

Trial for High Treason by Special Courts: Comment on the Lahore High Court's Judgment in *General (R) Pervez Musharraf vs Federation of Pakistan* (W.P. No. 71713/2019)

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Details of the Case

The full name of the parties to the case is *General (R) Pervez Musharraf vs The Federal Government of the Islamic Republic of Pakistan through the Secretary Interior Division, Government of Pakistan*. The case number is Writ Petition 71713 of 2019. The case was heard by Justices Sayyed Mazahar Ali Akbar Naqvi, Chaudhry Muhammad Masood Jahangir and Muhammad Ameer Bhatti of the Lahore High Court. The dates of hearing were 09.01.2020, 10.01.2020 and 13.01.2020.

Background and Facts of the Case

On 12 October 1999, the then Prime Minister of Pakistan, Mr. Nawaz Sharif fired the highest officer of the armed forces in the country, the then Chief of Army Staff, General (R) Pervez Musharraf ('the petitioner') and appointed the incumbent Chief of Intelligence

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at that time, General (R) Ziauddin as the next army chief.¹ The army, which proved to be firmly loyal to the petitioner,² responded swiftly. They arrested the Prime Minister, all his cabinet members and General (R) Ziauddin, putting them in 'precautionary custody'. They also took control of all TV stations, airports and administrative buildings in the country. Within seventeen hours the army had gained effective control over the whole country and the petitioner was able to appear on national television to announce that the civilian government stood deposed and that this had been necessary to restore 'stability'.³ Many, including the late former Prime Minister of Pakistan Benazir Bhutto, hoped that the military rule so established would be brief and it could pave the way to a quick restoration of democracy, perhaps within three months.⁴ Things did not go that way. The petitioner declared himself as the President of Pakistan in 2001 and retained power until 2008. In the autumn of 2007, a clash between the petitioner and the judiciary arose, leading to the arrest and mistreatment of the then Chief Justice of Pakistan, Justice (R) Iftikhar Chaudry by the Army on order of the petitioner. The ensuing protests of the legal fraternity and other parts of civil society led the petitioner to issue, on 3 November 2007, a Provisional Constitutional Order (PCO)⁵ declaring the state of emergency and suspending the Constitution of 1973 (the Constitution).⁶ Under the new constitutional

¹ 'Musharraf's 1999 Coup d'Etat Turns 19' *Pakistan Today* (12 October 2018) < <https://www.pakistantoday.com.pk/2018/10/11/musharrafs-1999-coup-detat-turns-19/>> accessed on 12 May 2020.

² Celia W. Dugger, 'Coup in Pakistan: The Overview; Pakistan Army Seizes Power Hours After Prime Minister Dismisses His Military Chief' *New York Times* (13 October 1999) Section A, Page 1.

³ *ibid.*

⁴ 'UK: Benazir Bhutto Comments on Pakistani Army Coup' (*Associated Press Archive*, 23 July 2015) <<https://www.youtube.com/watch?v=paOPw8jCsLQ>> accessed on 12 May 2020.

⁵ Provisional Constitutional Order 2007.

⁶ The Constitution of the Islamic Republic of Pakistan, 1973. Whenever the word 'Article' is used in this paper it refers to a provision of the Constitution.

order thus established, all judges of the Supreme Court of Pakistan ('Supreme Court') and of the high courts were requested to take a fresh oath.⁷ Failure to do so would cause them cease to hold office, since the validity of their tenures had ceased because of the new constitutional order inaugurated by the PCO. This resulted in a number of judges refusing to take oath under the PCO and therefore losing their office. Some were even confined to house arrest. A petition⁸ filed against the petitioner's act of proclamation of emergency was not validated by the Supreme Court. The Constitution remained suspended from 3 November until the petitioner restored it in December 2007.⁹ This move of last resort did not prove sufficient for the petitioner to retain power and eventually in 2008 general elections were held, which gave Pakistan a civilian government after almost nine years of military rule.

During the first democratic government after the demise of the regime, the then Prime Minister of Pakistan, Syed Yousaf Raza Gillani, restored the judges who had lost office in 2007 and challenged the vires of the PCO before the Supreme Court.¹⁰ The Supreme Court declared it was illegal. However, it fell short of pronouncing on the legal responsibility the petitioner in declaring the state of emergency and in suspending the Constitution.

It was only in June 2013, when Mr. Nawaz Sharif become Prime Minister of Pakistan for the third time, that he vowed to start

⁷ Oath of Office (Judges) Order, 2007.

⁸ *Tika Iqbal Muhammad Khan v General Pervez Musharraf and other* PLD (2008) SC 178.

⁹ Madiha Afzal, 'Why Pakistan's Former Ruler Musharraf Was Sentenced to Death, and What It Means' (*Brookings*, 19 December 2019) <<https://www.brookings.edu/blog/order-from-chaos/2019/12/19/why-pakistans-former-ruler-musharraf-was-sentenced-to-death-and-what-it-means/>> accessed on 12 May 2020.

