a *modus vivendi et operandi* and will smoothen the working of the Commission and the Committee in the roles envisaged for the two bodies under Article 175A of the Constitution. For now, these concerns expressed by Mr. Agha, even if not exaggerated, are more than counter-balanced by the ideal, espoused by the

Constitution, of an independent judiciary whose independence is to be fully secured.

63. Lastly, we would like to address the submission made on behalf of the Federation that Parliament represented the will of the people and such will had to be respected. It goes without saying that this Court, as a matter of Constitutional propriety makes every effort to defer to the legislative and constitutionally mandated actions of Parliament and endeavors to save and uphold such actions. This principal of deference is generally adhered to in recognition of the democratic ethos of our Constitution and to acknowledge that Parliament as a whole is comprised of "the chosen representatives of the people". Notwithstanding this legal principle, Courts undeniably have and do exercise the power of judicial review to strike down legislation and other Parliamentary action, wherever required in terms of the Constitution. Therefore, as noted earlier, these petitions should not be seen as a challenge to Parliament's authority or to it's representative status. Our task is much simpler. We are engaged merely in ascertaining the intent of the Constitution and enforcing it, under the well established rules and conventions of judicial review. We may add that deference to Parliament does not extend to bodies having a separate status even where such bodies are comprised of persons who may be members of Parliament. To illustrate this point, reference may be made to Article 91 of the Constitution. It provides *inter alia,* that *"[t]here shall be a Cabinet of Ministers, with the Prime Minister as its head, to aid and advise the President in the exercise of his functions".* In our parliamentary system of government, the Prime Minister and other ministers in the Cabinet are all members of Parliament, yet the Cabinet cannot be equated with Parliament or be accorded the same status as Parliament. The Committee likewise, though comprised of members of Parliament, is not to be equated with Parliament or,

as earlier discussed, even with a parliamentary committee elected by Parliament under the Senate Rules or the Assembly Rules.

GROUNDS OF REVIEW AND CONCLUSIONS

64. Having determined that the decisions of the Committee are justiciable and subject to this Court's power of judicial review, we need to determine the rules which should define the exercise of such power and the sources from which these rules are to be derived. The foremost source must be the Constitution itself which has created this Court as well as the two constitutional bodies *viz.* the Commission and the Committee. The basis of judicial review in these cases thus must be firmly anchored in the Constitution. Article 5 (2) of the Constitution declares that *"obedience to the Constitution and law is the inviolable obligation of every citizen …"* This means that the Committee too is obliged to ensure that its decisions are in accordance with the law and the Constitution. Whether this obligation has been duly discharged would be a matter reviewable by this Court. The touchstone for such review is conformity with the Constitution and the law. This is in line with Article 184 (3) read together with Article 199 (1) (a) (ii), which confer upon this Court the authority to make, in appropriate cases, an order declaring that *"any act done … in connection with the affairs of the Federation … has been done <u>without lawful authority</u>"* and is, therefore, *"of no legal effect."* It follows that what the Court needs to determine presently is whether the impugned decisions of the Committee conform with the requirements of the Constitution and the law, and whether such decisions have been taken while remaining within lawful authority. The grounds upon which this Court can adjudge this issue flow directly from these constitutional provisions themselves; they have also been elaborated upon in a number of precedents.

65. A classical analysis of the grounds on which administrative decisions are subjected to judicial review was presented in an English case, *Council of Civil Service Union v. Minister,* by Lord Diplock. This analysis has also been frequently adverted to in our jurisprudence on the judicial review of executive action. A recent instance can be found in the opinion of Ch. Ijaz Ahmad, J. in the case of the *Chief Justice of Pakistan, supra* at pages 232 to 238. The analysis in the case of the Civil Service Union *supra* is equally applicable to the circumstances of these petitions. Lord Diplock stated three grounds for exercise of the Court's power of judicial review. These are 'illegality', 'irrationality' and 'procedural impropriety.' *Council of Civil Service Union v. Minister* ([1984] 3 All ER 935, 950-952) What is important for deciding the present petitions is the scope and nature of 'illegality', which, in the language of the aforesaid case, is measured on the consideration "… *that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par-excellence a justiciable question to be decided, in the event of dispute, by those persons - the Judges by whom judicial power of the State is exercisable" (ibid).* Thus any decision based on an incorrect understanding of the law that regulates the decision-maker's decision-making power, would be an illegal decision, and it could be corrected through judicial review. What must be emphasized here is that in disputed cases, it is for the Courts to definitively interpret the law and thereafter to test the administrative decision on the touchstone of the law so interpreted.

66. In the present case, the Committee has taken a decision in accordance with its own understanding of Article 175A. We need to point out what the understanding adopted was, and then determine whether it was the correct one. To answer this question, we now take a detailed look at the facts of the Committee's decision, and the run up to it.

67. It is apparent from the record that on 22.1.2011, when the Commission assembled for the purpose of making nominations / appointments to the Lahore High Court, all thirteen of its members were present. They had a meeting where all factors relevant for such appointments were reviewed. This is evident from the letter which the Secretary of the Commission sent to the Secretary of the Committee, dated 22.1.2011. In relation to nominations to the Lahore High Court, it said *"the Commission had in depth discussions about [the] professional caliber, legal acumen, judicial skills, quality/quantum of judgments, commitment/devotion to duty, efforts made for expeditious disposal of cases, number of reserved/pending judgments and also examined [the] antecedents of 24 Judges nominated by Judicial Commission for appointment as Judges of the Lahore High Court"*. It is not necessary to reproduce the names of all 24 Judges nominated for appointment by the Commission. It will suffice for the present to note that the Commission performed its functions of nomination and appointment of the aforesaid Judges, in accordance with the provisions set out in clauses (1) to (8) of Article 175A of the Constitution. A similar exercise was undertaken by the Commission in respect of the nominations made for the Sindh High Court as is clear from the letter of the Secretary of the Commission dated 19.2.2011 written to the Secretary of the Committee, which letter is along the lines of the letter dated 22.1.2011, referred to above.

68. The Committee, after receiving the nominations including the recommendations for renewal of tenure of the above mentioned six Judges, took the decision not to confirm their nominations. It is important to note that the Committee chose to disregard the unanimous nominations made by the Judicial Commission. For this, it appears to have relied only on the contents of brief proformas which had been filled in by the Chief Justices of the Lahore and Sindh High Courts respectively. For reasons which are examined below, it is in

our opinion, of the greatest relevance to consider the significance of such proformas. These proformas appear to have been designed by the Commission for the purpose of obtaining particulars and general information about the persons being considered for appointment as Judges. The material column in the proforma, for the purpose of the present petitions, relates to the evaluation made by the Chief Justice of the concerned High Court in respect of a potential nominee, based on criteria such as integrity, knowledge of laws, performance etc. The proforma also contains the opinion of the Chief Justice of the concerned High Court as to whether or not a person being considered should be recommended to judicial office. In the case of the four Hon'ble Additional Judges of the Lahore High Court, the recommendation made in the proforma was that their tenure be renewed for a period of one year. However, in respect of the two Hon'ble Additional Judges of the Sindh High Court, the opinion stated by the Hon'ble Chief Justice was that their tenure should not be extended. Nevertheless, after deliberation by the Judicial Commission as a collegiate constitutional body, even the Hon'ble Chief Justice of the Sindh High Court agreed that the two Hon'ble Additional Judges of his Court should be recommended for renewal of their respective tenures for a further period of one year. The Committee chose, nonetheless, to turn these nominations down, relying solely on the earlier views expressed by the chief justices of the High Courts.

69. From this review of the facts, it seems clear that the Committee took Article 175A to mean that it is a constitutional body sitting in appeal over the decisions of the Commission. This, as we have shown earlier, is far from being the case. Such an interpretation is borne out neither by the text of Article 175A nor by its context. Earlier in this opinion we have reviewed the foundational principles of our Constitution, namely independence of the judiciary and

separation of powers, in the light of which Article 175A must be interpreted. We have also reviewed the historical evolution of this article and the legislative intent behind it, which demonstrates that while power has been devolved from persons to collegial institutions, the essential demarcation of duties between judicial consultees and executive functionaries, chalked out by precedent, has remained largely intact. All constitutional provisions have to be interpreted accordingly. Justice Fazal Karim, a former Judge of this Court can today be counted amongst the foremost scholars and academics on constitutional law. In his seminal book *"Judicial Review of Public Actions"*, he has examined a number of precedents from our jurisdiction to support his comment that *"the independence of Judiciary is now not merely one of the general principles of the Constitution of Pakistan; it is part of its substantive provisions and the relevant constitutional provisions must be construed accordingly to ensure the independence of the Judiciary. The provisions of Part-VII of the Constitution must be taken as giving effect to … that general principle"* (Karim, Fazal. *"Judicial Review of Public Actions"* Vol. 1, p.110). Our review of these factors, which collectively provide the context in which to read Article 175A, allows us to conclusively arrive at a more organic interpretation of the said Article. And, this interpretation does not support the expansive manner in which the Committee has construed its own power, nor does it support the dismissive way in which the Judicial Commission's unanimous recommendations have been treated. The Committee's decision, based on an incorrect understanding of the constitutional provision regulating its decision-making powers, travelled much beyond its lawful authority. On this ground alone, it may be held that the decisions of the Committee impugned before us, were taken without lawful authority and are thus unconstitutional.

70. It should be clear from the earlier discussion and established precedent that, to ensure the independence of the Judiciary, it is important that the process of making judicial appointments remains independent of the executive

and the legislature, except for such executive inputs in decision-making which can ensure and advance the independence of the Judiciary. In the case at hand, the Committee has not provided any such input.

71. It also needs to be reiterated that the thirteen members of the Commission are law-knowing and law related persons who can make an objective evaluation of the suitability of a nominee for judicial office. From members of the Committee, it is not expected that they will have first hand information about a nominee or that they will have the same level of expertise as the Commission, to evaluate the suitability of a nominee for appointment to high judicial office. The Committee, however, is not a meaningless or redundant body. It has the ability to add value to the process of making judicial appointments by taking into account information which is different from and may not have been available with the Commission.

72. Even the learned Additional Attorney General contended that the two bodies namely, the Commission and the Committee were coordinate bodies, neither of which was subordinate to the other. If, however, it is conceded either that the decisions of the Committee are not justiciable or that it has the power to review and reverse the findings of the Commission, an anomalous and even absurd situation can result. It would not be possible or justifiable (without adversely effecting the independence of the Judiciary) to interpret Article 175A in a manner which grants a virtual veto to the Committee enabling it to reverse the recommendations of the Commission, for considerations which have already received the attention of the Commission in its deliberations. This is so because of the composition earlier discussed, of the two bodies. It cannot be seen as the intention of the Constitution as amended, that the thirteen members of the Commission who amongst them include the five senior-most members of the Judiciary in the country together with a former Judge of this Court and the

Chief Justice of the High Court concerned, should be trumped in their views about the competence and suitability of a nominee, by six members of Parliament who, it may be stated with great respect, are not supposed to be equipped with the core ability for evaluating, *inter alia*, legal acumen and competence.

73. The two constitutional bodies also cannot be seen as adversaries serving antagonistic and conflicting ends. We are in agreement with the learned Additional Attorney General and learned counsel for the petitioners that the object of both bodies is to ensure the selection and appointment of the most suitable persons as Judges of the High Court, which, in turn, is essential to secure fully the independence of the Judiciary.

74. With the above considerations in mind we also need to avoid giving overly broad or sweeping statements on Article 175A as amended by the 19th amendment. We are not here engaged in an academic exercise or in a discourse to expound general constitutional principles of political philosophy. Our job here is to determine the fate of the petitions before us. And the the outcome of these petitions is determined, ultimately, by their own facts and circumstances.

75. There is another way in which the Parliamentary Committee's decision can be shown to be based on an erroneous understanding of the law and also violative of the spirit of the Constitution, as amended. One of the fundamental aspects of the 18th and 19th constitutional amendments, and the changes intended to be brought about thereby, was to do away with the subjective opinions of one or two persons. This object was to be achieved through the creation of a thirteen-member collegium which could, through consideration of varying opinions, make a collective decision by majority of its membership. In the present case, the collegium which is the Commission has, after deliberation,

made nominations which are unanimous and include also the concurrence therein of the respective Chief Justices of the Lahore and Sindh High Courts.

