JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD

CASE NO. : W.P. NO.1796-2024
Syed Muhammad Ali Bokhari
Vs.
Federation of Pakistan etc.

Petitioners by	:	Syed Muhammad Ali Bokhari, Advocate/petitioner in person with Syed Ishfaq Hussain Shah, Qamar Inayat Raja, Hassan Sajjad, Zakria Arif, M. Ali Haider, and Fida Hussain, Advocates in W.P.No.1796-2024 & W.P. No.1984-2024. Mr. M. Shoaib Shaheen, Advocate/petitioner in person with Barrister Hassan Shoaib, Mr. M. Umair Baluch, Mirza Waqas Qayyum and Sajeel Sheharyar Swati, Advocates in W.P. No.1797-2024 & W.P. No.1977-2024 Mr. Faisal Fareed Ch. Advocate with Bina Shahid Advocate along with petitioner in person in W.P. No.1798-2024 & 1981-2024
Respondents by	:	Mr. Waqas Mir, Ali Hassan Gillani, Kamran Haider Ali, Advocates for private respondents. Mr. Saad Hassan, Advocate for ECP with M. Arshad, D.G. (Law), Khurram Shehzad, ADG (Law) and Falak Sher, Legal Consultant. Mr. Munawwar Iqbal Duggal, Additional Attorney General with Syed Ahsan Raza Kazmi, Deputy Attorney General.
Date of decision	:	29.07.2024

AAMER FAROOQ C.J. This judgment shall decide instant writ petition as well as petitions mentioned in the Annexure attached herewith, as common questions are involved.

2. The petitioner, in W.P. No.1796-2024, contested the General Elections 2024 from NA-48 Islamabad along with respondent No.4, who was declared as returned candidate. Feeling aggrieved, he filed election petition before Election Tribunal appointed by Election Commission of Pakistan (ECP) through notification dated 17.02.2024. During course of proceedings, respondent No.4 filed transfer application under section 151 of the Elections Act, 2017 (the Act) before ECP, which stands allowed. The petitioner, in the instant petition, has challenged vires of The Elections (Amendment) Ordinance, 2024, whereby amendment was made in section 140 of the Act providing for appointment of a retired judge of a High Court as Election Tribunal without the consent of concerned Chief Justice and has also assailed

order dated 04.06.2024, whereby jurisdiction was assumed by ECP as to the transfer application as well as vires of Section 151 of the Act. Subsequently, ECP allowed the transfer application of respondent No.4 on 10.06.2024, which was also challenged by the petitioner and is the subject matter of W.P. No.1984-2024.

3. The petitioner namely Muhammad Shoaib Shaheen (W.P. No.1797-2024) contested General Elections 2024 from NA-47 ICT-II, Islamabad along with respondent No.3 and the latter was declared as a returned candidate. Feeling aggrieved, election petition was filed before Election Tribunal constituted vide Notification dated 17.02.2024 and during the course of proceedings, respondent No.3 filed transfer application under section 151 ibid. Challenge was made to provisions of The Elections (Amendment) Ordinance, 2024; assumption of jurisdiction by ECP regarding transfer application on 04.06.2024 and vires of section 151 of the Act. After transfer application was allowed by ECP on 10.06.2024, the same was challenged through W.P. No.1977-2024.

4. Aamer Masood, the petitioner in W.P. No.1798-2024, contested General Elections 2024 from Constituency NA-46, ICT-I, Islamabad but lost to respondent No.3. Election was challenged by way of a petition before Election Tribunal vide notification dated 17.02.2024. During course of proceedings, an application under section 151 of the Act was filed before ECP. The assumption of jurisdiction by ECP vide order dated 04.06.2024 was challenged along with The Elections (Amendment) Ordinance, 2024 by way of W.P. No.1798-2024 and vires of section 151 of the Act. The final order of ECP dated 10.06.2024, allowing transfer application filed by respondent No.3, was challenged through W.P. No.1981-2024.

5. It is pertinent to observe that during the course of proceedings, The Elections (Amendment) Ordinance, 2024 was presented before National Assembly and was passed by the Parliament and assented by the President of Pakistan and duly notified as The Elections (Amendment) Act, 2024 (the Act of 2024).

6. Learned counsel for the petitioners made a categoric statement that they shall not be questioning the provisions of the Act of 2024, however shall confine themselves to the extent of vires of section 151 of the Act of 2024 as well as transfer orders passed by ECP.

7. Barrister Hassan Shoaib, arguing for the petitioner in W.P. No.1797 & 1977-2024 *inter alia* contended that provisions of Section 151 of the Act, are ultra vires the Constitution. In this behalf, it was contended that plain reading of section 151 shows that power has been granted to ECP for transfer of an election petition from one Tribunal to another. It was contended that on the face of it, the power is absolute and vests with ECP with the only rider that reasons are to be given. It was submitted that this provision in fact does not synchronize with section 140 of the Act. In this behalf, it was submitted that at the time of appointment of an Election Tribunal, consultation with the Chief Justice of respective High Court, is mandatory, meaning thereby that role of the concerned High Court, is essential. It was submitted that said role of the High Court cannot be omitted at the time of transfer. Elaborating his arguments, learned counsel contended that proceedings before Election Tribunal are judicial in nature and since the Tribunal is a 'court' and proceedings are 'judicial', hence the principal of separation of powers are to be kept in mind to ensure that the Executive does not interfere in the affairs of the judiciary. Learned counsel took the Court through provisions of Article 175 of the Constitution to argue that referred provision of the Constitution provides for establishment of the courts through law. It was submitted that autonomy of the courts cannot be taken lightly and transfer of proceedings, in the referred backdrop, cannot be left solely to the Executive. He submitted that under Article 200, where a Judge of a High Court is to be transferred from one High Court to another, his consent is required along with consent of Chief Justice of concerned High Court and Chief Justice of Pakistan and only then, notification is issued by the President of Pakistan, meaning thereby that the judiciary is independent from clutches of the Executive. It was argued that power of transfer is judicial in nature and ECP, being a regulatory body constituted under the Constitution of Islamic Republic of Pakistan, does not have any judicial functions. It was contended that conferring such judicial functions on ECP through law, is against the spirit of the functions of ECP. Learned counsel took the Court through the provisions of Articles 213 to 216 of the Constitution to submit that functions and powers of ECP do not include any judicial function. Learned counsel argued that since the appointment of Election Tribunal comprising a sitting Judge of the High Court is made only after meaningful consultation with the Chief Justice of respective High Court,

absolute power of transfer cannot be conferred on ECP. It was contended that even-otherwise, transfer of cases is not to be taken lightly inasmuch as Chief Justice of a High Court does not have any authority or jurisdiction to transfer a case from one Bench to another and even when the Supreme Court does exercise this power under Article 186A of the Constitution, it is not done simply but only sparingly. It was submitted that protection is granted to the Election Tribunals under Article 225 of the Constitution and the matter cannot be left on the whims of ECP. It was submitted that since section 151 of the Act is violative of the basic provisions of Article 175 and Article 4 read with other constitutional provisions, the same is ultra vires the Constitution. In the alternative, it was submitted that if the Court comes to the conclusion that section 151 is not ultra vires the Constitution, then guidelines be provided laying down mechanism for transfer applications before ECP. It is also contended that it is appropriate that for transfer of election petition from one Tribunal to another, the word 'consultation' must be read in section 151 of the Act. It was added that where transfer is being made for administrative exigencies, it is to be concluded that appointed election Tribunal is only to perform its duties or Presiding Officer himself recuses and due to his inability to perform his work. It was also submitted that transfer order has not been passed in accordance with law as well as well established principle of jurisprudence was ignored viz no man can be a judge in his own cause. It was submitted that ECP has been impleaded as a respondent and allegations have been leveled there-against, hence it could not have transferred a petition. It was submitted that allegation of bias was leveled against the current Presiding Officer of Election Tribunal, but nothing was placed on record to substantiate that ECP passed the order without application of mind. It was contended that Presiding Officer was the competent forum for making an application of bias for transfer and only upon recusal, needful was done. Reference was made to cases reported as Liteky Vs. United States [(510 U.S. 540 (1994)], Advance Law Lexicon Dictionary, Oxford English Dictionary, Order dated 29.04.2024 in case titled Bushra Imran Khan Vs. Federation of Pakistan through Secretary, Ministry of Interior and Secretary, Ministry of Defence and others (W.P. No.2758-2023), Gen (R) Parvez Mushaarraf Vs. Nadeed Ahmed (Advocate) and another (PLD 2014 Supreme Court 585), Muhammad Azam Khan Swati Vs. The State and another (2023 P Cr. LJ 350), Muhammad Nawaz Vs. Ghulam Kadir and 3

others (PLD 1973 Supreme Court 327), Crown Vs. Abdul Aziz and S. Israr Hussain (PLD 1952 Sindh 1), Zaibo and others Vs. Habibullah and 2 others (2023 CLC 1531), Mst. Rukhsana Vs. Mian Imtiaz Aleem and 8 others (2013 MLD 739), Gujrat Electrical Board and another Vs. Atmaram SungomalPoshani (1990 MLD 957), Shehzadi Fatima Ali Vs. Nadia Asghar and 2 others (2020 CLC 1181), Chief Executive Officer Thermal, Power Station Genco and 8 others Vs. Asadullah and 2 others (2023 MLD 888), Ali Ahmed and 2 others Vs. Ghulam Mustafa and others (2022 MLD 908), Muhammad Warial Vs. Government of Sindh through DC and 5 others (2018 MLD 1438), Sain Rakhio Vs. Abdul Ghaffar and 5 others (2011 CLC 1160), Hassan Ali Gondal and others Vs.Messrs Karim Enterprises (2015 YLR 544), Saeeda Begum and 7 others Vs. District Officer (Revenue) Jhelum and 11 others (2009 YLR 950), Muhammad Younis Vs. Muhammad Ayub (2001 MLD 67), Muhammad Saleem Baig, Chairman Pakistan Electronic Media Regulatory Authority (PEMRA), Islamabad Vs. MessrsLabbaik Pvt. Ltd. through Executive Admin Bol TV, Quetta and others (PLD 2023 Supreme Court 27), Altaf Ibraim Qureshi and another Vs. Aam Log Ittehad and others (PLD 2019 Supreme Court 745), Muhammad Hanif Abbasi Vs. Imran Khan Niazi and others (PLD 2018 Supreme Court 189), Ms. Shabina Riaz Khan Vs. Federation of Pakistan and others (2016 CLC 458), United Bank Limited Vs. Federation of Pakistan and others (2018 CLD 587), The Queen Vs. Kirby and others [(1956 94 CLR 254 High Court of Australia)], Mehram Ali and others Vs. Federation of Pakistan and others (PLD 1998 Supreme Court 1445), Sami Ullah Baluch and others Vs. Abdul Karim Nousherwani and others (PLD 2018 Supreme Court 405), Muhammad Ijaz Ahmad Chaudhry Vs. Mumtaz Ahmad Tarar and others (2016 SCMR 1), Chief Election Commissioner of Pakistan and others Vs. Miss Nasreen Pervez [(2009 PLC (CS) 650],MessrsRanyal Textiles through Proprietor/Employer Vs. Sindh Labour Court No.3, Karachi and 3 others (PLD 2010 Karachi 27), Sh. Riaz Ul Haq and others Vs. Federation of Pakistan and others (PLD 2013 Supreme Court 501), Imran Vs. Presiding Officer, Punjab Special Court No.VI, Multan and 2 others (PLD 1996 Lahore 542), Reference No.1 of 2020: In the matter of (PLD 2021 Supreme Court 825), Sardar Bahadur Khan Bangulzai and others Vs. Sardar Attullah Khan Mengal and another (1999 SCMR 1921), Al-Jehad Trust through Raees-ul-Mujahideen Habib Al-Wahabul Khairi, Advocate Supreme Court and another Vs. Federation of Pakistan and others (PLD 1997

Supreme Court 84), Mahmood Khan Achakzai and others Vs. Federation of Pakistan and another (PLD 1997 Supreme Court 426), Shahid Nabi Malik and another Vs. Chief Election Commissioner, Islamabad and 7 others (PLD 1997 Supreme Court 32), Al-Jehad Trust through Raeesul Mujahideen Habib-ul-Wahab-ul-Khairi and others Vs. Federation of Pakistan and others (PLD 1996 Supreme Court 324), Sheikh Abdul Aziz Hamad Al-Gosaibi Vs. Pakistan International Airlines Corporation (PLD 1995 Karachi 566), District Bar Association, Rawalpindi and others Vs. Federation of Pakistan and others (PLD 2015 Supreme Court 401), M.H. Khondkar Vs. The State (PLD 1966 Supreme Court 140), Asif Ali Zardari and another Vs. The State (PLD 2001 Supreme Court 568), Brig. (R) F.B. Ali and another Vs. The State (PLD 1975 Supreme Court 506), Ms. Shabina Riaz Khan Vs. Federation of Pakistan (2016 CLC 458), Naveed Hussain Vs. The State and others (PLD 2020 Lahore 382), Raja Arshad Mehmood Vs. Mst. Maliha Malik and others (2020 SCMR 69), In the matter of Reference No.2 of 2005 by the President of Pakista (PLD 2005 Supreme Court 873) and Mohtarma Benazir Bhutto, Leader of the Opposition, Bilawal House, Clifton, Karachi and another Vs. The State through Chief Ehtesab Commissioner, Islamabad (1999 SCMR 759).