¹⁰ *Singh High Court Bar Association v Federation of Pakistan* PLD (2009) SC 789, 879.

proceedings against the petitioner, accusing him of high treason for illegal suspension of the Constitution.¹¹

The Acts of the Pakistani Parliament that specify the punishment for high treason and the related procedures are the High Treason (Punishment) Act, 1973¹² and the Criminal Law Amendment (Special Court) Act, 1976 ('CLAA 1976').¹³ Following the provisions of the latter, on 26 June 2013 the then Secretary of the Ministry of Interior (Interior Secretary), upon request by the then Prime Minister, directed the Federal Investigation Agency (FIA) to constitute a team for a full investigation in the matter of high treason charges against the petitioner.¹⁴ The FIA's team submitted its investigation report on 16 November 2013 for examination by the Interior Secretary. It was decided, after consultation with the Law Division, to start a case against the petitioner. A plaint following the procedure laid in Section 3¹⁵ of the CLAA 1976 was to be prepared by the Interior Secretary under authorization of the Federal Government.

It is to note that the charges of high treason were grounded on the new text of Article 6 of the Constitution as modified by the Eighteenth Amendment¹⁶ to read as follow:

Any person who abrogates or subverts or suspends or holds in abeyance, or attempts or conspires to abrogate or subvert or suspend or hold in abeyance, the Constitution by use of force

¹¹ Afzal (n 9).

¹² High Treason (Punishment) Act 1973 (LXVIII OF 1973).

¹³ Criminal Law Amendment (Special Court) Act 1976 (XXVII of 1976).

¹⁴ *The Federal Government of Islamic Republic Of Pakistan Through The Secretary Interior Division, Government Of Pakistan v General (R) Pervez Musharraf*, Special Court (CJ of PHC Waqar Ahmad Seth, JJ Nazar Akbar and Shahid Karim) complaint 1/2013 (17/12/2019) reported as 2019 IHC 208.

¹⁵ Criminal Law Amendment (Special Court) Act 1976, Section 3.

¹⁶ Constitution (Eighteenth Amendment) Act 2010, (X of 2010).

or show of force or by any other unconstitutional means shall be guilty of high treason.¹⁷

In December 2013, the proceedings began.¹⁸ The trial lasted six years, until on 19 December 2019, a special court sentenced the petitioner to death.¹⁹ The special court declared the petitioner guilty of high treason with a two to one majority. Justice Nazar Akbar dissented with the majority of the learned judges. The main judgment was written by Justice Waqar Seth and contained the following paragraph:

We direct the Law Enforcement Agencies to strive their level best to apprehend the fugitive/convict and to ensure that the punishment is inflicted as per law and if found dead, his corpse be dragged to the D-Chowk, Islamabad, Pakistan, and be hanged for 30 days.²⁰

The brutality of the order given in this part of the judge was such that even the other concurring judge in the panel took specific exception from it.²¹ It generated outrage even among those who hailed the verdict.²² The armed forces of Pakistan immediately issued a statement claiming that a person who had served the country of Pakistan in several ways for more than forty years and fought wars in its defence, could never be a traitor. The decision of the special court was inevitably to be challenged and indeed, a constitution petition challenging the vires of the proceedings before the special court constituted under CLAA 1976, was made by the petitioner, invoking

¹⁷ Constitution of Pakistan 1973, Article 6(1).

¹⁸ *The Federal Government of Islamic Republic Of Pakistan Through The Secretary Interior Division, Government Of Pakistan v General (R) Pervez Musharraf*, Special Court (CJ of PHC Waqar Ahmad Seth, JJ Nazar Akbar and Shahid Karim) complaint 1/2013 (17/12/2019) reported as 2019 IHC 208.

¹⁹ *ibid.*

²⁰ *ibid* at para 66.

²¹ Afzal (n 9).

²² *ibid.*

the Lahore High Court's jurisdiction under Article 199 of the Constitution of Pakistan.²³

The matter was taken into consideration by the Lahore High Court in the petition which forms the subject of this case note.

Legal Issues

The first two questions before the court related the maintainability of the petition. The first is whether it is essential to identify the scope of a constitutional petition, to confirm who may make a petition to the court and against whom an order may be issued by the court if the petition is accepted. This made it necessary to interpret the meaning of the term 'person'²⁴ in Article 199 to establish whether the Lahore High Court was competent to hear the writ petition of the petitioner as a person amenable to the territorial jurisdiction of the apex court of Punjab. The second question was whether, in case of violation of fundamental rights by acts of the state which are beyond the scope of the law, a court endowed with jurisdiction to hear constitutional petitions could establish its jurisdiction. This would be justified by the responsibility to provide justice and equity and Article 199 would be used to provide remedy to a person whose fundamental rights were violated. These two aspects were related to jurisdiction.