76. In the foregoing circumstances, it would negate the very purpose of the 18th and 19th amendments, if the Committee were to have the power to rely upon the opinion of just one member of the Commission, and that too, expressed prior to collective deliberations, to nullify the ultimate collective views of the Commission. The purpose of diffusing the decision-making process and spreading it over a collegium comprising of thirteen persons was to ensure that an objective and balanced opinion emerges from the deliberations of the Commission. This process was meant to ensure, to a great degree, objectivity in the nominations made after discussion and inputs from all members of the Commission.

77. The learned Additional Attorney General wished to emphasize the fact that the Chief Justice of the High Court was most suitable and was eminently qualified to make an evaluation as to competence etc. of a nominee. He seemed to suggest that since the Parliamentary Committee had relied on the views expressed by the Chief Justices of the respective High Courts to which the concerned judges were nominated, this lent weight to the Committtee's decision. This is an argument which is flawed on three counts.

78. Firstly, it is relevant to note that the proforma filled in by the Chief Justices of the two High Courts was at best a mechanism for tabling the particulars of a nominee which would enable the Commission (acting collectively) to have a meaningful and purposive discussion leading to an informed decision about recommending such nominee. As stated above, it is not necessary in the facts of the present petitions to embark on a scrutiny of the evaluations of the Hon'ble Chief Justices, made in respect of the six Hon'ble

Judges whose nominations are in question, because after considering each nomination, the Commission (including the Chief Justices of the two High Courts) has unanimously made its recommendation that their tenures be renewed. The pre-deliberation evaluations of the Chief Justices of the Sindh High Court and the Lahore High Court do not now need to be considered because, as a matter of law, such evaluations disappeared when they merged into the final recommendation of the Commission made by a majority of its members and which, in the present case, has been made unanimously.

79. Secondly, this argument does not take into account the express wording of Article 175A which mandates a collective decision of the Judicial Commission and leaves no room for individual opinions of any one member of the Judicial Commission. It should be clear by now that the Constitution, in its amended form, recognizes only the collective decision of the Commission. The Constitution does not accord any primacy or special weightage to the opinion of any one member of the Judicial Commission. This is particularly so when such opinion is a purely individual opinion without benefit of the views of other members of the Judicial Commission. If anything, the amendments in the Constitution appear consciously and deliberately to have eliminated reliance on the views of a single person. Weightage, if any, which may attach to the opinions of the individual members of the Judicial Commission, is a matter for consideration by the Judicial Commission alone because the Constitution as amended, does not recognize individual opinions as to the competence, antecedents or over-all suitability of a nominee.

80. Thirdly, the argument does not take into account the larger ramifications of such a ruling for the future of our constitutional system. If it is held today that the Parliamentary Committee may give primacy to the opinion expressed by the High Court Chief Justice sitting in the Commission, tomorrow, there

would be little justification left for objecting, if the Parliamentary Committee relied on the individual and varying opinions of any one of the thirteen members of the Judicial Commission. So, if things were left to proceed in that direction, even a 12-1 majority decision of the Judicial Commission could easily be negated by the Parliamentary Committee, relying on the one note of dissent that they find therein. This would effectively grant the Parliamentary Committee a veto in the appointment of judges – a situation contemplated neither by the Constitution nor palatable to any of the organs of the state, including the Parliament itself.

81. In the end, to facilitate understanding, we may recapitulate the key arguments, elaborated in this opinion, which bring us to reaffirm the short order pronounced earlier. *First*, we have held that these petitions are maintainable under Article 184(3) since they do involve issues of public importance and are related to the enforcement of fundamental rights. *Nex*t, we have laid out the principles which guide us in our task of constitutional interpretation. *After this*, by applying these principles while interpreting Article 175A, and by viewing it in the context of its historical genesis and the foundational principles of our Constitution, we arrive at a correct and organic interpretation of the said article. This has allowed us to determine that the decisions of the Parliamentary Committee are subject to judicial review in this Court; and it has also helped us better appreciate the relative roles assigned by the Constitution, as amended, to the various institutions and functionaries involved in the process of appointment of judges. *Finally*, the facts of the present petitions have been scrutinized using the well-understood principles of judicial review. This scrutiny reveals that the impugned decisions of the Committee are based on an erroneous understanding of the law and the

Constitution; since these decisions were taken without lawful authority, they are of no legal effect.

82. While concluding this opinion, I may add that there is nothing unusual or exceptional about differences as to constitutional questions cropping up between constitutional bodies or State functionaries in a democratic dispensation. Such differences may arise particularly when new provisions are incorporated in the Constitution. However, as nations mature and polities evolve, their maturity is reflected in the manner in which such differences are resolved in accordance with the governing compact, which is the Constitution. The differences of opinion between the Commission and the Committee, in this context, cannot be seen as adversarial turf-wars between the two bodies, or as matters of prestige. Both bodies, as noted earlier, have the common aim of ensuring that *"… the will of the People of Pakistan to establish an order … [w]herein the independence of the judiciary is fully secured,"* which is an objective set out in the Constitution itself, is accepted as a command of the People and is implemented, both in letter and in spirit with due humility and sincerity.

83. Lastly, I would like to refer to Articles 28 and 251 of the Constitution. These provisions highlight the Constitutional imperative of promoting languages other than English. In order to fulfill this need, I have made a humble attempt (as Annexed), that a gist of this opinion is (without need for intermediaries) made accessible to a wider section of those who are unable to understand the language of this opinion.

Sd/-
Jawwad S. Khawaja
Judge

APPROVED FOR REPORTING.

یہ مختصر تحریر ایک اعتبار سے غیر معمولی سمجھی جائے گی ۔ اِس عدالت سے صادر ہونے والے فیصلے انگریزی زبان میں تحریر ہوتے ہیں۔ انگریزی زبان عام فہم نہیں ہے۔

مقدمات کی کارروائی کے دوران، عدالتوں کے اندر بسا اوقات یہ تاثر ملتا ہے کہ اکثر وکلاء اور بعض جج صاحبان بھی اس زبان پر اُتنا عبور نہیں رکھتے، جتنا درکار ہے۔ نظامِ عدل کسی بھی زبان پر جتنے عبور کا تقاضا کرتا ہے، اتنا عبور انھیں حاصل نہیں ہے۔ اس مسئلے کی جڑیں ماضی میں دور تک تلاش کی جاسکتی ہیں۔ جب وکلاء اور ججوں میں عدالتوں میں زیرِ استعمال زبان کے کماحقہ فہم کی کمی ہے تو عوام الناس کا کیا حال ہوگا جن کی اکثریت انگریزی زبان سے واقفیت نہیں رکھتی۔ ایسے میں ذرائعِ ابلاغ میں عدالتی فیصلوں کی درست تفہیم مشکل ہو جاتی ہے اور بحث و تجزیہ کے دوران گفتگو اور سوچ، واقعات اور حقائق سے ہٹ جاتی ہے۔

عوام الناس محض تجزیہ نگاروں اور قانونی ''پنڈتوں'' اور ''ماہرین'' کے محتاج ہو کر رہ جاتے ہیں۔ یہ صورتِ حال یقیناً اطمینان بخش نہیں ہے۔

پاکستانی عوام کی اکثریت کو اپنے آئین اور آئینی حقوق کے بارے میں آگاہی کے لیے دوسروں کا سہارا لینا پڑتا ہے اور انھیں مختلف تجزیہ کاروں کی تشریحات اور تاویلوں کی جانچ پڑتال یا تنقید کا خود صرف اس وجہ سے موقع نہیں ملتا کہ عدالتی فیصلوں کی زبان اُن کی سمجھ سے باہر ہے۔

جہاں مندرجہ بالا تقاضوں کی اہمیت ہے، وہاں آئینی تقاضوں پر نظر ڈالنے کی بھی اشد ضرورت ہے۔

پاکستان کے آئین میں ''بنیادی حقوق'' کا باب بے حد اہم ہے۔ اس کے آرٹیکل 28 میں کہا گیا ہے کہ ''مختلف زبان، رسم الخط اور ثقافت کا حامل شہریوں کا کوئی بھی حصہ یہ حق رکھتا ہے کہ وہ ان کی حفاظت اور ترویج کرے اور آئینی تقاضوں کو مدنظر رکھتے ہوئے اس مقصد کے لیے ادارے قائم کرے۔'' اس کے علاوہ آرٹیکل (1)251 میں یہ واضح طور پر کہا گیا ہے کہ پاکستان کی قومی زبان اردو ہے، مزید یہ کہ نفاذِ آئین کے پندرہ سال کے عرصے میں وہ تمام ضروری اقدامات و انتظامات کر لیے جائیں گے جن سے اردو زبان سرکاری اور دیگر مقاصد کے لیے رائج ہو جائے۔ اب تک اِس آئینی تقاضے کو پورا کرنے کے لیے کسی جامع اور ٹھوس منصوبہ بندی کے تحت کوئی خاطر خواہ قدم نہیں اٹھایا گیا۔ گو آئین کے نفاذ کو 37 سال سے زیادہ عرصہ گزر چکا ہے۔ یہ پوری قوم کے لیے لمحہ فکریہ ہے۔

اس فیصلے کا ایک مقصد یہ بھی ہے کہ آئین کے آرٹیکل 28 اور (1)251 کی پاس داری

کے لیے ایک قدم بڑھایا جائے لیکن اس سے بھی بڑھ کر مقصود یہ ہے کہ آئینی فیصلے براہِ راست عوام تک پہنچانے کی کوشش کی جائے۔

یہاں یہ کہنا مناسب ہوگا کہ قانونی فیصلوں میں انگریزی زبان کا استعمال فوری طور پر ترک کرنے کی نہ تو ضرورت ہے اور نہ ہی اس فیصلے کو اس کی سفارش سمجھا جائے۔ یہ تحریر، تفصیلی انگریزی فیصلے کے اہم نکات کا اردو پیرایہ ہے تاکہ عوام براہِ راست اس سے استفادہ کر سکیں۔

اس ضروری تمہید کے بعد اب زیرِ بحث موضوع پر بات کی جاتی ہے:

میں نے فاضل برادر جسٹس شاہد صدیقی کے فیصلے سے استفادہ کیا ہے جس میں انھوں نے 4-3-2011 کے مختصر فیصلے (Short Order) کی تائید کی ہے۔ میں ان کی رائے سے متفق ہوں اور اس کی تائید میں یہاں کچھ اضافی وجوہات بھی قلم بند کر رہا ہوں۔

اِن دونوں مقدمات میں موضوعِ بحث ہمارے آئین میں حال ہی میں متعارف کرائے گئے دو ادارے ہیں: جوڈیشل کمیشن آف پاکستان اور پارلیمانی کمیٹی۔ ان دونوں مقدمات کا تصفیہ ایک ہی فیصلے سے کیا جا رہا ہے کیونکہ ان میں اٹھائے گئے قانونی اور آئینی نکات آپس میں بڑی حد تک ایک سے ہیں۔

جوڈیشل کمیشن درج ذیل ارکان پر مشتمل ہے:

چیف جسٹس پاکستان، سپریم کورٹ کے چار سینئر ترین جج، متعلقہ ہائی کورٹ کے چیف جسٹس، وفاقی وزیر قانون و پارلیمانی امور، اٹارنی جنرل پاکستان اور وکلاء برادری کے نمائندے[175A(2)]۔

پارلیمانی کمیٹی میں پارلیمنٹ کے آٹھ ارکان شامل ہیں۔ ضابطے کے مطابق، اُن میں سے آدھے حزبِ اقتدار سے ہیں اور آدھے حزبِ اختلاف سے [175A(9),(10)] یہ دونوں ادارے آئین کے آرٹیکل 175A کے تحت وجود میں آئے۔

18ویں آئینی ترمیم ایکٹ 2010 اور 19ویں آئینی ترمیمی ایکٹ 2010 کے تحت اسی آرٹیکل نے ان دونوں آئینی اداروں کو کچھ خاص ذمہ داریاں سونپیں۔ ان آئینی ترامیم نے سپریم کورٹ، وفاقی شرعی عدالت اور ہائی کورٹوں میں ججوں کے تقرر کا پرانا طریقہ کار بدل دیا۔ ان آئینی ترامیم کے بارے میں علیحدہ سے کئی آئینی مقدمات دائر ہو چکے ہیں اور ابھی تک 17 رکنی لارجر بنچ کے سامنے زیرِ سماعت ہیں۔