8. Syed Ishfaq Hussain Shah, Advocate, appearing for the petitioner in W.P. No.1796 & 1984-2024, *inter alia* contended that under Chapter 9 of the Act, disputes arising from elections, can only challenged by way of election petition under section 139 ibid. It was submitted that section 140 outlines the procedures for appointment of Election Tribunal and as for the same, a sitting Judge of the High Court, is to be appointed after consultation with the respective Chief Justice of that court. It was submitted that power to transfer an election petition from one Tribunal to another is provided to the ECP. It was submitted that though it is not exclusively provided in section 151 ibid but whenever transfer is to be made by ECP from one Tribunal to another, it should be read in section 151 that it requires concurrence of the Chief Justice of that High Court. It was submitted that provisions of section 151 be read in a manner that other provisions of the Act do not become redundant. It was submitted that for purposeful interpretation, this Court can read in the words to harmonize the same with other provisions. Reference was made to Muhammad Ayub Vs. Abdul Khaliq (1990 MLD 1293), Lt. Col. Nawabzada Muhammad Amir Khan Vs. The Controller of

Estate Duty etc. (PLD 1961 Supreme Court 119), Pakistan Tobacco Company Limited Vs. Pakistan Tobacco Company Employees Union, Dacca etc. (PLD 1961 Supreme Court 403) and Shalimar Recording and Broadcasting Company through Managing Director, Islamabad Vs. The Commissioner Inland Revenue (Appeals), LTU, Islamabad and 2 others (2019 PTD 2082). It was submitted that under the facts and circumstances, no ground for transfer was made out and the impugned order has been passed without lawful authority. It was contended that the allegation of bias has been leveled but no bias, as such, is made out. It was added that no opportunity to file reply was given to the petitioners.

9. Mr. Faisal Fareed Chaudhry, Advocate for the petitioner in W.P. No.1798 & 1981-2024, while adopting submissions made by other two learned counsel for the petitioners *inter alia* contended that while passing transfer order dated 10.06.2024, ECP has given finding on merit of the matter, which is totally uncalled for and ought to have not been made. It was added that there was no need or necessity for rendering such finding. It was also submitted that allegation leveled in the transfer application are derogatory and scandalous and should be omitted. It was further contended that allegation of nepotism and such like behavior on part of Presiding Officer of Election Tribunal was made, which is neither borne out from the record nor circumstances reflect so.

10. Mr. Waqas Mir, Advocate Supreme Court, appearing for the private respondents in all the petitions, controverted the stance taken by the petitioners. He submitted that vires of section 151 have been questioned on the touchstone that it violates the provisions of the Constitution. In this behalf, it was submitted that law has exhaustively been dealt with as to declaring the provisions of the statute ultra vires in case reported as Lahore Development Authority Ltd. Vs. Ms. Imrana Tiwana and others (2015 SCMR 1739). It was contended that none of the arguments raised by the petitioners meet the guidelines laid down in the said case. He also made reference to case reported as NS Bindra's Interpretation of Statutes, 12th Edition and Fundamental Law of Pakistan, AK Brohi to submit that principles laid down in the referred piece of work clearly show that the petitioner have failed to meet the criteria for declaring the provision of the statute i.e. section 151 as ultra vires. Learned counsel then took the Court through the scheme of the provisions pertaining to Election Commission of Pakistan in

three Constitutions viz the Constitution of the Islamic Republic of Pakistan, 1956,the Constitution of the Islamic Republic of Pakistan, 1962, and the Constitution of the Islamic Republic of Pakistan, 1973, to argue that for a period of time, Election Commission has evolved as a regulator and has certain rights and obligations. It was contended that functions of the ECP, as laid down in the present Constitution, are manifold and *inter alia* contained in Articles 219 to 222. It was submitted that duties of the Commission include appointing Election Tribunals and also through electoral laws passed by the Parliament to resolve the disputes arising in connection with elections. It was argued, with emphasis, that no law can abridge or take away the powers of ECP under the Constitution (Article 222). It was submitted that Election Tribunal appointed under section 140 of the Act is a *persona designata* and is not a Judge of the High Court while performing duties as Election Tribunal. Reference was made to cases reported as Pakistan Fisheries Limited, Karachi and others Vs. United Bank Limited (PLD 1993 Supreme Court 109), Messrs Tri-Star Polyester Limited and others Vs. Citi Bank (2001 SCMR 410), State and others Vs. Shereen Shah and others (CP No.388-P of 2016), Brothers Sugar Mills Limited and others Vs. Punjab Cooperative Board for Liquidation and others (2012 CLC 1369) and Gul Taiz Khan Marwat Vs. Registrar and others (PLD 2021 Supreme Court 391). To substantiate his arguments, he also placed reliance on cases reported as M.H. Khondkar Vs. The State (PLD 1996 SC 140), Abdul Haque Vs. The State (PLD 1996 SC 1), Hajj Organizers Association of Pakistan Vs. Federation of Pakistan (PLD 202 Sindh 42), Ms. Shabina Riaz Khan Vs. Federation of Pakistan (2016 CLC 458) and Mir Abdul Baqi Baluch Vs. The Government of Pakistan and others (PLD 1968 SC 313). It was argued that provisions of section 151 are not ultra vires the Constitution, as the power to transfer solely vests with ECP, which is administrative and supervisory in nature. It was contended that law provides that ECP can transfer a case from one Election Tribunal to another after assigning reasons. He submitted that since this power is supervisory in nature and ECP is a regulatory body, hence it falls within its sole domain to transfer a case from one Tribunal to another. It was contended that there is no requirement to read any words in the alternative of the Act inasmuch as it is clear that it is not the mandate of law. Moreover, it was contended that generally Election Tribunal appointed, if comprises of a sitting Judge of a High Court, then same must be appointed

with the consultation of the Chief Justice of that High Court and if it is a retired Judge, then there is no need to consult hence law, as it stands today, provides two different regimes and it cannot be read in that it is mandatory for ECP to consult with the Chief Justice at the time of transfer. Reference was made to cases reported as Sharaf Faridi and others Vs. Federation of Islamic Republic of Pakistan and others (PLD 1989 Karachi 404), Government of Sindh and others Vs. Sharaf Faridi and others (PLD 1994 SC 105), Government of Baluchistan Vs. Azizullah Memon and others (PLD 1993 SC 341), Registrar, Supreme Court of Pakistan Vs. Qazi Wali Muhammad (1997 SCMR 141), Mehram Ali and others Vs. Federation of Pakistan and others (PLD 1998 Supreme Court 1445), Imran Versus Presiding Officer, Punjab and others (PLD 1996 Lahore 542), Sh. Riaz Ul Haq and others Vs. Federation of Pakistan and others (PLD 2013 Supreme Court 501) and Khan Asfandyar Wali and others Vs. Federation of Pakistan and others (PLD 2001 Supreme Court 607). It was contended that, to resolve election disputes and supervise the same, is the bounden duty of ECP under the Constitution and the Act and since it is the sole duty conferred by the Constitution and the Act, hence it is to be exercised by ECP only. Reference was made to cases reported as Election Commission of Pakistan and others Vs. Javaid Hashmi and others (PLD 1989 Supreme Court 396), Workers Party Pakistan and others Vs. Federation of Pakistan and others (PLD 2012 Supreme Court 681), Aftab Shahban Mirani and others Vs. Muhammad Ibrahim and others (PLD 2008 Supreme Court 779), Let. Gen. Salahuddin Tirmizi Vs. Election Commission of Pakistan and others (PLD 2008 Supreme Court 735), Ali Asjad Malhi Vs. Syed Nosheen Iftikhar (PLD 2023 Supreme Court 01), Aurangzeb Khan Vs. Election Commission of Pakistan and others (PLD 2010 SC 34), Ghulam Mustafa Jatoi Vs. Additional Sessions Judge (1994 SCMR 1299), Ayatullah Dr. Imran Liaqat Vs. Election Commission of Pakistan 9PLD 2005 SC 52) and Muhammad Tariq Chaudhry Vs. Masroor Ahsan and others (PLD 1991 Lahore 200).

Objecting to the petitions challenging transfer orders, it was contended that orders of ECP cannot be questioned in a writ petition ordinarily and in this behalf, a very high standard is required and only when order impugned is without jurisdiction or patently illegal, a petition under Article 199 of the Constitution is maintainable. Reference was made to cases reported as Tariq Transport Company Vs. Sargodha Bhera Bus Service and others (PLD 1958

Supreme Court 437), Shell Company Vs. Federal Commissioner of Taxation(1931 AC 275), United Engineering Union Vs. Devanayagam [(1967) 2 All ER 367)] and Sh. Riaz Ul Haq and others Vs. Federation of Pakistan and others (PLD 2013 Supreme Court 501). It was contended that transfer orders were passed by ECP only on the ground of bias but due to the fact that the way the proceedings were being conducted. Learned counsel took the Court through the provisions of the Act to show that mandatory procedure, provided in sections 141, 142 and 143 of the Act, was not followed hence respondents were left with no option but to apply for the transfer. It was submitted that where such is the case, keeping in view the nature of the authority, ECP passed the transfer orders.

11. Learned counsel for ECP adopted the submissions made by learned counsel for private respondents, however contended that under section 151 of the Act, ECP does have jurisdiction to pass transfer orders from one Election Tribunal to another, but has to assign reasons.

12. Learned Additional Attorney General defended the vires of section 151 of the Act and contended that there is no need or necessity to read anything in section 151. Reference was made to case reported as Peoples University of Medical and Health Sciences for Women through Registrar and four others Vs. Pakistan Ministry of Health Services, Regulation and Coordination through Secretary and 13 others (PLD 2021 Sindh 256). It was contended that on the said principles, no justification is made out to strike down the law.

13. Submissions made by the parties have been heard and the documents, placed on record, examined with their able assistance.

