

Scenario 271

SCP (PRACTICE & PROCEDURE) BILL 2023

On 10TH April 2023: Pakistan's Parliament passed the Supreme Court (Practice and Procedure) Bill 2023. This proposed law was taken through to establish a panel of the most senior judges, led by the chief justice of Pakistan [CJP], to handle and conclude all cases, appeals, and issues presented before the top court. The said bill was introduced by the then federal minister of law Azam Nazeer Tarar.

Earlier, on 29th March 2023, the National Assembly (NA) passed the legislation without referring it to the relevant standing committee. This came one day after the Senate approved the bill. President Arif Alvi returned the bill to Parliament twice, asking for further consideration. However, on 10th April 2023, the bill was passed again with some modifications, amidst a noisy protest by Pakistan Tehreek-e-Insaf (PTI) law-makers.

The passage of the said act was prompted by a legal dispute between the previous government and the superior judiciary over important constitutional questions. The PDM government argued that the Supreme Court was overstepping its bounds and interfering in executive and legislative affairs. The top court countered that it was simply exercising its constitutional powers to uphold the rule of law and protect the fundamental rights of citizens. **Key Provisions of the Act** made a number of significant changes to the way the Supreme Court used to operate; including:

- ***Requiring a three-member committee of senior judges, including the CJP, to approve all suo-moto notices.***
- ***Establishing a transparent process for the formation of benches for hearing crucial constitutional issues.***
- ***Giving parties the right to appeal to the Supreme Court within 30 days of a final order from a lower court.***
- ***Requiring the apex court to hear applications alleging urgency or requesting interim relief within 14 days of filing.***

The act had met with mixed reactions from legal experts and civil society groups. Some argued that it was a necessary step to streamline the judicial process and to make the Supreme Court more accountable. Others argued that it was an attempt to undermine the independence of the judiciary and give the government more control over the top court. One of the main concerns about the act was that the prevailing system was giving the chief justice too much power – some termed it a judicial dictatorship.

The CJP would be responsible for appointing the other two judges to the committee, and the committee would have the final say on all *suo-moto* notices - the top judge would have a significant influence on the outcome of all cases heard by the Supreme Court of Pakistan [SCP]. Another concern was that the act would make it more difficult for ordinary citizens to access justice. The act introduced a new requirement that all appeals to the SCP must first be approved by a lower court. That meant that it would be more difficult for litigants to challenge decisions made by lower courts, even if those decisions were unfair or unjust.

In the light of above reservations, the Supreme Court (Practice and Procedure) Act 2023 was taken as a controversial piece of legislation passed by the PDM government under Shahbaz Sharif's premiership. The Act aimed to address concerns about the CJP's authority, procedures, and discretionary powers, particularly in relation to ***suo-moto*** proceedings and the composition of benches for hearing crucial constitutional issues.

On 21st April 2023: Despite Supreme Court's directive, the National Assembly notified the conversion of Supreme Court (Practice and Procedure) Bill 2023 – into an Act.

In fact the new law aimed to curtail the suo-motu powers of the office of the Chief Justice of Pakistan (CJP). The National Assembly Secretariat notified that the bill of the Parliament deemed to have been assented by the president (with effect from 21st April 2023) under Clause (2) of the Article 75 of the Constitution of Islamic Republic of Pakistan. In the light of completion of all legal rules and regulations, the law was sent for gazette publication.

Earlier, on 20th April 2023; President Dr Arif Alvi, sent back the Supreme Court (Practice and Procedure) Bill, 2023 without signing but it became law next day. The president had held that the issue of legislative competence and validity of the bill was pending before the highest judicial forum of the country. (Thus) in respect of the matter being heard, no further action on the bill was appropriate.

The bill was first approved by the Cabinet in late March 2023 and then passed by both the National Assembly and the Senate, but the president refused to sign it into law for the reason cited above. He returned it for reconsideration on 8th April 2023 and a joint parliamentary sitting reapproved it two days later, despite opposition from Imran Khan's Pakistan Tehreek-e-Insaf (PTI).

The bill was passed amid a standoff between the government and the judiciary over elections in Punjab and Khyber PK provinces. But the President had returned the Bill to the Parliament for reconsideration, stating that it prima-facie ***'travels beyond the competence of Parliament'***. After it the government then got the bill passed by a joint session of parliament on 10th April 2023 despite strong protest from the Pakistan Tehreek-e-Insaf (PTI), after which it was again sent to the president to sign. According to Article 75 (2) of the Constitution:

"When the President has returned a Bill to the Majlis-e-Shoora (Parliament), it shall be reconsidered by the Majlis-e-Shoora (Parliament) in joint sitting and, if it is again passed, with or without amendment, by the Majlis-e-Shoora (Parliament), by the votes of the majority of the members of both Houses present and voting; it shall be deemed for the purposes of the Constitution to have been passed by both Houses and shall be presented to the President, and the President shall give his assent within ten days, failing which such assent shall be deemed to have been given."