Moving on to the merits of the case, the main issue was the legality of the initiation of special court proceedings against the petitioner. This brought forth a discussion regarding the scope of

²³ Constitution of the Islamic Republic of Pakistan, 1973 (hereinafter referred to as 'the Constitution'). Whenever the word 'Article' is used in this note, it refers to Articles of the Constitution.

²⁴ *ibid*, Article 199(5): 'In this Article, unless the context otherwise requires, 'person' includes any body politic or corporate, any authority of or under the control of the Federal Government or of a Provincial Government, and any Court or tribunal, other than the Supreme Court, a High Court or a Court or tribunal established under a law relating to the Armed Forces of Pakistan'.

Article 270AAA,²⁵ an article that was already declared unconstitutional by the Supreme Court in the case of *Mobashir Hassan*.²⁶ The question arose of whether the executive had trampled on the procedure required by the law, by omitting to perform acts that were required in accordance with it, thus departing from the legislature's intent to ensure that a person accused of such a heinous crime as high treason were provided due process rights. This, conversely, cast a shadow on the constitutionality and *modus operandi* of the special court itself, since some of the omissions mentioned above concerned the creation of the special court by the government.

Furthermore, another issue before the Court pertained to the provisions of Section 9 of CLAA 1976 which restricts adjournments due to the absence of the accused.²⁷ The issue raised was whether the section is unconstitutional as it impinges on natural justice principles and raises concerns regarding conformity with Islamic Injunctions.

Another issue was whether the petitioner's act of emergency proclamation could be characterized as an instance of high treason under Article 6 of the Constitution.²⁸ In this regard, the interpretation

²⁵ Substituted by the Constitution (Eighteenth Amendment) Act, 2010 (X of 2010) Section 96, in place of Article 270AA as validated and substituted by the Constitution (Seventeenth Amendment) Act, 2003 (III of 2003) Section 10.

²⁶ *Mobashir Hassan v Federation of Pakistan* PLD (2010) Supreme Court 1.

²⁷ CLAA 1976, Section 9: 'No trial before the Special Court shall be adjourned for any purpose unless the Special Court is of opinion that the adjournment is necessary in the interests of justice and, in particular, no trial shall be adjourned by reason of the absence of any accused person due to illness, or if the absence of the accused or his counsel has been brought about by the accused person himself, or if the behaviour of the accused person prior to such absence has been, in the opinion of the Special Court, such as to impede the course of justice but, in any such case, the Special Court shall proceed with the trial after taking necessary steps to appoint an advocate to defend any such accused person.'

²⁸ Constitution of Pakistan 1973, Art 6.

of the words ‘abrogation, subversion and suspension’ under Article 6²⁹ and Article 12(2)³⁰ was called into question. Another issue the Court hinted at concerned the violation of Article 12(1)(a)(b).³¹

Furthermore, a legal question arose concerning the provisions of Article 232 of the Constitution³², which confers powers to the President of Pakistan to issue an emergency proclamation. Lastly, as accumulative effect of the aforementioned, the issue of the validity of acts of the executive taken without legal justification was contemplated.

Arguments of the Parties to the Case

A total of three (03) counsels, the counsel for the petitioner, an *amicus curiae* and an Additional Attorney General for Pakistan presented their arguments before the Court for the matter at hand, addressing issues from their perspective and research. This part shall provide a brief account of the arguments advanced by the counsels individually.

Counsel for the Petitioner

Relying on the case of *The Federal Government through Secretary Interior, Government of Pakistan vs. Ms. Ayyan Ali*,³³ the counsel for the petitioner (‘counsel’) considered the instant petition to be maintainable. No details are available in the case on what arguments the counsel used to support his stance on maintainability of the petition.

²⁹ *ibid* Art 6.

³⁰ *ibid* Art 12(2).

³¹ *ibid* Art 12(1)(a)(b).

³² *ibid* Art 232.

³³ *The Federal Government through Secretary Interior, Government of Pakistan v Ms. Ayyan Ali* (2017) SCMR 1179.

Challenging the merits of the case against their client, the counsel maintained that the initiation of the proceedings against the petitioner was mainly driven by ulterior motives and were *mala fide*. The same could be extracted from the fact that case proceedings began after a six-year lapse which invoked the doctrine of laches and hitting the principle of *coram-non-judice*.

The main issue of the instant petition concerned the legality of the proclamation of emergency by the petitioner on 3 November 2007 and the consequent suspension of the Constitution. The counsel asserted that the petitioner's act did not fall within the ambit of Article 6,³⁴ as Article 6 was unenforceable at the time. In light of this and of the High Treason (Punishment) Act 1973, it was argued that the proceedings against the petitioner in the special court were void ab initio and null in the eyes of law.