14. The legal and factual aspects of the case have already been mentioned in the preceding paragraphs and are also reflected in the arguments of learned counsel for the parties. The primary issues, involved in this case, are transfer orders passed by ECP and the vires of section 151 of the Act, which empowers ECP to transfer any election petition from one Election Tribunal to another. There are certain ancillary issues as well which are connected to the primary issues; the same being, the status of Election Tribunal and maintainability of a petition under Article 199 of the Constitution against decision of ECP. Before dealing with the primary and ancillary issues, it would be appropriate to reproduce relevant provisions of law. Since the transfer order has been passed by ECP under section 151 ibid and the vires

thereof are under challenge, hence it is the key provision and is reproduced below:-

> *"**151. Power to transfer petition**- The Commission may at any stage, on its own motion or on an application of a party and for reasons to be recorded, transfer an election petition from one Election Tribunal to another Election Tribunal and the Election Tribunal to which the lection petition is transferred-*
>
> *a) shall proceed with the trial of the election petition from the stage from which it is transferred; and*
> *b) may, if it deems fit, recall and examine any witness who has already been examined."*

The appointment of Election Tribunal is made by ECP under section 140 of the Act, which reads as follows:-

> *"140. **Appointment of Election Tribunals.—**(1) For the trial of election petitions under this Act, the Commission shall appoint as many Election Tribunals as may be necessary for swift disposal of election petitions.*
>
> *(2) An Election Tribunal shall comprise—*
>
> *(a) in the case of an election to an Assembly or the Senate, a person who is a Judge of a High Court; and*
>
> *(b) in the case of an election to a local government, a District and Sessions Judge or an Additional District and Sessions Judge.*
>
> *(3) The Commission shall appoint a sitting judge as Election Tribunal in consultation with the Chief Justice of the High Court concerned".*

It is important to mention that during pendency of petitions in question, Section 140 ibid was amended through Election (Amendment) Ordinance, 2024, whereby appointment of a Tribunal could also be made comprising a retired Judge of the High Court, however, a notable omission/substitution was made which is that while making said appointment, no consultation is required to be made with the Chief Justice of the respective Court. The said provision is reproduced below:-

> *"140. **Appointment of Election Tribunals.—**(1) For the trial of election petitions under this Act, the Commission shall appoint as many Election Tribunals as may be necessary for swift disposal of election petitions.*
>
> *(2) An Election Tribunal shall comprise—*
>
> *(a) in the case of an election to an Assembly or the Senate, a person who is [or has been][1] a Judge of a High Court; and*
>
> *(b) in the case of an election to a local government, [a person who is or has been][2] a District and Sessions Judge or [a person who is or has been][3] an Additional District and Sessions Judge.*

[1] Inserted by Ordinance No.V of 2024 dated 27.05.2024
[2] Ibid

[(3) In case of appointment of a sitting Judge as the Election Tribunal, the Commission shall consult with the Chief Justice of the High Court concerned"][4].

The powers of the ECP and the procedures, it has to follow, is contained in sections 141 to 149 of the Act, which read as follows:-

"141. Powers of the Election Tribunal.—(1) The Election Tribunal shall have all the powers of a civil court trying a suit under the Code of Civil Procedure, 1908 (Act V of 1908), and shall be deemed to be a civil court within the meaning of sections 476, 480 and 482 of the Code.

(2) For the purpose of enforcing attendance of witnesses, the local limits of the jurisdiction of the Election Tribunal shall be the territories to which this Act extends.

142. Presentation of petition.—(1) An election petition shall be presented to the Election Tribunal within forty-five days of the publication in the official Gazette of the name of the returned candidate and shall be accompanied by a receipt showing that the petitioner has deposited at any branch of the National Bank of Pakistan or at a Government Treasury or Sub-Treasury in favour of the Commission, under the prescribed head of account, as security for the costs of the petition, such amount as may be prescribed.

(2) An election petition shall be deemed to have been presented—

(a) when delivered to the Election Tribunal appointed under section 140—

(i) by the petitioner in person; or
(ii) by a person authorized in writing in this behalf by the petitioner; or

(b) when sent by registered post or courier service to the Election Tribunal by the petitioner.

(3) An election petition, if sent by registered post or courier service, shall be deemed to have been presented in time if it is posted or sent within the period specified in sub-section (1).

*143. **Parties to the petition.—**(1) The petitioner shall join as respondents to his election petition all other contesting candidates.*

(2) The Election Tribunal may direct the petitioner to join any other person as respondent against whom any specific allegation of contravention of this Act has been made.

(3) The petitioner shall serve a copy of the election petition with all annexures on each respondent, personally or by registered post or courier service, before or at the time of filing the election petition.

*144. **Contents of petition.—**(1) An election petition shall contain—*

(a) a precise statement of the material facts on which the petitioner relies; and

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[3] ibid

[4] Substituted by Ordinance No.V of 2024 dated 27.05.2024

(b) full particulars of any corrupt or illegal practice or other illegal act alleged to have been committed, including names of the parties who are alleged to have committed such corrupt or illegal practice or illegal act and the date and place of the commission of such practice or act.

(2) The following documents shall be attached with the petition—

(a) complete list of witnesses and their statements on affidavits;
(b) documentary evidence relied upon by the petitioner in support of allegations referred to in 1[clause (b) of sub-section (1);
(c) affidavit of service to the effect that a copy of the petition along with copies of all annexures, including list of witnesses, affidavits and documentary evidence, have been sent to all the respondents by registered post or courier service; and (d) the relief claimed by the petitioner.

(3) A petitioner may claim as relief any of the following declarations—

(a) that the election of the returned candidate is void and petitioner or some other candidate has been elected; or
(b) that the election of the returned candidate is partially void and that fresh poll be ordered in one or more polling stations; or
(c) that the election as a whole is void and fresh poll be conducted in the entire constituency.

(4) An election petition and its annexures shall be signed by the petitioner and the petition shall be verified in the manner laid down in the Code of Civil Procedure, 1908 (Act V of 1908) for the verification of pleadings.

*145. **Procedure before the Election Tribunal.—**(1) If any provision of section 142, 143 or 144 has not been complied with, the Election Tribunal shall summarily reject the election petition.*

(2) If an election petition is not rejected under sub-section (1), the Election Tribunal shall issue notice to each of the respondents through—

(a) registered post acknowledgement due;
(b) courier service or urgent mail service;
(c) any electronic mode of communication, which may include radio, television, email and short message service (sms);
(d) affixing a copy of the notice at some conspicuous part of the house, if any, in which the respondent is known to have last resided or at a place where the respondent is known to have last carried on business or personally worked for gain;
(e) publication in two widely circulated daily newspapers at the cost of the petitioner; and
(f) any other manner or mode as the Tribunal may deem fit.

*146. **Appearance before Election Tribunal.—**(1) Any appearance, application or act before an Election Tribunal may be made or done by a party in person or by an advocate or any other person entitled or allowed to plead in a civil court and duly appointed to act on his behalf:*

Provided that the Tribunal may, where it considers it necessary, direct any party to appear in person.

(2) If a respondent fails to appear before the Election Tribunal on a date of hearing despite service of notice through any one of the modes mentioned in section 145, the Tribunal shall proceed against the respondent ex-parte.

*147. **Contents of reply.**—(1) The reply by a respondent to an election petition shall contain a precise statement of the material facts on which the respondent relies to rebut the allegations in the election petition.*

(2) The respondent shall, amongst others, attach the following documents with the reply—

(a) complete list of witnesses and their statements on affidavits; and
(b) documentary evidence relied upon by the respondent to rebut the allegations in the election petition.

(3) In addition to dismissal of the election petition, the respondent may claim costs of the proceedings as well as award of special costs if the election petition is held to be frivolous or vexatious.

*148. **Procedure before Election Tribunal for trial of petitions.**—(1) Subject to this Act and the Rules, the trial of an election petition 1[shall be,] as nearly as possible, in accordance with the procedure applicable under the Code of Civil Procedure, 1908 (Act V of 1908) to the trial of suits and the Qanun-e-Shahadat Order, 1984 (President's Order. No. X of 1984).*

(2) The Election Tribunal shall, unless it directs otherwise for reasons to be recorded, order any or all the facts to be proved or disproved by affidavit and may, for the purposes of expeditious disposal, apply such other procedure as the circumstances of the case may warrant.

(4) On filing of reply by the respondent, the Election Tribunal may, with the consent of parties, fix specific dates for trial and disposal of the petition, providing for continuous hearing without adjournment.

(5) If the parties do not consent to specific dates under sub-section (4), the Election Tribunal shall proceed with the trial of the election petition on day to- day basis and no adjournment shall be granted to any party for more than seven days and that too on payment of one hundred thousand rupees and the election petition shall be decided within one hundred and eighty days of its filing.]

(6) If an election petition is not finally decided within one hundred and 3[eighty] days—

(a) further adjournment sought by a party shall be granted only on payment of special costs 4[ranging from ten thousand to fifty] thousand rupees per adjournment and adjournment shall not be granted for more than three days;
(b) If the Election Tribunal itself adjourns the election petition, it shall record reasons for such adjournment;
(c) where the delay in the proceedings is occasioned by any act or omission of a returned candidate or any other person acting on his behalf, the Election Tribunal itself or on application of the aggrieved party, may, after issuance of show cause notice to the returned candidate and within fifteen days of the date of show cause notice, order that the returned candidate has ceased to perform the functions of his office either till the conclusion of the proceedings or for such period as the Tribunal may direct; and
(d) if a serving Judge is the Election Tribunal, the Commission shall request the Chief Justice of the High Court that no judicial work other than election petitions should, to the extent practicable, be entrusted to him till the final disposal of the election petitions.

(7) The Election Tribunal may, for reasons to be recorded, refuse to examine any witness if it is of the opinion that the evidence of such witness is not material for the decision of the election petition or that the party on whose behalf such witness has been summoned has done so on frivolous grounds or with a view to delaying the proceedings.

(8) Notwithstanding anything contained in any other law, no document shall be inadmissible in evidence at the trial of an election petition only on the ground that it is not properly stamped or registered under the relevant law.

(9) A witness shall not be excused from answering any question as to any matter in issue or relevant to a matter in issue in the trial of an election petition upon the ground that the answer to such question may incriminate or tend to incriminate him or that it may expose or tend to expose him to any penalty or forfeiture, but a witness shall not be required or permitted to state for whom he has voted at an election.

(10) A witness who truly answers all questions which he is required to answer may be granted a certificate of indemnity by the Election Tribunal and an answer given by him to a question put by or before the Tribunal shall not, except in the case of any criminal proceeding for perjury in respect of his evidence, be admissible in evidence against him in any civil or criminal proceedings.

(11) A certificate of indemnity granted to any witness under sub-section (10) may be pleaded by him in any court and shall be a full and complete defence to or upon any charge under Chapter IXA of the Pakistan Penal Code, 1860 (Act LXV of 1860) or under this Act, arising out of the matters to which such certificate relates, but it shall not be deemed to relieve him from any disqualification in connection with an election imposed by any law.

(12) The Election Tribunal shall direct any party to pay reasonable expenses incurred by any person in attending the Tribunal to give evidence and shall, unless the Tribunal otherwise directs, be deemed to be part of the costs.

*149. **Amendment of petition.—**(1) The Election Tribunal may, at any time before the commencement of recording of evidence and upon such terms and on payment of such costs as it may direct, allow the petitioner to amend the election petition in such manner as may, in its opinion, be necessary for ensuring a fair and effective trial and for determining the real questions at issue but shall not permit raising of a new ground of challenge to the election through such amendment.*

(2) At any time during the trial of an election petition, the Election Tribunal may call upon the petitioner to deposit such further sum by way of security, in addition to the sum deposited under section 142 as it may deem fit and shall dismiss the election petition, if the petitioner fails to make the further deposit".

Since the vires of law (section 151 of the Act) has been challenged on the touchstone of the provisions of the Constitution, hence relevant provisions of the Constitution are reproduced below. Article 175 of the Constitution is as follows:-

*"**175. Establishment and jurisdiction of courts.** (1) There shall be a Supreme Court of Pakistan, a High Court for each Province and a High*

Court for the Islamabad Capital Territory and such other courts as may be established by law.

[Explanation. — Unless the context otherwise requires, the word "High Court" wherever occurring in the Constitution shall include Islamabad High Court".]

(2) No court shall have any jurisdiction save as is or may be conferred on it by the Constitution or by or under any law.