چونکہ اس مقدمے میں سائلان نے ان آئینی ترامیم کی حیثیت پر سوال نہیں اٹھائے، اس لیے ان کی آئینی حیثیت یہاں زیرِ بحث نہیں ہے۔

زیرِ سماعت مقدمات میں پارلیمانی کمیٹی کے طریقہ کار خاص طور پر کمیٹی کے دو فیصلوں کو چیلنج کیا گیا۔ کمیٹی نے اپنے ان دو فیصلوں میں جوڈیشل کمیشن کی نامزدگیوں کو مسترد کر دیا تھا جس میں لاہور ہائی کورٹ کے چار ایڈیشنل ججوں اور سندھ ہائی کورٹ کے دو ایڈیشنل ججوں کی مدتِ منصبی (Tenure) میں توسیع کا کہا گیا تھا۔ 4-3-2011 کو ایک مختصر حکم نامے کے ذریعے ہم نے یہ مقدمات سماعت کے لیے منظور کر کے کمیٹی کے یہ فیصلے کالعدم قرار دے دیے تھے۔ یہ فیصلہ اس مختصر حکم نامے کی تائید میں میرے دلائل پر مشتمل ہے۔

بہتر تفہیم کے لیے، اس فیصلے میں دلائل کو چند حصوں میں تقسیم کیا گیا ہے۔ پہلا حصہ اختیارِ سماعت سے متعلق ہے۔ دوسرے حصّے میں تشریحِ آئین کے قواعد وضوابط کا ذکر کیا گیا ہے۔ تیسرے حصے میں کمیٹی کے فیصلوں پر عدالتی نظرِ ثانی کے سوال کا جواب قانون اور آئین پر مبنی دلائل سے دیا گیا ہے۔ چوتھے حصے میں عدالتی نظرِ ثانی کے مسلّمہ اصول وضوابط کا اس مقدمے پر اطلاق کیا گیا ہے۔

اختیارِ سماعت:

سائلان کا دعویٰ ہے کہ اِس عدالت کو ان مقدمات کی سماعت کا اختیار آرٹیکل 184(3) کے تحت حاصل ہے۔ فاضل ایڈیشنل اٹارنی جنرل نے کہا کہ آرٹیکل 184(3) کے تحت اختیارِ سماعت صرف اُنھی مقدمات میں استعمال کیا جا سکتا ہے جہاں کوئی ایسا سوال زیرِ بحث ہو جو ''عوامی اہمیت'' کا حامل ہو اور جس کا ''بنیادی حقوق کے نفاذ'' سے گہرا رشتہ ہو۔ اُن کا کہنا تھا کہ اِس مقدمے میں ایسا کوئی سوال نہیں ابھرتا۔ لہٰذا یہ مقدمہ قابلِ سماعت نہیں ہے۔ قارئین کی سہولت کی خاطر آرٹیکل 184(3) ذیل میں درج ہے:

> ''اگر کسی مقدمے میں کوئی ایسا سوال ابھرتا ہے جو عوامی اہمیت کا ہے اور اس کا بنیادی حقوق کے نفاذ سے گہرا تعلق ہے تو سپریم کورٹ اُس نوعیت کا فیصلہ صادر کر سکتی ہے جس کا ذکر آرٹیکل 199 میں ہے۔ معلوم رہے کہ ایسا کرتے وقت اس آرٹیکل (199) [میں ہائی کورٹ کو دیے گئے اختیارات] سے تجاوز نہ ہو۔''

فاضل ایڈیشنل اٹارنی جنرل نے مزید کہا کہ کسی زیرِ بحث سوال کی ''عوامی اہمیت'' کا تعین لوگوں کی جانب سے اس میں اظہارِ دل چسپی کا اندازہ اس بنیاد پر کیا جانا چاہیے کہ لوگ اس میں کس قدر دل چسپی ظاہر کرتے ہیں۔ ان کی بحث سے یہ تأثر ملتا ہے کہ ہم کسی سوال کو عوامی اہمیت کا سوال صرف اُسی صورت میں قرار دے سکتے ہیں جب لوگ اس میں اپنی دل چسپی کا واضح

اظہار کریں، مثلاً سڑکوں پر احتجاج یا پرنٹ اور الیکٹرانک میڈیا میں پُر جوش مباحثوں کی صورت میں۔ اور چونکہ پارلیمانی کمیٹی کے زیرِ تنقید فیصلوں پر ایسا کوئی ردِعمل سامنے نہیں آیا، اس لیے یہ مسئلہ عوامی اہمیت کا مسئلہ قرار نہیں دیا جا سکتا۔

اول تو وفاق کی جانب سے کیے گئے اس دعوے کی صداقت اپنی جگہ خود بحث طلب ہے۔ جوڈیشل کمیشن کی طرف سے دی گئی نامزدگیاں اور پارلیمانی کمیٹی کی طرف سے انھیں رد کرنا، ان دونوں معاملوں میں عوام نے کسی حد تک دل چسپی کا اظہار کیا ہے اور یہ دونوں امور عوام، میڈیا اور وکلاء برادری میں موضوعِ بحث بھی بنے ہیں۔ ہائی کورٹوں کی بار ایسوسی ایشنوں نے اس مسئلے پر بحث کی اور سندھ ہائی کورٹ بار ایسوسی ایشن نے، جو خود اس مقدمے میں ایک فریق ہے، مورخہ 23-2-2011 کی ایک قرارداد میں کمیٹی کے فیصلے کی مذمت کی ہے۔ اس مقدمے کی سماعت کے دوران اِس موضوع کو پرنٹ اور الیکٹرانک میڈیا میں نمایاں جگہ بھی دی گئی۔ ان وجوہات کی بنیاد پر ہم فاضل ایڈیشنل اٹارنی جنرل کا موقف قبول نہیں کر سکتے۔

مگر اس سے بھی اہم بات یہ ہے کہ قانون کے مطابق زمینی حقائق کے بارے میں یہ دعویٰ موجودہ سوال کے جواب میں بڑی حد تک غیر متعلقہ ہے۔ موجودہ سوال یہ ہے:

''کیا اس مقدمے میں کوئی ایسا سوال ابھرتا ہے جو عوامی اہمیت کا ہے اور اس کا تعلق بنیادی حقوق کے نفاذ سے ہے؟''

ان دونوں باتوں کا تعین مقدمے کے حقائق کو پیشِ نظر رکھتے ہوئے خود عدالت نے کرنا ہے۔ اس آرٹیکل کے الفاظ سے یہ بات کافی واضح ہے۔ اس آئینی پہلو پر ہمارا فیصلہ مسلّمہ قانون پر مبنی ہے، ذاتی رائے نہیں۔

مزید برآں، اس بات کا تعین کرتے وقت، عدالت نہ تو عوامی جذبات کی رو کے ساتھ بہہ سکتی ہے، نہ ہی عدالت رائے عامّہ کا سروے کروائے گی۔ اس کے بجائے، مختلف دیگر عوامل، جن کی تشریح گذشتہ فیصلوں (نظائر) میں کی جا چکی ہے، زیرِ غور آئیں گے۔ انھیں زیرِ غور لانا اس لیے ضروری ہے کہ گذشتہ فیصلوں کی طرف رجوع سے ہی قانون کے خدوخال واضح ہوتے ہیں، جیسا کہ ایک اور فیصلے میں بھی کہا گیا ہے۔ آئین پاکستان، آرٹیکل 189 کے تحت، کامن لا کی معتبر روایت کے عین مطابق، گذشتہ فیصلوں کی اہمیت کا اعتراف کرتا ہے۔

آرٹیکل (3)184 کے خدوخال کی وضاحت کرنے والے فیصلوں کا جائزہ لیا جائے تو واضح ہوتا ہے کہ فاضل ایڈیشنل اٹارنی جنرل کے موقف کے برعکس ''عوامی دل چسپی کا صریح اظہار'' یا ''سڑکوں پر احتجاج'' یا ''میڈیا پر پُر جوش مباحثہ'' حقِ سماعت کے استعمال کے لیے

لازمی شرط نہیں ہیں۔ اس سوال کا مزید جائزہ لینے سے پہلے یہ بتا دینا مناسب ہے کہ فاضل ایڈیشنل اٹارنی جنرل بھی اس بات سے متفق تھے کہ صرف آزاد عدلیہ ہی آئین میں محفوظ کردہ بنیادی حقوق کا نفاذ کر سکتی ہے۔ انھوں نے یہ تسلیم کیا کہ بنیادی حقوق کے نفاذ کے لیے ایک آزاد نظام کے بغیر یہ حقوق بے معنی ہو کر رہ جائیں گے۔ بنیادی حقوق کے تحفظ اور نفاذ کی اہل آزاد عدلیہ کا وجود ہمارے آئین میں لازم قرار دیا گیا ہے۔ اس امر پر کوئی اختلاف نہیں ہے کہ اِس مقدمے میں ابھرنے والے سوال کا ''بنیادی حقوق کے نفاذ'' سے گہرا تعلّق ہے۔ بحث طلب سوال صرف یہ ہے کہ کیا یہ مسئلہ عوامی اہمیت کا بھی ہے؟

اس حوالے سے سائلان کے فاضل وکیل مخدوم علی خاں صاحب نے جن نظائر کا سہارا لیا، وہ قابلِ ذکر ہیں خاص کر الجہاد ٹرسٹ کیس (PLD1996 SC 324)، وطن پارٹی بنام وفاق پاکستان وغیرہ (PLD2006SC697) اور سندھ ہائی کورٹ بار ایسوسی ایشن بنام وفاق پاکستان (PLD2009 SC 879) جن میں آرٹیکل 184(3) کے دائرۂ کار کا جائزہ لیا گیا۔ بعض فیصلے ایسے بھی آئے جن کا تعلّق براہِ راست آزادیِ عدلیہ اور بنیادی حقوق کے نفاذ سے تھا۔ ان فیصلوں میں بھی یہ مسئلہ عوامی اہمیت کا مسئلہ قرار دیا گیا۔

مخدوم صاحب نے جن دیگر نظائر کا حوالہ دیا، ان کا بھی یہاں جائزہ لیا جا سکتا ہے۔ پہلے الجہاد ٹرسٹ کیس میں اس عدالت کے ایک پانچ رکنی بنچ نے یہ کہا کہ ججوں کے تقرر کا معاملہ آزادیِ عدلیہ کے قضیّے سے قریبی تعلق رکھتا ہے۔

اس مقدمے میں بھی سائل ایک وکیل تھا۔ اس نے ہائی کورٹ میں بعض ججوں کے تقرر کو چیلنج کیا۔ اس عدالت نے یہ حکم دیا کہ سائل کو اس مقدّمے کی پیروی کا حق حاصل ہے۔ چونکہ آزادیِ عدلیہ کے مسئلے سے ملک کے ہر شہری کا مفاد متاثر ہوتا ہے، ان حالات کے پیشِ نظر یہ قرار دیا گیا کہ ''سائل نے آرٹیکل 184(3) کے تحت حقِّ سماعت کا حوالہ بجا طور پر دیا ہے۔ ایسے سوال جو آئین میں ڈالی گئی نئی شقوں کی تشریح سے متعلق ہیں، بلاشبہ اُن سوالات میں شامل ہیں جن پر اس عدالت کو حقِّ سماعت حاصل ہے۔

الجہاد ٹرسٹ کیس میں جسٹس اجمل میاں نے واضح کر دیا تھا کہ ''آزاد عدلیہ کے بغیر آئین میں دیے گئے بنیادی حقوق بے معنی ہیں اور عوام النّاس کو ان کا کوئی فائدہ نہیں ہوگا۔'' مخدوم صاحب نے جن نظائر کا حوالہ دیا، اُن کے جائزے سے ثابت ہوتا ہے کہ آزادیِ عدلیہ سے متعلّق اِس مقدّمے کے مقابلے میں بہت کم اہمیت کے حامل مقدّمات کو بھی اِس عدالت نے خاطر خواہ ''عوامی اہمیت'' کا حامل گردانا ہے۔ ہمارے لیے یہاں اُن تمام نظائر کا ذکر

ضروری نہیں ہے کیوں کہ اب یہ طے شدہ امر ہے کہ عدلیہ میں تقرر کے امور بلاشبہ عوامی اہمیت کے حامل مسائل ہیں۔