The counsel further emphasized on procedural issues that included (a) the filing of the complaint against the petitioner; (b) the constitution of the special court; (c) the constitution of the prosecution team and (d) the appointment of the judges of the special court. These, the counsel claimed, lacked legal sanctity as they contravened explicit constitutional and legal provisions applicable to the subject. Examples of the procedural irregularities cited by the counsel were that no Federal Cabinet meeting was convened and the agenda items' (circulation and/or minutes to the President under Article 90(1)) were absent.³⁵

The counsel added that the mandatory procedure under Section 200/202 of the Criminal Procedure Code (CrPC)³⁶ was not adhered to as the proceedings were criminal in nature. During the trial, only FIA/Investigating officers appeared as witnesses, to the

³⁴ Constitution of Pakistan, Art 6.

³⁵ *ibid* Art 90.

³⁶ Code of Criminal Procedure 1898, (VII of 1898), Section 200/202. The Sections under discussion deal with Complaints to Magistrate.

exclusion of all others, including the petitioner himself. This, maintained the counsel, was an instance of trial *in absentia*, therefore unconstitutional under Article 9,³⁷ 10³⁸ and 10-A.³⁹ Lastly, the Counsel stated that, under Article 232 of the CrPC,⁴⁰ the Petitioner held the position of President of the Republic at the time of proclamation of emergency and therefore the act in question fell within the scope of his presidential powers.

Additional Attorney General for Pakistan

The Additional Attorney General (AAG) for Pakistan started his argument by expressing disagreement towards the initiation of proceedings against the petitioner, since the undertaking by the incumbent Attorney General for Pakistan at the time had been beyond the scope of law. He further referred to a letter written by the Prime Minister on 12 December 2013 giving instructions to the Secretary of Interior to hold an inquiry and investigation under Article 6,⁴¹ followed by a complaint lodged before special court. However, the AAG pointed out that the minutes of the meeting of the Cabinet held on 24 June 2013 showed that there was no agenda item available for the meeting.

Moreover, the authority of the Secretary of Interior to file a complaint before a special court channeled from Statutory Notification S.R.O 1234(1)/94⁴² was challenged. It was maintained by the AAG⁴³ that the Notification was ‘insignificant’ after the

³⁷ Constitution of Pakistan, Art 9.

³⁸ *ibid* Art 10.

³⁹ *ibid* Art 10A.

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⁴¹ *ibid* Art 6.

⁴² Statutory Notification (S.R.O.) 1234/1/94 (29 December 1994), Section 3, specifies who is the ‘person’ authorised by the Federal Government’ to file a complaint for high treason.

⁴³ *General (R) Pervez Musharraf v Federation of Pakistan* (2019) WP 71713 [5].

entering into force of the Eighteenth Amendment.⁴⁴ The AAG clarified that a special court was established through notification generated by Ministry of Law, Justice and Human Rights and conceded that the recommendations sought by the Chief Justice for appointment of the president and judges of the special court, failed to comply with the requisite procedure given in Article 90(1). Having conceded this, the AAG implied that those steps were taken beyond the mandate of law.

Amicus Curiae to assist the Court

Referring to Article 6,⁴⁵ the *amicus curiae* ('AC') explained how Article 6⁴⁶ was relevant (at the time, 03 November 2007) but did not encompass the emergency proclaimed by the petitioner. His arguments with regard to the core legal issues in the instant petition contended that: (a) the Eighteenth Amendment brought no corresponding revision to the High Treason (Punishment) Act 1973; (b) the Code of Criminal Procedure was the applicable law regulating the initiation of the proceedings. In view of this, the AC highlighted grave irregularities pertaining to Section 3 of CLAA 1976;⁴⁷ (c)

⁴⁴ Constitution (Eighteenth Amendment) Act 2010, (X of 2010).

⁴⁵ Constitution of Pakistan, Art 6.

⁴⁶ *ibid.*

⁴⁷ Criminal Law Amendment (Special Courts) Act 1976, Section 3: '(1) Any offence punishable under sections 121, 121A., 122, 123 and 123A of the Pakistan Penal Code (Act XLV of 1860), and any offence punishable under the High Treason (Punishment) Act, 1973 (LXVIII of 1973), including an offence of conspiracy to commit any such offence, whether committed before or after the commencement of this Act, shall be tried by the Special Court in accordance with the provisions of this Act. (2) No court other than the Special Court shall try an offence triable by the Special Court under sub-section (1). (3) If, in the course of a trial before the Special Court, the Court is of opinion that an accused before it has committed or appears to have committed any offence other than an offence referred to in sub-section (1) the Special Court shall record such opinion and refer such accused for the trial of such other offence to a court having jurisdiction to try the offence.'