(3) The Judiciary shall be separated progressively from the Executive within fourteen years from the commencing day.

Provided that the provisions of this Article shall have no application to the trial of persons under any of the Acts mentioned at Serial No. 6 and 7 of sub-part III of Part I of the First Schedule, who claim, or are known, to belong to any terrorist group or organization misusing the name of religion or a sect.

Explanation.— In this proviso the expression "sect" means a sect of religion and does not include any religious or political party regulated under the Political Parties Order, 2002.]

***175A. 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—

(i)	*Chief Justice of Pakistan;*	*Chairman*
(ii)	*[four] most senior Judges of the Supreme Court;*	*Member*
(iii)	*a former Chief Justice or a former Judge of the Supreme Court of Pakistan to be nominated by the Chief Justice of Pakistan, for a period of two years;*	*Member*
(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:—

(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)	*a advocate having not less than fifteen years practice in the High Court to be nominated by the concerned Bar council for a term of*	*Member*

	two years:	

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 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 appointment of Judges of the Islamabad High Court, the Commission in clause (2) shall also include the following, namely:—

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

Provided that for initial appointment of the 1 [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:

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

Provided that the Committee, for reasons to be recorded, may not confirm the nomination by three-fourth majority of its total membership within the said period:

Provided further that if a nomination is not confirmed by the Committee it shall forward its decision with reasons so recorded to the Commission through the Prime Minister:

Provided further that if a nomination is not confirmed, the Commission shall send another nomination.

(13) 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) 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.

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

Article 203 of the Constitution reads as follows:-

"203. High Court to superintend subordinate Courts. *Each High Court shall supervise and control all courts subordinate to it.*

Articles, 218, 219, 220, 222 & 225 of the Constitutions read as under:-

218. Election Commission. *(1) For the purpose of election to both Houses of Majlis-e-Shoora (Parliament), Provincial Assemblies and for election to such other public offices as may be specified by law, a permanent Election Commission shall be constituted in accordance with this Article.*

(2) The Election Commission shall consist of—

(a) the Commissioner who shall be Chairman of the Commission; and

(b) four members, one from each Province, each of whom shall be a person who has been a judge of a High Court or has been a senior civil servant or is a technocrat and is not more than sixty-five years of age, to be appointed by the President in the manner provided for appointment of the Commissioner in clauses (2A) and (2B) of Article 213.

Explanation.—"senior civil servant" and "technocrat" shall have the same meaning as given in clause (2) of Article 213.

(3) It shall be the duty of the Election Commission to organize and conduct the election and to make such arrangements as are necessary to ensure that the election is conducted honestly, justly, fairly and in accordance with law, and that corrupt practices are guarded against.

219.Duties of Commission. *The Commission shall be charged with the duty of—*

(a) preparing electoral rolls for election to the National Assembly, Provincial Assemblies and local governments, and revising such rolls periodically to keep them up-to-date;

(b) organizing and conducting election to the Senate or to fill casual vacancies in a House or a Provincial Assembly; and

(c) appointing Election Tribunals

(d) the holding of general elections to the National Assembly, Provincial Assemblies and the local governments; and

(e) such other functions as may be specified by an Act of Majlis-e-Shoora (Parliament)

Provided that till such time as the members of the Commission are first appointed in accordance with the provisions of paragraph (b) of clause (2) of Article 218 pursuant to the Constitution (Eighteenth Amendment) Act, 2010, and enter upon their office, the Commissioner shall remain charged with the duties enumerated in paragraphs (a), (b) and (c) of this Article.

220. Executive authorities to assist Commission, etc. *It shall be the duty of all executive authorities in the Federation and in the Provinces to assist the Commissioner and the Election Commission in the discharge of his or their functions.*

222. Electoral laws. *Subject to the Constitution, Majlis-e-Shoora (Parliament) may by law provide for—*

(a) the allocation of seats in the National Assembly as required by clauses (3) and (4) of Article 51;

(b) the delimitation of constituencies by the Election Commission including delimitation of constituencies of local governments;

(c) the preparation of electoral rolls, the requirements as to residence in a constituency, the determination of objections pertaining to and the commencement of electoral rolls;

(d) the conduct of elections and election petitions the decision of doubts and disputes arising in connection with elections;

(e) matters relating to corrupt practices and other offences in connection with elections; and

(f) all other matters necessary for the due constitution of the two Houses the Provincial Assemblies and local governments;

> *but no such law shall have the effect of taking away or abridging any of the powers of the Commissioner or the Election Commission under this Part.*
>
> ***225. Election dispute.*** *No election to a House or a Provincial Assembly shall be called in question except by an election petition presented to such tribunal and in such manner as may be determined by Act of Majlis-e-Shoora (Parliament).”*

15. After highlighting the issues and reproduction of law, I propose to decide ancillary issues first before proceeding to render my opinion on the core issues involved.

16. The first ancillary issue is regarding the status of Election Tribunal. Under Article 225 of the Constitution, no election to a House or a Provincial Assembly shall be called in question except by an election petition presented to such tribunal and in such manner as may be determined by Act of the Parliament, meaning thereby the Constitution has catered for establishment of a forum for resolving the election disputes. Pursuant to Article 225 of the Constitution, election tribunals are to be created under law to be enacted by Parliament and the Presiding Officers thereof to be appointed in a manner as laid down in the law. In this behalf, relevant provisions for filing a petition challenging any election, appointment of the Tribunal, the powers and procedures to be followed by such tribunals, are contained in sections 140 to 150 of the Act. Section 140 ibid, which provides for the appointment of Presiding Officer of the election tribunal, as existed at the time of General Elections, 2024 was to the effect that Election Tribunal shall comprise of a sitting Judge of the High Court to be appointed with consultation of the Chief Justice of that High Court, but amendment was made, after the elections, whereby a former Judge of the High Court could head the Tribunal and his appointment did not require consultation with the Chief Justice of that High Court. The referred law makes it clear that now, as the law stands, an Election Tribunal can be presided by either a sitting Judge of a High Court or the former Judge of the High Court for the purposes of determination of election disputes with respect to elections of Assembly or the Senate.

17. The question for determination, before the Court, is where a sitting Judge of a High Court is appointed as Election Tribunal; whether he, while doing so, is acting as a Judge of the High Court or is *persona designata* (as was argued by learned counsel for the respondents). The seminal judgement on the question seems to be Mian Jamal Shah Vs. The Member, Election

Commission, Government of Pakistan, Lahore etc. (PLD 1966 Supreme Court 1).In the referred case, though the issues involved were different, but one issue was whether against order of election tribunal, a petition under Article 199 of the Constitution, is maintainable. While addressing this issue, Mr. Justice A.R. Cornellus, C.J., as he then was, observed that the Judge of a High Court while sitting as Presiding Officer of Election Tribunal, is a *persona designata* and not the High Court or a Judge of the High Court, he went on to observe that in appropriate cases, even a petition under Article 98 of 1962 Constitution (predecessor of Article 199 of the present Constitution), was maintainable.

18. There are some other judgments, which are later in time and which discuss the concept of *persona designata.* Since judgment reported as PLD 1966 Supreme Court 1 supra is direct on the issue yet following judgments are reproduced for further analysis. In case reported as Pakistan Fisheries Limited, Karachi and others Vs. United Bank Limited (PLD 1993 Supreme Court 109), the Supreme Court was concerned with a similar proposition, as to whether a Judge of a High Court, while exercising power as Banking Court, is *persona designata* or acts as a High Court; while dealing with the issue, it was reiterated that when a Judge of a High Court acts as Banking Court, it is *persona designata* and not the High Court. Similar observations were made in cases reported as Messrs Tri-Star Polyester Limited and others Vs. Citi Bank (2001 SCMR 410) as well as Ehsan Ellahi Vs. Muhammad Arif (2001 SCMR 416) and a fairly recent judgment dated 10.05.2023 titled as State and others Vs. Shereen Shah and others (CP No.388-P of 2016).In the referred case, petitions under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973, were filed against the decision of Special Appellate Court under section 44 of the Prevention of Smuggling Act, 1977. The Presiding Officer of the Appellate Court was the Judge of High Court. An order of Special Appellate Court was challenged before Peshawar High Court through writ petition; the petition was dismissed as not maintainable on the basis that since a Judge of a High Court presides over Special Appellate Court, therefore writ cannot be granted in terms of Article 199(5) of the Constitution. The Supreme Court of Pakistan reversed the said finding on the basis that Special Appellate Court constituted under the Act of 1977 is distinct from High Court. It was observed that the former is a creation of the statute while the latter that of the Constitution. It was observed that

jurisdiction, powers and functions of the Special Appellate Court are provided and governed under the Act of 1977 and while presiding as Special Court, the status of the Presiding Officer, despite being a sitting Judge of a High Court, is that of *persona designata* and not the Judge of a High Court. The presiding judge of the Special Court is no more than an individual as opposed to a Judge ascertained as a member of the High Court. It was also observed that the mischief contemplated under Article 199(5) is, therefore, not attracted in such like cases, as the action of a Judge, which relates to the performance of the latter's duties and functions as a Judge of the High Court or as a member thereof, cannot be brought under challenge under Article 199 of the Constitution. The Supreme Court went on to observe that that every action of a Judge of a High Court, performing functions and exercising powers and jurisdiction as a *persona designata* are amenable to the jurisdiction of the High Court under Article 199 of the Constitution. It was also observed that competence of a High Court to issue a writ to a Judge of the High Court in his personal capacity or working as a *persona designata* has been affirmed by a larger bench of Supreme Court consisting of thirteen Judges. Reference was made to case reported as Chief Justice of Pakistan Iftikhar Muhammad Chaudhry Vs. President of Pakistan and others (PLD 2010 SC 61). The Supreme Court concluded that acts, orders or judgments of the Appellate Court established under the Act of 1977, are not immune from the jurisdiction of the High Court under Article 199 of the Constitution because its presiding Judge performs judicial functions as *persona designata*. The upshot of the above discussion is that Election Tribunal presided by a sitting Judge of the High Court is not a High Court but is *persona designata* and in appropriate cases, as observed in case reported as PLD 1966 SC 01 supra, a petition under Article 199 of the Constitution shall be maintainable, if order impugned suffers from jurisdictional error or is patently against the law.

19. The second ancillary issue, mentioned hereinabove, is regarding maintainability of a petition under Article 199 of the Constitution. The preliminary objection was taken by learned counsel for the respondents that such a petition is not maintainable and even if it is, the yardstick for setting aside such order is very high. In order to address this preliminary issue on part of respondents, it is important to examine the status of ECP. Admittedly, ECP has a constitutional role. It always had that role as is

obvious from reading of the Constitutions of the Islamic Republic of Pakistan, 1956 and 1962. The present Constitution of 1973 also confirms the said position. Article 218 of the Constitution provides for the creation of ECP and the primary or core function of the Body is to hold and conduct elections for the Parliament as well as Provincial Assemblies and other Public Offices, as may be provided by law. The duties of ECP under Article 219 include appointing Election Tribunals. Similarly, it is provided in Article 222 ibid that the Parliament shall legislate by enacting law pertaining to conducting of elections and election petitions; the decisions of doubts and disputes arising in connection with the elections. This led to various legislations in past, but the law, as it stands in its present form, is consolidation of various laws and provides for the powers, duties and functions of ECP and the ancillary issues by way of Elections Act, 2017. As noted above, prior to the Act, there were various enactments dealing with different aspects of the elections and allied matters pertaining thereto; for instance, there was Representation of Peoples Act, 1973, Senate Act, 1977, Political Parties Order, 2002 etc. There is no cavil with the proposition that that ECP is a constitutional body and its functions and duties flow out of the Constitution and are also contained in the Act of 2017.