ان گذشتہ نظائر کا تفصیلی جائزہ لینے کے بعد، آرٹیکل (3)184 کے تحت اس عدالت کے حقِ سماعت کا تعیّن قدرے آسان ہوگیا ہے۔ ہمارے پیشِ نظر دو باتیں ہیں:

اوّل یہ کہ عدلیہ میں تقرر کا مسئلہ آزادیِ عدلیہ سے منسلک ہے اور آزادیِ عدلیہ کا معاملہ بنیادی حقوق کے نفاذ سے وابستہ ہے۔ جس کا منطقی نتیجہ یہ ہوا کہ عدلیہ میں تقرر کا مسئلہ دراصل بنیادی حقوق کے نفاذ کے مسئلے سے جُڑا ہوا ہے۔

دوسرا یہ کہ عدلیہ میں تقرر کے طریقۂ کار کے بارے میں نئی آئینی شقوں کی تشریح ''عوامی اہمیت'' کا معاملہ ہے۔ اس لیے یہ مقدّمہ عدالت کی متعیّن کردہ شرائط پر پورا اترتا ہے اور یہ ثابت ہے کہ عدالت اس مقدّمے میں نہ صرف اختیارِ سماعت رکھتی ہے بلکہ آرٹیکل (3)184 کے تحت اس مقدّمے کی سماعت اِس عدالت کا فریضہ بھی ہے۔

اس بحث کے اختتام سے پہلے ہم یہ واضح کردیں کہ بعض فیصلوں میں اِس عدالت نے آرٹیکل (3)184 کے تحت اختیارِ سماعت کے استعمال سے گریز کیا، کیوں کہ ان میں اٹھائے گئے سوالات ''عوامی اہمیت'' کے نہیں تھے یا ان کا تعلّق بنیادی حقوق کے نفاذ سے نہیں تھا مگر یہ مقدّمہ ان مقدّموں سے مختلف ہے کیوں کہ اُن میں سے کسی مقدّمے کا تعلّق آزادیِ عدلیہ سے نہیں تھا۔

تشریحِ آئین کے چند اصول:

اختیارِ سماعت کے سوال کا حتمی جواب دینے کے بعد، اب ہم آرٹیکل 175A کی تشریح کی طرف آتے ہیں جو ان مقدمات میں زیرِ بحث ہے۔ فاضل ایڈیشنل اٹارنی جنرل نے اس شق کو آئین کے مجموعی تناظر سے الگ تھلگ کرکے، اس پر بہت زور دیا ہے۔ ان کی اس دلیل کا تفصیلی جواب بعد میں آئے گا، یہاں اس پر مختصراً بات کی جاتی ہے۔

فاضل ایڈیشنل اٹارنی جنرل نے کہا کہ آرٹیکل 175A میں یہ نہیں لکھا کہ پارلیمانی کمیٹی کے فیصلے اس عدالت میں نظرِ ثانی کے قابل ہوں گے۔ اور اس اعتبار سے یہ آرٹیکل 21-10-2010 کو صادر کیے گئے لارجر بنچ کے حکم سے انحراف کرتا ہے۔ لہٰذا فاضل ایڈیشنل اٹارنی جنرل کے مطابق ہمیں اس سے یہ اخذ کرنا چاہیے کہ پارلیمنٹ نے آرٹیکل 175A میں شعوری طور پر ہمارے اختیارِ سماعت کا ذکر نہ کرکے، اس اختیار کو آئین سے بے دخل کردیا ہے۔ اُن کی اِس دلیل پر مفصل بحث آگے آئے گی۔ یہاں یہ کہنا کافی ہوگا کہ اُن کی یہ دلیل

تشریحِ آئین کے طے شدہ اصولوں کے منافی ہے۔

ہماری گذشتہ آئینی تشریحات میں یہ بات اب طے شدہ ہے کہ آئین کو ''مربوط اور مکمل ضابطے'' (Organic Whole) کی طرح پڑھنا چاہیے۔اس معاملے میں الجہاد ٹرسٹ کیس کا حوالہ ہی کافی ہے جہاں کہا گیا:

> ''تحریر شدہ آئین ایک مربوط دستاویز ہے جس میں آنے والے وقتوں کی ضروریات کو بھی پیشِ نظر رکھا گیا ہے۔اس کی مثال اس جاندار درخت کی سی ہے جو وقت کے ساتھ ساتھ بڑھتا بھی ہے اور پھلتا پھولتا بھی ہے۔تاکہ وہ اس ملک اور اس کے عوام کی پیشرفت کا ساتھ نبھا سکے۔اس لیے آئین کی کسی بھی شق کی تشریح اس انداز میں کی جانی چاہیے جو جامد نہ ہو، ترقی پسندانہ ہو اور ہر نئی صورتِ حال کا سامنا کرنے کی صلاحیت رکھتی ہو۔تشریح تنگ نظری پر مبنی نہ ہو اور جزئیات میں الجھ کر نہ رہ جائے...آئین کے الفاظ سیاق وسباق سے کاٹ کر نہ دیکھے جائیں۔ بہ الفاظِ دِگر ان کا مفہوم ان کے سیاق سے حاصل کیا جائے''۔
>
> (PLD 1996 SC 32, p. 429)

اِس لفظ ''مربوط اور مکمل ضابطے'' کا آئین کے حوالے سے کیا مفہوم ہے؟ اگرچہ ہماری عدالتوں کے گذشتہ فیصلوں میں یہ اصطلاح کثرت سے استعمال ہوئی ہے مگر اس کے مفہوم اور نتائج ومضمرات کی وضاحت نہیں کی گئی، نہ ہی آئین کو اس انداز میں پڑھنے کی ضرورت کا جواز پیش کیا گیا ہے۔آئین میں، حال ہی میں شامل کیے گئے آرٹیکل 175A کی صحیح تفہیم کے لیے یہ اصول سمجھنا لازم ہے۔لہٰذا یہاں اس کی وضاحت کی جاتی ہے۔عدالت اس فیصلے میں اس عمومی اصول پر کاربند ہے کہ اگر آئین کی شقوں کو کُل سے قطع نظر، فرداً فرداً پڑھا اور سمجھا جائے تو یہ عمل پڑھنے والے کو گمراہ کرسکتا ہے۔گذشتہ نظائر اس اصول کی تائید کرتے ہیں۔اس طرزِ عمل کی معقولیت خود ہی عیاں ہو جاتی ہے، وضاحت کی محتاج نہیں۔لیکن راہنمائی کے لیے بزرگوں کی عرفانی روایت سے ایک سادہ مگر حکمت بھری حکایت بیان کی جاتی ہے۔

مثنوی معنوی میں مولانا جلال الدین رومی بیان کرتے ہیں کہ ایک بہت ہی اندھیری جگہ پر کچھ لوگوں کا زندگی میں پہلی بار ایک ہاتھی سے پالا پڑا۔ ہر آدمی نے ہاتھی کے کسی نہ کسی عضو کو اپنے ہاتھ سے ٹٹولا اور محسوس کیا کیونکہ گھپ اندھیرے میں وہ اسے دیکھ نہ سکتے

تھے۔ان میں سے ہر کسی نے اپنے ذہن میں ہاتھی کے بارے میں کوئی تصور قائم کیا۔جس نے ہاتھی کا کان پکڑا، وہ اسے پنکھا سمجھا۔جس نے اس کی ٹانگ پکڑی، وہ اسے ستون سمجھا۔جس نے اس کی سونڈ پکڑی، وہ اسے پرنالہ سمجھا اور یہی معاملہ ہر ایک کا تھا۔کوئی بھی شخص ہاتھی کے پورے وجود کو سمجھ نہ سکا۔جیسا کہ مولانا فرماتے ہیں کہ ان آدمیوں کی کم نصیبی یہ تھی کہ ان کے پاس کوئی چراغ نہ تھا جس کی روشنی انھیں یہ دِکھاتی کہ ہاتھی ایک جانور ہے جو اپنے تمام اعضا سے مل کر بنتا ہے اور جسے اُس وقت تک نہیں جانا جا سکتا جب تک یہ معلوم نہ ہو کہ اس کے تمام اجزا ایک ہی کُل کا حصّہ ہیں۔(رومی، مثنوی معنوی ،دفتر سوم،تہران، انتشاراتِ مجید، 2003،ص 6-335) قدیم یونانی صاحب دانش بقراط نے جس کا قول ایڈورڈو گیلیانو (Eduardo Galeano) نے اپنی کتاب *Mirrors* میں نقل کیا ہے، یہی بات کچھ اس انداز سے کہی کہ ''آپ جسم کے مختلف حصوں کی حقیقت اُس وقت تک نہیں سمجھ سکتے جب تک کہ آپ کو اس کی کُل ماہیت کی سمجھ نہ ہو''۔

اس لیے اگر ہم آرٹیکل 175A کو بہتر طور پر سمجھنا چاہتے ہیں تو ہمیں آئین کو بہ طورِ کُل سمجھنا ہوگا۔

یہ اصول آفاقی ہے اور کئی مختلف قانونی نظاموں میں قدرِ مشترک بھی۔اسی لیے امریکی ماہرینِ آئین لارنس ٹرائب (Lawrence Tribe) اور مائیکل ڈورف (Michael Dorf) ہمیں خبردار کرتے ہیں کہ آئین اپنے تمام اجزا کا ایک مربوط اور مکمل ضابطہ ہے جن میں سے ہر ایک کی اپنی تاریخ ہے۔یہ محض بے ربط جملوں اور شقوں کا مجموعہ نہیں۔اس لیے آئین کی ہر شق کو کُل متن کے تناظر میں پڑھا جائے۔

(Tribe, Lawrence H., Dorf, Micheal C., "Chepter 1: How not to read the Constitution" or On Reading the Constitution, Harvard University Press, Cambridge, 1991)

یہی اصول یورپی سوِل لا کے محقق ڈاکٹر کونریڈ (Dr. Conrad) کے ہاں بھی ملتا ہے وہ قانون دانوں کو باور کراتے ہیں: ''ایسے صریح اور واضح الفاظ کہیں نہیں ملتے جن کا مفہوم زبان اور سوچ کے پیرایوں سے اثر انداز نہ ہوتا ہو۔یہ معاملہ خاص طور پر آئین جیسی مربوط دستاویز میں درپیش ہے جہاں ہر شق کو کُل سے ملا کر دیکھنا چاہیے۔ہر اختیار اور ہر عطا کردہ طاقت کا مقصد بالآخر ایک ہی نظام کی بہتری ہے...ان تصوّرات کو تشریحِ متن سے غیر متعلق محض ''سیاسی نظریات'' کہہ کر نظر انداز نہیں کیا جا سکتا''۔

(*Limitation of Amendment Procedures and the Constituent Power, The Indian Yearbook of International Affairs*, 1967, p. 375)

اسی لیے یہ یاد رہے کہ آرٹیکل 175A آئین کی مجموعی ہیئت کا ایک حصہ ہے جسے اس ہیئت کے مجموعی تناظر ہی میں پڑھا جائے۔ اسے آئین کے وسیع سمندر کا کوئی الگ تھلگ جزیرہ نہ سمجھیں۔

اختیارِ نظر ثانی:

آئین کی تشریح کے بنیادی اصول بیان کر دینے کے بعد، اب ہم اس سوال کا جائزہ لیتے ہیں کہ کیا اِس عدالت کو پارلیمانی کمیٹی کے فیصلوں پر عدالتی نظر ثانی کا حق حاصل ہے؟ اِس مقدّمے کے سائلان کی استدعا تھی کہ اِس عدالت کو یہ حق حاصل ہے، جب کہ وفاق کی استدعا اس کے بالکل برعکس تھی۔ فاضل ایڈیشنل اٹارنی جنرل کی مزید یہ استدعا بھی تھی کہ اگر عدالت کو نظر ثانی کا حق حاصل ہے، تب بھی اسے اس کے استعمال سے گریز کرنا چاہیے۔

اس سوال کا جواب ہمیں سب سے پہلے آئین کے متن میں تلاش کرنا چاہیے۔ 19ویں ترمیم نے 175A کی ذیلی شق 12 میں دو نکات کا اضافہ کیا ہے، جن کے الفاظ یہ ہیں:

> ''معلوم رہے کہ کمیٹی، اپنے ارکان کی تین چوتھائی اکثریت کی تائید سے، **ایسی وجوہات کی بنا پر جنھیں ریکارڈ کیا جائے گا۔** (جوڈیشل کمیشن کی) نامزدگیوں کو قبول کرنے سے انکار کر سکتی ہے اور یہ بھی معلوم رہے کہ اگر کمیٹی نامزدگیاں قبول نہیں کرتی تو وہ اپنا فیصلہ، **ریکارڈ کردہ وجوہات کے ساتھ**، وزیرِ اعظم کے توسّط سے کمیشن کو بھیجے گی۔''

آرٹیکل 175A میں ایک نئی ذیلی شق نمبر 15 بھی متعارف کرائی گئی ہے:

> ''کمیٹی کے اجلاس بند کمرے میں ہوں گے اور **اس کی کارروائی کا ریکارڈ مرتب اور محفوظ کیا جائے گا۔**''

کمیٹی کی کارروائی اور اس کے فیصلوں کا قلم بند ہونا لازمی ہیں۔ ان امور کا بار بار اعادہ یہ اشارہ دیتا ہے کہ ان فیصلوں کی عدالتی نظر ثانی مقصود ہے۔ ورنہ اگر مقصود یہ تھا کہ اس کمیٹی کے فیصلے عدالتی نظر ثانی سے قطعاً مستثنیٰ ہوں گے تو پھر وجوہات قلم بند کرنے کی یہ ہدایت کچھ سمجھ میں نہیں آتی۔ ویسے بھی تشریحِ آئین کا ایک معروف قاعدہ یہ ہے کہ تشریح وہ اختیار کی جائے جس

کی بدولت پارلیمنٹ کا استعمال کردہ کوئی بھی لفظ فالتو اور بے مقصد نہ نظر آئے۔ اگر یہ مان لیا جائے کہ پارلیمانی کمیٹی کے فیصلے عدالتی نظر ثانی سے بالاتر ہیں تو آئین سازوں کا وجوہات تحریر کرنے پر یہ بار بار اصرار بے مقصد نظر آئے گا۔ لہٰذا ہم یہ تشریح اختیار نہیں کر سکتے۔ کیونکہ یہ تشریح آئین کے معروف اصولوں کے منافی ہے۔

فاضل ایڈیشنل اٹارنی جنرل نے مزید یہ کہا کہ چونکہ اس عدالت کے عبوری فیصلے مورخہ 20-10-2010 میں یہ واضح کیا گیا تھا کہ پارلیمانی کمیٹی کے فیصلوں پر عدالتی نظر ثانی ہو سکے گی اور اس کے باوجود 19 ویں ترمیم میں یہ واضح نہیں کیا گیا، اس لیے عدالت کو خود ہی یہ اخذ کر لینا چاہیے کہ پارلیمنٹ، عدالت کو یہ اختیار نہیں دینا چاہتی۔ ہم یہ دلیل قبول نہیں کر سکتے۔ کیوں کہ ہماری عدالتوں کا مسلّمہ اصول یہی ہے کہ اِس عدالت کی عمل داری تمام غور طلب معاملات کا احاطہ کرتی ہے، سوائے ان معاملات کے جہاں اسے واضح اور دوٹوک انداز میں بے دخل کیا گیا ہے اور جہاں پارلیمنٹ واضح الفاظ میں اِس عدالت کا دائرۂ عمل محدود کر دے، وہاں بھی یہ عدالت اس قسم کی شقوں کی محدود تعبیر کرتی ہے تا کہ آئین کے بنیادی اصولوں کی پاس داری ممکن ہو سکے۔ بحوالہ فضل القادر چوہدری بنام محمد عبدالحق (PLD 1963 SC 468)، سنٹرل بورڈ آف ریونیو بنام سائٹ (PLD 1985 SC 97) اور فاروق لغاری بنام وفاق پاکستان (PLD 1999 SC 57)

جناب مخدوم علی خان نے ہمیں یاد دلایا کہ آئین میں کم از کم سترہ مقامات پر اس قسم کی ''عدالت کو سماعت سے روکنے والی شقیں'' (Ouster Clauses) موجود ہیں۔ اگر پارلیمنٹ کو واقعی عدالتی نظر ثانی قبول نہیں تھی تو اس قسم کے الفاظ یہاں بھی استعمال کیے جا سکتے تھے۔ مگر ایسا نہیں کیا گیا، جس سے ہم یہی اخذ کر سکتے ہیں کہ ہمیں اس معاملے میں نظر ثانی کا حق حاصل ہے۔

یہاں کمیٹی کے زیرِ تنقید فیصلوں کی نوعیت کو بھی ایک نظر دیکھ لیا جائے۔

سب سے پہلے تو یہ کہ یہ بات متفق علیہ ہے کہ یہ فیصلے نوعیت کے اعتبار سے انتظامی ہیں۔ یہ امر کہ فیصلہ کرنے والے لوگ پارلیمنٹ کے ارکان ہیں، ان فیصلوں کی نوعیت پر اثر انداز نہیں ہوتا۔ اگر چہ اس بات میں کسی کو بھی کلام نہ تھا مگر ہم پھر بھی اس کے اثبات میں کچھ دلائل بیان کر دیتے ہیں:

اول یہ کہ پارلیمانی کمیٹی کو جو ذمّہ داری سونپی گئی ہے، یعنی ججوں کا تقرر، وہ ایک انتظامی معاملہ ہے۔ یہ الجہاد ٹرسٹ کیس میں واضح کر دیا گیا تھا۔ مزید یہ کہ ہمارے مابعد

نوآبادیاتی نظامِ قانون کا خاصّہ یہ ہے کہ تمام انتظامی فیصلوں پر عدالتی نظرِ ثانی کی گنجائش موجود ہے، سوائے چند ایک کے، جنھیں واضح طور پر اس سے مستثنیٰ قرار دیا گیا۔

لہٰذا اگر آئین میں کچھ الفاظ ایسے ڈال دیے گئے ہیں جن سے یہ تاثر ملتا ہو کہ پارلیمانی کمیٹی کے فیصلوں پر عدالتی نظرِ ثانی ہو سکتی ہے، تو یہ کوئی اَن ہونی بات نہیں۔ اس سے تو ہمارے آئینی اور قانونی نظام کی روح کی عکّاسی ہوتی ہے۔

دوسرا یہ کہ قانونی اعتبار سے ''پارلیمانی کمیٹی''، ''پارلیمانی'' کمیٹی نہیں ہے۔ یہ پارلیمنٹ کے ارکان کی ایک کمیٹی ہے جو انتظامی حیثیت رکھتی ہے۔ اس کی وضاحت ہم ابھی کرتے ہیں۔

اگرچہ اس کمیٹی کا نام ''پارلیمانی کمیٹی'' ہے مگر یہ نہیں بھولنا چاہیے کہ کسی بھی آئینی ادارے کی حیثیت کا تعیّن اس کے نام سے نہیں ہوتا۔ آئین پر ایک اجمالی نظر سے یہ فرق واضح ہو جائے گا۔ آرٹیکل 67 کے مطابق پارلیمنٹ کا ہر ایوان ''اپنے فرائض کی انجام دہی کے لیے اصول وضوابط مقرر کر سکتا ہے''۔ دونوں ایوانوں نے یہ اختیار استعمال کرتے ہوئے اپنے لیے ضابطے بنائے ہیں، جن میں پارلیمانی کمیٹیوں کے بارے میں بھی ضابطے بنائے گئے ہیں۔

قومی اسمبلی اور سینٹ، دونوں کے ضابطوں میں یہ درج ہے کہ ''پارلیمانی کمیٹی'' صرف وہی ہوگی جسے ایوان کے تمام ارکان نے خاص اس مقصد کے لیے ''منتخب'' کیا ہو، نہ کہ وہ جسے قائدِ ایوان یا قائدِ حزبِ اختلاف نے نامزد کیا ہو۔ ''پارلیمانی کمیٹیاں'' دراصل ایوان کی منتخب کردہ نمائندہ ہوتی ہیں اور اپنے فرائض کی انجام دہی میں براہِ راست ایوان کو جواب دہ ہوتی ہیں۔ اس کے برعکس زیرِ تنقید ''پارلیمانی کمیٹی'' کے آٹھ محترم ارکان نہ تو براہ راست ایوانوں سے منتخب کیے گئے ہیں اور نہ ہی کسی ایوان کے آگے جواب دہ ہیں۔

اسی مناسبت سے اِس عدالت کے لارجر بنچ نے 21-10-2010 کو اپنے عبوری فیصلے میں اس کمیٹی کے لیے ''پارلیمنٹ کے ارکان کی کمیٹی'' کی اصطلاح استعمال کی تاکہ اسے دونوں ایوانوں کے اصول وضوابط کے مطابق بننے والی پارلیمانی کمیٹیوں سے گڈمڈ نہ کیا جائے۔ اس فرق کو سمجھنا بہت اہم ہے۔ کیونکہ یہ عدالت، پارلیمنٹ کے اوامر کا بہت گہرا احترام کرتی ہے اور کوشش کرتی ہے کہ جہاں تک ہو سکے، ان اوامر کی ایسی تشریح کی جائے جو آئین سے ہم آہنگ ہو، تاکہ وہ اوامر خلافِ آئین قرار نہ پائیں۔ احترام کا یہ اصول ہمارے آئین کی جمہوری روح کا عکّاس ہے، جس میں کہا گیا ہے کہ پارلیمنٹ، بہ شکلِ مجموعی، عوام کی منتخب نمائندہ ہے۔ اس کے باوجود، عدالتوں کو پارلیمنٹ کے منظور کردہ قوانین کا آئینی جائزہ لینے اور

جہاں ضروری ہو، وہاں انھیں کالعدم قرار دینے کا اختیار بھی ہے۔

مختصر یہ کہ میری رائے میں ایک ایسی کمیٹی، جو اگرچہ پارلیمنٹ کے معزز ارکان پر مشتمل ہے، مگر قواعد وضوابط کے مطابق ''پارلیمانی کمیٹی'' نہیں ہے اور انتظامی نوعیت کے فیصلے کرتی ہے، وہ اپنے فیصلوں پر عدالتی نظر ثانی سے استثنیٰ کا دعویٰ نہیں کر سکتی۔

آئین پر ایک اجمالی نظر ڈالی جائے تو واضح ہو جاتا ہے کہ آئین جو نظام ہمیں دیتا ہے، وہ طاقت کے توازن (Checks and Balances) پر مبنی ہے۔ ریاست کا ہر ادارہ دوسرے پر نگران ہے۔ آرٹیکل (3)184 اور 199 کے تحت انتظامیہ کے افعال ایک طرف تو عدالتی نظر ثانی سے مستثنیٰ نہیں تو دوسری طرف پارلیمنٹ کے سامنے بھی جواب دِہ ہیں۔ پارلیمنٹ کے منظور کردہ قوانین آئین کی کسوٹی پر پرکھے جا سکتے ہیں۔ اسی طرح اس عدالت کے صادر شدہ فیصلوں اور قانونی تشریحات کو، محدود حالات میں، پارلیمنٹ کی قانون سازی سے بدلا جا سکتا ہے۔ اس طرح ریاست کا ہر ادارہ آئین کے طے کردہ دائرۂ کار میں رہ کر کام کرنے کا پابند ہے اور ہر ایک دوسرے پر نگران بھی ہے۔

اس لیے اگر یہ مان بھی لیا جائے کہ پارلیمانی کمیٹی عدالتی نظر ثانی سے مستثنیٰ ہے تو یہ ایک انوکھی صورتِ حال ہوگی۔ کیونکہ یہ کمیٹی اپنی کارکردگی کے معاملے میں نہ تو پارلیمنٹ کو جوابدہ ہوگی اور نہ ہی انتظامیہ کے اعلیٰ ترین عہدے داروں یعنی صدر اور وزیر اعظم کو، اور نہ ہی کسی عدالت کو۔ اس لیے ایسی کوئی بھی تشریح ہمارے آئین کی روح کے مطابق نہیں اور قانونی اصولوں کے تحت اسے قبول نہیں کیا جا سکتا۔

