**IN THE SUPREME COURT OF PAKISTAN**
(Review Jurisdiction)

**PRESENT:**

Mr. Justice Umar Ata Bandial
Mr. Justice Manzoor Ahmad Malik
Mr. Justice Mazhar Alam Khan Miankhel
Mr. Justice Sajjad Ali Shah
Mr. Justice Munib Akhtar
Mr. Justice Qazi Muhammad Amin Ahmed

**CIVIL REVIEW PETITION NO.296 of 2020 a/w**
**C. M. A. NO. 7084 OF 2020 &**

**CIVIL REVIEW PETITION NO.297 of 2020 a/w**
**C. M. A. NO. 7086 OF 2020 &**

**CIVIL REVIEW PETITION NO.298 of 2020 a/w**
**C. M. A. NO. 7085 OF 2020 &**

**CIVIL REVIEW PETITION NO.299 of 2020 a/w**
**C. M. A. NO. 7087 OF 2020 &**

**CIVIL REVIEW PETITION NO.300 of 2020 a/w**
**C. M. A. NO. 7169 OF 2020 &**

**CIVIL REVIEW PETITION NO.301 of 2020 a/w**
**C. M. A. NO. 7170 OF 2020 &**

**C.M.A NO.4533 OF 2020 IN CRP NO. NIL OF 2020 &**

**CIVIL REVIEW PETITION NO.308 of 2020 a/w**
**C. M. A. NO. 7171 OF 2020 &**

**CIVIL REVIEW PETITION NO.309 of 2020 a/w**
**C. M. A. NO. 7172 OF 2020 &**

**CIVIL REVIEW PETITION NO.509 of 2020.**

Justice Qazi Faez Isa — ***... Petitioner(s)*** ***(in CRP No.296/2020)***

Sindh High Court Bar Association — ***... Petitioner(s)*** ***(in CRP No.297/2020)***

Mrs. Sarina Isa — ***... Petitioner(s)*** ***(in CRP No.298/2020)***

Supreme Court Bar Association — ***... Petitioner(s)*** ***(in CRP No.299/2020)***

Muhammad Asif Reki President Quetta Bar Association — ***... Petitioner(s)*** ***(in CRP No.300/2020)***

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| Shahnawaz Ismail, VC Punjab Bar Council | ***... Petitioner(s)*** ***(in CRP No.301/2020)*** |
| Balochistan Bar Council | ***... Petitioner(s)*** ***(in CRP No.308/2020)*** |
| Pakistan Federal Union of Journalists | ***... Petitioner(s)*** ***(in CRP No.309/2020)*** |
| Abid Hassan Minto | ***... Applicant(s)*** ***(in CMA No.4533/2020 in CRP No.Nil of 2020)*** |
| Pakistan Bar Council thr. VC | ***... Applicant(s)*** ***(in CRP.509 of 2020)*** |

**VERSUS**

| | |
|---|---|
| The President of Pakistan and others | ***...Respondent(s)*** ***(in CRP.296-301& 308-309 & CRP.509 of 2020)*** |
| The Supreme Judicial Council thr. its Secretary and others | ***... Respondent(s)*** ***(in CMA No.4533 of 2020)*** |

For the petitioner(s) : Mrs. Sarina Faez Isa (In-person)
Mr. Kassim Mirjat, AOR.
***(in CRP.298/2020 & CMA.7085/2020).***

Mr. Munir A. Malik, Sr.ASC.
*(through Video Link from Karachi).*
***(in CRP.296/2020 & CMA.7084/2020)***
Mr. Kassim Mirjat, AOR.

Mr. Rasheed A. Rizvi, Sr. ASC.
*(through Video Link from Karachi).*
***(in CRP.297/2020 & CMA.7086/2020 & in CRP.309/2020 & CMA.7172/2020)***

Mr. Hamid Khan, Sr. ASC.
*(through Video Link from Lahore).*
***(in CRP.299/2020 & CMA.7087/2020 & in CRP.300/2020 & CMA.7169/2020 & in CRP.301/2020 & CMA.7170/2020 & in CRP.308/2020 & CMA.7171/2020)***

Nemo.
***(in CMA.4533/2020)***

Syed Rifaqat Hussain Shah, AOR.
***(in CRP.509/2020)***

Ms. Shireen Imran, ASC.
***(in Addl. Secy. SCBAP)***

Respondents : Not represented.

Dates of hearing : 08.12.2020 & 10.12.2020.

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**O R D E R**

We have before us a number of miscellaneous applications, filed under Order XXVI, Rule 8 of the Supreme Court Rules, 1980 read with other enabling provisions. These seek reconstitution of the Bench hearing several review petitions filed against the majority judgment in Justice Qazi Faez Isa Vs. President of Pakistan and others (**Const. P 17/2019**) and connected petitions. The said Constitutional petitions had been filed under Article 184(3) of the Constitution. These were heard by a ten member Bench of the Court and were disposed of by means of a short order dated 19.06.2020, which is reported as (Mr.) Justice Qazi Faez Isa and 14 others Vs. The President of Pakistan and others (**PLD 2020 SC 346**) (**"Short Order"**). Subsequently, five judgments giving reasons were released. Seven members of the Bench were party to the whole of the Short Order, in particular paras 3 to 11 thereof (which portion is the subject matter of the review petitions). They released a common judgment (authored by Justice Umar Ata Bandial) on 23.10.2020 (**"majority judgment"**). One of them, Justice Faisal Arab, added his concurring judgment. The remaining three learned members, who did not join in the aforementioned paras 3 to 11 of the Short Order, authored their separate minority judgments (**"minority judgments"**). Justice Yahya Afridi released his minority judgment at the same time as the majority on 23.10.2020, while Justice Maqbool Baqar and Justice Mansoor Ali Shah released their respective minority judgments on 04.11.2020. The decision of the connected petitions under Article 184(3) is therefore reflected in the majority judgment concurred by seven learned members of the Bench and the three

