

Court it self. [PLD 2013 S.C. 403]

⁵[175-A] Appointment of Judges to the Supreme Court, High Courts and the Federal Shariat Court.—(1) There shall be a Judicial Commission of Pakistan, hereinafter in this Article referred to as the Commission, for appointment of Judges of the Supreme Court, High Courts and the Federal Shariat Court, as hereinafter provided.

(2) For appointment of Judges of the Supreme Court, the Commission shall consist of--

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| (i) | Chief Justice of Pakistan; | Chairman |
| (ii) | ⁶ [Four] most senior Judges of the Supreme Court; | Members |
| (iii) | A former Chief Justice or a former Judge of the Supreme Court of Pakistan to be nominated by | Member |

5 Inserted by Constitution (Eighteenth Amendment) Act, X of 2010.

6 Subs. by Constitution (19th Amndt.) Act, 2010 (Act I of 2011).

the Chief Justice of Pakistan, in consultation with the ⁷[four] member Judges, for a period of two years;

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| (iv) | Federal Minister for Law and Justice; | Member |
| (v) | Attorney-General for Pakistan; and | Member |
| (vi) | A Senior Advocate of the Supreme Court of Pakistan nominated by the Pakistan Bar Council for a term of two years. | Member |

(3) Notwithstanding anything contained in clause (1) or clause (2), the President shall appoint the most senior Judge of the Supreme Court as the Chief Justice of Pakistan.

(4) The Commission may make rules regulating its procedure.

(5) For appointment of Judges of a High Court, the Commission in clause (2) shall also include the following, namely:-

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| (i) | Chief Justice of the High Court to which the appointment is being made; | Member |
| (ii) | The most senior Judge of that High Court; | Member |
| (iii) | Provincial Minister for Law; and | Member |
| (iv) | ⁸ [An advocate having not less than fifteen years practice in the High Court to be nominated by the concerned Bar Council for a term of two years:] | Member |

⁹[Provided that for appointment of the Chief Justice of a High Court the most Senior Judge mentioned in paragraph (ii) shall not be member of the Commission:

Provided further that if for any reason the Chief Justice of a High Court is not available, he shall be substituted by a former Chief Justice or former Judge of that Court, to be nominated by the Chief Justice of Pakistan in consultation with the four member Judges of the Commission mentioned in paragraph (ii) of clause (2).]

(6) For appointments of Judges of the Islamabad High Court, the Commission in clause (2) shall also include the following namely:-

7 Subs. by Constitution (19th Amndt.) Act, 2010 (Act I of 2011).

8 Subs. by Constitution (19th Amndt.) Act, 2010 (Act I of 2011).

9 Subs. by Constitution (19th Amndt.) Act, 2010 (Act I of 2011).

- (i) Chief Justice of the Islamabad High Court; Member
and
- (ii) The most senior Judge of that High Court: Member

Provided that for initial appointment of the ¹⁰[Chief Justice and the] Judges of the Islamabad High Court, the Chief Justices of the four Provincial High Courts shall also be members of the Commission:

Provided further that subject to the foregoing proviso, in case of appointment of Chief Justice of Islamabad High Court, the provisos to clause (5) shall, *mutatis mutandis*, apply.

(7) For appointment of Judges of the Federal Shariat Court, the Commission in clause (2) shall also include the Chief Justice of the Federal Shariat Court and the most senior Judge of that Court as its members:

Provided that for appointment of Chief Justice of Federal Shariat Court, the provisos to clause (5) shall, *mutatis mutandis*, apply.

(8) The Commission by majority of its total membership shall nominate to the Parliamentary Committee one person, for each vacancy of a Judge in the Supreme Court, a High Court or the Federal Shariat Court, as the case may be;

(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:

¹¹[Provided that when the National Assembly is dissolved, the total membership of the Parliamentary Committee shall consist of the members from the Senate only mentioned in paragraph (i) and the provisions of this Article shall, *mutatis mutandis*, apply.]

(10) Out of the eight members of the Committee, four shall be from the Treasury Benches, two from each House and four from the Opposition Benches, two from each House. The nomination of members from the Treasury Benches shall be made by the Leader of the House and from the Opposition Benches by the Leader of the Opposition.

(11) Secretary, Senate shall act as the Secretary of the Committee.

(12) The Committee on receipt of a nomination from the Commission may confirm the nominee by majority of its total membership within fourteen days,

¹⁰ Inst. by Constitution (19th Amndt.) Act, 2010 (Act I of 2011).

¹¹ Inst. by Constitution (19th Amndt.) Act, 2010 (Act I of 2011).

failing which the nomination shall be deemed to have been confirmed:

¹²[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.]

¹³[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.]

¹⁴[(13) The Committee shall send the name of the nominee confirmed by it or deemed to have been confirmed to the Prime Minister who shall forward the same to the President for appointment.]

(14) No action or decision taken by the Commission or a Committee shall be invalid or called in question only on the ground of the existence of a vacancy therein or of the absence of any member from any meeting thereof.

¹⁵[(15) The meetings of the Committee shall be held in camera and the record of its proceedings shall be maintained.

(16) The provisions of Article 68 shall not apply to the proceedings of the Committee.]

¹⁶[(17) The Committee may make rules for regulating its procedure.

SYNOPSIS

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| <ol style="list-style-type: none"> 1. Scope. 2. Parliament Committee. 3. Power of Parliament Committee 4. Role of Parliament Committee. 5. Refusal of Parliament Committee to confirm nominations made by judicial Committee. 6. Process of appointment of Judge/Additional Judge of High Court. | <ol style="list-style-type: none"> 7. Process for confirmation of Judge/Additional Judge of High Court. 8. Judicial Commission has exclusive jurisdiction to evaluate performance skill 9. Judicial Commission—Nomination of a name by majority. 10. Judicial review. 11. Ante-dated seniority |
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1. **Scope.** Article 175-A has been amended by Constitution (19th Amendment Act, I of 2011). This Article 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 between the Constitution, unconnected with its other paras. Parliamentary Committee constituted under

¹² Subs. by Constitution (19th Amndt.) Act, 2010 (Act I of 2011).

¹³ Inst. by Constitution (19th Amndt.) Act, 2010 (Act I of 2011).

¹⁴ Subs. by Constitution (19th Amndt.) Act, 2010 (Act I of 2011).

¹⁵ Clauses (15) & (16) Inst. by Constitution (19th Amndt.) Act, 2010 (Act I of 2011).

¹⁶ Former clause (15) renumbered as clause (17) by Constitution (19th Amndt.) Act, 2010 (Act I of 2011).

Article 175-A of the Constitution cannot be considered as part of the legislature. Said Committee is not to have any connection or even semblance of relevance to the legislature or any form of Parliamentary attribute. Parliamentary Committee owes its existence to Article 175-A of the Constitution and not to the provisions relating to the Legislature or the Executive in the Constitution and is an authority constituted under Article 175-A of the Constitution. Any authority created under a Constitutional provision is bound to act within its specified mandate as per Article 4 of the Constitution and there is no immunity from Judicial scrutiny reserved for the Committee under the Constitution and Article 69 of the Constitution has no application. [PLD 2011 S.C. 407]

Parliamentary Committee though comprised of Members of Parliament, is not to be equated with Parliament or, even with a Parliamentary Committee elected by Parliament under the Senate or Assembly Rules. 'Parliamentary Committee' cannot (without eroding judicial independence) be seen as a superior body sitting in appeal over the recommendations of the Judicial Commission with the ability to set aside or reverse the well-considered opinion of the members of the Judicial Commission. Decisions of Parliamentary Committee are executive in nature, having bearing on the independence of Judiciary and the separation of powers between the different State organs. Supreme Court under the constitutional mandate can exercise Judicial review over the decisions of the Committee. [PLD 2011 S.C. 407]

Scope of Parliamentary Committee's function and competence is limited to consider the antecedents, which are to be examined on the basis of material obtained by the Committee/ executive Article 175-A of the Constitution expressly mandated a collective decision of the Judicial Commission and left no room for individual opinions of any one member of the Commission, particularly when such opinion was purely an individual opinion, without benefit of the views of other members. [PLD 2012 Sindh 531]

2. Parliament Committee. "Parliament committee" constituted under Article 175-A of the Constitution cannot even remotely be considered as a part of the legislature nor 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 Article 175-A. Both of them owe their existence to Article 175-A 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 175-A of the constitution. Any Authority created under a constitutional provisions is bound to act within its specified mandate as per Article 4 of the Constitution. There is thus no immunity from judicial scrutiny reserved for the committee under the constitution and Article 69 has no application in the present case.

Article 175-A(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 175-A, owing its existence to the said provision of the constitution. 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 175-A. 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? 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 the please, acting under the guise of the will of people. 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. [PLD 2011 S.C. 407]

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 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. One was 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.

Article 175-A 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 nomination. 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 Article 175-A is to take away the powers of one person and make the process a collective efforts. 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 175-A. 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 175-A.

The Committee could not 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? Even these views did not last the Commission passed the nomination unanimously. Such was neither the function of the Parliamentary Committee, nor its mandate under Article 175-A, and would amount to an incorrect and unconstitutional decision.

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 cannot 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 constitutional mechanisms and procedures.

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 justifiable. This is the clear direction of clause (12) of Article 175-A.

Since in the present case, the Committee had tried to assume the jurisdiction of the Commission, there was no option but to come to the conclusion that the Committee failed to perform its functions in terms of clause (12) of Article 175-A. 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, Supreme Court might have been required to send the issue back to the authority for consideration in accordance with law, here the Constitution had left with no such option because of a deeming provision.

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 was 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.

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 case 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".

Supreme Court in circumstances, issued direction to the Federation to notify the appointments on the recommendations received, in accordance with Article 175-A, within a period of fourteen days.

The principles of law enunciated in earlier judgments such as *Al-Jehad Trust's Case* (PLD 1996 S.C. 324), *Malik Asad Ali's case* (PLD 1998 S.C. 161), 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 175-A.

The recommendations of the Judicial Commission are now on the earlier system. These cannot be superseded for any extraneous considerations. 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.

The Judicial Commission had made recommendations for extension in tenure of Judges of High Courts. The parliamentary Committee however, disagreed with the recommendations of the Judicial Commission and decided not to recommend the names of these Judges for appointment.