Regarding the constitution of benches, the bill stated that every cause, matter or appeal before the apex court would be heard and disposed of by a bench constituted by a committee comprising the CJP and the two senior-most judges. It added that the decisions of the committee would be taken by a majority.

Regarding exercising the apex court's original jurisdiction, the bill said that any matter invoking the use of Article 184(3) would first be placed before the aforementioned committee.

The bill said that: *'if the committee is of the view that a question of public importance with reference to the enforcement of any of the fundamental rights conferred by Chapter I of Part II of the Constitution is involved, it shall constitute a bench comprising not less than three judges of the Supreme Court of Pakistan which may also include the members of the committee, for adjudication of the matter'*. The bill additionally said that a party would have the right to appoint its counsel of choice for filing a review application under Article 188 of the Constitution.

REVIEW / APPEALS DISMISSED:

On 11th October 2023; after hearing the arguments from both sides the SCP dismissed the petitions against the Practice and Procedure Act, and sustained the law with a majority of 10-5. A full court bench comprising 15 judges, headed by CJP Qazi Faez Isa, pronounced the judgement that was reserved earlier after five consecutive hearings. The law was deemed in accordance with the Constitution. Justice Ijazul Ahsan, Justice Mazahar Naqvi, Justice Muneeb Akhtar, Justice Ayesha Malik were among the dissenters of the 10-5 verdict. With this decision, the Supreme Court (Practice and Procedure) Act was declared fit to be enforced.

According to the verdict, ***the right to appeal would not apply retroactively.*** The clause seeking application of the right to appeal on past decisions was voided with 8-7 majority, while the chief justice dissented from the decision. The right to appeal in decisions of *suo-motu* cases under Article 184(3) were sustained with a 6-9 majority.

The Supreme Court had reserved its decision on the applications against the Practice and Procedure Act. The CJP Qazi Faez Isa said ***'...if a consensus is reached, the verdict will be pronounced, otherwise it will be reserved'***. Then the SCP resumed the hearing of multiple petitions against the Practice and Procedure Act for the fourth consecutive day. A day earlier, the MQM and Pakistan Bar Council had announced their support for the Practice and Procedure Act. Under Article 175, legislation regarding the Supreme Court was not possible, petitioner's counsel remarked. Justice Jamal Mandokhel said if the law sustained the full court could amend rules. Justice Ayesha Malik said the full court rules could also not be made outside the law.

Beginning his arguments, Attorney General for Pakistan [AGP] Mansoor Usman Awan said he would talk about Article 191 and the independence of the judiciary; adding that the Constitution mentions ***'subject to law'*** at various places; further that the right to privacy was also kept subject to law. Article 191 didn't take away the right of parliament to legislate. The AGP further argued:

"Parliament has given independence to the judiciary but hasn't rescinded its right to legislate. There has been no amendment to Article 191 since the Constitution was made; and that not amending Article 191 was to ensure the independence of the judiciary. The right to legislation in the high treason and Right to Information laws was derived from constitutional provisions.

- *(To a question, the AGP responded) that the judges are bound to implement it under their oaths. The Constitution does not recognize the chief justice as the master of roster."*

The CJP observed that:

"... 'subject to law' could also mean judgement law. Maybe parliament maintained these words this way for further legislation. One institution should respect the other - he thought parliament had respected the Supreme Court. Now we'll see maybe there is a need to make further rules.

Under Article 189, there is no obligation to obey traditions. (Also, that) the burden of proving that the provisions of the Act are unconstitutional lies with the petitioners."

The CJP further commented that the scope of the issue should not be expanded, adding parliament was not an enemy nor did it consider the court its enemy. One institution should not clash with another, he maintained. ***"The world is moving ahead, and we're going backwards."***

This Supreme Court did what was not within its power, the CJP said further, adding that one bench gave a decision and the other gave its own verdict on it. **"No petitioner had the courage to talk about this,"** Justice Isa said. **"Enough of this drama that parliament cannot do this!"** he stressed. **"That was not even the jurisdiction of the review,"** CJP Isa added.

"Can the Supreme Court expand its jurisdiction if parliament cannot?" the CJP asked. The AGP responded in the negative; adding that the only question before them was whether the Practice and Procedure Act was constitutional or not. **"Honour parliament so it follows our decisions,"** CJP Isa said, adding that there could be debate on whether the law is good or bad.

The CJP questioned why judges were afraid of hearing the truth or listening to criticism. **"I will not have a problem if you show me the mirror,"** he remarked.

The AGP further argued that the powers of the Supreme Court could be increased by parliament, but not reduced; the ambit of Article 184 or 185 could be extended by parliament. The CJP Qazi Isa said, suggesting forgetting about assumptions and completing arguments, that:

"Let me admit that I made a mistake by forming a full court; however, none of his colleagues objected to the decision. Even when the first eight-member bench was formed, there was no objection (either)."