minority judgments rendered by three learned members of the Bench.

**Factual Context**

2. The review petitions, disputing paras 3 to 11 of the Short Order subscribed to by seven members of the Bench, were initially posted on 28.10.2020 before a Bench comprising the seven learned Judges who had passed the majority judgment. However, the matter was adjourned on the request of the review petitioners for examining the detailed reasons given in the majority judgment. Shortly afterwards, on 04.11.2020 Justice Faisal Arab retired from his office, necessitating the reconstitution of the Bench to its strength of seven Judges for hearing the review petitions. At this stage, all of the review petitioners filed miscellaneous applications and/or corresponded with the Registrar of the Court seeking the inclusion of the three Judges in the review Bench who had delivered the minority judgements. As the constitution of Benches is the prerogative of the Hon'ble Chief Justice (**"HCJ"**), these pleas were placed before the HCJ who, vide order dated 11.11.2020, directed that the applications be placed for consideration and decision before a Bench comprising the six remaining Judges who had delivered the majority judgment. Thus, in total eight such applications are fixed before us for rendering our opinion to assist the HCJ in the formation of a review Bench in the matter.

3. In two CMAs, each filed by Justice Qazi Faez Isa (**"the learned petitioner"**) and Mrs. Sarina Isa (**"Mrs. Isa"**), the prayer is that the review petitions be listed before a Bench which includes the three learned Judges who passed the minority judgments. In the remaining six CMAs (filed by the Bar

Associations/Councils and PFUJ) the prayer is that the review petitions 'be heard by the same Bench as possible as may be that passed the judgment dated 19th June 2020.' Reference is also made to what is perceived as the 'established practice' of the Court, namely, that the Bench 'hearing the review [be] of at least the same number of judges as passed the judgment under review.' It may be added that before these CMAs were fixed for hearing, the learned petitioner filed additional grounds of review in light of the detailed reasons given by Justice Yahya Afridi in his minority judgment. Mrs. Isa also filed additional grounds of review in which she disputed all three minority judgments.

**Procedure for Review: Legal Context**

4. Before examining the pleas raised by the review petitioners, it would be useful to first consider the law vesting review jurisdiction in this Court and the procedure laid down to regulate its exercise:

The Constitution of Islamic Republic of Pakistan, 1973 (**"Constitution"**):

> "**188. Review of Judgments or Orders by the Supreme Court.** The Supreme Court shall have power, subject to the provisions of any Act of [Majlis-e-Shoora (Parliament)] and of any rules made by the Supreme Court, to review any judgment pronounced or any order made by it.
>
> **191. Rules of Procedure.** Subject to the Constitution and law, the Supreme Court may make rules regulating the practice and procedure of the Court.

The Supreme Court Rules, 1980 (**"SCR"**) framed under Article 191 of the Constitution:

**ORDER XI**

**CONSTITUTION OF BENCHES**

> "Save as otherwise provided by law or by these Rules every cause, appeal or matter shall be heard and disposed of by a Bench consisting of not less than three Judges to be nominated by the Chief Justice:..."

**ORDER XXVI**

**REVIEW**

> 1. Subject to the law and the practice of the Court, the Court may review its judgment or order in a Civil proceeding on grounds similar to those mentioned in Order XLVII, rule I of the Code [of Civil Procedure, 1908] and in a criminal proceeding on the ground of an error apparent on the face of the record.
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> 8. As far as practicable the application for review shall be posted before the same Bench that delivered the judgment or order sought to be reviewed."
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> (*emphasis supplied*)

5. We shall deal with each of these provisions in turn although not necessarily in the sequence that they appear. To begin, Article 188 declares that the power of review has been vested in this Court by the Constitution itself. However, what is significant for our purposes is that the review jurisdiction has been conferred in respect of 'any' judgment pronounced or any order made by the Court. But Article 188 does not explain what the term 'any' means thereby leaving it for this Court to ascertain precisely which types of judgments are amenable to review. In this behalf, Article 188 provides us with an important guideline: the review jurisdiction of this Court is subject to or regulated by any Act of Parliament or any Rules made by the Supreme Court. At present, there is no such Act in the field but there are Rules, specifically the

SCR, which have been framed by the Supreme Court in exercise of its power under Article 191. We shall now examine how these shed light on the meaning of the phrase 'any judgment pronounced, or any order made' used in Article 188.