یہاں ہم یہ کہنا بھی ضروری سمجھتے ہیں کہ فاضل ایڈیشنل اٹارنی جنرل کی یہ استدعا تھی کہ پارلیمانی کمیٹی ''زیرِ گردوں کسی بھی سبب سے'' جوڈیشل کمیشن کی نامزدگیوں کو رد کر سکتی ہے، حتیٰ کہ اس نامزدگی کو بھی جو مکمل اتفاقِ رائے سے ہوئی ہو اور عدالت پھر بھی اس کا نوٹس نہیں لے سکتی۔ اس عجیب وغریب طرزِ استدلال کا نتیجہ یہ ہوگا کہ اگر پارلیمانی کمیٹی کے کسی فیصلے سے آزادیِ عدلیہ پر آنچ آئے، تب بھی یہ عدالت بے بس ہوگی۔ ذہن میں رہے کہ یہ پہلے ہی واضح کیا جا چکا ہے کہ یہ کمیٹی اس سلسلے میں پارلیمنٹ، وزیرِ اعظم یا صدر کو بھی جواب دِہ نہیں ہے۔ میری رائے میں ایسی صورت میں اس کمیٹی کی نگرانی کا اگر کوئی ذریعہ باقی رہ جاتا ہے تو وہ عدالتی نظر ثانی ہی ہے۔

اس معاملے میں سب سے عمدہ راہنمائی ان بنیادی آئینی اصولوں سے ملتی ہے جن کے پس منظر میں آرٹیکل 175A کو پڑھا جانا چاہیے۔ یعنی آزادیِ عدلیہ اور اختیارات کی حد

بندی۔ آرٹیکل 175A کو اس پس منظر میں سمجھ کر ہم مختلف آئینی اداروں کے جداگانہ، باہمی اور دوطرفہ کردار سمجھ سکتے ہیں اور یہ متعین کر سکتے ہیں کہ کیا پارلیمانی کمیٹی کے فیصلوں پر نظرِ ثانی ہو سکتی ہے؟ اور اگر ہو سکتی ہے تو کس حد تک؟

آزادیِ عدلیہ اور اختیارات کی حد بندی ان اصولوں میں سے ہیں جن پر ہمارے آئین کی بنیاد قائم ہے۔ اگرچہ 1956ء اور 1962ء کے آئین میں بھی ان کا ذکر ملتا ہے مگر 1973ء کے آئین سازوں نے ان اصولوں کو بے مثال اہمیت دی ہے۔ 1972ء کے مجوزہ آئینی مسودے کے دفاع میں جو ''ایڈ میموار'' (Aide Memoire) ذوالفقار علی بھٹو مرحوم نے لکھا تھا، اس کا اقتباس ہمیں ان آئین سازوں کے حسنِ نیت کی بہتر انداز میں خبر دیتا ہے۔ اس میں اعلان کیا گیا ہے کہ ''عدلیہ کو انتظامیہ سے مکمل آزادی حاصل ہوگی .... بلاشبہ عدلیہ کو انتظامیہ سے علیحدہ کرنے کے لیے پہلی بار واضح شقیں مرتب کی گئی ہیں۔'' اس کے بعد کئی اعلیٰ عدالتی فیصلوں میں ان اصولوں کا اطلاق ہوا۔ ان میں سے بعض یہ ہیں:

شرف فریدی بنام وفاق (PLD 1989 KAR. 404 at p. 427-8)
جہاں واضح کیا گیا کہ 1973ء کے آئین میں ''ریاست کے تین اداروں میں سہ فریقی تقسیمِ اختیارات مقصود تھی .... اور یہ بھی مقصود تھا کہ عدلیہ ریاست کے دوسرے اداروں سے علیحدہ اور آزاد ہوگی۔'' اس کے بعد الجہاد ٹرسٹ کیس اور پھر ظفر علی شاہ کیس (PLD 2000 SC 869) اور چیف جسٹس کیس (PLD 2010 SC 61, p. 173) میں بھی اسی اصول کا اعادہ کیا گیا۔ اسی طرح عدالتوں نے بارہا یہ واضح کیا ہے کہ آزادیِ عدلیہ کا اعلیٰ عدلیہ کے ججوں کے تقرر، برطرفی اور مدتِ منصبی جیسے امور سے گہرا تعلق ہے۔ لہٰذا یہ واضح ہے کہ اعلیٰ عدلیہ میں ججوں کے تقرر، معطّلی اور مدتِ منصبی کے معاملات میں آزادیِ عدلیہ کو مکمل طور پر یقینی بنانا ہمارے آئین کا بنیادی اصول ہے۔ یہ اصول 18ویں اور 19ویں ترمیم سے پہلے بھی واضح تھے اور یہ اب بھی اُسی طرح قائم ہیں۔

اس بات کا اندازہ پارلیمنٹ میں کی جانے والی اُن تقریروں سے بھی لگایا جا سکتا ہے، جب 18ویں ترمیم پارلیمنٹ میں پیش کی جا رہی تھی۔ زیرِ بحث مقدمے میں خاص اہمیت کی حامل جناب رضا ربّانی کی وہ تقریر ہے جو انھوں نے آئینی اصلاحات کے لیے بنائی جانے والی، پارلیمنٹ کی خصوصی کمیٹی کے سربراہ کی حیثیت سے قومی اسمبلی کے ایوان میں کی۔ انھوں نے کہا:

''اس سے پہلے کہ مَیں اس آرٹیکل 175A کی تفصیل میں

جاؤں، مَیں یہ دُہرانا چاہتا ہوں کہ ان آئینی اصلاحات کا ایک اہم مقصد، بلکہ اس کے دو تین اہم مقاصد میں سے ایک یہ ہے کہ آئین کے بنیادی اصول تبدیل نہیں کیے جائیں گے۔ اس لیے جو ترامیم بھی کی گئی ہیں، وہ اُن بنیادی اصولوں کے اندر رہ کر ہی کی گئی ہیں اور جہاں تک آئینی اداروں کا معاملہ ہے، ان کی آزادی پر کوئی قدغن نہیں لگائی گئی اور ان کی آزادی اُسی طرح یقینی بنائی گئی ہے، جس طرح 1973ء کے آئین میں ہے۔''

اس سے یہ واضح ہے کہ آئین کے بنیادی اصول نہیں بدلے ہیں اور چونکہ وہ نہیں بدلے ہیں، اس لیے جن نظائر میں ان اصولوں کی تشریح کی گئی ہے، وہ اب بھی قائم و موجود ہیں۔ جب ان اصولوں کا موجودہ مقدمے کے حقائق پر اطلاق کیا جائے تو یہ مسئلہ قدرے آسان ہو جاتا ہے۔ ہم پر یہ واضح ہو جاتا ہے کہ چونکہ پارلیمانی کمیٹی کے فیصلے، اِن اصولوں پر دُور رس عملی اثرات کے حامل ہیں، اس لیے یہ عدالت ان فیصلوں کی آئینی جانچ پڑتال کا فریضہ نظر انداز نہیں کر سکتی۔

آخر میں اس تاریخی سیاق و سباق پر ایک نظر ڈالتے ہیں جس کے پیشِ نظر جوڈیشل کمیشن اور پارلیمانی کمیٹی کے ادارے قائم کیے گئے۔ اس سے ہمیں ان اداروں کے جداگانہ، باہمی اور دوطرفہ کرداروں کو سمجھنے میں مزید مدد ملے گی۔

ماضی میں اس عدالت اور ہائی کورٹوں کے ججوں کا تقرر، عدلیہ اور انتظامیہ کے چند افراد کی باہمی مشاورت کے ایک قدرے ڈھکے چھپے طریقے سے عمل میں لایا جاتا تھا۔ ہماری تاریخ میں بعض لمحے ایسے بھی گذرے جب عدلیہ اور انتظامیہ کے مابین، اس معاملے پر خاصا تناؤ پیدا ہو گیا اور بعض مرحلے ایسے بھی آئے جہاں عدلیہ نے خود پر شدید ترین دباؤ محسوس کیا۔ چونکہ یہ صورتِ حال آزادیِ عدلیہ کے منافی تھی، اس لیے، دیگر معاملات کے ساتھ ساتھ، الجہاد ٹرسٹ کیس میں اس پر بھی فیصلہ صادر کیا گیا۔ آئین کے لائحۂ عمل کا باریک بینی سے مطالعہ کیا گیا اور اس کی بنا پر عدلیہ اور انتظامیہ کے مشیران (Consultees) کے مابین تقسیمِ اختیارات کی حد بندی کی گئی۔

مختصراً یہ قرار دیا گیا کہ عدلیہ کے مشیران ہی جج کے منصب پر تقرر کے لیے کسی بھی زیرِ غور امیدوار کی قابلیت، مہارت، قانون پر اس کی گرفت اور عمومی اہلیت بہتر جانچ سکتے ہیں۔ اس کے مقابلے میں انتظامیہ کے مشیر نامزد کردہ افراد کے دیگر کوائف کے بارے میں زیادہ

آگاہ ہو سکتے ہیں۔ اس طرح عدلیہ اور انتظامیہ کے مشیران کے مابین اختیارات کی ایک کم و بیش واضح تقسیم کر دی گئی۔ یہ واضح تھا کہ اگر انتظامیہ اس معاملے میں چیف جسٹس کی رائے کو رد کرتی ہے تو اُسے اپنے اِس فیصلے کی وجوہات بیان کرنا ہوں گی اور یہ بھی معروف تھا کہ عدالت میں ان وجوہات کی جانچ پڑتال اور نظر ثانی کی جا سکتی ہے۔ پھر آئینی اصولوں کو تفصیلی طور پر ملحوظِ خاطر رکھ کر، بعد میں آنے والے فیصلوں میں اس بنیادی لائحۂ عمل کے خدو خال واضح کیے گئے۔ اس سلسلے میں صادر ہونے والے حالیہ فیصلے سندھ ہائی کورٹ بنام وفاق پاکستان وغیرہ میں یہ کہا گیا کہ آئینی عدالت میں کسی شخص کے تقرر کے لیے اس کی اہلیت کا سب سے بہتر جائزہ چیف جسٹس پاکستان لے سکتے ہیں اور ان کی رائے کی عدالتی نظر ثانی ممکن نہیں۔

جوڈیشل کمیشن اور پارلیمانی کمیٹی کی تشکیل کو اس پس منظر میں دیکھنا چاہیے۔ یہ بعید از قیاس نہیں کہ پارلیمنٹ نے یہ محسوس کیا کہ بعض نظائر میں کی جانے والی آئین کی تشریح سے، اعلیٰ عدلیہ میں تقرر کے بہت زیادہ اختیارات ایک ہی فرد- یعنی چیف جسٹس پاکستان- کے عہدے میں مرکوز ہو گئے ہیں جو کہ پالیسی کے اعتبار سے بہت موزوں نہیں۔ اگرچہ ان اختیارات میں متعلقہ ہائی کورٹوں کے چیف جسٹس صاحبان بھی کسی حد تک شریک تھے مگر پھر بھی یہ بخوبی سمجھ میں آتا ہے کہ پارلیمنٹ نے یہ محسوس کیا کہ اس طریقۂ کار میں غلطی کی گنجائش موجود ہے یا اس سے اختیار کے ناجائز استعمال کا دروازہ کُھل سکتا ہے۔

لہٰذا آرٹیکل 175A کو متعارف کرانے کا ایک مقصد تو واضح ہے۔ نئے نظام میں ایک فرد- چیف جسٹس پاکستان- یا دو افراد- چیف جسٹس پاکستان اور متعلقہ ہائی کورٹ کے چیف جسٹس- کی بجائے جج کے لیے زیرِ غور افراد کی اہلیت پرکھنے کے لیے 13 افراد پر مشتمل ایک ادارہ بنایا گیا ہے۔ یوں اختیار کو افراد سے لے کر ادارے میں پھیلا دیا گیا ہے۔ پارلیمانی کمیٹی کی تشکیل سے انتظامیہ کی فیصلہ سازی میں بھی اسی طرح کا پھیلاؤ مقصود ہے۔ جوڈیشل کمیشن کے ارکان اور ان میں سے ہر ایک کے پس منظر، تجربے اور قابلیت کا جائزہ لیا جائے تو واضح ہو جاتا ہے کہ ان میں سے ہر فرد، کسی نہ کسی حیثیت میں، نظامِ عدل سے منسلک ہے۔ ایک سابق سپریم کورٹ جج اور وکلاء کے علاوہ باقی سب بہ لحاظِ عہدہ (Ex-Officio) اس کے رکن ہیں۔