Section 200/202⁴⁸ of the CrPC explained the procedure as it required the special court to examine the complainant upon filing of the complaint at a preliminary stage for further evaluation and inquiry. However, Sections 200 to 202 of CrPC were ignored and a letter directing Secretary of Interior Division to inquire the matter through FIA by the Secretary to the Prime Minister was requested before the constitution of the special court (i.e. 20 November 2013), which vitiated the whole procedure adopted in the case. The AC further pointed out how the procedure adopted in the case of the petitioner was in derogation of Section 4 of CLAA 1976, thus undermining the legality of the constitution of the special court itself. With regards to the complaint registered before the special court under Section 5 of CLAA 1976,⁴⁹ the AC showed how the complaint was filed by an unauthorized officer. Furthermore, with respect to Section 9 of CLAA 1976,⁵⁰ the AC contended that the provision was repugnant to Article 8 of the Constitution⁵¹ and Islamic injunctions. This will be discussed in detail in this case brief while analyzing the issues.

The AC also observed how the petitioner was the only person being accused of High Treason, whereas the nature of the act of treason is such that it cannot be committed single-handedly. Treason is, an eminently collective effort, he maintained citing as supporting evidence the unambiguous wording of Section 9 of CLAA 1976 where the expression ‘accused persons’ is used. This, in the opinion of the amicus curiae, confirmed the *mala fide* and ulterior motives behind the present petition. It was further contended that under the

⁴⁸ Code of Criminal Procedure, Sections 200/202.

⁴⁹ Criminal Law Amendment (Special Courts) Act 1976, Section 5: (1) The Federal Government shall forward to the Special Court, on behalf of the prosecution, a complaint in the form of a statement of the case to be tried by the Court, together with a list of the accused persons, formal charges of offences alleged to have been committed by each one of them and a list of witnesses intended to be produced in support of each charge.

⁵⁰ Criminal Law Amendment (Special Courts) Act 1976, Section 9. See (n 27) for the full text of the provision.

⁵¹ Constitution of Pakistan, Art 8.

case of *Sindh High Court Bar Association through Secretary and another vs. Federation of Pakistan through Secretary, Ministry of Law and Justice Islamabad*⁵² the issue of the legality of invoking emergency provision arose earlier before the Supreme Court. Although the decision stated that the acts were unconstitutional, no penalising consequences followed.

Coming to the interpretation of Article 6 of the Constitution, the AC explained that words such as ‘suspension’ and ‘holding in abeyance’ were only introduced by Eighteenth Amendment, while at the time the emergency was proclaimed, the text of Article 6⁵³ was alien to such vocabulary. He claimed that a retrospective effect cannot be given to them as per Article 12(1)(a)⁵⁴. The proclamation of emergency is a brainchild of the Constitution, the AC vehemently argued before the Court, adding that the application of Article 6⁵⁵ was entirely inappropriate in the circumstances. In light of the aforementioned, the AC concluded, the proceedings before the special court, from the inception of the complaint to the culmination, had been conducted in utter disregard of the Constitution, and were therefore, unlawful, *ultra vires* and *coram-non-judice*.

Judgement

Right at the beginning of its judgement the court mentioned the concept of ‘judicial review’. This was done to explain and justify why courts vested with the duty of guardians of the constitution, such as the Lahore High Court, may assert their jurisdiction whenever a constitutional petition is made by an aggrieved citizen. Going back to

⁵² *Sindh High Court Bar Association through Secretary v Federation of Pakistan through Secretary, Ministry of Law and Justice Islamabad* PLD (2009) SC 789.

⁵³ Constitution of Pakistan, Art 6.

⁵⁴ *ibid* Art 12.

⁵⁵ *ibid* Art 6.

the landmark case *Marbury vs. Madison*.⁵⁶ the Lahore High Court explained that in order to determine the constitutionality of the enacted law the courts exercise their power to judicially review legislative actions which is essential for vindicating rights, upholding democracy and ensuring constitutional supremacy⁵⁷. The court went on quoting Chief Justice Marshall, who strengthened the system to its fullest by declaring,

So if a law be in opposition to the Constitution; if both the law and the Constitution apply to a particular motion case so that the court must either decide that case conformably to the law, disregarding the Constitution; or conformably to the Constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty. If then the courts are to regard the Constitution; and the Constitution is superior to any ordinary act of the legislature; the Constitution, and not such ordinary act, must govern the case to which they both apply.⁵⁸

The judiciary is entrusted with the custody of constitutional principles, the protection of constitutional liberties and democratic institutions. The most powerful tool in their arsenal for this purpose is the power of judicial review.⁵⁹ This jurisprudential concept serves the purpose to control legislative and administrative acts that violate the supreme law of the country. The Court also regarded the provision of Article 2A as a further strengthening of the principle of judicial review in Pakistan, since it maintained that Allah (Almighty) ordains

⁵⁶ *William Marbury v James Madison, Secretary of State of the United States* 5 U.S. (1 Cranch) 137 (1803).

⁵⁷ *General (R) Pervez Musharraf v Federation of Pakistan* [2019] No. 71713, 8.

⁵⁸ *Marbury v Madison*, 5 U.S. (1 Cranch) 137 (1803) at 178.