6. At first glance, the provisions of Order XXVI of the SCR are the most pertinent to our inquiry. Indeed, during oral arguments on 08.12.2020 when this matter came up for consideration, Mr. Munir A. Malik, who represents the learned petitioner in his review petition, also relied on Order XXVI, Rule 8 while making his submissions (in CMA 7084/2020). He stated that the judgment of the Court was that of the seven member majority. They were party to the whole of the Short Order including the paragraphs by which the review petitioners are aggrieved. However, for the purposes of Rule 8 that judgment had to be regarded as having been delivered by the ten member Bench. In other words, it was the ten member Bench that was the 'same Bench,' in terms of Order XXVI Rule 8 of the SCR, that had 'delivered the judgment... sought to be reviewed.' Therefore, the review petitions had to be heard by a Bench that included the learned Judges in the minority as well. Learned counsel referred to a number of decisions of this Court that, according to him, showed that a judgment in review was heard by the same number of Judges who had delivered it. On a query from the Court, learned counsel accepted that the overwhelming majority of the decisions relied upon by him were unanimous verdicts. However, he submitted that two had involved dissents and he relied in particular on one of those cases: Zulfiqar Ali Bhutto Vs. The State (**PLD 1979 SC 741**) (**"the Z A Bhutto case"**).

7. It will be recalled that (as presently relevant) Mr.Zulfiqar Ali Bhutto and other accused had been tried and convicted by the Lahore High Court. Mr. Bhutto's subsequent appeal to this Court against his conviction failed. It was heard by a seven member Bench and was dismissed 4:3. The subsequent review petition, decided by the above-cited reported judgment, was heard by the same seven member Bench. It was dismissed unanimously. Two reasoned judgments were delivered. One was by Justice Muhammad Akram, which was agreed with by the three learned Judges who, like him, had dismissed Mr. Bhutto's appeal. The other was delivered by Justice Dorab Patel, which was agreed upon by the two learned Judges who, like him, had allowed the appeal. Both judgments are relevant to our present inquiry. However, learned counsel relied only on the following paragraph from the judgment of Justice Muhammad Akram:

> "27. At a subsequent stage a question arose as to the position of the three learned Judges of this Court who had recorded dissenting opinions in regard to the disposal of the petitioner's appeal. Again, relying upon the aforesaid rule 6, we took the view that as they were part of the Bench that delivered the judgment sought to be reviewed, their presence on the Bench was necessary, as they were continuing as Judges of the Supreme Court and were available for the disposal of the review petition."
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> (*emphasis supplied*)

It was argued that the same situation applied in the present case. It was further submitted that the **Z A Bhutto** case, having been decided by a seven member Bench, was binding upon us (a six member Bench). On the foregoing basis it was prayed that a suitable declaration or order may be made that the review petitions

in the present case be heard by a Bench inclusive of the three learned Judges in minority.

8. At this stage, the attention of learned counsel was drawn to Order X, Rule 2 of the SCR which provides as follows:

> "2. Subject to the provisions contained in Order XXVI, a judgment pronounced by the Court or by majority of the Court or by a dissenting Judge in open Court shall not afterwards be altered or added to, save for the purpose of correcting a clerical or arithmetical mistake or an error arising from any accidental slip or omission."
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> (*emphasis supplied*)

The context for referring to this provision was, of course, the crucial questions raised in these applications, namely: according to the meaning and for the purposes of Rule 8, what is the judgment that is sought to be reviewed? And which is the Bench that has delivered it? More specifically, a question was put to learned counsel with reference to Order X, Rule 2: since this provision clearly contemplates three different types of judgments, could for example, a minority judgment (such as a dissent) be reviewed? Initially, Mr. Munir A. Malik was inclined to answer this question in the negative. This was on the basis of Rule 1 of Order XXVI, which provides: 'the Court may review its judgment or order.' Learned counsel submitted, relying in particular on the word emphasised, that there could be only one judgment of the Court, that of the Bench in its entirety (if unanimous) or its majority, if such be the case. That alone was the judgment that could be reviewed, and none was possible of a minority judgment. Hence, he submitted that Order X, Rule 2 had no relevance for the purposes of review jurisdiction, i.e., Order XXVI.

9. It was pointed out to learned counsel that the learned petitioner had, as noted above, also sought a review of the minority judgment delivered by Justice Yahya Afridi. On the position taken by learned counsel such a review would obviously be impossible. In the event, as the hearing proceeded learned counsel reconsidered his position and ultimately accepted that a review of a minority judgment was also possible but submitted that this matter should be settled in a later, more appropriate, case.

10. Next, Mr. Hamid Khan and Mr. Rasheed A. Rizvi, learned counsel who appeared for the other review petitioners (in CMA Nos. 7169, 7170, 7171, 7172, 7086 and 7087, all of 2020), adopted the submissions made by Mr. Munir A. Malik. However, they did not express any view on whether a review of a minority judgment is possible. Mr. Latif Afridi, one of the senior most members of the Bar and currently the President of the Supreme Court Bar Association (which too is a review petitioner), also appeared before the Court and filed written submissions in support of the foregoing.

11. Mrs. Isa, the spouse of the learned petitioner, also filed a review petition and appeared in person. She relied on Order XXVI, Rule 8 to make the same prayer (in CMA 7085/2020). She further submitted that in the additional grounds filed by her in support of her review petition, she has sought review of each minority judgment and therefore, for this reason, the appropriate Bench for hearing the review petitions had to include the three dissenting Judges.