جوڈیشل کمیشن کی تشکیل کے جائزے سے دو باتیں واضح ہیں: اول یہ کہ وہ اہلیت، قابلیت اور قانون میں مہارت کا جائزہ بہتر طور پر لے سکتا ہے۔ دوسرا یہ کہ وہ مختلف صلاحیتوں

اور آراء کے حامل افراد کو یکجا کر کے ان کی مجموعی دانش سے فائدہ اٹھاتا ہے جس کے باعث اس کی مجموعی رائے معروضی ہوتی ہے، نہ کہ ذاتی۔

غرض تھوڑے سے غور و فکر سے یہ واضح ہو جاتا ہے کہ جو فرائض ماضی میں (نظائر کے مطابق) عدلیہ کے مشیران کو سونپے گئے تھے، وہ اب جوڈیشل کمیشن کے اجتماعی ادارے (Collegium) کو انجام دینا ہیں۔ اس کے مقابلے میں پارلیمانی کمیٹی وہ فرائض بجالائے گی جو ماضی میں وزیراعظم کی مشاورت سے، صدر انجام دے رہے تھے۔ پارلیمانی کمیٹی، جوڈیشل کمیشن کی تجاویز پر اپیلیں سننے کا ادارہ نہیں ہے جو کمیشن کے بہت سوچ سمجھ کر کیے گئے فیصلوں کو رد کر دے۔ پارلیمنٹ نے آئین کے اصول نہیں بدلے بلکہ وہ ان اصولوں اور ان کی عدالتی تشریحات سے بخوبی واقف تھی۔ پھر بھی اس نے پارلیمانی کمیٹی اور جوڈیشل کمیشن کے مابین اختیارات کی واضح حد بندی نہیں کی، جو اس امر کا واضح ثبوت ہے کہ پارلیمنٹ، انتظامیہ اور عدلیہ کے دائرہ عمل کے مابین ماضی میں رکھے گئے امتیاز کو قائم رکھنا چاہتی ہے۔ تبدیلی صرف یہ آئی ہے کہ اب چند افراد نہیں بلکہ ادارے یہ کردار ادا کر رہے ہیں۔

اگلے حصے تک جانے سے پہلے ہم فاضل ایڈیشنل اٹارنی جنرل کے کچھ دلائل پر اظہارِ رائے ضروری سمجھتے ہیں۔

اوّل تو اُن کا یہ کہنا تھا کہ اس مقدمے کے فیصلے کا 18ویں ترمیم سے متعلق زیرِ سماعت مقدمات پر منفی اثر پڑ سکتا ہے۔ اس سلسلے میں ہم یہ واضح کر دیں کہ یہ مقدمہ ان مقدمات سے مختلف نوعیت کا ہے۔ یہاں جو کچھ زیرِ بحث ہے، وہ کسی آئینی ترمیم کا متن نہیں ہے، بلکہ آئین اور اس میں کی گئی ترامیم کو تو یہاں جوں کا توں تسلیم کیا گیا ہے۔ یہاں موضوعِ بحث صرف پارلیمانی کمیٹی کے دو فیصلے ہیں جن میں اس نے سندھ ہائی کورٹ کے دو اور لاہور ہائی کورٹ کے چار ججوں کے جوڈیشل کمیشن کی طرف سے تقرر کو رد کر دیا ہے۔ اِس لیے اس مقدمے کا، اُن مقدمّات کے فیصلوں پر کوئی اثر نہیں پڑے گا۔

فاضل ایڈیشنل اٹارنی جنرل کا دوسرا نکتہ یہ تھا کہ ججوں کی اہلیت و قابلیت پر عوامی بحث، جو عدالتی نظرِ ثانی کے دوران ضرور ہوگی، عدلیہ کی ساکھ کے لیے نقصان دہ ہو سکتی ہے۔ اس بارے میں ہم صرف یہ کہہ سکتے ہیں کہ اس دعوے میں شاید کچھ صداقت ہو مگر ہمیں اور فاضل ایڈیشنل اٹارنی جنرل کو یہ احساس ہے کہ تبدیلی کے اس دور میں کچھ مسائل تو لازم ہیں لیکن ہم پُرامید ہیں کہ بہت جلد ایسی روایات فروغ پائیں گی جن کے سہارے اس کارروائی میں آسانیاں پیدا ہوں گی۔

نظر ثانی کے اصول اور اُن کا اطلاق:

یہ طے کر لینے کے بعد کہ پارلیمانی کمیٹی کے فیصلے عدالتی نظر ثانی سے مستثنیٰ نہیں ہیں، اب ہم یہ متعین کریں گے کہ اس جانچ پڑتال کے دوران عدالت کن اصول وقواعد کا اطلاق کرے گی۔ ہمارا پہلا رہنما خود آئینِ پاکستان ہے جس نے اس عدالت کو اور زیر بحث آئینی اداروں- جوڈیشل کمیشن اور پارلیمانی کمیٹی- دونوں کو جنم دیا ہے۔ نظر ثانی یقیناً ایسے اصولوں پر ہونی چاہیے جو آئین سے جڑے ہوئے ہوں۔ آئین کا آرٹیکل 5(2) یہ واضح کرتا ہے کہ ''آئین اور قانون کی پاس داری ہر شہری کا فرض ہے'' جس کا مطلب یہ ہے کہ پارلیمانی کمیٹی کے جاری کردہ تمام انتظامی فیصلے بھی آئین اور قانون کے مطابق ہونے چاہئیں۔ اور اس بات کا تعین کہ قانون اور آئین کی پاس داری کی گئی ہے یا نہیں، اس عدالت کی ذمہ داری ہے۔ یہ آئین کے آرٹیکلز 184(3) اور 199 (اکٹھے پڑھے جائیں) کے عین مطابق ہے، جو اس عدالت کو یہ اختیار دیتے ہیں کہ یہ وفاق کے امور کے سلسلے میں لیے گئے کسی بھی اقدام کو غیر قانونی یا ''بلا جواز'' قرار دے، جہاں ایسا کرنا مناسب ہو۔ یہ وہ آئینی شقیں ہیں جن پر اس عدالت کے اختیارِ نظر ثانی کی بنیاد قائم ہے اور انھی سے جانچ پڑتال کے اصولوں کا پتہ چلتا ہے۔ اور ان اصولوں کی تفصیلات گذشتہ عدالتی فیصلوں میں بھی واضح کی جا چکی ہیں۔ انتظامی فیصلوں کی عدالتی جانچ پڑتال کن بنیادوں پر کی جائے، اس مسئلے کی کلاسیکی تشریح انگلستان کے ایک فاضل جج لارڈ ڈپلاک (Lord Diplock) نے اپنے ایک فیصلے میں کی۔ وہ تشریح اس مقدمے کے تناظر میں بھی بالکل بجا ہے۔ کونسل آف سول سروس بنام منسٹر (952-950,935 3AllER [1984]) میں اس جانچ پڑتال کے تین اصول گنوائے گئے ہیں: اول، فیصلے کا خلافِ قانون ہونا؛ دوسرا فیصلے کا انتہائی غیر معقول ہونا؛ اور تیسرا فیصلہ سازی کا نامناسب طریق کار۔

موجودہ مقدمے کے تناظر میں پہلا اصول- خلاف ورزی قانون- اہم ہے جس پر اب بات ہوگی۔

لارڈ ڈپلاک کے الفاظ میں:

> ''کسی فیصلے میں پاس داری قانون تب ہی ممکن ہوگی جب فیصلہ ساز اس قانون کو صحیح طور پر سمجھتا ہو جس کی بدولت اسے اختیارات عطا کیے گئے ہیں، اور جب وہ اس قانون پر پابندی سے کاربند ہو۔ آیا اس نے ایسی پاس داری کی یا نہیں۔ تنازع یا

اختلاف کی صورت میں اس سوال کا جواب ریاست کا عدالتی
ادارہ-یعنی عدلیہ- ہی بہتر طور پر دے سکتی ہے۔اور یہ سوال عین
قابلِ نظر ثانی ہے۔''

اس مقدمے میں پارلیمانی کمیٹی نے آرٹیکل 175A کی ایک تشریح کی اور اسی تشریح کی بنیاد پر اپنا فیصلہ صادر کیا۔ہمیں اب یہ متعین کرنا ہے کہ وہ تشریح کیا تھی اور آیا وہ صحیح ہے؟ اس کا تعین کرنے کے لیے ہمیں اس کیس کے حقائق پر ایک گہری نگاہ ڈالنا ہوگی۔

ریکارڈ سے یہ واضح ہے کہ 22-1-2011 کو جب جوڈیشل کمیشن نے لاہور ہائی کورٹ کے ججوں کے لیے نامزدگی کی خاطر اجلاس کیا تو اس میں سب کے سب 13 ارکان شریک تھے۔اجلاس میں تمام متعلقہ کوائف پر سیر حاصل بحث ہوئی۔ یہ جوڈیشل کمیشن کے سیکرٹری کے اُس خط سے ظاہر ہے جو انھوں نے 22-1-2011 کو پارلیمانی کمیٹی کے سیکرٹری کو بھیجا۔لاہور ہائی کورٹ کی نامزدگیوں کے بارے میں اس میں درج ہے کہ ''کمیشن نے اپنے نامزد کردہ 24 ججوں کی پیشہ ورانہ قابلیت، قانون پر مہارت، ہنر مندی، کیے گئے فیصلوں کی تعداد اور ان کے معیار، کام سے وفاداری، مقدموں کو جلد نمٹانے کی کوشش، زیرِ تجویز (Pending) فیصلوں اور زیرِ غور افراد کے کوائف کا تفصیلی جائزہ لیا۔'' ان تمام 24 نامزد شدہ ججوں کے نام لینا یہاں ضروری نہیں۔ یہاں یہ بتا دینا کافی ہے کہ جوڈیشل کمیشن نے اپنے فرائض آرٹیکل (A)175 کی ذیلی شقوں (1) تا (8) کے عین مطابق ادا کیے۔ سندھ ہائی کورٹ کے ججوں کے معاملے میں بھی جوڈیشل کمیشن نے ایسا ہی کیا۔پارلیمانی کمیٹی نے سفارشات موصول ہونے کے بعد ان چھ ججوں کی مدتِ منصبی میں توسیع سے انکار کیا۔یہاں یہ یاد رہے کہ رد کردہ نامزدگیاں جوڈیشل کمیشن کی متفقہ نامزدگیاں تھیں۔اس سلسلے میں پارلیمانی کمیٹی نے اُن پر فارموں (Proformas) کا سہارا لیا جو لاہور ہائی کورٹ کے چیف جسٹس اور سندھ ہائی کورٹ کے چیف جسٹس صاحبان نے پُر کیے تھے۔ہماری رائے میں ان پر فارموں کے مندرجات پر غور کرنا اہم ہے۔معلوم ہوتا ہے کہ یہ پر فارمے جوڈیشل کمیشن نے ان افراد کے ذاتی کوائف اور ان کے بارے میں عام معلومات اکٹھا کرنے کی خاطر بنائے تھے، جنھیں جج کے عہدے پر فائز کرنے کے بارے میں سوچا جا رہا تھا۔اس مقدمے کے حوالے سے پر فارمے کا اہم ترین کالم وہ ہے جس میں چیف جسٹس صاحبان نے قانون میں مہارت، کارکردگی وغیرہ کے سلسلے میں زیرِ غور فرد کے بارے میں اپنی رائے قلم بند کرنا تھی۔ پر فارمے میں متعلقہ ہائی کورٹ کے چیف جسٹس کی اس بارے میں رائے بھی درج ہوتی ہے کہ زیرِ غور فرد

کو جج کے منصب پر فائز کیا جائے یا نہیں ۔ لاہور ہائی کورٹ کے زیرِ غور اُن چار ایڈیشنل جج صاحبان کے بارے میں درج رائے یہ تھی کہ ان کی مدتِ منصبی میں ایک سال کی توسیع کی جائے۔ سندھ ہائی کورٹ کے دو جج صاحبان کے بارے میں یہ رائے اس کے برعکس تھی۔ تاہم جوڈیشل کمیشن میں دیگر رفقائے کار سے تبادلۂ خیال کے بعد تو سندھ ہائی کورٹ کے چیف جسٹس صاحب کی یہ رائے بدل گئی۔ وہ بھی اس بات پر متفق ہو گئے کہ زیرِ غور دو ایڈیشنل جج صاحبان کی مدتِ منصبی میں ایک سال کی توسیع کر دی جائے۔