⁵⁹ *General (R) Pervez Musharraf v Federation of Pakistan* [2019] No. 71713, 8.

in Holy Book to deliver justice through methods structured on fairness and mercy.

The issues highlighted by the parties and the arguments advanced convinced the court to accept the instant petition's maintainability and The bench accepted that it had competence to hear the writ petition. The Federal Government was held to be 'person amenable' to the jurisdiction of the Lahore High Court, thus enabling the court to entertain the petition. This was because the federal notification dated 12 December 2013 in question was the basic premise upon which the entire proceedings against the petitioner rested. Although the notification was issued by the Federal Government, which is based in Islamabad, the Lahore High Court asserted its territorial jurisdiction under Article 199. Reference was made to the two cases of *LPG Associations of Pakistan's case*⁶⁰ and *Ms. Ayyan Ali*⁶¹ where the Supreme Court held that the '...Federal Government, though may have exclusive residence or location at Islamabad, would still be deemed to function all over the country...'

Coming to the merits of the petition, the way the proceedings before the special court were initiated and conducted was found to be illegal as they violated the applicable laws and the Constitution. First, the bench took notice of how Article 270 AAA has been declared unconstitutional and without any legal effect by the Supreme Court in *Sindh High Court Bar Association vs. Federation of Pakistan*⁶², following which Article 270 AAA ceased to be part of the Constitution.⁶³ Second, the delay of six years before the special court

⁶⁰ *LPG Associations of Pakistan through Chairman v Federation of Pakistan through Secretary, Ministry of Petroleum and Natural Resources, Islamabad* (2009) CLD 1498.

⁶¹ *The Federal Government through Secretary Interior, Government of Pakistan v Ms. Ayyan Ali* SCMR (2017) 1179.

⁶² *Sindh High Court Bar Association through Secretary and another v Federation of Pakistan through Secretary, Ministry of Law and Justice, Islamabad* PLD (2009) SC 789.

⁶³ *Dr. Mobashir Hassan v Federation of Pakistan* PLD (2010) SC 1.

was instituted and its *modus operandi* were declared illegal and improper, since the requisite procedure was not adopted despite guidance available through the case of *Mustafa Impex*.⁶⁴ In that case the *M/S Mustafa Impex* challenged some 2013 notifications in Islamabad High Court on the grounds that such they were only to be issued by the Federal Government and that the Additional Secretary was not competent to issue such notifications.⁶⁵ Justice Nisar in his detailed literal interpretation of constitutional provisions held the actions of the government to be unlawful since the act were not made by the person authorised by law. The Lahore High Court, using the ruling of the Supreme Court in *Mustafa Impex*, noted that the Federal Government's had not adhered to the mechanism thereby enunciated. This, continued the bench, made the proceedings against the petitioner before the special court illegal, *void ab initio*, and unconstitutional as they violated the dictum of due process/fair trial.

The court while relying on *Chittranjan vs Staff Union*⁶⁶ was of the view that where a court is not constituted properly, the proceedings carried out by it are *coram-non iudice*;⁶⁷ it further stated that questions relating purely to the jurisdiction of the court could be raised at any stage of the proceedings.⁶⁸

Furthermore, the Court stated that from an analysis of the provisions for High Treason it was evident that, at a preliminary stage, there should be an examination of other witnesses apart from the statement of the complainant. Only after those other witnesses have been heard, a decision may be taken on whether to initiate an inquiry on the allegation or drop the proceedings. Nevertheless, the Court observed that the executive deviated from the procedure, making the

⁶⁴ *Mustafa Impex, Karachi v The Government of Pakistan through Secretary Finance, Islamabad* PLD (2016) SC 808.

⁶⁵ *ibid*, at 848.

⁶⁶ *Chittaranjan Cotton Mills Ltd. v Staff Union* PLD (1971) SC 197.

⁶⁷ *ibid*.

⁶⁸ *General (R) Pervez Musharaff v Federation of Pakistan* [2019] No. 71713, at 11.

acts taken *ultra vires*. This statement was supported by referring to *Messers Super Asia case*⁶⁹, *Zia Ur Rehman case*⁷⁰ and *Atta Muhammad Qureshi's case*⁷¹ where it was stated that neglecting a plain requirement of an absolute statutory enactment prescribing how something is to be done would invalidate any act being done in some other manner.⁷² The principle to follow the prescribed law was further explained in the case of *Zia Ur Rehman*⁷³ as the Supreme Court observed as under: 'If law required a particular thing to be done in a particular manner, it had to be done accordingly, and otherwise it would be non-compliance with the legislative intent....'⁷⁴

The Court held that although various degrees of unreasonableness may exist, one of a very extreme nature, as the one discussed in the present case, automatically bring defective administrative decisions within the legitimate scope of judicial invalidation.