20. The central question before the Court with respect to the maintainability of the present petitions is, whether any administrative/ executive or quasi-judicial function exercised by ECP, is amenable to writ jurisdiction of this Court; the simple response to this query is in affirmative. The duties and functions performed by ECP are amenable to writ jurisdiction of this Court. In holding so, I am fortified by various judgments on the issue, however, let me cite some key judgments highlighting the election process and also regarding forum for resolution of the election disputes. In case reported as Election Commission of Pakistan and others Vs. Javaid Hashmi and others (PLD 1989 Supreme Court 396), the Supreme Court of Pakistan interpreted and affirmed the constitutional provision that any dispute, arising out of elections, is to be filed before ECP and is not challengeable before any other forum. The Supreme Court went on to observe by making a comparison of Articles 225 & 199 of the Constitution by observing that exercise of powers under Article 199 ibid cannot be placed on any higher footing than that emanating from Article 225 of the Constitution and while the power under Article 199 exercise-able by the High Court, is ‘Subject to

the Constitution'; there is no such limitation in Article 225. This Article by its language creates an independent jurisdiction for the decision of election disputes under the law and its contents, therefore, should be given due sanctity regardless of whatever is stated in other Articles. It was also observed that Article 225 is not controlled by Article 199 and creates an independent jurisdiction. Likewise, in case reported as Workers Party Pakistan and others Vs. Federation of Pakistan and others (PLD 2012 Supreme Court 681), the Supreme Court of Pakistan spelt out the functions and duties of ECP. In case reported as Aftab Shahban Mirani and others Vs. Muhammad Ibrahim and others (PLD 2008 Supreme Court 779), the core question before the Supreme Court was, whether a petition under Article 199 of the Constitution, is maintainable, even after Election Tribunal has been constituted and the opinion was in 'affirmative'. It was observed that High Court, no doubt can set aside the orders passed by Election Commission, if it comes to the conclusion that order was illegal but care must be taken by using the language for such exercise of power. Similar proposition was before the Supreme Court in case reported as Let. Gen. Salahuddin Tirmizi Vs. Election Commission of Pakistan and others (PLD 2008 Supreme Court 735) and it was opined that the scope of judicial review by a High Court in presence of Article 225 is that where election authority acts without lawful authority or it is *corum non judice* or malafide, interference is warranted, however, jurisdiction of the High Court cannot be enlarged to cases relating to factual inquiry or in case, in which, other view of the matter was also possible and if such view would have been taken it would not be illegal or unconstitutional. It was added that High Court is also not supposed to substitute its opinion on the question of fact with the opinion formed by election authority or a Tribunal of competent jurisdiction. The matter was again examined in case reported as Ali Asjad Malhi Vs. Syed Nosheen Iftikhar (PLD 2023 Supreme Court 01) and upshot of discussion was that a petition under Article 199 of the Constitution is maintainable against a decision/action by ECP in certain circumstances. Reference is also made to cases reported as Aurangzeb Khan Vs. Election Commission of Pakistan and others (PLD 2010 SC 34) and Ghulam Mustafa Jatoi Vs. Additional Sessions Judge (1994 SCMR 1299).

21. It was emphasized by learned counsel for the respondents that the bar for challenging actions/orders of ECP is very high and for this argument, he

sought to derive support from case reported as Tariq Transport Company Vs. Sargodha Bhera Bus Service and others (PLD 1958 Supreme Court 437). The relevant paragraphs, for the purposes of present controversy, are reproduced below:-

> *"The question whether an act is judicial, quasi-judicial or administrative is clouded by a confusion which it is extremely difficult to resolve and no clear-cut distinction between these three functions can be discovered from the lame number of reported cases and the divergent opinions expressed therein, In modern States where expertise is the dominating feature of Government more than one function is combined in administrative tribunals, and more often than not an administrative agency discharges not only legislative and administrative but also judicial functions. The true question in the case of such tribunals always is whether the act which is complained of is a judicial act and not whether the procedure adopted by the tribunal is judicial or quasi judicial or whether the dominant or general aspect of the tribunal is that of a judicial, quasi-judicial or administrative body. A tribunal is not always furnished with the trappings of a Court, nor will such trappings make its action judicial. The character of the action taken in a given case and the nature of the right on which it operates must determine whether that action is judicial, ministerial or legislative or whether it is simply the act of a public agent. A tribunal acts judicially in the full sense of the term if*
>
> *(1) it has to determine a dispute ;*
>
> *(2) the dispute relates to a right or liability which, whatever its immediate aspect, is ultimately referable to some right or liability, recognised by the Constitution or statute or by custom or equity which by the domestic law is declared to be the rule of decision ;*
>
> *(3) since every right or liability depends upon facts, the tribunal is under an obligation to discover the relevant facts ;*
>
> *(4) the ascertainment of the facts is in the presence of the parties either of whom is entitled to produce evidence in support of its respective case and to question the truth of the evidence produced by his opponent ; and*
>
> *(5) after an investigation of the facts and hearing legal arguments the tribunal renders a judgment which so far as the tribunal is concerned terminates the dispute.*
>
> *In the case of an administrative tribunal, however, the emphasis is on policy, expediency and discretion to enable it to achieve the object with which it was set up. In the case of such a tribunal the, approach in determining the relevant facts is there fore often subjective and not objective, there being generally no lis before it in which the parties are arrayed against each other for the enforcement of a private right or liability and who for that purpose are entitled to produce evidence and adduce legal argument. The word `quasi' as prefixed to the word `judicial'*

may either indicate that the tribunal is not acting purely administratively or that it is acting in a manner in which a judicial tribunal is expected to act.

In his recent book "Fundamental Law of Pakistan", Mr. Brohi has a critical comment on this subject at pp. 475 to 484 and after discussing and analyzing leading cases thus states his general conclusion at p. 481: "In other words, if the law permits a subjective approach to the determination of the conditions limiting the exercise of power, and constitutes the officer exercising the power as a sole judge as to their existence, writ of certiorari will not lie but if, on the other hand, those conditions have themselves to be determined objectively then they become `conditions-precedent' to the exercise of the power and their existence cannot be said to be conclusively demonstrated merely because the officer exercising the power says that such conditions exist. In the latter case the Court can go behind the declaration that such conditions have been found to exist". And at p. 482 he quotes from an article of Mr. Gordon contributed to 49 L Q R in the course of which at p. 107 the writer says:-

"Judicial Tribunals must treat legal rights and liabilities as pre-existing, because such tribunals declare themselves bound by a fixed objective standard, they profess not to confer rights or impose liabilities themselves but only to do what is dictated by law. But administrative tribunals which act upon policy and expediency, themselves dictate what is policy and expedient; they are not concerned with pre-existing rights and liabilities but themselves create rights and liabilities that they enforce".

In certiorari the initial question is whether the official whose action is called in question was acting under a law. If he was not, the act was that of a mere public agent and action at law and not certiorari is the remedy. If, however, public functionary has acted in exercise of a statutory authority, then the question to be determined is whether he was the sole judge of facts and of the necessity, expediency, advisability, or reasonableness of the action to be taken. If the reply be in the affirmative, he was not acting judicially and his discretion is not liable to judicial review. But if he was under an obligation to find the facts in a judicial or specially prescribed manner, a material departure from the procedure which has adversely affected the rights of a party would render his action liable to judicial review, even if, on the facts to be so found, the action to be taken depended on his discretion. These cases are distinguishable from those where, whatever be the nature of the Tribunal, the order made is illegal in the sense that the Tribunal was not competent to make it or when on the facts found, whether subjectively or objectively, the order in question could not have been made or an order should have been but has not been made or where the Tribunal suffers from lack of jurisdiction for the reasons stated earlier in this judgment. In all such cases, the order is liable to review by a superior Court in writ proceedings provided it has affected any right of the petitioner for a writ. What has to be seen in all such cases is the provision of the statute under which the action was taken and it is on a true construction of that Provision in the context of the statute that the answer to the question under discussion will primarily depend In making these observations,

> *however, I must not be understood as laying down a precise definition of judicial or of administrative action; all that is meant is that the factors mentioned are important considerations for a correct determination of the, question.*

There is no cavil with the observation made by Supreme Court in the referred judgment, rather opinion of Justice Muhammad Munir C.J. (as he then was), is apt and still applicable today. The conclusion drawn from the above case law is that actions of ECP are amenable to judicial scrutiny under Article 199 of the Constitution under the principles already mentioned in various judgments including cases reported as **PLD 2008 Supreme Court 735** and **PLD 2008 Supreme Court 779** supra.

22. The petitioners have challenged vires of section 151 of the Act, which has been reproduced above and for the sake of brevity, it is repeated that it confers on ECP the power to transfer an election petition from one Election Tribunal to another and has to render reasons for the same. Since vires of a federal statute has been called in question, it would be apt to reproduce the principles, on the basis of which, this Court can examine the same. The jurisdiction of this Court to strike down any law is not questionable, however, the principles, on the basis of which, it can be done, have been laid down and reiterated time and again. The recent judgment of the Supreme Court, which reiterates the principles, on the basis of which, law can be struck down, is case reported as Lahore Development Authority Ltd. Vs. Ms. Imrana Tiwana and others (2015 SCMR 1739). The Supreme Court of Pakistan, in the said judgment, listed all possible principles on the touchstone of which, a statute can be struck down; they are contained in paragraph-65 of the referred judgment of the Supreme Court and are reproduced for the ease of convenience:-

> *"65. Cooley in his "Treatise on Constitutional Limitations", Pages 159 to 186, H.M. Seervai in "Constitutional Law of India", Volume I, Pages 260 to 262, the late Mr. A.K. Brohi in "Fundamental Law of Pakistan", Pages 562 to 592, Mr. Justice Fazal Karim in "Judicial Review of Public Actions" Volume I, Pages 488 to 492 state the rules which must be applied in discharging this solemn duty to declare laws unconstitutional. These can be summarized as follows:--*
>
> *I. There is a presumption in favour of constitutionality and a law must not be declared unconstitutional unless the statute is placed next to the Constitution and no way can be found in reconciling the two;*
>
> *II. Where more than one interpretation is possible, one of which would make the law valid and the other void, the Court must prefer the interpretation which favours validity;*

III. A statute must never be declared unconstitutional unless its invalidity is beyond reasonable doubt. A reasonable doubt must be resolved in favour of the statute being valid;

IV. If a case can be decided on other or narrower grounds, the Court will abstain from deciding the constitutional question;

V. The Court will not decide a larger constitutional question than is necessary for the determination of the case;

VI. The Court will not declare a statute unconstitutional on the ground that it violates the spirit of the Constitution unless it also violates the letter of the Constitution;

VII. The Court is not concerned with the wisdom or prudence of the legislation but only with its constitutionality;

VIII. The Court will not strike down statutes on principles of republican or democratic government unless those principles are placed beyond legislative encroachment by the Constitution;

IX. Mala fides will not be attributed to the Legislature.

It was also settled in the referred judgment after discussing the law on the subject that if a statue is not ex-facie repugnant to the fundamental rights under the Constitution, but is capable of being so when administered, it cannot be struck down unless the party challenging it, could prove that it had been actually so administered. Reference was made to by the Supreme Court to the cases ofFederation of Pakistan Vs. Shaukat Ali Rana (PLD 1999 SC 1026),Bneazir Bhutto Vs. Federation of Pakistan (1991 MLD 2622), East and West Steamship Vs. Pakistan (PLD 1958 SC 41) and Jibendra Kishore Achharyya Chowdhry Vs. The Province of Pakistan (PLD 1957 SC 9). N.S. Bindra's in Interpretation of Statutes 12th Edition has also reproduced the principles, on the basis of which, law can be struck down. The basic principle is that statutes are presumed to be valid and the courts of law have to presume that a particular law is intra vires and not ultra vires. It was reiterated that in case, there are two interpretations possible with respect to a law i.e. one that would make them consistent with Constitution and the other that would render them unconstitutional, the court would lean in favour of former construction. Similar approach was propounded by A.K. Brohi in his book Fundamental Law of Pakistan. It was concluded that the approach to be adopted by a court, while deciding vires of the legislature, ought to be as under:-

"A study of the constitutional decisions rendered by the United State Supreme Court, as also those of the judicial committee of Privy Council and

the Supreme Court of Canada and the High Court of Australia shows that they constantly keep two guiding principles before them while setting out to determine constitutional questions. They express a preference for avoiding a decision on constitutional grounds if they case can be otherwise disposed of. They purport to refrain from entering into any extended discussion of constructional doctrine save as this may be necessary for deciding the case at hand. (see Canadian constitutional law by Laskin, P.70, and the cases referred therein. In particular see the cases of A.G. Manitoba v. Manitoba Licence-holders Association (1902), A.C. 73, where Privy Council observed with respect to the second principles that it was in the nature of an advice often quoted but perhaps not always followed. See also Citizens Insurance Co. V. Parsons, (1881), Appeal cases 96, etc. etc.)