12. We have heard learned counsel for the review petitioners and have considered the record and case law cited, in

particular the decision in the **Z A Bhutto** case. The questions raised by the present applications are surprisingly complex. For reasons that will become clear as we proceed, they have to be approached somewhat obliquely. It is only in this manner that the correct constitutional and legal position will emerge.

**The Review Bench: Legal Analysis**

13. The primary question posed by these applications is: what should be the numerical strength and composition of the review Bench? The answer to this question depends upon two considerations: the judgment sought to be reviewed and matters of practicability (both criteria are given in Order XXVI, Rule 8). These are the primary factors taken into account by the HCJ (in exercise of his power under Order XI), along with the relevant provisions of the Constitution, the SCR, the practice of the Court and the law laid down by it, to guide him in constituting a review Bench.

14. Now as has already been noted, the source of review jurisdiction of the Court can be found in Article 188 of the Constitution. This Article permits the Court to review 'any' judgment pronounced or order made by it subject to the provisions of an Act of Parliament or the SCR. Rule 8 of Order XXVI of the SCR is germane to the subject. It links the constitution of a review Bench with the judgment that is sought to be reviewed. Rule 8 does not, however, specify the types of judgments that are amenable to review; therefore it does not curtail the classification of 'any' type of judgment given in Article 188 of the Constitution. The term 'judgment' has not been defined anywhere in the SCR. However, Order X, Rule 2 in a context similar to Order XXVI Rule

8, enumerates three types of judgments: unanimous, majority and dissenting. This provision might be relevant for interpreting the term 'judgment' used in Rule 8 for the reason that Order X, Rule 2 itself records its connection with Order XXVI by beginning with the expression 'Subject to the provisions of Order XXVI.' A reading of the two Orders of the SCR reveals the cause of their express association: the commonality of their purpose, namely, rectification/correction of a judgment (albeit that whilst Order X deals with minor ministerial errors in a judgment, Order XXVI is concerned with errors in its substantive content). Therefore, the wide and ambiguous term 'judgment' used in Order XXVI, Rule 8 can be interpreted in light of the meaning assigned to it in Order X, Rule 2. Such a reading of Rule 8 finds support from the principle of harmonious interpretation, a succinct elaboration of which is found in Mirza Shaukat Baig Vs. Shahid Jamil (**PLD 2005 SC 530**):

> "13. No principle of interpretation of statutes is more firmly settled than the rule that the Court must deduce the intention of Parliament from the words used in [an] Act. But if the words of an instrument are ambiguous in the sense that they can reasonably bear more than one meaning, that is to say, if the words are semantically ambiguous, or if a provision, if read literally, is patently incompatible with the other provisions of that instrument, the Court would-be justified in construing the words in a manner which will make the particular provision purposeful. That, in essence, is the rule of harmonious construction."
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> (*emphasis supplied*)

15. At this point, a limitation imposed by Order XXVI, Rule 1 of the SCR needs to be stated. The use of the expression 'its judgment' in the said Rule suggests that only a judgment of the

Court is amenable to review. That would mean a judgment (direction, order or decree) that is enforceable or binding under Article 187 or Article 189 of the Constitution throughout Pakistan. In this respect a minority judgment does not possess the status of being enforceable as a judgment of the Court. Consequently, minority judgments, *prima facie*, fall outside the purview of review under Order XXVI, Rule 1. However, the other two categories of judgments given in Order X, Rule 2, namely, unanimous and majority judgments issuing directions, orders or decrees possess the attribute of being enforceable throughout Pakistan. Therefore, on a joint reading of Order XXVI, Rule 1 and Rule 8, it is these judgments that are reviewable. This conclusion also finds support in our current legal jurisprudence, particularly in the test of review laid down by the Court which only permits a review petition to succeed if there is a material irregularity in the judgment which has a substantial effect on the result of the case. In this regard, one of the most seminal judgments is that of Chief Justice Cornelius in Lt Col Nawabzada Muhammad Amir Khan Vs. The Controller of Estate Duty (**PLD 1962 SC 335**). The relevant portion from the judgment is produced below:

> "... There must be a substantial or material effect to be produced upon the result of the case... if there be found material irregularity, and yet there be no substantial injury consequent thereon, the exercise of the power of review to alter the judgments would not necessarily be required. The irregularity must be of such a nature as converts the process from being one in aid of justice to a process that brings about injustice."
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> (*emphasis supplied*)

16. This test was subsequently approved by the Court in Abdul Ghaffar-Abdul Rehman Vs. Asghar Ali (**PLD 1998 SC 363**) at para 17 and has been followed ever since. The relevance of this test is that it expressly states that a review can only succeed if it has a material effect on the result of the case i.e., it changes the outcome of the case. Short of that, even a substantial irregularity in a judgment will not convince this Court to recall its earlier decision. This test, therefore, makes it abundantly clear that a unanimous and majority judgment of the Court can be challenged in review because a correction in these judgments can actually alter the outcome/result of a case. On the other hand, a minority judgment, whatever its content, lacks both enforceability and effect on the outcome/result of a case. As a result, under the present dispensation of the law even though a minority judgment does fall within the ambit of Article 188 of the Constitution and within the classification set out in Order X, Rule 2 of the SCR, *prima facie,* it does not qualify the test of review. The foregoing suffices for present purposes, and therefore we leave this question open for further consideration in an appropriate case. Accordingly, insofar as the additional grounds of review filed against the minority judgments by the learned petitioner and Mrs. Isa are concerned, the same should not be heard by us i.e., the Bench that has delivered the majority judgment. Consequently, the Office is directed to separate these grounds of review (to the extent that they challenge the minority judgments) and place the same before the HCJ for appropriate orders.