With regard to Article 12(1)(a)(b) of the Constitution,⁷⁵ the Court noted that it is sufficient to clarify that criminal acts shall not be given retrospective effect and the special court seemed violative of this principle. Instances where the principle of non-retrospective applicability of incriminating provisions was stated were the cases of

⁶⁹ *Collector of Sales Tax, Gujranwala v Super Asia, Muhammad Din and Sons* SCMR (2017) 1427.

⁷⁰ *Zia Ur Rehman v Syed Ahmed Hussain* SCMR (2014) 1015.

⁷¹ *Atta Muhammad Qureshi v The Settlement Commissioner, Lahore Division* PLD (1971) SC 61.

⁷² *General (R) Pervez Musharraf v Federation of Pakistan* [2019] No. 71713, at 12.

⁷³ *Zia Ur Rehman v Syed Ahmad Hussain* SCMR (2014) 1015.

⁷⁴ *General (R) Pervez Musharraf v Federation of Pakistan* [2019] No. 71713, at 12.

⁷⁵ (1) No law shall authorize the punishment of a person: (a) for an act or omission that was not punishable by law at the time of the act or omission; or (b) for an offence by a penalty greater than, or of a kind different from, the penalty prescribed by law for that offence at the time the offence was committed.

*Muhammad Fazal*⁷⁶ and *Edward Henry Louis*⁷⁷, which the bench used to corroborate its stance on the matter.

The aspect of trial *in absentia* under Section 9 of CLAA 1976 negates the principles of natural justice and transgresses Islamic injunctions as considered in *Zia Ullah Khan's case*,⁷⁸ where the Lahore High Court found that Section 8 of the Special Courts for Speedy Trials Act (XV of 1987) is violative of Article 10 insofar as it permits the trial of an accused person *in absentia*.⁷⁹ The aforesaid judgment was upheld in *Muhammad Arif vs. The State*⁸⁰ and *Arbab Khan vs. The State*.⁸¹ Moreover, the insertion of Article 10-A in the Constitution strengthened the superior courts' view. The right to a fair trial was duly complemented by the ruling in the case *Pakistan and others vs. Public at Large and others*⁸² where it was held that the Quranic Injunctions and Sunnah guaranteed due process and protected fundamental rights against unfair treatment.

The Court went on quite cautiously while examining whether the act of emergency proclamation by the petitioner attracts Article 6⁸³ after the Eighteenth Amendment and under Section 2 of High Treason (Punishment) Act 1973.⁸⁴ It is pertinent to note that Court showed how all the words added by the Eighteenth Amendment into Article 6 have several meanings. After clarifying their interpretation, it reached the conclusion that the word 'suspension' had a specific meaning and could not be considered the same as such as 'abrogation' or 'subversion'. Hence, the suspension of the Constitution by the

⁷⁶ *Muhammad Fazal v Saeedullah Khan* SCMR (2011) 1137.

⁷⁷ *Dr. Muhammad Safdar v Edward Henry Louis* PLD (2009) SC 404.

⁷⁸ *Zia Ullah Khan v Government of the Punjab* PLD (1989) LC 554.

⁷⁹ *General (R) Pervez Musharraf v Federation of Pakistan* [2019] WP 71713, at 13.

⁸⁰ *Muhammad Arif v The State* SCMR (2008) 829.

⁸¹ *Arbab Khan v The State* SCMR (2010) 755.

⁸² *Pakistan v Public a Large* PLD (1987) SC 304.

⁸³ The Constitution of Pakistan, Art 6.

⁸⁴ High Treason (Punishment) Act 1973, Section 2.

petitioner such could not be made basis for starting a trial for high treason under Article 6,⁸⁵ since the Constitution stood neither abrogated nor subverted after the proclamation of emergency on 3 November 2007.

Concluding the above consideration, the Court held that the proceedings against the petitioner, General (R) Pervez Musharraf, were, from the inception to its zenith, beyond the mandate of the Constitution, *ultra vires*, *coram-non-judice*, and unlawful especially with reference to the Supreme Court decision in the *Rehmatullah case*⁸⁶ where it was stated that '[W]hen basic order is without lawful authority, then all superstructure built on it would fall on the ground automatically.'

Impact of the Decision

The petition discussed above focused on legal issues dealing with not just the petitioner, but any individual's constitutionally guaranteed rights in accordance with the principles of justice, fairness and equity, in the context of the Pakistani legal system which is built on Islamic injunctions. This part of the case brief shall focus on the impact of the judgement for this petition.

The first consequence of this judgment is that the petitioner shall not be punished for suspending the Constitution on 3 November 2007. In an article published on 24 December 2019, Advocate Hassan Niazi stated that this judgment marks a symbolic precedent that shall be remembered by this nation which has had prolonged experiments with dictatorship. Once more, the use of force to override fundamental constitutional values was not stated to be treason.⁸⁷ The author continues by arguing that the way forward in democracy is rooted in

⁸⁵ The Constitution of Pakistan, Art 6.