Supreme Court declared that the decision of the Parliamentary Committee, whereby the names of the Judges were not confirmed for extension in their tenure, were not in accordance with the provisions of the Constitution; as a result of said decision of the Parliamentary Committee, Supreme Court directed the Federation to implement the recommendations of the Judicial Commission in respect of said judges of the High courts and to issue notifications for the appointment of the said Judges in consonance with the recommendations of the Judicial Commission. [PLD 2011 S.C. 407]

3. Power of Parliament Committee. Parliamentary Committee can refuse to accept the nomination of the Judicial Commission only on the basis of antecedents, such as character, moral and/or financial integrity (of a nominee). Parliamentary Committee's refusal to accept the nomination by the Judicial Commission should be based on very strong and justifiable reasons pertaining to the criteria falling within its domain and the reasons so given were amenable to judicial scrutiny/review. [PLD 2012 Sindh 531]

4. Role of Parliament Committee. The Committee has and can exercise the powers which under the earlier dispensation were exercisable by the Prime Minister. *Role which the Prime Minister and President were performing in the previous legal set up... is now logically to be performed by the Committee.* Therefore, if the Prime Minister's role in the previous appointment mechanism was not considered to be meaningless the Committee, charged with performing the same role, can be considered redundant. The Committee is only an "institutionalized forum" for performing the functions which were previously the domain and province of the Prime Minister.

Though the Commission and the Committee perform essentially the same functions as the Chief Justice and the Prime Minister in the previous dispensation, it would be a mistake to imagine these constitutional bodies as simply substitutes for the chief Justice of Pakistan and the Prime Minister respectively. The base of decision-making has been substantially broadened. Thus now the Commission, has members of the bar and the governing Executive involved in the decision-making process along with seven members of the Judiciary who did not have a constitutional role in the previous dispensation. This provides capacity to the Commission which enables it to have information about, and consider what in the jurisprudence are referred to as 'antecedents', of a potential nominee for judicial office. This should not be taken to mean that the committee's role in considering the antecedents of such nominee stands eliminated. The Committee may also examine the antecedents of a nominee and form an opinion as to his suitability for judicial office. Such opinion, however, must conform to standards which pass judicial scrutiny because the decisions of the Committee are subject to judicial review.

There may, therefore, be an overlap of functions of the Commission and the committee in, for instance, assessing and evaluating the antecedents of a nominee for judicial office. But this overlap does not eliminate the role of the committee or make it redundant. It simply requires the Committee to engage in a conscious and rigorous exercise of its own

which will ensure that a person who has dubious antecedents is filtered out in the selection and appointment process. It is precisely this function which has been emphasized on behalf of the Federation in the synopsis of arguments wherein it has been said, inter alia, that the Committee may "be concerned in calling for intelligence reports which was the function of the governor under the old system".

However, if the Committee, as in the present cases, does not engage in any exercise at all other than picking up an observation of one member of the commission and chooses to base its decision on it without more, it will have fallen in error. The Committee has to perform its role in a meaningful way and with the application of mind which will withstand judicial scrutiny in accordance with recognized standards. The appointment of Judges is too serious a matter to be dealt with in such casual fashion. The requirement of Article 175-A is that the Committee shall give "its decision with reasons" in the event it does not confirm a nomination made by the commission.

Therefore, if in future the Committee decides to subordinate itself to the opinion of one member of the Commission, it must, under accepted norms of judicial scrutiny, give its own reasons for making this choice. Without such reasons which are capable of withstanding judicial scrutiny, the opinion of the committee can only be termed as unreasoned and arbitrary. Jurisprudence as a rule strikes down arbitrary and unreasoned exercise of discretionary power, particularly when the law requires that reasons be given by the decision maker for such exercise of power.

The Committee does not have, untrammelled powers to choose, without sound reasons, the unconsidered views of one member of the Commission out of thirteen, while discarding the considered views of all thirteen members together or of the remaining twelve members. The decisions of the committee must meet the usual and well recognized standards of objectivity and application of mind, amongst other standards.

Allowing the Committee to pick and choose between the views of members of the Commission would amount to unwarranted slippage into the territory, which Article 175-A has endeavoured to avoid.

Giving weightage to the views of one member of the Commission, apart from being questionable on the said ground, will also have the effect of negating the principle of collegiate decision-making introduced in the Constitution by Article 175-A. This would emasculate the Commission, reducing its power to selection of nominees only, but otherwise, in matters of actual appointment, it would be rendered subordinate to the Committee.

Committee only has to adhere to established standards in arriving at its decisions to ensure that such decisions withstand judicial scrutiny. [PLD 2011 S.C. 752]

Where Parliament Committee endorsed the view of the Commission as regards confirmation of only four Judges but declined to recommend confirmation of two Judges in question on the basis of adverse remarks given against them by Chief Justice of the High Court at an earlier time regarding their performance, knowledge and capability and on the basis of their questionable financial integrity and non-payment of income tax. High Court struck down the decision of the Committee on grounds that its decision is beyond its domain and is an encroachment upon the powers of the commission. Contentions on behalf of the Committee were that it is the sole prerogative of the Committee to record its disagreement/ dissent to the recommendations of the Commission by assigning its own reason for such decision, and that reasons recorded by Committee for not confirming the Judges in question were based on

proper information and data collected through various concerned agencies. Initial notification of appointment of two Judges presupposed a detailed exercise undertaken by Chief Justice of the Province, Chief Justice of Pakistan and other Government functionaries, including intelligence agencies etc., which must have undertaken such homework before recommendation/clearance of their names for appointment as Additional Judges of the High Court. Tenure of office of said two Judges is extended for one year on the recommendation of the Commission and Committee, as both the bodies found them suitable for such purpose. Commission recommended names of said two Judges for confirmation/permanent appointment after due consideration of each and every relevant aspect of the matter. Committee has given undue weight to the earlier adverse remarks/ opinion of the Chief Justice of the High Court because after due deliberations before the Commission, Chief Justice of the High Court himself retracted from his earlier stance as is evident from the unanimous decision of the Commission in such regard. Commission because of its expertise has exclusive jurisdiction to evaluate the professional capability, performance, skills rectitude and competence of an Additional Judge of the High Court before recommending his name for permanent appointment. Embarking upon the professional capability and other related issues of a recomendeé of the Commission, is clearly beyond the domain of the Committee. Regarding objection of non-payment of taxes, said objection might have been forceful, in case it has been raised by concerned quarters at the time of initial appointment or at time of extension of tenure of the two Judges in question. Since tax authorities has not taken any action against said two Judges regarding concealment of income or evasion of tax, therefore, conclusions drawn by Committee were squarely based on presumptions. No reliance could be placed on reports of tax authorities and intelligence agencies based on simple conjectures. Two Judges in question were denied their legitimate right by the Committee for reasons which were neither factually correct nor tenable in law. Permanent appointment of two Judges in question would have its effect from 17-9-2011, the dated when four other recomendeés of the Commission in the same batch were notified by the Committee, and they would have their respective seniority and other benefits as permanent Judges of the High Court from such date. Supreme Court observed that ratio of the case *Munir Hussain Bhatti v. Federation of Pakistan* (PLD 2011 SC 407) is fully applicable to the present case and is rightly relied upon by the High Court in the impugned judgment to give requisite relief to the two Judges in question. [PLD 2012 S.C. 1067]

When Parliamentary Committee confirmed the name of a nominee of the Judicial Commission or the same was deemed to have been confirmed by it, the Prime Minister was left with no discretion but to forward the same to the President of Pakistan for appointment. Prime Minister after confirmation of the name of the nominee by the Parliamentary Committee was not required to advise the President, under Art. 48 of the Constitution or vice versa since no advice are given by the Prime Minister to return the same for reconsideration. [PLD 2013 S.C. 279]

5. Refusal of Parliament Committee to confirm nominations made by Judicial Committee—Justiceable. Direction of Article 175-A(12) of the Constitution is that the Parliamentary Committee, on receipt of a nomination from the Judicial Commission can either confirm the nominee by a majority of its total membership within 14 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 justifiable. In the present case two specific decisions of the parliamentary committee have been assailed by the petitioners under Article 184(3) of the Constitution. These decisions relate to the refusal of the committee

to confirm the nominations made by the commission for the renewal of tenure of Judges of High Court.

Held, the nomination made by the Judicial Committee and the refusal of the Parliamentary Committee to confirm the same appeared 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 also debated the impugned decisions of the committee. The Sindh High Court Bar Association, which is itself a petitioner, has placed on record its resolution "condemning" the action of the Committee. The proceedings in these petitions and the short order have also made headlines in the print and the electronic media. More so, critical comments on the said order have been carried prominently in the media. Contention that no question of public importance had arisen in the matter, had no substance in circumstances.

Article 184(3) of the Constitution empowers Supreme 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 Supreme Court itself, keeping the facts of the case in mind. Only an independent Judiciary can enforce the fundamental rights enshrined in the Constitution. Without an independent mechanism for enforcing fundamental rights, the contents of Chapter 1 (Fundamental Rights) of Part-II of the Constitution would become meaningless.

In determining as to whether question of public importance had arisen in the matter 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 arrange of factors need to be kept in mind, which have, over the years, been expounded innumerable precedents of Supreme Court. It is important to keep these precedents in view because, it is through the use of precedent that the contours of the law are constantly defined. The Constitution, through Article 189, recognizes the significance of judicial precedent in the acknowledged tradition of a Common Law jurisdiction. "Overt expression of public interest" or "street demonstrations and vigorous media debate" are not necessary factors for the exercise of jurisdiction over a case under the Article.

Therefore, questions which require the interpretations of newly added provisions (Article 175-A) in the Constitution relating to judicial appointments would quite clearly be matters of public importance.

The fact that independence of the Judiciary is a matter of public importance has also been firmly established in our jurisprudence. 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.

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. An issue that could considerably damage 'the very fabric of independence and separation of Judiciary' amounted to a matter of great public importance. Questions of interpretation of the Articles of Constitution relating to the Judiciary were undoubtedly a matter of public importance.

Precedents which examine and pronounce upon the scope of the Article 184(3) of the Constitution remain relevant. Therefore, in line with Article 189 of the Constitution, the

184. Original Jurisdiction of Supreme Court. (1) The Supreme Court shall, to the exclusion of every other Court, have original jurisdiction in any dispute between any two or more Governments.

Explanation. In this clause, "Governments" means the Federal Government and the Provincial Governments.

(2) In the exercise of the jurisdiction conferred on it by clause (1), the Supreme Court shall pronounce declaratory judgments only.