17. We will now consider the main conundrum in this case: what is to be the numerical strength and composition of a review Bench? It is obvious that where the decision of the Court is

unanimous and only one judgment is delivered (which invariably happens in the overwhelming number of cases) there is no issue: the Bench that delivered the original judgment and the one for purposes of review in terms of Rule 8 coincide. The real question is the one raised by these applications: what happens when there is a majority decision? In our view, the answer must be that for purposes of Rule 8 one has to look at the judgment that was delivered, and the Judges who actually gave that decision. It is those Judges who (subject to what is said below) can be considered the authors of the judgment and therefore 'the same Bench' which 'delivered the judgment' under review.

18. At this stage, it would be appropriate to recall the arguments of Mr. Munir A. Malik. His primary submission, during the hearing, was that 'same Bench' as used in Rule 8 included all the Judges in the Bench, whether they were in the majority or the minority. This contention was based upon the proposition that a judgment delivered by the Bench is a judgment of all the Judges who comprised the said Bench regardless of whether a minority amongst them dissented. In support of his contention he relied on the **Z A Bhutto** case wherein this view was approved by the Court (ref: para 27 of that judgment produced above). But that legal position may not be in line with the literal interpretation of Order XXVI, Rule 8. However, we are not in a position to resolve this difference because the decision in the **Z A Bhutto** case was given by a seven member Bench whereas we are sitting as a six member Bench. As such, the judgment in that case is binding on us unless a larger Bench (comprised of more than 7 Judges) re-examines this matter and arrives at a different conclusion.

19. Be that as it may, the question remains: how does the above plain reading of the SCR reconcile with the law enunciated by this Court in the **Z A Bhutto** case, namely, that the numerical strength of the review Bench and the original Bench has to be identical regardless of whether the judgment under review was passed by majority. This shall become clear in the following section where we will examine the final two legal elements i.e., the practice of the Court and its pronouncements on the subject of constitution and composition of a review Bench.

## The Practice of the Court

### A. Practicability

20. A particularly important factor in the practice of the Court is the discretion vested by Order XI of the SCR (reproduced above) in the HCJ to constitute Benches. Order XI lays down one of the paramount duties of the HCJ which is to ensure a smooth functioning of the Court system. The formal requirement under Order XI is that (except where its provisos apply or the law or the SCR direct otherwise) the Benches before which matters are to be placed must comprise of not less than three Judges. Beyond that, the matter is left to the discretion of the HCJ, both as to the number of Judges who are to sit on a Bench and the composition thereof. Such a view has been affirmed consistently by this Court. Reference is made to the decision in Federation of Pakistan Vs. Mian Muhammad Nawaz Sharif (**PLD 2009 SC 284**):

> "122. ... The question of constitution of larger Bench is the prerogative of the Hon'ble Chief Justice of the Court as was held in PLD 2002 SC 939 (Supreme Court Bar Association v. Federation of Pakistan wherein it was clearly laid down as a principle that it was the sole prerogative of the Hon'ble Chief Justice to

> constitute a Bench of any number of Judges to hear a particular case. Neither an objection can be raised nor any party is entitled to ask for constitution of a Bench of its own choice.
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> 123. While considering the provision of Order XI and Order XXXIII Rule 6 of the Supreme Court Rules, 1980, it was laid down in PLD 1997 SC 80 (In re: M.A. No.657 of 1996 in References Nos.1 and 2 of 1996) that no litigant or lawyer can be permitted to ask that his case be heard by a Bench of his choice, for it is the duty and privilege of the Chief Justice of the Supreme Court to constitute Benches for the hearing and disposal of cases coming before the Court. In Malik Hamid Sarfaraz v. Federation of Pakistan and another (PLD 1979 SC 991) it was held that no litigant or the lawyer can be permitted to ask that a case be heard by a Bench of his choice. In Malik Asad Ali and others v. Federation of Pakistan (PLD 1998 SC 161) it was held that "the qualification to hold the office of the Judge is indeed discretion and has nothing to do with his performance as a Court or a Member of the Court.
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> 124. In PLD 2005 SC 186 (Ch. Muhammad Siddique and 2 others v. Government of Pakistan, through Secretary, Ministry of Law and Justice Division, Islamabad and others) it was held: -
>
> > "...it was not the right of petitioner/appellant to select the Judge[s], of their own choice---To constitute a Bench was a prerogative of the Chief Justice and the parties could not ask for a Bench of '...their choice"."
> >
> > (*emphasis supplied*)