Similarly, Mr. Justice Frankfurter, in the case of Youngstown Sheet and Tube Co. v. Sawyer (1952) 343 U.S. 579 at p.593, set forth the attitude which ought to be adopted by Courts while they are engaged in settling constitutional controversies. On the one hand, the Court should be conscious that since:

‘’The accretion of dangerous power does not come in a day. It does come, however slowly, from the generative force of unchecked disregard of the restrictions that it ought to be vigilant and jealously guard against any move in the direction of autocratism that must result from power being allowed to go unchecked and unregulated- and, on the other, the court should realize that:

:Judicial power can be exercised only as to matters that were the traditional concern of the courts at Westminster, and only if they arise in ways that to the expert feel of lawyers constitute ‘case’ or ‘controversies’”

And he goes on further to add:

“Even as to questions that were the staple of judicial business, it is not for the courts to pass upon them unless they are indispensably involved in a conventional litigation….. Rigorous adherence to the narrow scope of the judicial function is specially demanded in cont5roverswies that arouse appeals to the constitution. The attitude with which this court must approach its duty when confronted with such issues is precisely the opposite of that normally manifested by the general public. So-called constitutional questions seem to exercise a mesmeric influence over the popular mind. This eagerness to settle- preferably forever- a specific problem on the basis of the broadest possible constitutional pronouncements may not unfairly be called on of our minor national traits…… Due regards for the implications of the distribution of powers in our Constitution and for the nature of judicial process as the ultimate authority in interpreting the constitution, has not only confined the court within the narrow domain of appropriate adjudication: it has also led to a series of rules under which it has avoided passing upon a large part of all the constitutional questions passed upon it for decision’. (Brandeis, J. in Ashwander V. Tennes-see Valley Authority, 297 U.S. 288). A basic rule is the duty of the Court not to pass on a unconstitutional issue at all, however narrowly it may be confined, if the case may, as a matter of intellectual honesty, be decided without even considering delicate problems of power under Constitution”. (Consult further Cooley’s Principles of Constitutional Law, Chap.XV, Sec.4 Judicial Restraints on Legislative Encroachments, pp.190-201)”.

23. The crux of the arguments on behalf of petitioners to have section 151 ibid declared ultra vires of the Constitution is that Election Tribunal is a 'court' under Article 175 of the Constitution and it cannot be regulated by the Executive (ECP) and even if the power to transfer does exist, same can only be exercised with the consultation of the Chief Justice of respective High Court inasmuch as the role of judiciary cannot be ousted and the power of transfer be given solely to the executive. It was argued, in alternative, that if the Court holds that section 151 ibid is intra vires the Constitution, it should be read in the statute that the power is to be exercised with the consent of the Chief Justice of the respective High Court. In order to appreciate the argument advanced by learned counsel for the petitioners, it is appropriate to examine the scheme of law. Article 175 of the Constitution envisages establishment of Supreme Court and High Courts and such other courts as are established under the law. The concept of separation of powers is well enshrined in our Constitution as well as the system. The seminal judgment, on the issue is by the Supreme Court reported as State Vs. Zia ur Rehman (PLD 1973 SC 49), wherein it was emphasized that there exists trichotomy of power, in which, judiciary, legislature and the executive have different roles to play. The independence of judiciary and its separation from the Executive was again emphasized in case reported as Mehram Ali and others Vs. Federation of Pakistan and others (PLD 1998 Supreme Court 1445); the Supreme Court of Pakistan, while discussing independence of judiciary and its separation from the Executive, discussed Article 175 of the Constitution. It was observed that the referred Article provides a framework of judiciary i.e. the Supreme Court and the High Courts for each province and the ICT and other courts as may be established by law. It was added that the words such other courts, as may be established by law, are employed in clause (1) of Article 175 of the Constitution and are relatable to the subordinate courts referred to in Article 203 thereof; that our Constitution recognize such specific tribunal(s) to share judicial powers with the courts which have been specifically provided by the Constitution itself viz Federal Shariat Court, Tribunals under Article 212, Election Tribunals (Article 225). It must follow as a corollary that any court or tribunal which is not founded on any of the Articles of the Constitution cannot lawfully share judicial power with the Courts referred to in Articles 175 & 203 of the Constitution. It was reiterated that the hallmark of our Constitution is that it

envisages separation of the judiciary from the executive in order to ensure independence of judiciary and, therefore, any Court or tribunal which is not subject to judicial review and administrative control of the High Court and/or Supreme Court does not fit in within the judicial framework of the Constitution. It was added that the right of access to justice is a fundamental right, which cannot be exercised in the absence of an independent judiciary providing impartial, fair and just adjudicatory framework i.e. judicial hierarchy. The courts/tribunals are manned and run by the executive authorities without being under the control and supervision of the High Court in terms of Article 203 of the Constitution, can hardly meet the mandatory requirement of the Constitution. The Supreme Court concluded, after discussing relevant case law, that constitutional framework relating to the judiciary does not permit establishment of a parallel system of the courts or tribunals, which are not under the judicial review and administrative control or supervision of the High Court (s) in terms of Article 203 of the Constitution. It may be pointed out that where the constitution makers wanted to provide judicial forums other than what is envisaged by Articles 175, 202 and 203 of the Constitution, they have expressly provided it in the Constitution. In this regard, reference again was made to Article 212 of the Constitution envisaging establishment of administrative courts or the tribunals relating to terms and conditions of a civil servant. Reference was also made by the Supreme Court to Article 225 of the Constitution mandating that election disputes are to be decided by the election tribunal to be constituted through the Act of the Parliament and where such tribunals/courts are constituted, they are within the scope of the Constitution and outside the purview of Articles 175, 202& 203 of the Constitution. In case reported as Sami Ullah Baluch and others Vs. Abdul Karim Nousherwani and others (PLD 2018 Supreme Court 405), the Supreme Court observed that in case, there is conflict between two provisions of the Constitution; the Constitution must be interpreted as a whole because it is an organic document that was meant to apply to the changing circumstances of time and space. It was added that each provision of the Constitution or part thereof had a purpose, meaning and integral place that must be understood, acknowledged and applied harmoniously. It is only when a conflict between two provisions of the Constitution was irreconcilable and one of such provision was inserted when the Constitution

was held in abeyance, then the provision, which was made part of the Constitution during the period of its abeyance would yield, provided that the other provision conflicting therewith was enforced by Parliamentary will and was closer to the provisions of the Preamble of the Constitution. In case reported as Muhammad Ijaz Ahmad Chaudhry Vs. Mumtaz Ahmad Tarar and others (2016 SCMR 1), Supreme Court observed that every procedure that permitted administration of justice was permissible unless it was expressly prohibited. In case reported as Chief Election Commissioner of Pakistan and others Vs. Miss Nasreen Pervez [(2009 PLC (CS) 650], the Supreme Court observed that Election Commission was performing functions in connection with the affairs of the Federation, as there is no doubt that the Constitution itself confers a certain amount of autonomy to the Election Commission in view of the sensitive nature of its functions so as to insulate it from the influence of the Executive/Government but there could be no doubt that it is only performing essential functions of the State and not any commercial or industrial activity having nothing to do with the affairs of the State. In case reported as Messrs Ranyal Textiles through Proprietor/Employer Vs. Sindh Labour Court No.3, Karachi and 3 others (PLD 2010 Karachi 27), it was observed that under the judicial system as established by the Constitution, there were courts and tribunals, tribunals, however, were only limited to the tribunals specified in the Constitution, such as, Election Tribunals, Administrative Tribunals and Tribunals relating to Military affairs. It was added that all other tribunals regardless of how they are labeled, are courts and had to be manned, controlled and regulated in accordance with the established judicial principles and the law relating to manning, regulation and control of courts in Pakistan. It was added that it would be axiomatic to say that a court is subordinate to High Court but its Presiding Officers is to be decided and appointed by the Provincial Government without consulting High Court. It was concluded that consultation with the Chief Justice of the High Court is sine-qua-non, an essential prerequisite and a condition precedent for all such appointments. In case reported as Sh. Riaz Ul Haq and others Vs. Federation of Pakistan and others (PLD 2013 Supreme Court 501), the Supreme Court elaborated meaning of the word ‘court’. It was observed as follows:-

> *"45. The Principle of separation and independence of judiciary as envisaged in Article 175 of the Constitution is also applicable to the lower judiciary as it is the part of the judicial hierarchy. Thus, its separation and independence*

has to be secured and preserved as that of superior judiciary. In terms of Article 175 read with Article 203 of the Constitution, the lower judiciary should be separated from the Executive and the High Court shall supervise and control all courts subordinate to it. Reference may be made to the case of Government of Sindh v. Sharaf Faridi (PLD 1994 SC 105). In the case of Dr. Mobashir Hassan v. Federation of Pakistan (PLD 2010 SC 265) it has been held that the Legislature is competent to legislate but such legislation would not be sustainable if it is contrary to the principle of independence of judiciary as mentioned in Article 2A of the Constitution, which provides that independence of judiciary shall be fully secured read with Article 175 of the Constitution, which lays down a scheme for the establishment of the Courts, including the superior Courts and such other Courts as may be established by law. As it has been held that Service Tribunal discharges judicial functions, thus falls within the definition of a "Court' in view of the above discussion, therefore, the Tribunals have to be separated from Executive following the principle of independence of judiciary in view of Article 175(3) of the Constitution.

46. In the light of the finding given hereinabove to the extent that the Service Tribunals are included in the term 'Court' mentioned in Article 175(3) of the Constitution and are to be managed, controlled and regulated in accordance with the law relating to the Courts in Pakistan, the question arises as to whether Service Tribunal enjoys independence even in the appointment of its Chairman and the Members. Although the Act and the rules do not provide consultation with the respective Chief Justice, yet having been declared that the Tribunals established under Article 212 fall within contemplation of Article 175(3) of the Constitution, the requirements of said provision has to be adhered to while making appointment to the Chairman/Members of the Tribunal. We are in agreement with the learned counsel for the petitioner that the Service Tribunals exercise judicial powers with remedy of appeal before this Court under Article 212(3), if the case involves a substantial question of law of public importance, as such, the matters regarding appointment of the Chairman and Members of the Service Tribunals are as important as those of judges of the High Courts. Thus, we are in agreement with the learned counsel for the petitioner that the Tribunal should not be under the administrative or financial control of the Executive. On the analogy of the judges of the High Courts and Federal Shariat Court, the terms and conditions of the Chairman and Members of the Tribunal may be independently determined so as to make them outside the Executive influence and to ensure uniformity.

47. In this context, it is to be noted that in the case of Al-Jehad Trust v. Federation of Pakistan (PLD 1996 SC 324), it has been held that the Constitution provided that the appointment of Judges of the superior Courts is to be made by the President after consultation with the consultees mentioned therein. Such 'consultation' cannot be treated lightly as a mere formality, rather supposed to be effective, meaningful, purposive, consensus oriented, leaving no room for complaint of arbitrariness or unfair play. The Chief Justice of the High Court and the Chief Justice of Pakistan normally know advocates who appear in their Courts regularly and would nominate or recommend names of such advocates who are capable and fit to be Judges of the High Court and their opinion, which is expert opinion in a way, cannot and should not be ignored, but, must be given due weight. Their opinion, as to the fitness and suitability of a candidate for judgeship, is entitled to be accepted in the absence of very sound reasons to be recorded in writing by the President/Executive.