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

SYNOPSIS

1. Original Jurisdiction.
2. Jurisdiction of High Court and Supreme Court as Court of appeal.
3. Power of Supreme Court.
4. Constitution petition—Maintainability.
5. Declaratory judgment.
6. Dispute.
- ARTICLE 184(2)**
7. Appeal competent under Article 185(2)—Petitioner for leave to appeal not competent
8. Application for leave to appeal conversion into I C A—To be decided by High Court.
- ARTICLE 184(3)**
9. Scope.
10. Disputed questions of fact
11. Judicial review.
12. Article 184(3) read with Article 199.
13. Article 184(3)—Redressal of individual grievance.
14. Invocation of original jurisdiction of Supreme Court under Article 184(3).
15. Nature of order which can be passed.
16. Criminal appeal.
17. Locus standi.
18. NAB Ordinance, 1999.
19. Leave granting order.
20. Cause of action.
21. Direct petition to Supreme Court.
22. Redressal of individual grievance.
23. Issuance of writ by High Court/Supreme Court against itself.
24. Matter of great public importance.
25. Public interest litigation.
26. Proclamation of Emergency on 14-10-1999.
27. Proclamation of Emergency on 03-11-2007.
28. Removal of Chief of the Army Staff—Procedure.

29. Fundamental rights—Meaning.
30. *Resjudicata*—Principles.
31. Right to information
32. Law of *Shariah*.
33. *Aalim* Judge.
34. Launching of Housing Scheme.
35. Article 184 (3) read with Contempt of Court Act (XVIII of 2012)
36. Article 184(3) read with Representation of the People Act 1976—Door to door campaign—Significance
37. Contempt of Court—Speaker of National Assembly refusal to send reference.
38. Unlawful appointment.
39. Without prejudice.

40. Allocation of development funds by the Prime Minister.
 41. Service grievances (Art. 8 to 28).
- SUO MOTU JURISDICTION**
42. *Suo motu* notice—Quo ineffective investigation
 43. *Suo motu* notice regarding allegation of business deal between a businessman and son of the serving Chief Justice.
 44. Delay in PIA flight—*Suo motu* notice.
 45. *Suo motu* action regarding law and order situation in Karachi.
 46. Abduction of doctor.
 47. Internally displaced person.
 48. Missing person.
 49. Smuggling of Arms.

1. Original Jurisdiction. The 1973 Constitution provides for a clear trichotomy of powers between the executive, legislative and judicial organs of the State. However, owing to reasons of necessity, the executive and the legislative power now stands combined in one authority, for the reason that these two organs of the State had lost their constitutional and moral authority in the circumstances arising since the 7th of March 1977, but no such considerations arose in regard to the judicial organ of the State. Accordingly, on no principle of necessity could powers of judicial review vested in the Superior Courts under the 1973 Constitution, be taken away. Muslim rulers have always regarded themselves as being accountable to the Courts of the land for all their actions and have never claimed exemption even from personal appearance in the Courts. The Courts of justice are an embodiment and a symbol of the conscience of the Millat (Muslim Community), and provide an effective safeguard for the rights of the subjects. On this principle as well, the power of judicial review for judging the validity of the action of the Martial Law Authorities must continue to remain in the superior Courts. [PLD 1977 S.C. 657]

The Supreme Court of Pakistan has exclusive jurisdiction in all inter-Government disputes, i.e., disputes between (i) one Provincial Government and another (ii) the Federal Government and the Provincial Governments and (iii) the Federal Government and a Provincial Government.

The provision is based on the principle that all dispute, whether of law or of fact, must be determined by the Supreme Court if the parties to the dispute happen to be the Federal Government on one side, and the Provincial Governments on the other side, or two or more Provincial Governments are arrayed against each other. It is in the highest degree undesirable that the Centre and the Provinces should be fighting out their battles in subordinate Courts like common litigants. [PLD 1956 FC 72] The jurisdiction of the Supreme Court is exclusive, because it excludes the jurisdiction of all other Courts in respect of the disputes mentioned in the Article under reference.

Supreme Court has fullest power to do complete justice without fettering itself with any self-imposed restrictions, which are no longer necessary in the context of changed circumstances in which Court does now function. [2005 SCMR 1484] Whenever there is any

dispute between two or more governments, the original jurisdiction of Supreme Court gets attracted to the exclusion of every other Court. [2005 CLC 905]

- 1.1 Judicial vigilance.** In contemporary age, there has been a significant growth in the judicial review of administrative actions and the grounds on which the Courts interfere have been expanded. This expansion, however, "has taken place in the shadow of competing concerns of 'vigilance' and 'restraint'.... and it is faithfulness to these dual concerns of vigilance and restraint which produces the unique supervisory jurisdiction which is the hallmark of judicial review." If the Courts fail to maintain this delicate balance, none else but people's confidence in the judiciary would be the worst victim. [PLD 2014 S.C. 1]
- 1.2 Fiduciary obligation of State.** A fiduciary obligation is not merely an ethical precept. As a legal imperative, fiduciaries must act in the best interests of the principal performing their functions with care and complete fidelity. In the private law context, where fiduciary duties are routinely enforced by the courts, elections alone are not considered sufficient to hold company directors responsible to shareholders and align their interests. Instead, in the area of corporate law, there is a recognition that the interests of elected directors and diffuse, it may be difficult for them to effectively monitor the decisions taken by the Board. Further, because of collective action problems, the shareholders may find it difficult to coordinate and respond to abuse of discretionary authority by the Directors. Hence, corporate law employs a judicial mechanism, the enforcement of fiduciary duties, to align the interest of the shareholders and their agent, the Board of Directors. The structure of the principal-agent problem is the same in the case of State agencies, such that public officials may have an incentive to advance their own interests at the expense of them citizens' interests. In fact, the need for a judicial mechanism is even more acute in the case of State agencies, since the principal, the people, is even more numerous and diffuse than the shareholders of a company. [PLD 2014 S.C. 47]
- 1.3 Roll of Judiciary.** Judiciary, in such a system, is assigned the role of interpreting and applying the law, adjudicating upon disputes arising among governments or between State and citizens or citizens inter se and enforcing the fundamental rights. [PLD 2012 S.C. 774]
- 1.4 Jurisdictional oversight.** Not all decisions by State functionaries are to be subjected to an exacting judicial oversight. This is because the principal, (the people), has in fact vested State agencies with discretionary power of an administrative nature. Such delegation of authority by the principal is essential to the efficient functioning of the government. However, given the possibility of the agent's deliberate or negligent deviation from the best interests of the beneficiary, the court will enforce fiduciary obligations under certain circumstances. A breach of the duty of loyalty, of interest, will trigger heightened scrutiny by the court. Further, if public officials fail to exercise the duty of care that is expected of a prudent manager, the court will assess the underlying action or transaction to ascertain whether the state functionaries have breached their fiduciary obligations to the people of Pakistan. [PLD 2014 S.C. 47]
- 1.5 Judicial restraint and activism.** Judicial restraint and activism are Judicial restraint and activism are value-laden concepts often employed in the media and in public discourse, to understand the impact of Court decisions. The Court itself, however, does not operate in the framework of these concepts. For the court, as guardian and

interpreter of the Constitution, the only concept that matters is that of the rule of law. The court will not condone an illegal action by the State just because it will be perceived as an activist institution. The Constitution defines the role of the judiciary, as upholding the rule of law, and that is the only consideration the court will have while adjudicating the matters before it. [PLD 2014 S.C. 47]

1.6 Exercise of discretionary power. Basis of discretionary power of State functionaries is the delegation of authority by the principal, the people of the country. State's legal authority is derived from such fiduciary relationship and if the State or its instrumentalities deviate from their fiduciary obligations, the underlying authority of the State to administer and enforce the law is thereby eroded and if this happens, the State, as legal subjects of the State, can no longer be expected to obey the law since the State itself has reneged on its public fiduciary duties. Violations of public fiduciary duties cannot be condoned because doing so will lead to an erosion of the basis of the State's legal authority and the rule of law. [PLD 2014 S.C. 47]

2 Jurisdiction of High Court and Supreme Court as Court of appeal. High Court and Supreme Court do not interfere with or disturb settled position and established facts on record or exercise their discretionary jurisdiction tending to interfere with valuable, vested and guaranteed rights of citizens protected by the Constitution. [2006 SCMR 562] Sub-Article (1) of Article 184 of Constitution of Pakistan provides that Supreme Court has the exclusive jurisdiction to adjudicate upon a dispute on a question of law or fact between Federal government and the Provincial Government or inter se the Provincial governments and under sub-Article (2) the Supreme Court pronounce only a declaratory judgment. Whereas under sub-Article (3) the Supreme Court is empowered to make an order of the nature mentioned in Article 199 of the Constitution in a case in which a question relating to the enforcement of any of the fundamental rights conferred by Chapter-I of Part II of the Constitution of Pakistan is involved. The historical and comparative study of the provisions relating to original jurisdiction of the Supreme Court of Pakistan would show that there is distinction between the original jurisdiction and exclusive jurisdiction. The Court is said to have exclusive jurisdiction when it has the power and authority to hear and adjudicate upon the matter with exclusion of any other Court, tribunal or authority whereas original jurisdiction may not necessarily exclude the jurisdiction of other Courts or a tribunal or an authority as is provided in sub-Article (3) of Article 184 of the Constitution.

The plain reading of Article 184(3) would sufficiently indicate that it is an open ended Article and Supreme Court under this sub-Article in a case in which the question relating to the enforcement of fundamental rights of any individual or of a group or of a class of persons is involved may take cognizance and interference to adjudicate the matter. In this special jurisdiction under Article 184(3) of the Constitution the Supreme Court can take cognizance of any matter involving the question of public importance with reference to the enforcement of fundamental rights and if in the petition before it an infraction of any of fundamental right is shown, may pass an appropriate order with the liberal interpretation of provision of Article 184(3) of Constitution to carve and assert in the matter referred therein. The essential element for exercise of jurisdiction by the Supreme Court under Article 184(3) of the Constitution is that it must involve a question of public importance with reference to the enforcement of fundamental right and if the matter relating to the enforcement of fundamental right, is not of public importance the Court may refuse to entertain the petition and exercise the jurisdiction. [PLD 2010 S.C. 61]

2.1 Jurisdictional limits of the power of High Court and Supreme Court. Jurisdictional limits of the powers of the High Court under Article 199 of the Constitution do not apply to the Supreme Court in terms of Article 187 of the Constitution. Supreme Court on account of general institutional dysfunction and to render "complete Justice" has expanded the scope of judicial review in exercise of its powers under Articles 184(3) and 187 of the Constitution. But while doing so, it has also been conscious of the principle of separation of powers in terms of which the functions of various organs of the State have been delineated in the Constitution. It intervenes to ensure enforcement of Fundamental Rights, to address the menace of corruption when laws are blatantly violated and to fill the gap in law with a view to render "complete justice". The object has also been to ensure that State institutions perform their functions with integrity in accord with law and the oath of their calling.