21. Indeed, even where the SCR direct a matter to be fixed before a Bench of a specific number, they invariably use the expression 'not less than'. For instance, Order XI directs that any cause, appeal or matter shall be heard and disposed of by a Bench consisting of not less than three Judges to be nominated by the HCJ. However, the first proviso to Order XI also permits appeals from judgments/orders of the Service Tribunal or Administrative Courts to be heard by a Bench of two Judges. Nevertheless, that

very proviso expressly allows for the same matter to be laid down before a larger Bench. Similarly, Order XXV requires that applications for enforcement of Fundamental Rights should be heard by a Bench 'consisting of not less than two Judges.' Likewise, Order XXXV, Rule 4 states that an appeal against the judgment of the Federal Shariat Court shall be fixed before a Bench of 'not less than three members' in the case of an acquittal and before a Bench of 'not less than two members' in all other matters. It is thus clear that any direction under the SCR with respect to the number of Judges in a Bench is a minimum figure. Therefore, in all the above cases the SCR leave it within the power and discretion of the HCJ to direct the numerical strength of a larger Bench before which a matter may be placed for hearing.

22. Clearly, in this sense the HCJ is the 'master of the roster' and he can form review Benches according to his discretion as structured under guidance provided from four sources, namely, Order XXVI, Rule 8 (the provision most relevant to the present controversy), Order XI, and the practice of and the law laid down by this Court. Rule 8 makes it abundantly clear that practicability is the dominating factor in the constitution of review Benches. A concise definition of the term 'practicable' has been provided in Words and Phrases (Volume 33, 1971 at page 251):

> "If undertaking, procedure, or thing is possible to practice or perform or is capable of attainment or accomplishment, it is "practicable." An act is "practicable" if conditions and circumstances are such as to permit its performance or to render it feasible."
>
> (*emphasis supplied*)

By subjecting the constitution and therefore composition of a review Bench to what is practicable, Rule 8 by its own terms lays down directory criteria. The HCJ therefore has power to take into consideration such conditions and circumstances that can affect the formation of a review Bench. Therefore, Order XXVI, Rule 8 requires a substantial, rather than strict, compliance with its terms. And whilst it is not possible for us to exhaustively list the conditions and/or circumstances that may influence the strength of the review Bench in each case, a few examples will suffice to suggest the salient factors that may prevail with the HCJ:

i. The temporary and/or permanent unavailability of the Judges (e.g., because of retirement of the Judge) who originally heard the matter [ref: Government of Punjab Vs. Aamir Zahoor-ul-Haq (**PLD 2016 SC 421**) at para 17];

ii. To ensure the smooth and efficient functioning of the Court as a whole [ref: Federation of Pakistan Vs. Mian Muhammad Nawaz Sharif (**PLD 2009 SC 391**) at para 4];

iii. The nature of cases e.g., matters that, *inter alia*, involve complex questions of law or are of significant public importance are placed before a larger review Bench. For instance, in Federation of Pakistan Vs. Mian Muhammad Nawaz Sharif (**PLD 2009 SC 664**) the strength of the review Bench was increased to five members from the original Bench comprised of three members; likewise in Fida Hussain Vs. The Secretary,

Kashmir Affairs and Northern Affairs Division, Islamabad (**PLD 1995 SC 701**)]; and

iv. Deference to the norms of judicial propriety.

**B. Strength and Composition of Review Bench**

23. The flexibility furnished by Rule 8 for the HCJ is a continuation of the discretion vested in him by Rule 6 of Order XXVI of the erstwhile Supreme Court Rules, 1956. This discretionary exercise of the HCJ's power was later articulated in the Supreme Court Office Order No.P.Reg.99/90 (14)/SCA dated 03.03.1990. It identifies the essential features of Court practice about the numerical strength of a review Bench and about the need to include the author Judge, if available, in such a Bench. The relevant portion from the Office Order is produced below for reference:

> "...However, the practice of fixing before a Bench in which the author Judge is a member and if he is no more available, before the Bench in which at least one Hon'ble Judge of the previous Bench is sitting can be followed. When none of them is available a new Bench can hear the review. Same applies to the number of Judges on the Bench, if not the same."

24. The said Order represents a convention in the practice of the Court and was approved in Federation of Pakistan Vs. Mian Muhammad Nawaz Sharif (**PLD 2009 SC 391**):

> "4. Moreover, the well settled practice and convention of this Court is that an application for review is ordinarily placed before the Bench of which the author judge or in case of unavailability any other member of the earlier Bench is a Member, so as to ensure that working of that Bench is not interrupted. The Office Order No.P.Reg.99/90

> (14)/SCA dated 3-3-1990 of this Court is reflective of this convention. Since two out of the three Hon'ble Judges of the Bench which passed the judgment under review are part of this Bench and as both of them are authors of the same, the mandate of Order XXVI, Rule 8 of the Supreme Court Rules, 1980, stands substantially complied with."
>
> (*emphasis supplied*)

25. The above view was recently reiterated in Shahzada Aslam Vs. Ch Muhammad Akram (**PLD 2017 SC 142**) when learned counsel for the review petitioner in that case claimed that only the exact 'same Bench' which heard and decided the original matter could hear the review:

> "8. The contention of the learned Counsel for the Petitioners that this Rule [8] has been interpreted in the case of Asad Ali v. Federation of Pakistan (PLD 1998 SC 161) (at page 253) and this Court has held that "a matter is to be heard as far as possible by the same Bench", is misconceived. Even this judgment, in no way, extends any help to the learned Counsel for the Petitioners, whereas the language of the said Rule and the interpretation given by this Court in the aforesaid case are very much clear and does not mandate that the same Bench should hear the Review Petition. In fact, it states that the same Bench that delivered the judgment needs to hear the matter, but subject to the availability and practicability of the Bench, which in other words suggests that the Review Petition needs to be assigned by the Chief Justice or the office at least before a Bench of which the author Judge is a Member. If the contention of the learned Counsel is accepted, it would lead to anomalous consequences, because hundreds of review petitions are filed and the practice of the nature will deprive the Hon'ble Chief Justice from exercising powers under Order XI, besides it would cause inconvenience to the lawyers and the office. Even the plain reading of Rule 8 of Order XXVI, itself does not suggest so."
>
> (*emphasis supplied*)

It may be noticed from the above-quoted passages that the actual practice of the Court is not a pedantic reading of the terms of Order XXVI, Rule 8. Instead, it captures the spirit of the said provision. So even though the HCJ may constitute a Bench of his choice in a review matter, the exercise of his discretion ought to be guided by two criteria: firstly, the review Bench (at the minimum) should bear the numerical strength of the original Bench. By convention, this practice is followed even in cases where only the majority judgment is under review. Secondly, the composition of the review Bench should include the author Judge. If he is not available then another member of the previous Bench (i.e., a Judge who agreed with the author Judge) may substitute him. Consequently, contrary to the argument of Mr. Munir A. Malik, there is no practice of the Court of forming a review Bench comprised of exactly the same Judges who heard the original matter. As observed in the aforenoted precedent, such a practice would be unworkable leading to anomalous consequences in the hundreds of review petitions filed in the Court.

26. Having read the practice of the Court on the second criterion, the composition of a review Bench contemplated in the **Z A Bhutto** case needs to be understood in its special context. In that case the Judges who had heard the original matter were also a part of the review Bench. This has been taken by learned counsel for the petitioner to mean that all the members of the original Bench must be included in the review Bench. But before such a conclusion can be drawn it needs to be appreciated that in 1979, when this case was heard and decided, the total strength of Judges in the Supreme Court was nine. However, prior to the hearing of

the appeal in the **Z A Bhutto** case, one learned Judge, Justice Qaiser Khan had already retired. Another learned Judge, Justice Waheeduddin Ahmed, fell ill during the course of the hearing of the appeal. Therefore, only seven Judges decided the appeal. When the matter came up for review, the number of available Judges in the Court was still seven. As per the existing practice of the Court at the time, the numerical strength of the review Bench had to be maintained at seven. Hence, the original Judges had to be a part of the seven member review Bench. Evidence of this can be seen in para 27 of the review judgment where it was observed that the dissenting Judges were sitting in the review Bench because they 'were *continuing* as Judges of the Supreme Court and were *available* for the disposal of the review petition.' Consequently, this case is good authority for the proposition that a review Bench must bear the numerical strength of the original Bench but it is doubtful that it mandates a review Bench to mirror the composition of the original Bench. In fact, there is sufficient practice after 1979 which rebuts any claim whatsoever to this effect e.g., both the numerical strength and the composition of the review Bench in Federation of Pakistan Vs. Mian Muhammad Nawaz Sharif (**PLD 2009 SC 644**) and Akhter Umar Hayat Lalayka Vs. Mushtaq Ahmed Sukhaira (**2018 SCMR 1218**) were revised. Specifically, the size of the two review Benches was increased from three to five, whereas the composition was altered by replacing the Judges who had heard and decided the original matter with different Judges despite the fact that the former were still continuing as Judges of the Supreme Court and were therefore available for disposal of the review petitions.

27. Consequently, the following points may be summarised in the light of the foregoing analysis of the practice of the Court:

i. The constitution of review Benches (or any Bench) is the sole prerogative of the HCJ under Order XI;

ii. The direction in Order XXVI, Rule 8 that review petitions should be posted before the 'same Bench' is subject to the requirements of practicability;

iii. In constituting a review Bench the HCJ should ensure substantial compliance with Rule 8 of Order XXVI by including the author Judge (if available) in the review Bench. However, where it is not practicable to do so there is no obligation to have exactly the same Judges on the Bench;

iv. The numerical strength of a review Bench has to be the same as that of the original Bench, regardless of whether the judgment under review was passed unanimously or by majority; and

v. In certain circumstances (as noted above), the HCJ may in his discretion constitute a larger Bench according to the importance of a matter or other considerations of practicability.

**Exercise of Review Jurisdiction**

28. We must now refer again to the **Z A Bhutto** case to read another valuable judicial observation, namely, the brief judgment of Justice Dorab Patel. His Lordship is regarded as one of the titans of the law and anything that fell from his pen is worthy of, and warrants, close attention. As noted, he had been in the minority in dismissing Mr. Bhutto's appeal against conviction.