48. In the case of Imran v. Presiding Officer, Punjab Special Court (PLD 1996 Lahore 542), constitution of Special Courts under the Suppression of

Terrorists Activities (Special Courts) Act, 1975 and the Offences in Respect of Banks (Special Courts) Ordinance, 1984 were challenged, on ground that the said courts were established and managed at the will of Executive as the Presiding Officers are appointed by the Government and work at its pleasure without having security of office. The Court held that it stands recognized that even if the power of appointment or of establishment of a Court vests in the Government/ Executive, the appointments cannot be made arbitrarily, and the said power of appointment is to be exercised through meaningful consultation of the judiciary or its head (Chief Justice), and judicial power cannot be invested by the Executive by appointing persons on its own, providing any procedures or imposing any sentence or conviction so as to control free and fair exercise of judicial power. It was further held as under:-

> *"20. The principles deductible from the survey of the Constitutional provisions and the case-law are that in order to comply with the mandate of independence and separation of Judiciary, the Courts howsoever designated as 'Special Court' or 'Tribunal' are to be established and constituted by making appointment with meaningful consultation of the Chief Justice of the High Court and by providing security of tenure for a period which will not act as a disincentive, such a tenure should then be secured by making necessary provision in the Statute itself. The concept of consultation with the Chief Justice/the High Court is not a new concept introduced by the Supreme Court in its recent judgment. The consultation with the High Court is provided by the Civil Courts Ordinance, 1962, for making appointments of District Judges under section 5, for Additional District Judges under section 6 and for Civil Judges under section 8 of the Ordinance. ..... Even the Executive Magistrates who desire to be absorbed in the Judiciary on option are to be accepted by the High Court provided they fulfil the requisite qualifications prescribed by the relevant Service Rules. The appointments made to the judicial posts/tribunals as such by any contrary method is thus violative of the theory of independence of judiciary. In addition to these features, the power to transfer cases from one Tribunal to the other is not to be left to the discretion of the Executive and financial independence is also to be secured."*
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> *The matter of appointment of the judges of the special Courts was examined by this Court in the case of Mehram Ali and others v. Federation of Pakistan (PLD 1998 SC 1445) wherein it was held as under:--*
>
> *"35. The appointment of the Judges of the Special Courts are required, by subsection (2) of section 14 of the Act, to be made by the Government after consultation with the Chief Justice of the High Court. The Executive does not have a free hand in the making of such appointments. As to the meaning of consultation we can do no better than to rely on the recent judgments of the Supreme Court in the cases of Al-Jehad Trust through Raeesul Mujahideen Habib Al-Wahabul Khairi, and others v. Federation of Pakistan PLD 1996 SC 324 and Al-Jehad Trust through Raees-ul-Mujahidin Habib-Al-Wahabul Khairi, Advocate Supreme Court and another (PLD 1997 SC 84). The Federal Government is bound to accept the recommendations of the honourable Chief Justice of the High Court except for valid reasons justifying a departure. We were informed by the learned Attorney General for Pakistan and the learned Advocate-General, Punjab, that no Presiding Officer of the Special Court shall be removable except with the consent/concurrence or recommendation by the honourable Chief Justice of the High Court. Even otherwise, the power of removal*

> *is basically an adjunct to the power of appointment. We, however, notice that the security of tenure for a certain period is also required to be provided by making necessary provisions in the statute itself as held by a Full Bench of this Court in the case of Imran v. Presiding Officer, Punjab Special Court No.VI, Multan and 2 others (PLD 1996 Lahore 542). In the precedent case, provisions of Suppression of Terrorist Activities (Special Courts) Act, 1975 and the Offences in Respect of Banks (Special Courts) Ordinance, 1980, were examined threadbare. We allow two months time of making necessary amendments in the law."*
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> *49. In the case of Hazrat Baz v. Political Agent/District Magistrate Khyber Agency (PLD 2010 Peshawar 7) it has been held that if it is required to establish Special Courts and then to appoint a Sessions Judge or an Additional Sessions Judge as a Judge Special Court, same should be done after consultation with the Chief Justice of the High Court. In the case of MessrsRanyal Textiles v. Sindh Labour Court (PLD 2010 Karachi 27) it has been held that in the appointment of Chairman of Labour Appellate Tribunal, the consultation with the Chief Justice of the High Court is an essential prerequisite and a condition precedent. It was further held that all judicial appointments must be subordinate to the High Court and it is only High Court which can and should exercise exclusive administrative and supervisory control over subordinate judiciary. Such supervisory and administrative control cannot exist if a credible and pivotal role is denied to the High Court in appointment of such persons. It will be axiomatic to say that a Court is subordinate to High Court but its Presiding Officers is to be appointed the Provincial Government without consulting High Court. Reliance can also be placed on S.P. Sampath Kumar v. Union of India (AIR 1987 Supreme Court 386).*
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> *50. From the above case-law, it is manifest that whenever the appointment of a 'judicial officer' or the Chairman/Member of a Tribunal performing 'judicial functions' is made, the consultation with the concerned Chief Justice is prerequisite. Thus, the appointments of the Chairman/Member of the Service Tribunal, Federal or Provincial, must be made in consultation with the Chief Justice of Pakistan or the Chief Justice of concerned High Court, as the case may be and all appointments made without such consultation are void".*

In case reported as Imran Vs. Presiding Officer, Punjab Special Court No.VI, Multan and 2 others (PLD 1996 Lahore 542), Lahore High Court on the touchstone of Article 175, struck down the provisions as to the appointment and transfer of Presiding Officer of Special Court or Tribunal. It was observed that courts howsoever designated whether as 'Special Court' or 'Tribunal' are to be established and constituted by making appointment with meaningful consultation of the Chief Justice of the High Court and by providing security of tenure. It was added that transfer of cases from one Tribunal to the other is not to be left to the discretion of the Executive and financial independence is also to be secured. In Reference No.1 of 2020: In the matter of (PLD 2021 Supreme Court 825), the Supreme Court observed that a general interpretation of the Constitution is that no specific provision of the Constitution has to be read in isolation. The Constitution is an organic whole.

It is true that no provision of the Constitution could be interpreted in isolation, rather the Constitution has to be read organically and holistically, and articles and clauses of the Constitution, if read in isolation from the rest of the Constitution, may mislead the readers because the meaning of the Constitution has to be gathered from the Constitution as an integrated whole, not as a mechanical deduction but based on reasons. In case reported as Mahmood Khan Achakzai and others Vs. Federation of Pakistan and another (PLD 1997 Supreme Court 426), the Supreme Court opined that the basic structure theory in Pakistan is not specifically mentioned in the Constitution but Objectives Resolution when read with other provisions of the Constitution reflects salient features of the Constitution highlighting Federalism and Parliamentary form of Government blended with Islamic provisions. The Supreme Court highlighted principles of interpretation of Constitution and held that if two provisions conflict with each other the courts should first resolve the same by reconciling them, but if reconciliation seems difficult, then such interpretation should be adopted which is more nearer to the provisions of the Constitution guaranteeing fundamental rights, independence of judiciary and democratic principles blended with Islamic provisions. In another case reported as Al-Jehad Trust through Raeesul Mujahideen Habib-ul-Wahab-ul-Khairi and others Vs. Federation of Pakistan and others (PLD 1996 Supreme Court 324), the Supreme Court held that since consultation for the appointment/confirmation of a Judge of a Superior Court by the President/Executive with consultees mentioned in the relevant Articles of the Constitution is mandatory any appointment/confirmation made without consulting any of the consultees as interpreted above would be violative of the Constitution and, therefore, would be invalid. In case reported as Sheikh Abdul Aziz Hamad Al-Gosaibi Vs. Pakistan International Airlines Corporation (PLD 1995 Karachi 566), the Sindh High Court observed that Additional Judges have the same powers, powers, jurisdiction, authority and privileges as those of permanent Judge. In case reported as District Bar Association, Rawalpindi and others Vs. Federation of Pakistan and others(PLD 2015 Supreme Court 401), the Supreme Court concluded that it is settled law that any order passed or sentence awarded by a Court Martial or other forums under the Pakistan Army Act, 1952, included as amended by the Pakistan Army (Amendment) Act, 2015, is subject to the Judicial Review both by the High Courts and this Court, inter alia, on the ground of coram

non judice, without jurisdiction or suffering from malafides including malice in law. It was added that this would also hold true for any decision selecting or transferring a case for trial before a Court Martial or even if such decision requires the exercise of discretion by the Executive Authority, which must necessarily be exercised reasonably, fairly, justly and for the advancement of the purpose of the enactment, as provided by section 24A of the General Clauses Act, 1897.

24. In light of the provisions of the Constitution, the scheme as is envisaged in Articles 175, 202 & 203 of the Constitution and other related provisions as well as case law, it is crystal clear that by law, courts can be constituted by the Parliament, however, Constitution does recognize creation of certain tribunals including Election Tribunal under Article 225 of the Constitution. Since the Constitution of Pakistan specifically recognizes establishment of Election Tribunals as a 'forum' for resolution of the election disputes under the law by the Parliament, as noted in the case law, harmonious interpretation to the provisions of the Constitution is to be made so that no one provision of the Constitution collides with the other. In light of said principle of interpretation, it can safely be concluded that Election Tribunal is not a 'Court' as envisaged in Article 175(3) of the Constitution and is a 'Tribunal' created for deciding election disputes. The Election Tribunals, as has already been seen, are manned by sitting Judges of the High Court and after recent amendment through the Elections (Amendment) Act, 2024, by former Judge of the High Court.

25. In so far as appointment of a sitting Judge of the High Court is concerned, it is with consultation with the Chief Justice of respective High Court, hence judiciary has a role in the same, but the legislature in its wisdom, has provided for appointment of a former Judge without consultation and at this juncture, no opinion is required inasmuch as vires of Elections (Amendment) Act, 2024 is under challenge in separate petitions. As was observed in Mehram Ali's case supra that hallmark of independence of judiciary is that any court or tribunal should remain away from clutches of the executive and it should either be administered by the superior courts or is subject to judicial review. The orders passed by Election Commission are subject to judicial review as was observed in case reported as PLD 1966 SC 01 supra. Till recently, (before enactment of Elections (Amendment Act, 2024), all the Elections Tribunals were appointed with the consultation of the

Chief Justice of the respective High Court hence transfer of election petitions from one Election Tribunal to another with the consultation of the Chief Justice of the High Court was unnecessary inasmuch as all the Tribunals were appointed with consultation of the Chief Justice and theoretically there is no bar on transferring of election petition from a Tribunal constituted in one province to another in a different province. The creation of Election Tribunal is within the legal framework of the Constitution, however, to say that providing power of transfer to ECP, is conferring power of transfer to the executive and hence is in violation of the framework/scheme as contained in Article 175, would not be correct. As is already observed ECP is not the executive *per se*; it is a constitutional body having manifold functions including holding of elections and also to appoint Presiding Officers of the forums for resolution of election disputes (Election Tribunals). It is pertinent to observe that appointment of Election Tribunals is not made by the respective High Courts rather is done by ECP in consultation with the Chief Justice of that High Court. Any appointment made by the ECP of a sitting Judge of a High Court, of course, without consultation of Chief Justice, would be invalid, however, to say that power to transfer has been conferred on executive, would be incorrect. It is reiterated that ECP cannot be regarded as 'Executive' but an autonomous constitutional body, which acts as regulator of the election matters and also has been mandated by the Constitution to provide for resolution of the election disputes. Likewise, it is reiterated and emphasized that Election Tribunal is not a 'Court' for the purposes of Article 175(3) of the Constitution, but is a 'Tribunal' as has been designated in Article 225, hence section 151 ibid cannot be struck down on the touchstone of judgment reported as Ms. Imrana Tiwana supra for violating any provision of the Constitution including fundamental rights or the scheme of judiciary and/or independence thereof.