While seized of petitions under Article 199 of the Constitution the High Courts at times are faced with prayers to pass order and provide relief for "doing complete justice". But such powers in constitutional jurisdiction are vested in the Supreme Court under Article 187 of the Constitution. These powers are distinct both in scope and the manner of their exercise. The apex Courts in most of the democratic countries enjoy such powers. The powers of the Supreme Court to pass any order or give any direction "for doing complete justice" are similar to those, which the Supreme Court of India enjoys under Article 142 of the Constitution of India and such powers cannot be exercised by the High Courts in India in exercise of their constitutional jurisdiction.

Under Articles 187 of the Constitution of Pakistan and Article 142 of the Constitution of India; the paramount consideration and the constitutional intent is common i.e. "for doing complete justice". These powers being inherent are complementary to those, which are specifically conferred on the Court by the Constitutions of these two countries. These powers remain undefined so that the Court can cater to any situation and could even mould the relief. However, this power should not be misconstrued to mean to pass any order, which is against the letter of law or against specific constitutional provisions. The rationale appears to be that in situations which cannot be resolved by existing provisions of law and warrant an intervention by the Court, it may pass an order to ensure "complete justice". This can also be used where the Court finds a gap in legislation and a solution is required till the Legislature acts and covers the field.

The very fact that this power is conferred on the apex Court alone has to be used sparingly and with an element of judicial restraint so as not to contravene any other constitutional provision or statute.

The Constitution makers conferred powers to issue such directions, orders, or decrees as may be necessary for doing complete justice" (Article 187) only to the Supreme Court and not to the High Courts. This constitutional intent is significant and has to be kept in view by the High Courts. Power to render "complete justice" vests with the Supreme Court alone whereas the High Court is a creature of the Constitution and can only exercise that power which is vested in it under the law.

For passing an order under Article 187 of the Constitution, no independent proceeding before the Court is required and once the Court is seized of a lis competently, it can pass orders, decrees for doing "complete justice".

Analysis of the comparative constitutional law from Pakistan and India would show that while the Supreme Courts in India and Pakistan have the power to issue any direction or, pass a decree "for doing complete justice", the High Courts cannot pass any order in derogation to Article 199 of the Constitution or any law for the time being in force because "the principles of common law or equity and good conscience cannot confer jurisdiction on the Courts in Pakistan which has not been vested in them by law". [PLD 2014 S.C. 1, PLD 2011 S.C. 997, PLD 2009 S.C. 879, 1999 SCMR 1904, ref.]

Distinction between jurisdiction of High Court under Article 199 of the Constitution and jurisdiction of the Supreme Court by virtue of Art.187 of the Constitution. While seized of petitions under Art.199 of the Constitution, the High Courts at times were faced with prayers to pass order and provide relief for "doing complete justice"; however such power in constitutional jurisdiction were vested only in the Supreme Courts under Art.187 of the Constitution. Such powers were distinct both in scope and the manner of their exercise. Constitution makes conferred powers "to issue such directions, orders, or decrees as may be necessary for doing complete justice" (Art.187) only to the Supreme Court and not to the High Courts and such Constitutional intent was significant and had to be kept in view by the High Courts. Power to render "complete justice" rested with the Supreme Court alone, whereas the High Court was a creature of the Constitution and could only exercise that power which is vested in it under the law. High Courts could not pass any order in derogation to Art.199 of the Constitution or any law for the time being in force because the principles of common law or equity and good conscience could not confer jurisdiction on the Courts in Pakistan which had not been vested in them by law. [PLD 2014 S.C. 1]

3. Power of Supreme Court. Article 184(3) of the Constitution provides as under:

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

A bare perusal of Article 184(3) of the Constitution would reveal that it has been couched in a very simple and plain language, thus, it hardly needs any scholarly interpretation. The jurisdiction as conferred upon Supreme Court under Article 184(3) of the Constitution can be exercised only where a question of public importance with reference to the enforcement of any of the fundamental rights is involved, meaning thereby that the question of public importance is sine qua non for exercise of jurisdiction under Article 184(3) of the Constitution. [2011 SCMR 1688]

Supreme Court has wide powers in terms of Article 184(3) of the Constitution to oversee the acts/actions of the other organs of the state namely the executive and the legislature. [PLD 2013 S.C. 641] Supreme Court in exercise of its Constitutional jurisdiction can check arbitrary exercise of authorities looting of public by executive functionaries and involvement of public office holders in corruption and corrupt practices. [PLD 2013 Isl. 85] Discharge of constitutional duty by the State functionaries in deviation to the spirit of the Constitution could be anvil to the Constitution and was challengeable on diverse grounds including mala fide and colourable exercise of the power in bad faith for ulterior motive. Validity and immunity could not be conferred to the mala fide act or action from judicial scrutiny in exercise of power of judicial review which was inherent in the superior courts. [PLD 2013 S.C. 641]

Supreme Court enjoys the jurisdiction of judicial review against administrative actions of the executives. Supreme Court is the final arbiter of disputes in order to maintain check and balance and for these reasons, the independence of judiciary has been guaranteed and the very Preamble of the Constitution provides that the "People of Pakistan and the independence of judiciary shall be fully secured". Judiciary cannot compromise at any cost its independence, as guaranteed under the Constitution, as such compromises would lead the Nation to the situation of the last so many years. [PLD 2011 S.C. 963; PLD 2010 S.C. 265] Whenever Supreme Court will notice that there is corruption or corrupt practices, it would be very difficult to compromise or digest same because the public money of the country cannot be allowed to be looted by anyone whatsoever status he may have. Supreme Court always exercises such jurisdiction judiciously and with judicial restraint and by now parameters of the Court's power of judicial review of administrative or executive action or decision and the grounds on which the Court can interfere with the same is well settled. Every executive or administrative action of the State or other statutory or public bodies is open to judicial scrutiny and the High Court or the Supreme Court can, in exercise of the power of judicial review under the Constitution, quash the executive action or decision which is contrary to law or is violative of Fundamental rights guaranteed by the Constitution. With the expanding horizon of Articles of the Constitution dealing with Fundamental Rights, every executive action of the Government or other public bodies, if arbitrary, unreasonable or contrary to law, is now amendable to the writ jurisdiction of the superior Courts and can be validly scrutinized on the touchstone of the Constitutional mandate. [PLD 2011 S.C. 963] If the administrative or executive action or decision is perverse or is such that no reasonable body of persons, properly informed, could come to or has been arrived at by the authority misdirecting itself by adopting a wrong approach or has been influenced by irrelevant or extraneous matters the Court would be justified in interfering with the same. [PLD 2011 S.C. 963] Power under this Article can be exercised only when a question of public importance with reference to the enforcement of any of the fundamental rights is involved, meaning there by that the question of public importance is *sina qua non* for exercise of jurisdiction under Article 184(3) of the Constitution. [2011 SCMR 1688] While construing Article 184(3) of the Constitution, the interpretative approach should not be ceremonious observance of the rules or usages of interpretation, but regard should be had to the object and the purpose for which this Article is enacted, that is, this interpretative approach must receive inspiration from the trait of provisions which saturate and invigorate the entire Constitution, namely, the Objectives Resolution (Article 2-A), the Fundamental Rights and the Principles of Policy so as to achieve democracy, tolerance, equality and social justice according to Islam. [2011 SCMR 1688]

3.1 Violation of fundamental right. Supreme Court can interfere in the case where violation of fundamental right is of nature of public importance such as violation of individual freedom, including effectiveness and safeguard for their implementation. Jurisdiction of Supreme Court under Article 184(3) of the Constitution can be invoked even by an individual if matter involves a question of public importance with reference to enforcement of any of his fundamental rights. [PLD 2009 S.C. 217] Courts and all institutions have to work under the provisions of law and the Constitution; no sooner a case is registered, law enforcing agencies are required to take full interest and involve all the concerned authorities for the purpose of concluding the investigation of the case in just and proper manner. Supreme Court desired that law enforcing agencies with full zeal and commitment shall make efforts to extend relief to the aggrieved

persons at the preliminary stage of the happening of an incident instead of waiting for direction of the Court of law to put the machinery into motion. [PLD 2011 S.C. 17]

3.2 Notice to affected person. Where there is likelihood of any adverse decision/action against any one (General Retired Pervez Musharaff in the present case) principle of natural justice to be followed and person concerned is to be provided and opportunity of being heard. [PLD 2011 S.C. 671]

4. Constitution petition—Maintainability. Article 184(3) provides an expeditious and inexpensive remedy for protection of fundamental rights from legislative and executive interference. Such jurisdiction would be exercised subject to establishing by petitioner, by furnishing convincing evidence, as to non-availability of any other adequate remedy and that question of public importance with reference to enforcement of fundamental rights had been made out. Without establishing such essential conditions, Supreme Court would not assume such jurisdiction. [PLD 2004 S.C. 600] Two conditions are precedent for invoking Article 184(3) of the Constitution, firstly the petition must clearly demonstrate that the grievance relates to violation of fundamental rights, secondly, the violation is of nature of public importance which means any invasion of individuals' freedom, liberty, fundamental rights, including effectiveness and safeguard for their implementation. Facts and circumstances of each case would have to be scrutinized on their own merits having regard to the connotation of the words "public importance". Case, in order to acquire "public importance", thus must relate to a question, which is of interest to, or affects the whole body of people or entire community. [PLD 2004 S.C. 583] Jurisdiction of the Supreme Court under Article 184(3) can not be invoked for redressal of a grievance affecting only rights of an individual and not public at large. [2004 SCMR 354] Apprehension in the mind of petitioner and its legal adjudication is not possible nor it can be made a basis for invoking the jurisdiction under Article 184(3) of the Constitution. Constitutional petition under Article 184(3) cannot be entertained merely on apprehension whatever its nature may be. [PLD 2004 S.C. 583] Supreme Court can be moved only when a violation of some legal or Constitutional right actually takes place, [PLD 2004 S.C. 583] the apex Court does not act as a Court of appeal, but as a Court of review. [PLD 2004 S.C. 583] It can only interfere in cases of violation of Fundamental Rights, which are of public importance. [PLD 2004 S.C. 583] It cannot entertain a petition, which has its basis on a premature act. [PLD 2004 S.C. 583] What is essential is that the question raised in the petition must relate to the interest of whole body of the people or an entire community. Case must be such, which raises a question affecting the legal rights or liabilities of the public or the community at large, irrespective of the person who raised such question. [PLD 2004 S.C. 583] Where a Fundamental Right has been breached, but the breach is of such a nature that it raises a question of public importance, then a petition under Article 184(3) can be directly filed in the Supreme Court. [PLD 2004 S.C. 583] According to the criminal law in Pakistan a convict can avail the remedy of one appeal as of right to challenge his conviction and sentence and such right of appeal is also available in the Northern Areas. Accused wanted to use the provisions of Article 184 of the Constitution for the redressal of his individual grievances and not in a matter involving the question of public importance relating to the enforcement of any of the fundamental rights guaranteed by the Constitution, petition not maintainable. [2004 SCMR 1334] Under Article 199 there are certain parameters prescribed by the Legislature in its wisdom for entertaining Constitutional petitions whereas under Article 184(3) of the Constitution such restrictions are not imposed by the legislature in its wisdom. [2004 YLR 2471]

5. Declaratory judgment. As ordained in Clause 2 of Article 184, in the exercise of this jurisdiction, the Court can pass only a declaratory judgment and not a decree or order or direction, which may be executable under Article 187. This shows that such disputes will be brought before the Supreme Court for its opinion and for a determination of rights and liabilities. Of course during the hearing executable orders, such as orders for production of documents, attendance of witnesses etc., may be passed.