حقائق کے اس جائزے سے معلوم ہوتا ہے کہ پارلیمانی کمیٹی نے آرٹیکل 175A کی تشریح کچھ ایسے کی کہ خود کو جوڈیشل کمیشن کے فیصلوں پر فوقیت رکھنے والا ادارہ سمجھا۔ جیسا کہ ہم پہلے واضح کر چکے ہیں یہ فہم درست نہیں ہے۔ حقیقت حال کچھ مختلف ہے۔ آرٹیکل 175A کی یہ تشریح نہ تو اس کے متن سے ثابت ہے اور نہ ہی اس کے سیاق وسباق سے۔ آئین کے بنیادی اصولوں، اس آرٹیکل کے تاریخی پس منظر اور پارلیمنٹ کی منشا پر غور کرنے سے ہم 175A کی ایک بہتر (organic) تشریح تک پہنچتے ہیں۔ پارلیمانی کمیٹی نے جس انداز میں خود کو بااختیار سمجھا، یہ تشریح اسے ایسا کرنے کی اجازت ہرگز نہیں دیتی۔ پارلیمانی کمیٹی کے زیرِ تنقید اقدامات کو قانونی اختیار سے متجاوز اور غیر آئینی قرار دینے کے لیے یہ بہت کافی ہے۔ آزادیِ عدلیہ کو یقینی بنانے کے لیے، گذشتہ بحث کی بنیاد پر یہ واضح ہو گیا ہے کہ عدلیہ میں تقرر کا طریقۂ کار انتظامیہ اور پارلیمنٹ کی دخل اندازی کا متحمل نہیں ہو سکتا، ماسوائے ان امور میں جہاں انتظامی نوعیت کی معاونت سے اس آزادی کو پروان چڑھانے میں مدد ملتی ہے۔

یہاں یہ بھی اچھی طرح ذہن نشین کر لیا جائے کہ جوڈیشل کمیشن کے 13 افراد شعبہ قانون سے متعلقہ اور قانون کو سمجھنے والے ایسے افراد ہیں جو کسی بھی زیرِ غور فرد کی اس عہدے کے لیے اہلیت کا اچھا جائزہ لے سکتے ہیں۔ پارلیمانی کمیٹی کے ارکان سے یہ توقع نہیں کی جانی چاہیے کہ وہ ان نامزد شدہ افراد کے بارے میں جوڈیشل کمیشن کے ارکان جتنی براہِ راست معلومات رکھتے ہوں یا ان کی اہلیت کو اتنی ہی مہارت سے جانچ سکتے ہوں۔

اس کا یہ مطلب نہیں کہ پارلیمانی کمیٹی بے فائدہ یا بے مقصد ہے۔ وہ تقرر کے عمل میں اس طرح اپنا کردار ادا کر سکتی ہے کہ ایسی معلومات مدنظر رکھے یا زیرِ غور لائے جن پر کمیشن نے غور نہیں کیا، یا جو کمیشن کی دسترس میں تھے ہی نہیں۔

فاضل ایڈیشنل اٹارنی جنرل بھی اس بات سے متفق تھے کہ جوڈیشل کمیشن اور پارلیمانی کمیٹی دونوں ہم پلّہ (co-ordinate) ادارے ہیں جن میں سے کوئی دوسرے کے ماتحت

نہیں لیکن اگر یہ مان لیا جائے کہ پارلیمانی کمیٹی کے پاس جوڈیشل کمیشن کے فیصلوں کو کالعدم قرار دینے کا لامحدود اختیار ہے، اور پارلیمانی کمیٹی کے فیصلے عدالتی نظر ثانی سے مستثنیٰ ہیں تو اس کے نتیجے میں ایک عجیب وغریب اور نامعقول صورتِ حال پیدا ہو جائے گی۔ اس لیے یہ اصولاً مناسب نہیں کہ آرٹیکل 175A کی تشریح یوں کی جائے کہ نتیجتاً پارلیمانی کمیٹی، جوڈیشل کمیشن کی سفارشات کو ویٹو کر سکے۔ اس کی وجہ دونوں اداروں کے ارکان کے کوائف ہیں۔ کیوں کہ یہ قرینِ قیاس نہیں کہ آئین کی منشا یہ ہو کہ ایک 13 رکنی کمیشن۔ جس میں عدلیہ کے پانچ سینئر ترین لوگ اور متعلقہ ہائی کورٹ کے چیف جسٹس اور اس عدالت کے ایک سابق جج بھی شامل ہیں۔ کسی زیرِ غور فرد کی لیاقت اور قابلیت کے بارے میں ان کی رائے کو پارلیمانی کمیٹی مسترد کر دے، جب کہ پارلیمانی کمیٹی کے معزز ارکان کے بارے میں یہ لازم نہیں ہے کہ وہ خود قانونی مہارت کے حامل ہوں۔ یہ قرینِ قیاس نہیں معلوم ہوتا۔

اور ان دونوں اداروں کو ایک دوسرے کا حریف بھی نہیں سمجھنا چاہیے۔ ان کا مقصود ایک ہی ہے۔ یعنی مناسب ترین لوگوں کا بطور جج تقرر۔

بہر حال یہاں ضرورت سے زیادہ عمومی بیانات دینا مناسب نہیں۔ ہمیں یہاں کسی نظریاتی، فلسفیانہ یا علمی بحث سے سروکار نہیں۔ ایک اور طریقے سے بھی پارلیمانی کمیٹی کا فیصلہ آئین کے متن اور اس کی روح سے متصادم ہے۔ پارلیمانی کمیٹی نے ایک فردِ واحد کی رائے ۔ یعنی ہائی کورٹ کے چیف جسٹس کی انفرادی رائے ۔ کو بنیاد بنا کر جوڈیشل کمیشن کی مجموعی رائے کو رد کر دیا۔ اس طریقِ کار کو 18 ویں ترمیم کے پس منظر میں دیکھا جائے، جہاں مقصود ہی یہ تھا کہ کسی فردِ واحد کی رائے پر کامل انحصار کی بجائے ججوں کے تقرر کا اختیار اداروں کو منتقل کر دیا جائے۔ پارلیمانی کمیٹی کا طرزِ عمل اس آئینی اصول کے خلاف ہے اور آئینی ترمیم کی روح کے بالکل منافی ہے۔ کیوں کہ انھوں نے تو پھر سے ایک ادارے کی مجموعی رائے کو رد کر دیا ہے۔

فاضل ایڈیشنل اٹارنی جنرل نے یہ بھی کہا ہے کہ اس معاملے میں متعلقہ ہائی کورٹوں کے چیف جسٹس صاحبان کی انفرادی رائے کو فوقیت حاصل ہے۔ یہ دلیل بھی آئین کی منشا کے خلاف ہے۔

اول یہ کہ جن پرفارموں میں درج آراء کا حوالہ دیا جا رہا ہے، اُن پرفارموں کا مقصد تو صرف کمیشن کو بحث وتمحیص اور سوچ بچار میں معاونت دینا تھا۔ تا کہ وہ کسی حتمی رائے تک پہنچ سکیں۔ پرفارموں کے مندرجات کی حیثیت حتمی رائے کی نہیں۔ بہر حال پرفارموں کے مندرجات کا تفصیلی جائزہ لینے کی ضرورت اس لیے نہیں ہے کیوں کہ کمیشن کی حتمی رائے اکثریتی

نہیں، متفقہ تھی۔ آرٹیکل 175A کے متن کے مطابق کمیشن کا فیصلہ متفقہ فیصلہ ہے اور انفرادی آراء کی اس میں کوئی گنجائش نہیں۔

دوسرا یہ کہ یہ آئینی ترامیم کے مقصد اور ان کے پس منظر سے ہم آہنگ نہیں۔ کیوں کہ ان ترامیم سے تو مقصود ہی یہ تھا کہ انفرادی رائے پر انحصار کی بجائے اداروں کی رائے کو اہمیت دی جائے۔

تیسرا یہ کہ یہ دلیل اس معاملے کے وسیع تر نتائج و مضمرات سے غفلت پر مبنی ہے۔ اگر آج یہ طے پا جائے کہ کمیٹی، کمیشن کے ارکان میں سے کسی ایک اختلافی رائے کو فوقیت دے کر کمیشن کی مجموعی رائے کو رد کر سکتی ہے تو بعد میں وہ کسی بھی اختلافی رائے کو فوقیت دے سکتی ہے، یوں کمیشن کے بھاری اکثریتی فیصلے بھی رد کیے جا سکیں گے اور کمیٹی کو مطلق العنانی حاصل ہو جائے گی۔ اور یہ صورتِ حال بھی آرٹیکل 175A کے اصل معنی اور صحیح تشریح کے منافی ہے۔

آخر میں ہم قاری کی سہولت کے لیے اس فیصلے میں دیے گئے نکات کو دُہرا دیتے ہیں۔ اوّلاً ہم نے آرٹیکل 184(3) کے تحت اِن درخواستوں کو قابلِ سماعت قرار دیا ہے، کیوں کہ ان میں ایسے سوال ابھرتے ہیں جو عوامی اہمیت کے ہیں اور جن کا بنیادی حقوق کے نفاذ سے گہرا تعلّق ہے۔ اس کے بعد، ہم نے تشریحِ آئین کے چند اہم اصول بیان کیے اور پھر آرٹیکل 175A کی تشریح پر اُن اصولوں کا اطلاق کیا اور اس آرٹیکل کا اس کے تاریخی پس منظر اور آئین کے بنیادی اصولوں کے تناظر میں جائزہ لیا۔ اس عمل سے ہم اس آرٹیکل کی صحیح تفہیم تک پہنچے، جس سے یہ ظاہر ہوا کہ پارلیمانی کمیٹی کے فیصلے اِس عدالت میں قابلِ نظرِ ثانی ہیں۔ اور اسی عمل سے ہم نے ججوں کے تقرر کے طریقِ کار میں شامل مختلف اداروں کے کردار کو بہتر طور پر سمجھا۔

اس سب کے بعد، ہم نے عدالتی نظرِ ثانی کے مروّجہ اصولوں کے تناظر میں اس درخواست کے حقائق کا جائزہ لیا۔ اس جانچ پڑتال سے یہ ظاہر ہوا کہ پارلیمانی کمیٹی کے زیرِ تنقید فیصلے قانون اور آئین کی غلط تفہیم پر مبنی ہیں۔ چونکہ یہ فیصلے بغیر کسی آئینی جواز کے کیے گئے ہیں، اس لیے قانونی طور پر کالعدم ہیں جیسا کہ مختصر فیصلہ صادر ہو چکا ہے۔

اختتامی کلمات کے طور پر یہ کہتا چلوں کہ ایک جمہوری نظام میں آئینی اور ریاستی اداروں کے مابین آئینی معاملات پر اختلافِ رائے کوئی اچھنبے کی بات نہیں۔ خاص طور پر جب آئین میں کچھ نئی شقیں متعارف کرائی جاتی ہیں تو ایسا ہو جاتا ہے۔ لیکن جوں جوں قومیں پختہ اور ان کے سیاسی نظام ارتقاء پذیر ہوتے ہیں، ان کی اس بالغ نظری کی جھلک میثاقِ حکومت

یعنی آئین سے متعلقہ تنازعوں کے حل کے طریقے میں بھی نظر آتی ہے۔اس لحاظ سے کمیشن اور کمیٹی کے مابین درپیش یہ اختلاف دوفریقوں کے درمیان تصادم یا انا کی جنگ نہیں ہے۔ کیونکہ،جیسا کہ پہلے کہا گیا،ان دونوں اداروں کا تو مقصد ہی ایک ہےاور وہ ہے پاکستان کے عوام کے اُس حکم کوعملی جامہ پہنانا کہ یہاں ایک ایسا نظام قائم کیا جائے،جس میں آزادیِ عدلیہ کومکمل تحفظ حاصل ہو۔یہ حکم عوام کا ہے جو آئین میں درج بھی ہےاوراس لائق بھی ہے کہ اس پر دل وجان سے عمل کیا جائے۔

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