In the concluding paragraph of his judgment (in review) Justice Dorab Patel reflected on how a Judge who dissented ought to act if called upon to sit in review of the majority judgment. His words distil the wisdom of the ages:

> "However, Mr. Yahya Bakhtiar's arguments on the question of sentence were without prejudice to his main submission, which was that the majority judgment suffered from errors apparent on the record which had resulted in the dismissal of Mr. Bhutto's appeal. Now learned counsel had address us for nearly two weeks on this question, but as he has failed to persuade the Judges, who pronounced the majority judgment of the Court, to revise the finding of guilt of the petitioner, it follows that the review petition must be dismissed. In these circumstances, consistently with judicial dignity and the practice of this Court, I do not think it would be proper for me to make any observations on learned counsel's submissions; and I would dismiss the petition for the reasons given herein."
>
> (*emphasis supplied*)

As is clear from the foregoing, Justice Dorab Patel believed that the question whether a case had been made out for the review of a judgment was, in the final analysis, essentially something for the Judges who actually delivered the judgment under review to decide. If those Judges were not so persuaded, then any other Judges sitting on the Bench hearing the review ought to show maximum restraint and maintain judicial dignity and quietude, particularly when they had already expressed an opposite view in the original matter. It is quite obvious that the learned Judge was acutely aware of, and alive and sensitive to, the very real possibility of the Judges, howsoever unwittingly and despite their best efforts, slipping from the exercise of review jurisdiction into regarding consideration of the review petition as but the "second round" in an ongoing litigation. The words and wisdom of Justice Dorab Patel

are evergreen and, in our respectful view, merit reflection by all Judges in every generation.

29. Indeed, the views expressed by Justice Dorab Patel were very recently followed by Justice Asif Saeed Khan Khosa in the review filed against the decision in the PANAMA case. That judgment is reported as Imran Ahmad Khan Niazi Vs. Mian Muhammad Nawaz Sharif (**PLD 2017 SC 265**). In this case the three Judges in majority formed a JIT to probe into the allegations against the then sitting Prime Minister whereas the two minority Judges, including Justice Khosa, ordered the immediate disqualification of the Prime Minister from the National Assembly. Subsequently, the report of the JIT was released pursuant to which the three majority Judges and the two minority Judges by order of the Court jointly declared the Prime Minister debarred from holding public office. Thereafter, a review was filed by the respondent against this decision. The judgment in that case is reported as Mian Muhammad Nawaz Sharif Vs. Imran Ahmed Khan Niazi (**PLD 2018 SC 1**). During the hearing of the review, learned counsel for the petitioner (previously the respondent) raised an objection against the inclusion of the two minority Judges in the Bench. According to him, the said Judges had become *functus officio* after rendering their opinions. In the circumstances of the case, Justice Ejaz Afzal Khan, speaking for the whole Bench, repelled this contention of counsel for being academic in nature.

30. Accordingly, the review petitions were heard and dismissed unanimously by the five Judges. Justice Khosa, one of the minority Judges, also added a brief note of his own. This is produced below for reference:

> "No ground has been taken in these review petitions nor any argument has been advanced at the bar questioning anything

> observed or concluded by me in my separate opinion recorded in the main case. The other Hon'ble members of the Bench have not felt persuaded to review their opinions already recorded. These review petitions are, therefore, dismissed."
>
> (*emphasis supplied*)

It is evident from His Lordship's observation that he did not deem it appropriate to comment on the judgment passed by the majority because the majority Judges themselves were not persuaded to review their opinion. Therefore, in these circumstances he dismissed the review petitions simpliciter. At this stage, it must be reiterated that the power of review is limited in scope (ref: Lt Col Nawabzada Muhammad Amir Khan and Abdul Ghaffar-Abdul Rehman). Consequently, it must be exercised by all the Judges sitting in the review Bench in such a manner that it does not overstep into the realm of revisiting or re-hearing the original judgment.

**Conclusion**

31. Accordingly, in light of what has been discussed above, these miscellaneous applications are disposed of as follows:

i. Review jurisdiction (at present) can be invoked only in relation to the judgments of this Court, namely, unanimous and majority judgments.

ii. As a matter of the current law and practice of the Court:

   a. for the purposes of Order XXVI, Rule 8, the minimum numerical strength of the Bench that delivered the judgment or order under review is the numerical strength of the Bench which heard and decided the original matter,

regardless of whether the judgment under review was passed unanimously or by majority; and

b. the review Bench should comprise the author Judge, if still on the Court, as its member, and in case he is unavailable then any other Judge who agreed with the author Judge should be included in the Bench.

iii. As a matter of law and settled practice it is for the HCJ, as the master of the roster, to determine the composition of a Bench and he may, for like reason, constitute a larger Bench for hearing the review petition.

32. Therefore, the Office is directed to place the review petitions before the HCJ for such orders as are deemed appropriate.

Sd/-
**JUDGE**

I have read the order. I agree with the conclusion drawn in Para 31(ii)(a) ***(numerical strength of review Bench).*** However, I would attach my separate note for remaining findings/observations given in the order.

Sd/-
**JUDGE**

Sd/-
**JUDGE**

Sd/-
**JUDGE**

Sd/-
**JUDGE**

Sd/-
**JUDGE**

Announced in open Court
on 22nd day of February, 2021.

Sd/-
**J(2).**

**APPROVED FOR REPORTING.**