5.1 Exercise of jurisdiction. Court has to see that discretion is exercised in such a way that mischief and chaos is prevented. It should be exercised only when necessary, for injudicious exercise of such power, might result in grave and serious consequences. [1999 SCMR 2811] Constitutional jurisdiction is always discretionary in character. He who seeks equity must come with clear hands. [2009 SCMR 1243]

5.2 Modification of judgment. While exercising such jurisdiction the findings recorded by Supreme Court in criminal appeal cannot be set aside/modified, nor any portion of it can be expunged or substituted. [PLD 2001 S.C. 1028]

5.3 Delay in obtaining certified copies. The delay in obtaining certified copies not attributed to the applicant, condoned. [1968 SCMR 320]

5.4 Delay in performance of certain act. Direction with regard to time for certain action to be taken by the respondent is generally considered directory in nature and not mandatory. If default in period is not visited with penalty or the consequences to flow and in case the act or thing is not done within that period, the delay will not defeat the action or performance of the duty. [PLD 2003 Lah 371]

5.5 Right to choose profession. Every citizen shall have the right to choose and conduct any profession, occupation, trade or business, but subject to the requisite qualifications, if any, prescribed by law in that behalf and further that such profession etc., has not been declared unlawful or forbidden by any law. Validity of such prescribed qualifications or the prohibition can still be examined by the superior Courts in exercise of the power of the judicial review, on the touchstone of other fundamental rights, including Article 18 and other provisions of the constitution and the law. [PLD 2004 Lah. 376]

6. Dispute. The word 'dispute' has not been defined and is wide enough to include all disputes, jurisdictional, administrative and fiscal. The Supreme Court has exclusive jurisdiction to determine a dispute between the Central Government and a Province in regard to the liability of the latter to income-tax or income derived from certain commercial activities of the Province, dispute the provisions of Income Tax Act (XI of 1922), which provides a machinery for challenging assessments made under that Act. [PLD 2001 S.C. 1028]

ARTICLE 184(3)

9. **Scope.** Article 184(3) of the Constitution has expressly empowered Supreme Court to exercise the powers vested in a High Court under Article 199 of the Constitution subject to the two fold rider that the matter should be one of public importance and should relate to the enforcement of fundamental right. [PLD 2011 S.C. 752] Supreme Court in exercise of its jurisdiction under Article 184(3) of the Constitution, which is in the nature of "inquisitorial proceedings", has the same power as are available to the High Court under Article 199 of the Constitution. [PLD 2011 S.C. 997] Supreme Court can exercise jurisdiction under Article 184(3) of the Constitution even where a legal proceeding in respect of the same matter is pending or had been finally decided by the High Court. [PLD 2012 S.C. 132; 2010 SCMR 885] However, new issues are not entertainable at the review state. [PLD 2011 S.C. 997]

Article 184(3) of the Constitution of Pakistan pertains to original jurisdiction of the Supreme Court and its object is to ensure the enforcement of Fundamental Rights referred to therein. This provision is an edifice of democratic way of life and manifestation of responsibility cast on Supreme Court as a protector and guardian of the Constitution. The jurisdiction conferred by it is fairly wide and the Court can make an order of the nature envisaged by Article 199, in a case where a question of public importance, with reference to enforcement of any Fundamental Right conferred by Chapter 1 of Part II of the Constitution is involved. Article 184(3) is remedial in character and is conditioned by three prerequisites, namely:

- (i) There is a question of public importance.
- (ii) Such a question involves enforcement of Fundamental Right, and
- (iii) The Fundamental Right sought to be enforced is conferred by Chapter 1, Part II of the Constitution.

The opening words "without prejudice" in Article 184(3) mean only not affecting, saving or excepting and when read with the words following thereafter, "to the provisions of Article 199", the expression means no more than to save the provisions of Article 199 without, in any way, superimposing itself on the power of the Supreme Court to decide a question of public importance relating to the enforcement of any of the Fundamental Rights. What it aims at is that it leaves the power of the High Court under Article 199 intact. It is for the party who is affected to choose which of the two forums it wishes to invoke, and if it be the Supreme Court then the power exercisable is subject to the limitation under Article 184(3), that is, that the element of "public importance" must be involved in the enforcement of Fundamental Rights. [PLD 1988 S.C. 416 + PLD 1993 S.C. 473]

This Article does not say as to what proceedings should be followed, then whatever be its nature must be judged in the light of the purpose, that is, the enforcement of any of the Fundamental Rights. It is, therefore, permissible when the *lis* is between an aggrieved person and the Government or an authority to follow the adversary procedure and in other cases where there are violation of Fundamental Rights of a class or a group of persons who belong to the category as afore-stated and are unable to seek redresses from the Court, then the

traditional rule of locus standi can be dispensed with, and the procedure available in public interest litigation can be made use of, if it is brought to the notice of the Court by the person acting bona fide. On the language of Article 184(3), it is needless to insist on a rigid formula of proceedings for the enforcement of the Fundamental Rights. If the framers of the Constitution had intended the proceedings for the enforcement of the Fundamental Rights to be in a strait-jacket, then they would have said so, but not having done that, one would not read any constraint in it. Article 184(3) therefore, provides abundant scope for the enforcement of the Fundamental Rights of an individual or a group or class of persons in the event of their infraction. It would be for the Supreme Court to lay down the contours generally in order to regular the proceedings of group or class actions from case to case. [PLD 1988 S.C. 416]

As the human right norm is higher than the law then any violation and its consequent enforcement can only be controlled by an in built limitation in the provision itself. A rule of practice which has received recognition as a provision of law is not higher than the norm and the machinery for its enforcement. [PLD 1988 S.C. 416]

If a cause of action is recurring constitutional petition under Article 184(3) of the Constitution petition cannot be defeated on the ground of estoppel or laches, if otherwise the petitioner demonstrates that the impugned action or order is violative of Fundamental Rights and what is being challenged is not a past and closed. [1999 SCMR 382] It can strike down any law of violative of constitutional provision. [PLD 1999 S.C. 504]

To maintain a petition under Article 184(3) of the Constitution, it is not necessary that infraction of any Fundamental Right of the petitioner/individual must be established. The question of infringement of the Fundamental Right of the individual is relevant in proceedings under Article 199 of the Constitution with reference to his locus standi to maintain the proceedings. In contradistinction to the proceedings under Article 199 of the Constitution, the question of locus standi of the petitioner is hardly of any significance in a petition filed under Article 184(3) of the Constitution is more on the "public importance" of the question raised in the proceedings. Therefore, some times a complaint regarding violation of the Fundamental Right of an individual may give rise to a question which may affect the entire community or the whole population, thus, making it a case fit for cognizance under Article 184(3) of the Constitution while in another case the violation of the Fundamental Rights of a large number of people may not affect the whole community or the entire population thereby rendering the question not fit for adjudication under Article 184(3) of the Constitution. The condition that the petition filed under Article 184(3) of the Constitution must relate to the enforcement of any of the Fundamental Rights, does not necessarily mean or refer to the enforcement of the Fundamental Right of the petitioner or an individual who moves the Court under Article 184(3) of the Constitution. Reference to enforcement of Fundamental Rights in Article 184(3) implies a Fundamental Right in enforcement whereof the whole community or public-at-large is interested. [PLD 1999 S.C. 504]

To sum up:—

Constitutional petition before Supreme Court. Language of Art. 184(3) of the Constitution made it clear that it is not necessary that Fundamental Right of any particular individual is breached, rather the only requirement is that a question of public importance with reference to the enforcement of a Fundamental Right is involved. [PLD 2012 S.C. 923]

Supreme Court can exercise jurisdiction under Art. 184(3) of the Constitution even where a legal proceeding in respect of the same matter is pending or has been finally decided

by High Court. [PLD 2012 S.C. 132] It is competent to ensure enforcement of the fundamental rights of the citizens in all matters of public importance. [PLD 2012 S.C. 660]

Supreme Court is empowered to make a declaratory order to enforce any of the fundamental rights conferred by Chap. 1, Part II of the Constitution. Such kind of litigation fell within the category of inquisitorial proceedings and not adversarial, which is generally undertaken by the litigants against each other for determination of their respective rights in the common law countries. [PLD 2012 S.C.292]

While entertaining a petition under Art. 184(3), the Supreme Court has ample power to examine the vires of laws, rules or regulations. Where a petition falls under public interest litigation, which is not adversarial but inquisitorial in nature. Supreme Court has the jurisdiction to adjudicate upon a case if it fell within the ambit of inquisitorial proceedings. [PLD 2012 S.C. 681]

Public importance is one of the components to attract the said jurisdiction Supreme Court coupled with the facts that three elements i.e. question of public importance; question of enforcement of fundamental rights and fundamental rights sought to be enforced as conferred by Chap. 1 Part II of the Constitution are required to be satisfied. Public importance. [PLD 2012 S.C. 292]

Supreme Court enjoys jurisdiction to proceed in all those matters which are justiciable; however if there is an issue, which is alleged to be non-justiciable it would be the duty of the Court to examine each case in view of its facts and circumstances, and to come to the conclusion whether it is non-justifiable or otherwise. [PLD 2012 S.C. 292]

At the same time, Supreme Court retains the discretion to deny petitioners who approached the court after undue delay or with unclean hands; would refuse to exercise its jurisdiction where other forums that were efficacious and suitable were available, and would refuse to entertain a petition under Art. 184(3) of the Constitution if it involved the need for extensive fact-finding which might more appropriately be done by another forum. [PLD 2012 S.C. 774]

The following guidelines were provided by the Supreme Court in exercise of its constitutional jurisdiction under Article 184(3) of the Constitution to achieve the required objective:

- (i) Cases relating to terrorism be entrusted to the Special Courts already established or which may be established under the Anti-Terrorism Act, 1997 or under any law in terms of the judgment of Supreme Court in the case of *Mehram Ali and other v. Federation of Pakistan* (PLD 1998 S.C. 1445);
- (ii) One case be assigned at a time to a Special Court and till judgment is announced in such case, no other case be entrusted to it;
- (iii) The concerned Special Court should proceed with the case entrusted to it on day-to-day basis and pronounce judgment within a period of 7 days as already provided in Anti-Terrorism Act, 1997 or as may be provided in any other law;
- (iv) Challan of a case should be submitted to a Special Court after full preparation and after ensuring that all witnesses will be produced as and when required by the concerned Special Court;
- (v) An appeal arising out of an order/judgment of the Special Court shall be decided by the appellate forum within a period of 7 days from the filing of such appeal;

- (vi) Any lapse on the part of the investigating and prosecuting agencies shall entail immediate disciplinary action according to the law applicable;
- (vii) The Chief Justice of the High Court concerned shall nominate one or more Judges of the High Court for monitoring and ensuring that the cases/appeals are disposed of in terms of these guidelines;
- (viii) That the Chief Justice of Pakistan may nominate one or more Judges of the Supreme Court to monitor the implementation of the guidelines. The Judge or Judges so nominated will also ensure that if any petition for leave/or appeal with the leave is filed, the same is disposed of without any delay in the Supreme Court;
- (ix) That besides invoking aid of the Armed Forces in terms of sections 4 and 5 of the Anti-Terrorism Act, 1997, the assistance of the Armed Forces can be pressed into service by virtue of Article 245 of the Constitution at all stages including the security of the Presiding Officer, Advocates and witnesses appearing in the cases, minus the process of judicial adjudication as to the guilt and quantum of sentence, till the execution of the sentence. [PLD 1999 S.C. 504]

Courts today are choked by "legal pollution" and the society has become litigious. The goal of access to justice is defeated, when too many claims overwhelm the limited resources of the Courts. The right to participate in the legal process as envisaged by the Constitution and valid law is fundamental to a just society. If the citizens are deprived of their constitutional rights to have access to justice in accordance with the Constitution and the law because they are unable to utilize the Courts effectively for the resolution of their disputes or the disputes between the Government and the citizens or that a particular class of citizens is excluded from having access to justice by creating a parallel judicial system *i.e.* a 'barrier' to access to justice, certainly such a course would be repugnant to the constitutional mandate provided under Article 5 of the Constitution that obedience to the Constitution and law is the inviolable obligation of every citizen wherever he may be and of every other person for the time being within Pakistan while Article 4 thereof guarantees the right of individuals to be dealt with in accordance with law. The right of access to justice to all is enshrined in the Constitution, which is also found in the doctrine of "due process of law". Such a right includes the right to be treated according to law; the right to have a fair and proper trial and the right to have an impartial Court or Tribunal. Without holding an independent Judiciary, the Fundamental Rights enshrined in the Constitution will be meaningless and will have no efficacy or beneficial value to the public-at-large. [PLD 1999 S.C. 504]

Provisions of Article 184(3) provides abundant scope for the enforcement of the Fundamental Rights of an individual or a group or class of persons in the event of their infractions and it would be for the Supreme Court to laid down the contours generally in order to regulate the proceedings of group or class actions from case to case. Under Article 184(3) of the Constitution there is no requirement that only an aggrieved party can press into service this provision. Supreme Court can entertain a petition under this Article and the behest of the person. This Article is remedial in character and is conditioned by three prerequisites, namely that there is a question of public important, that such a question involves enforcement of Fundamental Right and that the Fundamentals Right sought to be enforce is conferred by Chapter 1, Part II of the Constitution. [PLD 2007 S.C. 642]

Following principles are highlighted to exercise jurisdiction under Article 184(3) of the Constitution:--

- (1) It is not necessary that who has approached the Court for the enforcement of fundamental rights as an information has to be laid before the Court, may be by an individual or more than one person.
- (2) The case must involve decision on an issue in which the public-at large is interested.
- (3) The case also relates to the enforcement/violation of any of the 'fundamental rights mentioned in Chapter I, Part-II of the Constitution, namely, Articles 8 to 28.
- (4) If it is permissible for the next friend to move the Court on behalf of a minor or a person under disability, or a person under detention or in restraint, then why not a person, who were to act bona fide to activate a court for the enforcement of the Fundamental Rights of a group or a class of persons who are unable to seek relief.
- (5) Under Article 184(3), it is not a traditional litigation which, of course, is of an adversary character where there is a lis between the two contending parties, one claiming relief against the other and the other resisting the claim.
- (6) The Court while dealing with a case under Article 184(3) of the Constitution is neither bound by the procedural trappings of Article 199 nor by the limitations mentioned in the said Article for exercise of power by the High Court.
- (7) The provisions of Article 184(3) of the Constitution are self-contained and they regulate the jurisdiction of Supreme Court on its own terminology.
- (8) in a given case where 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, it should directly interfere, and any rigid or a strait-jacket formula prescribed for enforcement of the Rights would be self-defeating.
- (9) In order to ascertain the violation of a fundamental right, the Court has to consider the direct and inevitable consequences of the action which is sought to be remedied or the guarantee of which is sought to be enforced.

It is also significant to note that the Court seized with the inquisitorial kind of proceedings is bound to be careful while examining the matter placed before it, lest it should cause injustice or prejudice to any of them and shall make reference of the material/documents or circumstances, which are not disputed between them. When in a case reference has only been made to the documents in respect whereof the parties before the Court have no controversial attitude against each other and despite it, final determination about the civil liability and criminal culpability has to be made by the forum empowered to determine the extent of the involvement subject to following the due process as defined in Articles 4 and 10A of the Constitution. Supreme Court enjoys jurisdiction to proceed in all those matters which are justiciable; however, if there is an issue, which is alleged to be non-justiciable it would be the duty of the Court to examine each case in view of its facts and circumstances, and then to come to the conclusion whether it is non-justifiable or otherwise. [PLD 2012 S.C. 292]

Even the disputed question of facts which do not requires voluminous evidence can be looked into where fundamental rights have been breached. [PLD 2007 S.C. 642]

185. Appellate jurisdiction of Supreme Court. (1) Subject to this Article, the Supreme Court shall have jurisdiction to hear and determine appeals from judgments, decrees, final orders or sentences of a High Court.

(2) An appeal shall lie to the Supreme Court from any judgment, decree, final order or sentence of a High Court—

- (a) if the High Court has on appeal reversed an order of acquittal of an accused person and sentenced him to death or transportation for life or imprisonment for life; or, on revision, has enhanced a sentence to a sentence as aforesaid; or
- (b) if the High Court has withdrawn for trial before itself any case from any Court subordinate to it and has in such trial convicted the accused person and sentenced him as aforesaid; or
- (c) if the High Court has imposed any punishment on any person for contempt of the High Court; or
- (d) if the amount or value of the subject-matter of the dispute in the Court of first instance was, and also in dispute in appeal is, not less than fifty thousand rupees or such other sum as may be specified in that behalf by Act of ¹[Majlis-e-Shoora (Parliament)] and the judgment, decree or final order appealed from has varied or set aside the judgment, decree or final order of the Court immediately below; or
- (e) if the judgment, decree or final order involves directly or indirectly some claim or question respecting property of the like amount or value and the judgment, decree or final order appealed from has varied or set aside the judgment, decree or final order of the Court immediately below; or
- (f) if the High Court certifies that the case involves a substantial question of law as to the interpretation of the Constitution.

(3) An appeal to the Supreme Court from a judgment, decree, order or sentence of a High Court in a case to which clause (2) does not apply shall lie only if the Supreme Court grants leave to appeal.

SYNOPSIS

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| 1. Appeal to Supreme Court—Clause (1) and (2). | 5. Order. |
| 2. Civil Appellate Jurisdiction. | 6. <i>Locus standi</i> to file appeal. |
| 3. Article 185(2)(d)—Value of subject matter more than 50,000. | 7. Power of judicial review. |
| 4. Criminal appeal. | 8. Certificate by High Court. |
| | 9. Judges of Superior Court not immune from accountability. |

¹ Subs. by P.O. 14 of 1985 w.e.f. 2 March 1985.

10. Common judgment of High Court.
11. Value of subject matter.
12. Making of contradictory position.
13. Constitution of Bench.
14. Interference by Supreme Court.

15. Amendment in the Constitution through Legal Framework Order, 2002.
16. Vires of Legal Framework Order, 2002 challenged by a particular group—Not treated as a case of public importance.

1. **Appeal to Supreme Court—Clauses (1) and (2).** The appellate jurisdiction of the Supreme Court has been substantially enhanced by the present Constitution as compared to the corresponding jurisdiction in the 1962 Constitution. An appeal now lies to the Supreme Court from any judgment, decree, final order or sentence of a High Court when—

- (a) the High Court has sentenced a person or enhanced his sentence to death or to transportation for life or imprisonment for life; on appeal against acquittal, [1971 SCMC 403] or in the exercise of revisional powers.
- (b) when a person is convicted and sentenced to death or to transportation for life or imprisonment for life by the High Court after withdrawing the case from the subordinate Court.
- (c) the amount or value of the subject-matter of the dispute in the Court of first instance was and also in appeal is, not less than fifty thousand rupees.
- (d) when the judgment, decree or final order in respect of the property given above have been varied or set aside by the Court immediately below.
- (e) the High Court has punished a person for contempt of the kind mentioned in Article 204.
- (f) the High Court certifies that a substantial question of law is involved in the case, as to the interpretation of the Constitution.