⁸⁶ *Rehmatullah v Saleh Khan* SCMR (2007) 729

⁸⁷ Hassan Niazi, 'The Verdict' *The Express Tribune* (24 December 2019) <<https://tribune.com.pk/story/2123702/6-the-verdict/>> accessed 3rd April, 2020.

liberal constitutional values. He maintains that the trial by the special court that stands disregarded in the instant petition was not suffering from any legal defects. In his opinion, the petitioner received a fair trial as he was granted permission to record his statement in 2014. Not only he did not avail the opportunity he was given, but his counsel delayed and stalled the trial by not appearing before the court. Niazi, further points out that that the most popular argument⁸⁸ which was quoted before the court appeared to be Musharraf's inability to single-handedly act and get punished when his accomplices roam free. Although it may be true that high treason cannot be done by one person, this does not mean that the main perpetrator should be absolved.⁸⁹ However, he fails to consider that the Lahore High Court overruled the special court's decision on other important grounds, as was shown in this case brief.

While many celebrated after the special court order, some questioned whether a ruler cannot take steps that may be required by necessity. However, the current Prime Minister of Pakistan, Imran Khan, along with his cabinet did not celebrate the decision and became a party advocating for the petitioner when he was, once, the strongest proponent of this conviction. Musharraf, the petitioner himself, expressed his disappointment along with other military personnel denouncing the ruling as a 'vendetta'⁹⁰.

It may be argued that the special court's decision may have been a 'vendetta' by referring to the brutal punishment envisaged in its famous paragraph 66.⁹¹

⁸⁸ *ibid.*

⁸⁹ *ibid.*

⁹⁰ 'Judges Say Special Court in Musharraf Case Was Unconstitutional' (*Al Jazeera*, 13 January 2020) <<https://www.aljazeera.com/news/2020/01/judges-special-court-musharraf-case-unconstitutional-200113115027557.html>> accessed 27th March, 2020.

⁹¹ *The Federal Government of Islamic Republic of Pakistan Through The Secretary Interior Division, Government of Pakistan v General (R) Pervez*

The Lahore High Court declared the formation of the special court unconstitutional. The reactions to the ruling of the Lahore High Court were mixed. On one side, it attracted comments and criticism on the judicial system. It was stated by the spokesperson of the All Pakistan Muslim League, the party of the petitioner, that: ‘We have always maintained that the way he (Musharraf) was victimized by political rivals and [former chief justice] Iftikhar Chaudhary, shows *mala fide* at their end.’⁹² Barrister Ali Zafar, *amicus curiae*, narrated how the case against the petitioner seems to have been filed on the behest of the then Prime Minister as no record was present of the matter on the agenda of the cabinet meetings held at that time,⁹³ drawing attention to the extent political rivalries have an influence in matters of the State and judiciary.

While some chose to criticize the flawed structure and procedure followed by the special court,⁹⁴ others appreciated the judgment of the Lahore High Court, applauding it as further nourishment of the jurisprudential concept of judicial review. It gave Musharraf his chance to present the arguments, something that was not done by the special court.⁹⁵ Once it was recognized that the complaint against the petitioner before the special court was not filed in accordance with the prescribed law,⁹⁶ it was only natural that the

Musharraf, Special Court (CJ of PHC Waqar Ahmad Seth, JJ Nazar Akbar and Shahid Karim) complaint 1/2013 (17/12/2019) reported as 2019 IHC 208, at paragraph 66.

⁹² Rana Bilal ‘Special Court Formed for Musharraf Treason Trial ‘Unconstitutional’, Rules LHC’ *Dawn* (10 April, 2020) <<https://www.dawn.com/news/1528058>> accessed 10 April, 2020.

⁹³ *ibid.*

⁹⁴ Wajih Ahmad Sheikh ‘LHC Returns Musharraf Application Against his Conviction’ *Dawn* (28 December, 2019) <<https://www.dawn.com/news/1524797>> accessed 20 April, 2020.

⁹⁵ *ibid.*

⁹⁶ Rana Yasif ‘LHC Quashes Musharraf Case Verdict, Says Special Court Formation ‘Unconstitutional’’ *The Express Tribune* (9 April, 2020) <<https://tribune.com.pk/story/2136166/1-lhc-reserves-verdict-musharrafs-petition-challenging-establishment-trial-court/>> accessed 9 April, 2020.

decision of the special court should be overruled by the Lahore High Court. The Lahore High Court in the judgement has shown strong support to the safeguarding of rights and guarantees promised by the Constitution. It has sent a clear message to every individual that the judgement by the special court was not reversed under any pressure by politically driven forces or by fear of the military rage. The petitioner was dealt as any other citizen, with the court intervening to save him from a grave miscarriage of justice. In this way, this judgment may have the profound effect of restoring trust of every individual coming before the courts, that those who seek justice will eventually find it.

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