26. It was empathetically argued on behalf of petitioners that in case reported as PLD 1996 Lah. 542 supra, Full Bench of Lahore High Court struck down the provision for appointment and transfer of the Presiding Officer of the Special Court with respect to Offences of Banks, hence section 151 ibid, also should have the same fate. I do not subscribe to the referred view by the petitioners inasmuch as the principles laid down in case reported as PLD 1996 Lah. 542 supra were correct inasmuch as the Special Court constituted under the law in question in the said case was not within the

scheme of the Constitution rather was a 'Court' as per Article 175 of the Constitution, however, decision in the case in hand, is different inasmuch as Election Tribunal is specially mentioned in the constitutional scheme (Article 225), hence is a 'Tribunal' and the appointment of its Presiding Officer is with the consultation of the Chief Justice and if the transfer is made to another Tribunal comprising a sitting Judge, then of course, the same would have also been appointed with the consultation of the Chief Justice of said High Court.

27. On behalf of petitioners, it was argued that in case, this Court is not inclined to strike down section 151 ibid, then in alternative, in section 151 of the Act, it should be read in that transfer also would be with the consultation of the Chief Justice of the High Court concerned. Syed Ishfaq Hussain Shah, appearing on behalf of one of the petitioners, led the charge in this behalf and sought to do so, on the basis of various judgments. Reference was made to cases reported as Govindan Sellappah Naar Kodakan Pillai Vs. Punch Banda Mundanayake and others (PLD 1953 Privy Council 51) and Mrs. Shaila Joseph Vs. Chairman, Hazara Hill Tract Improvement Trust, Abbotabad and 3 others (1990 MLD 807). It was argued that the same is required for the purposes of maintaining harmony in the provisions of the Constitution. Whether this approach can be adopted by the courts, came in consideration before Sindh High Court in Peoples University of Medical and Health Sciences for Women through Registrar and four others Vs. Pakistan Ministry of Health Services, Regulation and Coordination through Secretary and 13 others (PLD 2021 Sindh 256). In the referred case, the Division Bench of Sindh High Court, discussed the principles of reading down and it was observed that while reading down of a statute, two principles have to be kept in view; first that the object of reading down is primarily to save statute and in doing so paramount question is whether in the event of reading down, can the statute remain functional and secondly, would the Legislature enact the law, if that issue had been brought to its notice which was being agitated before the Court. It was observed that doctrine of reading down is an internal aid to construe the word or phrase in a statute to give reasonable meaning but not to detract, distort or emasculate the language so as to give supposed purpose to avoid unconstitutionality. It was also observed that object of reading down is to keep operation of statute within the purpose of the Act and constitutionally valid. It seems from the above judgment that

reading in the words 'with the consultation' only perhaps would be required to save section 151 ibid but since this Court has already observed that section 151 is not in violation of the Constitution inasmuch as, as already noted above, ECP while transferring a petition, has to give reasons and referred reasons are justiciable inasmuch as against any action of ECP, a petition under Article 199 of the Constitution, is maintainable, hence section 151 ibid itself provides for laying down the reasons and judiciary also has installed a safeguard to protect the rights of the public/litigants. Moreover, confronted with similar situation of transfer of cases before Military Courts/Tribunals, the Supreme Court already opined in case reported as PLD 2015 SC 401 supra that such actions are subject to judicial review. Likewise, if any party is aggrieved of a decision of ECP by transfer of election petition from one Tribunal to another, same always is subject to challenge by way of judicial review before the High Court and in case, the yardstick for challenging the actions of ECP are fulfilled, which have already been discussed hereinabove, the courts, in appropriate cases, can strike down the same. It is emphasized that it is must for ECP to give reasons for transfer (emphasis added).

28. The petitioners have also challenged transfer orders passed by ECP regarding transfer of election petitions filed by the petitioners to newly constituted Tribunal under the Elections (Amendment) Act, 2024. The reading of the transfer applications, filed by the private respondents in the writ petitions, shows that primary allegation of 'bias' was leveled against the Tribunal presently hearing the petitions. Mr. Waqas Mir, Advocate Supreme Court, appearing for private respondents, however did say that there were allegations of flouting the mandatory provisions of Elections Act as well and since the respondents have no other remedy, hence applications for transfer were made. The referred stance of learned counsel for the private respondents is not tenable inasmuch as without adverting to the merits of the matter, even if any order is passed by Election Tribunal which was in violation of the mandatory provisions of Elections Act, 2017, the respondents always had the remedy of moving an appropriate petition under Article 199 of the Constitution pursuant to the dictum of the Supreme Court in case reported as PLD 1966 SC 1 supra. It is an admitted position that no such application was filed and straight away transfer applications were filed on the basis of 'bias'.

29. It was affirmed by learned counsel for the petitioners that no opportunity was provided to them to file reply to the transfer applications and only in one case (W.P. No.1981-2024), the petitioner namely Aamer Masud did file reply though ECP did not ask him to do so. The stance taken by learned counsel for the petitioners is that since the Tribunal, presently hearing the petitions, is a sitting Judge of this Court, application for recusal had to be made to him and transfer application was not maintainable. No doubt, the Presiding Officer currently hearing the election petitions, is a sitting Judge of this Court, however, as was observed in case reported as PLD 1966 SC 01 that when a Judge of a High Court was sitting as an Election Tribunal, he is *persona designata* and does not act as High Court.

30. Much emphasis was placed by the petitioners as well as private respondents on case reported as M.H. Khondkar Vs. The State (PLD 1966 Supreme Court 140). On behalf of petitioners, it was argued that as per this judgment, even Chief Justice of a High Court does not have the jurisdiction to transfer a case from one Bench to another and it is the sole prerogative of the Bench hearing the matter to recuse itself from doing so. In the referred judgment, principles of alleging 'bias' against a Judge of a superior court and how it is to be dealt with and on what basis, were exhaustively laid down. This Court, relying on this judgment and similar judgments, has already laid down exhaustively the principles alleging 'bias' against a Judge of a superior court and how it is to be dealt with in case reported as Muhammad Azam Khan Swati Vs. The State and another (2023 P. Cr. LJ 350).On the basis of case law on the subject, it is very clear that 'bias' against a Judge of a superior court, cannot form basis for transfer, however, the matter is to be brought to the knowledge of the Judge and then the presiding officer is to act his conscious and decide whether to continue or to recuse. In case reported as Liteky Vs. United States [(510 U.S. 540 (1994)], USA courts of appeal, while dealing with such situation, it was observed as follows:-

> *For all these reasons, we think that the "extrajudicial source" doctrine, as we have described it, applies to § 455(a). As we have described it, however, there is not much doctrine to the doctrine. The fact that an opinion held by a judge derives from a source outside judicial proceedings is not a necessary condition for "bias or prejudice" recusal, since predispositions developed during the course of a trial will sometimes (albeit rarely) suffice. Nor is it a sufficient condition for "bias or prejudice" recusal, since some opinions acquired outside the context of judicial proceedings (for example, the judge's view of the law acquired in scholarly reading) will not suffice. Since neither the presence of an extrajudicial source necessarily establishes bias, nor the absence of an extrajudicial source necessarily precludes bias, it would be*

> *better to speak of the existence of a significant (and often determinative) "extrajudicial source" factor, than of an "extrajudicial source" doctrine, in recusal jurisprudence. The facts of the present case do not require us to describe the consequences of that factor in complete detail. It is enough for present purposes to say the following: First, judicial rulings alone almost never constitute a valid basis for a bias or partiality motion. See United States v. Grinnell Corp., 384 U. S., at 583. In and of themselves (i. e., apart from surrounding comments or accompanying opinion), they cannot possibly show reliance upon an extrajudicial source; and can only in the rarest circumstances evidence the degree of favoritism or antagonism required (as discussed below) when no extrajudicial source is involved. Almost invariably, they are proper grounds for appeal, not for recusal. Second, opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible. Thus, judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge. They may do so if they reveal an opinion that derives from an extrajudicial source; and they will do so if they reveal such a high degree of favoritism or antagonism as to make fair judgment impossible. An example of the latter (and perhaps of the former as well) is the statement that was alleged to have been made by the District Judge in Berger v. United States, 255 U. S. 22 (1921), a World War I espionage case against German-American defendants:"One must have a very judicial mind, indeed, not [to be] prejudiced against the German Americans" because their "hearts are reeking with disloyalty." Id., at 28 (internal quotation marks omitted). Not establishing bias or partiality, however, are expressions of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women, even after having been confirmed as federal judges, sometimes display. A judge's ordinary efforts at courtroom administration—even a stern and short-tempered judge's ordinary efforts at courtroom administration— remain immune".*

How to conduct proceedings, within the realm of law, remains the sole prerogative of the Judge and whether he is to recuse, is again his prerogative. Having affirmed the law on the subject, it is not the case that application to ECP for transfer of election petition, is not maintainable; it is maintainable as has already been observed by this Court; whether on the ground of 'bias', remains a grey area. The proper process ought to have been that a request should have been made in this regard to the Presiding Officer for recusal from the case and the rest left to the conscious of the Judge, but since the Presiding Officer, is not the Judge of the High Court, normal principles ought not be applicable and 'bias' may still be a ground, but burden of proof of 'bias' is heavy and mere wrong application of law and not granting adjournments or rejection of the applications or making certain observations in the Court, is not a ground for 'bias'. Having said that, the important aspect of the matter is that ECP seems to have proceeded with the transfer application in haste without providing opportunity of filing

affidavits and counter-affidavits/replies to the allegation of 'bias' or misapplication of law. Proper opportunity should have been granted to the petitioners; failure on part of ECP to grant such opportunity to present the case, apparently is in violation of Article 10-A of the Constitution. It is settled that ECP is not a 'judicial forum'; it is not even purely executive, as noted, it is a constitutional body, which has some quasi-judicial powers to perform while deciding certain issues. The power of transfer is supervisory and administrative in nature and has to be exercised after providing opportunity to everyone concerned. There is nothing on record to show that the same was done and in one of the writ petitions (W.P. No.1981-2024), while allowing the transfer application, even merits were touched and finding on the same was rendered, which is surely not the mandate of ECP. In such view of the matter, it is only appropriate that ECP revisits the matter because it does have the authority and mandate to decide transfer application under section 151 and also can transfer petitions suomoto but has to give reasons for the same. However, where the application has been filed for transfer, naturally all parties are to be heard, which in the instant case, was not done as such, in a proper manner, hence the impugned orders are not sustainable and merit setting aside.

31. For what has been stated above, W.P. No.1977-2024, W.P. No.1981-2024 & W.P. No.1984-2024, are allowed and transfer orders dated 10.06.2024 passed by ECP are set aside; consequently, transfer applications filed by private respondents, shall be deemed to be pending and decided in accordance with law and observations made hereinabove. W.P. No.1796-2024, W.P. No.1797-2024 & W.P. No.1798-2024, challenging vires of section 151 ibid, are dismissed for the reasons stated above.

(CHIEF JUSTICE)

Announced in Open Court on 19.09.2024

(CHIEF JUSTICE)

Approved for reporting

Zawar

Annexure

Serial No.	CASE NO./YEAR	TITLE
1.	W.P. No.1797-2024	Muhammad Shoaib Shaheen Vs. Federation of Pakistan etc.
2.	W.P. No.1977-2024	Muhammad Shoaib Shaheen Vs. Election Commission of Pakistan & Another
3.	W.P. No.1798-2024	Aamer Masood Vs. Federation of Pakistan etc.
4.	W.P. No.1981-2024	Aamer Masood Vs. Election Commission of Pakistan & Another
5.	W.P. No.1984-2024	Syed Muhammad Ali Bokhari Vs. Election Commission of Pakistan & Another