In all other cases, when clause (2) does not apply, an appeal lies from a judgement, decree, order or sentence of a High Court only by leave of the Supreme Court. Appeal would lie to the Supreme Court as of right if the matter is covered under Article 185(2)(d) and (e) of the Constitution for which the limitation is 30 days, if the matter is not so covered than leave to appeal has to be sought from Supreme Court in terms of Article 185(3) of the Constitution. [2009 SCMR 857]

The principle consistently enunciated by the Supreme Court is that as an ultimate Court, the Supreme Court must give due weight and consideration to the findings of the Courts below, and normally it should not interfere with their findings where it is satisfied that they are reasonable and were not arrived at by the disregard of any accepted principle regarding the appreciation of evidence. The mere fact that the Supreme Court might have taken a different view of the evidence should not be sufficient to overrule the findings of the Courts below. However, if the grounds upon which the High Court has acted are not supportable on the record, or the decision on a question of fact has turned upon inadmissible evidence or upon a faulty reading of evidence, or where there has been a departure from due procedure in the reception of evidence or otherwise, which is calculated to interfere with the due or safe dispensation of justice, then interference by this Court would be justified and necessary. [PLD 1977 S.C. 4] The general practice of the Supreme Court following the Privy Council practice, has been not to allow counsel to agitate points on which leave to appeal had not been granted but this is not an inflexible rule, and there may well be cases in which the Supreme Court, in the interest of justice, may be constrained to depart from this practice, although such cases

will, no doubt, be extremely rare. The Supreme Court has undoubtedly the power, under the Constitution itself, to do complete justice and, therefore, it has never tied itself down in such a manner as to deprive itself of this power. The rule is at best a rule of practice only developed as a result of the practice of the Judicial Committee and, therefore, like all rules of practice it can legitimately be departed from if the interests of justice so demands. [1975 SCMR 16] Where the Courts below had missed the important features and legal aspects from taking into consideration, the Supreme Court as Court of last appeal, would be under legal duty to interfere and correct the irregularity and illegality committed by the Courts below. [2008 SCMR 1384] Supreme Court in the exercise of its power to do complete justice is competent to examine points other than those on which leave was granted. Normally or in ordinary course, Supreme Court would not permit raising of point/question not mentioned in the leave granting order, but in exceptional cases for doing complete justice it would permit or allow the appellant to agitate a point or question not mentioned in the leave granting order. [2005 SCMR 1544] Supreme Court being at the apex has constitutional duty to impart complete justice and therefore, it cannot be inhibited by any restraint or restriction and has abiding duty to consider all the pros and cons of the matter and to take an overall view of the case while dispensing justice. [2006 SCMR 1225]

Supreme Court has complete power to do justice without fettering itself with any self-imposed restrictions. However, the Supreme Court should not interfere with such findings where it is satisfied that same are reasonable and were not arrived at by disregard of any accepted principles relating to the appraisal of evidence in the interest of justice. Supreme Court will not hesitate to interfere where the court whose judgment is complained of has made no real endeavour to judge the case or having made such endeavour, has arrived at a result so atrocious or ludicrous that no reasonable man could possibly approve of it. In all such cases the court will interfere because in the circumstances assumed a principle of natural justice has been contravened and the very basis of justice choked. [PLD 2011 S.C. 44] On the authority/power of Supreme Court to do complete justice and allowing additional evidence, there cannot be any cudgel however, such power should not be exercised as a matter of course to favour a delinquent litigant, rather than in genuine cases. Additional evidence can only be allowed by court when its consonance with, and within the scope of pleadings of parties and not otherwise. [PLD 2011 S.C. 151] Supreme Court while hearing appeal would be ceased of whole *lis*. Law would not debar Supreme Court from noticing or finding relevant fatal defects and deficiencies in appellant's case. [2011 SCMR 1926; AIR 1977 S.C. 1011 relv.]

Article 185(2) of the Constitution enlists the kind of cases in which an appeal can competently be filed before Supreme Court whereas Article 185(3) of the Constitution provides that in all cases wherein an appeal is not competent under Article 185(2) of the Constitution an appeal shall lie to Supreme Court only if the Supreme Court grants leave to appeal. There are also some statutes which provide for an appeal before Supreme Court. [PLD 2012 SC 421]

A petition for leave to appeal under Article 185(3) of the Constitution and an appeal under Article 185(2) of the Constitution or under any statute are not only mutually exclusive remedies but are also not interchangeable remedies suiting convenience of a party. Treating such distinct remedies as interchangeable may be offensive even to the scope of such remedies because, by virtue of the provisions of Rule 2 of Order XIII and Rule 1 of Order XXIII of the Supreme Court Rules, 1980, the scope of a petition for leave to appeal is restricted only to "points of law which arise for determination" whereas by virtue of Rule 3 of Order XII and

Rule 1 of Order XXII of the Supreme Court Rules, 1980 an appeal lies against all "objections to the decision of the High Court" and such objections may include inter alia objections to factual determinations and appraisal of evidence which may be alien to the scope of a petition for leave to appeal. On account of mutual exclusivity in the matter of competence and distinct scopes of maintainability of these two remedies any consideration based upon the interests of justice for holding a petition for leave to appeal under Article 185(3) of the Constitution to be maintainable where an appeal is competent under Article 185(2) of the Constitution or under some statute ought to be irrelevant to the question of competence or maintainability of such a petition because under Article 175(2) of the Constitution "No court shall have any jurisdiction save as is or may be conferred on it by the Constitution or by or under any law". No provision of the Constitution or any law confers any jurisdiction on the Supreme Court to hold a remedy to be maintainable in the interests of justice where it is actually not maintainable under the Constitution or the relevant law. It may also be pertinent to mention here that by virtue of Art. 4(1) of the Constitution "To enjoy the protection of law and to be treated in accordance with law is the inalienable right of every citizen " and by virtue of Article 5(2) of the Constitution "Obedience to the Constitution and law is the inviolable obligation of every citizen.....". It goes without saying that an indolent, negligent or careless litigant failing to file an appeal before the Supreme Court where such appeal was competent cannot be allowed to achieve his object through an incompetent petition for leave to appeal and thereby to try to snatch away a vested right already accrued to the opposite party by efflux of time. It is trite that what cannot be done directly cannot be allowed to be achieved indirectly. In most of the cases petitions for leave to appeal had been allowed to be converted into appeals beyond the period of limitation prescribed for filing of an appeal without appreciating that the period of 30 days provided for filing an appeal under Rule 2 of Order XII of the Supreme Court Rules 1980 can be extended under the said rule only in a case where an appeal has actually been filed and the period of limitation of 60 days provided for filing a petition for leave to appeal under Rule 1 of Order XIII of the Supreme Court Rules, 1980 can be extended only where a petition for leave to appeal has actually been filed. It would be inapt to apply the provision regarding extension of time for filing of an appeal to something which has actually been filed before the court as a petition for leave to appeal. The appropriate course to be adopted in such a situation would be to dismiss the incompetent petition for leave to appeal as not maintainable leaving the relevant party to file a time-barred appeal and to seek extension of time in that regard under the appropriate rule. However, an exception to this would be a case where an appeal to the Supreme Court is competent but a petition for leave to appeal has mistakenly been filed but the same has been filed within the period of limitation prescribed for filing of an appeal and in such a case the question of extension of time may be irrelevant because such a petition for leave to appeal can be treated as an appeal filed within the requisite period of limitation. Such a case would be a case of misdescription only and the law is settled by now that mistakenly mentioning of a wrong provision of law does not denude a court of its jurisdiction where such jurisdiction exists.

As regards the cases under any other statute providing for an appeal to the Supreme Court the remedy available to a litigant under such statutes is to be governed by that statute and not by or under the provisions of Article 185(3) of the Constitution which has relevance only to the provisions of Article 185(2) of the Constitution and not to any other law or statute.

No petition for leave to appeal is competent or maintainable before the Supreme Court under Article 185(3) of the Constitution if the remedy of appeal provided under the relevant statute is not availed of by the concerned party and, no such incompetent petition for leave to

appeal filed under Article 185(3) of the Constitution can be converted into an appeal under the relevant statute.

In some of the cases an incompetent petition for leave to appeal had been allowed to be converted into an appeal merely because the office of the Supreme Court had failed to object to maintainability of the petition for leave to appeal at the time of its presentation. Any failure on the part of the office of the Supreme Court to raise an objection to maintainability of a petition for leave to appeal cannot make such a petition competent or maintainable. Two wrongs, i.e. one on the part of the litigant or his counsel in filing an incompetent petition and second on the part of the office of the Supreme Court in failing to object to filing of such incompetent petition, do not make a right nor such two wrongs create any right in favour of a party where no such right exists under the Constitution or the law. There is no gainsaying that ignorance of law is no excuse, be it on the part of a litigant or his counsel or on the part of the court.

The practice of filing a petition for leave to appeal before the Supreme Court under Article 185(3) of the Constitution where an appeal is competent before the Supreme Court under Article 185(2) of the Constitution or under any statute but has become barred by time amounts to hoodwinking or deceiving the spirit as well as the express provisions of Article 185(3) of the Constitution and such practice must be brought to an end. If an appeal competent before the Supreme Court has not been filed within the period of limitation prescribed for filing of the same then the only remedy available in that regard is to file a time-barred appeal and seek extension of time or condonation of delay in filing of the same in terms of Rule 2 of Order XII or Rule 1 of Order XXII of the Supreme Court Rules, 1980. No petition for leave to appeal filed under Article 185(3) of the Constitution can be entertained by the office of the Supreme Court in any case where an appeal is competent before the Supreme Court under Article 185(2) of the Constitution or under any statute and no such incompetent petition for leave to appeal, even if erroneously entertained by the office of the Supreme Court can be converted into or treated as an appeal except in the case of an incompetent petition for leave to appeal filed within the period of limitation for filing a competent appeal. In the present cases appeals were competent before the Supreme Court under Article 185(2) of the Constitution or under some statute but the matters had been brought to the Supreme Court in the shape of petitions for leave to appeal filed under Article 185(3) of the Constitution at a time when the remedy of appeal had become barred by time. All these petitions thus filed were, therefore, incompetent and not maintainable at the time of their institution. Supreme Court observed that court was cognizant of the fact that legal position regarding maintainability of such petitions had remained unsettled in the past on account of some inconsistent judgments of the Supreme Court and thus, it would be oppressive, if not unfair, to dismiss these petitions and appeals arising out of the same as incompetent and not maintainable at such a late stage. Supreme Court further observed that the petitioners/appellants in all the present petitions/appeals may apply before the Supreme Court for treating their petitions filed under Article 185(3) of the Constitution as appeals filed under Article 185(2) of the Constitution or the relevant statute and may also apply for extension of time or condonation of delay in filing of such appeals and it shall then be for the Supreme Court to decide such applications keeping in view the peculiar circumstances of each case. Such concession is meant only for the present set of petitions and appeals wherein the petitioners/appellants had been caught up in a confusion or uncertainty which was not of their making and that all future institution of petitions for leave to appeal under Article 185(3) of the Constitution shall be governed by the legal

ARTICLE 185(3)—APPEAL BY SPECIAL LEAVE

1. Power of Supreme Court's to do complete justice.
2. Appeal by Special Leave.
3. Limitation—Condonation of delay.
4. Zubair's case.
5. Finding of fact.
6. Concurrent finding.
7. Plea of jurisdiction.
8. New plea.
9. Question of limitation.
10. Interlocutory order.
11. Re-appraisal of evidence.
12. Service matters.
13. Criminal cases.
14. Appeal against conviction.
15. Appeal against acquittal.
16. When leave refused.
17. Court of Judicial Commissioner for Northern Areas—Final order—Appeal.
18. Sessions trial—Procedure.
19. Civil cases.
20. Winding up a Banking company.
21. Income Tax Ordinance, 1979—Direct appeal to Supreme Court.
22. Order XII, R. 2, Supreme Court Rules, 1980.
23. Fiscal statute—Function of the judiciary.
24. Colony Land—Transfer on the basis alleged gift.
25. Contractual obligation.
26. Restoration of petition.
27. Educational institutions—Violation of Rules/Regulations.
28. Local Government Election Rules, 2001—Determination of age.
29. Taxation—Payment of entertainment duty.
30. Resumption of plot after construction.
31. Life insurance policy.
32. Contractual service.
33. Article 185(3) read with Exit Control Ordinance, 1981.

1. **Power of Supreme Court's to do complete justice.** Supreme Court has complete power to do justice without fettering itself with any self impose restriction. [PLD 2011 S.C. 44] Notwithstanding the fact that a party would not be entitled as of right to urge a point which having been considered, leave was not granted thereon, the Supreme Court would be competent in exercise of its power to do complete justice to examine point other than those on which leave was granted. The reliance of the learned counsel for the appellants thus, on Article 187 of the Constitution read with rules 5 and 6 of Order XXXIII of the Supreme Court Rules is not misplaced. Therefore, in the present case, we hold that the grant of leave to appeal to appellant who has otherwise been found entitled to acquittal on extension of benefit of reasonable doubt, cannot operate as a bar for this Court to the acceptance of his appeal on merits regarding his guilt. [PLD 1981 S.C. 582] The Supreme Court has incidental power to pass such interlocutory orders which are in aid of exercise of the jurisdiction conferred on it. The Supreme Court stands at the apex of the judicial hierarchy in the country having all the powers of appellate Court and can, therefore, clearly pass all ancillary and incidental orders which are necessary for proper disposal and final adjudication of the cases. [PLD 1982 S.C. 282] Supreme Court as ultimate Court in land, as a rule, should give due weight and consideration to opinion of Courts below while exercising constitutional powers. Supreme Court does not meddle with the findings of fact reached by Lower Appellate Court or High Court when it is satisfied that the Courts below are on the whole reasonable and findings are not arrived at by disregarding any provision of law or any accepted principle concerning appreciation of evidence. Such would be notwithstanding that a different view might also be possible. [2007 SCMR 1719] However, the Supreme Court should not interfere with such findings where it is satisfied that same are reasonable and were not arrived at by disregard of any accepted principles relating to the appraisal of evidence in the interest of justice. Supreme

Court will not hesitate to interfere where the Court whose judgment is complained of has made no real endeavour to judge the case or having made such endeavour, has arrived at a result so atrocious or ludicrous that no reasonable man could possibly approve of it. In all such cases the Court will interfere because in the circumstances assumed a principle of natural justice has been contravened and the very basis of justice choked. [PLD 2011 S.C. 44]

No limitation has been imposed by provision of Article 185(3) of the Constitution, for grant of leave to appeal. Conduct of petitioner has substantial bearing on the question of leave to appeal or otherwise. Supreme Court is not a court of appeal while exercising power under Art.185(3) of the Constitution to reappraise evidence, except in exceptional circumstances. [2012 SCMR 51] Incompetent petition for leave to appeal filed within the period of limitation for filing a competent appeal. Such a petition for leave to appeal could be converted into or treated as an appeal. [2012 SCMR 1292]

1.1 Appeal to Supreme Court. In the following cases Supreme Court declined to entertain appeal:

- i) Supreme Court not bound to interfere with exercise of discretion in decision, which were otherwise just, proper and equitable. [2004 SCMR 1030]
- ii) No desirable exercise to collaterally impeach the judgments of a Constitutional Court which had in any case attained finality. [PLD 2004 S.C. 219]
- iii) Subject of the appeal falling to be determined by the Federal Shariat Court, Supreme Court declined to examine the argument in detail. [PLD 2004 S.C. 219]

2. Appeal by Special Leave. An appeal by special leave is not an appeal as of right nor is it an appeal in the ordinary course, therefore, such leave cannot be granted as a matter of routine nor can petitions for special leave to appeal be heard as if they were appeals themselves. The difference is that when ordinary appeals are heard they are, subject to preliminary technical objections, if any, firstly examined on merits for judging their fitness for calling upon the respondent to defend; and if such merit is prima facie found to exist in them, then they are heard again after notice to the opposite party. If these petitions are not appeals, the petitioners had to satisfy the Court that there was some unusual or exceptional reason for granting leave to them to make submission before the Court on the merits of their case. [PLD 1969 S.C. 98] Grant of special leave to appeal from the Supreme Court cannot be claimed as a matter of right. Essentially, it is matter of discretion with the Court, which is to be exercised on a judicial consideration of the circumstances of each case. Where the petitioner was obviously disentitled to seek the indulgence of Supreme Court to grant him leave to challenge an order of the High Court, which he had invited himself on a compromise, and he cannot be permitted to repudiate it. As a matter of law and principle, no appeal is admissible against a consent decree. [1971 SCMR 186 (p. 187)] Jurisdiction of Supreme Court under Article 185 is not attracted to grant Special Leave to appeal from the interlocutory [1968 SCMR 143], raising substantial question of law of public importance in sine quo non for the grant of leave. [PLD 2004 S.C. 10] Supreme Court always declined to entertain such civil petitions wherein interlocutory order/fragmentary decision are challenged, unless a very strong case of exceptional nature is made out. [PLD 2004 S.C. 70] Mere filing or pendency of petition/appeal before Supreme Court does not operate as a stay or restraint order. [2004 CLD 232] Neither it is the practice of Supreme Court to interfere with such discretionary orders unless it is shown that the order is palpably unjust or capricious or perverse. [1974 SCMR 434] Petition for leave to appeal can be entertained by Supreme Court only in cases which fall outside the purview of the Article 185(2) of the Constitution. Such petition is incompetent if judgment or order etc.,

sought to be impugned, is appealable. Maintainability of petition under Article 185(3) is conditional upon non-availability of a right of appeal under Article 185(2) of the Constitution. [2005 SCMR 1371] Petitioner having waived the question of limitation in second appeal, 2005 SCMR 1853 is debarred to agitate the same point before the Supreme Court. [2005 SCMR 1853] Supreme Court is not Court of appeal while exercising power under Article 185(3) of the Constitution and is not expected to reappraise the evidence except in exceptional circumstances. [2006 SCMR 1217] Supreme Court in petty cases can refuse to decide a question of law even if leave to appeal is granted and can revoke the leave which has been obtained by making false and misleading assertions in petition. [PLD 2007 S.C. 535]

While deciding petition for leave the limitation as laid in PLD 1973 S.C. 469 are to be clearly borne in mind. At page 492, 493 of the report it has been observed:

"In the matter of granting leave, this Court undoubtedly has a discretion vested in it which, may well not be exercised in favour of an applicant for leave, even though the Courts below might have committed an error of law of such a grave nature as would have justified leave. The Court would, in such cases, be entitled to refuse leave, if it comes to the conclusion that the Court below had on the whole done substantial justice and no useful purpose will be served by granting leave and thereby raising a false expectation in the minds of the persons affected. From this it would also follow that, in the matter of granting leave to appeal, as this Court has repeatedly emphasized, it does not function "as an ordinary Court of criminal appeal". In order to justify the grant of leave, at least some serious question of law must *prima facie* be made out or some case of grave miscarriage of justice established either by reason of the fact that the findings sought to be impugned could not have been arrived at by any reasonable person or that the findings were so ridiculous, shocking or improbable that to uphold such a finding would amount to a travesty of justice."

"The limitations, which the Court imposes on its powers are, however, only such as are implicit in the nature and character of the power itself. They cannot be defined with any precision, because, it is not advisable to fetter the exercise of this discretionary power by any set rule. The Court, will no doubt use its good sense in determining the circumstances in which it will grant leave and exercise its discretion on well-established principles but where the Court reaches the conclusion that a person has been dealt with in violation of the established principles of the administration of criminal justice, then no technical hurdles should be allowed to stand in its way of doing justice and seeing that injustice is not perpetuated or perpetrated by the decisions of the Courts below".

"As an ultimate Court, we must give due weight and consideration to the opinions of the Courts below, and normally we should not interfere with their findings where we are satisfied that they are reasonable and were not arrived at by the disregard of any accepted principles regarding the appreciation of evidence. The mere fact that this Court might have taken a different view of the evidence should not be sufficient to overrule the findings of the Courts below; but we should first satisfy ourselves that there is some serious defect in the process by which the finding has been arrived at. Where such defect is discovered and the finding is not considered tenable, then it should be open to the Court to come to its own independent finding upon a re-examination of the evidence untrammelled by the opinions of the Courts below". [PLD 1973 S.C. 469] Once leave has been granted, in the absence of clear indication to the

contrary, the whole case is open for review by the Supreme Court. The Supreme Court grants leave *ex debito justitiae* and is not hedged by any consideration of technical nature. It has been observed by Supreme Court in Civil Appeal No. 3 of 1973, that once leave is granted, there is no reason why an appeal by special leave should be treated differently from an appeal as of right. Both the appeals stand on the same footing and should be determined on the same principle of justice. This is, however, not to dispute the proposition that as a Court of ultimate jurisdiction, Supreme Court will ordinarily give due weight to the opinion of the Courts below particularly the Court of the first instance in the matter of appreciation of evidence. [PLD 1977 S.C. 28] The effect of granting leave is not that the whole case is open. Leave may be granted subject to the terms and conditions. However, where leave has been granted only on special questions it may later on be extended to cover other questions also. [PLD 1951 FC 41]

Raising substantial question of law of public importance is *sine qua non* for the grant of leave. [PLD 2004 S.C. 10; 2004 SCMR 354] This is the constant practice of the Supreme Court not to grant leave to examine academic questions, [1980 SCMR 400] unless a live issue has been brought before the Court for consideration. [2000 SCMR 1331] Supreme Court would be reluctant to interfere in matters involving exercise of discretion, but in exceptional cases where the interest of justice demands and it is evident that either a provision of law has been misconstrued or wrongly applied or the decision is contrary to the principles laid down by Supreme Court as well as those governing the safe administration of criminal justice, then it is the Constitutional obligation of Supreme Court to set the matter right. [2004 SCMR 1560] Proceedings in petition for leave to appeal to be decided on admitted set of facts and cannot be equated with proceedings in a suit attracting entire different procedure for recording of findings on issues after examining the evidence. In case of matters requiring recording of evidence before arriving at any conclusion, Supreme Court refused to grant leave to appeal. [2011 SCMR 287]

Mere grant of leave to appeal in some other case is no ground to recall and reverse the leave refusing order in other case. [PLD 2006 S.C. 189] Moulding of relief for leave to appeal would not operate as a bar to High Court to decide constitutional petition on its own merits. [2009 SCMR 993] Such petition would lie only on established principles governing grant or refusal of leave to appeal. Such jurisdiction cannot be invoked for perpetuation of any illegality or in justice. [2011 SCMR 585]