"Sorry, but these are not assumptions," Justice Muneeb Akhtar remarked.

Justice Sardar Tariq Masood remarked that:

"A chief justice approves an unconstitutional move by forming a bench and there is no objection to it. Even the holy Quran talks about consultation. You say dictatorship is right; are we slaves? (Adding that) this was about the future; (we're) not to promote dictatorship."

Justice Malik further said the law gave the right to appeal in cases under Article 184(3). But where the appeal against the case go, asked the CJP, adding *'the law says there will be right to appeal in some cases.'*

The fact remained that the Pakistani law gives the right to appeal in cases under Article 184(3) if the court forms a full court to hear a case, the appeal cannot go anywhere. Justice Malik also raised a proposition if the SC could eliminate the right to appeal given in the law through a full court.

The intelligentsia added positive comments to the said procedures. The Supreme Court (Practice and Procedure) Act 2023 was a landmark legal development. It removed the Chief Justice's unilateral **'master of the roster'** status, replacing it with a three-judge committee to form benches and fix cases. Certain **Judicial Remarks** were that: *'... during live-streamed hearings, the bench highlighted that regulating the court's proceedings promotes transparency. Judges, including Justice Athar Minallah, noted that Parliament is fully competent to legislate on access to justice and to check unbridled administrative powers'.*

ON 'INTERNAL' JUDICIAL INDEPENDENCE:

On 11th October 2023, the Supreme Court by a 10-5 majority upheld the constitutionality of provisions related to bench formation and case allocation in the Supreme Court (Practice and Procedure) Act, 2023. Parliament's enactment of a law distributing to a committee of judges what were earlier the chief justice of Pakistan's (CJP) sole discretionary powers, and the Supreme Court upholding its constitutional validity, are both welcome and necessary first steps in recognising the 'internal' aspect of the independence of the judiciary.

A brief history of the evolution of the independence of the judiciary would help explain the meaning of 'internal' judicial independence and its significance. In essence, judicial independence means judges should be free to perform their duties in accordance with the law without any improper influence. This is important as only an independent judiciary can safeguard the rule of law, access to justice, and more generally, the fundamental rights of the people.

In Pakistan, like in many other jurisdictions, independence of the judiciary has been entirely been seen as the institutional and functional separation of the judiciary from other branches of the state in matters such as appointments, accountability, and court administration. In later years, the people saw how the CJP's power to allocate cases has been raising concerns. However, as judiciaries in many parts of the world becoming more institutionally independent with greater powers of self-governance — same has been happening in Pakistan as well — there were growing concerns about the 'internal dimension of judicial independence', which sought protection for individual judges from interference or improper influences from within the judiciary. The European Court of Human Rights, for example, in a number of judgements since 2009, recognized:

"...judicial independence demands that individual judges be free not only from undue influences outside the judiciary, but also from within. Internal judicial independence requires that judges should be free from directives or pressures from the fellow judges or those who have administrative responsibilities in the court such as the president of the court or the president of a division in the court".

One such example of 'internal' independence was ensuring court presidents or chief justices do not have arbitrary, unstructured powers to constitute benches and assign cases to individual judges. The UN Special Rapporteur on the **Independence of Judges and Lawyers** said case allocation 'at the discretion of the court chairperson may lead to a system where more sensitive cases are allocated to specific judges to the exclusion of others' and thus argued for a mechanism that 'protects judges from interference from within the judiciary', including through legislation.

Referring to REEMA OMAR's essay (at reema.omer@icj.org) dated 15th October 2023:

"A number of constitutions, particularly in Europe, recognise the right to a 'lawful' or 'natural' judge. This right is now also seen as a safeguard against deprivation of the 'lawful judge' from within the court administration. In countries such as Germany, therefore, a 'management group' consisting of the court president and a number of judges decides how cases are allocated on the basis of predetermined management plans".

These examples show allocation of cases to individual judges or benches is not solely a matter of court administration, but has serious implications for 'internal' judicial independence, and consequently, for the rule of law, access to justice, and the right to a fair trial. Parliaments, therefore, are not just competent to provide a remedy in such cases, as they have done in a number of jurisdictions, **but have a duty to do so**. This is true for Pakistan as well.

There is ample record available that, in Pakistan, how the CJP's arbitrary power to allocate cases has been raising concerns of illegitimate influences on the functioning of the judiciary and case outcomes. Chief

justices have been grossly misusing their powers by assigning politically significant cases to a handful of judges to the exclusion of others, based on no clear criteria, creating a hierarchy in Supreme Court judges. ***Cases have been taken from particular judges and allocated to others in the middle of the proceedings.*** And while certain petitions were heard promptly, others remained pending for years.

Surprisingly, a number of judges, lawyers, and other commentators still consider bench formation and case allocation an ***'administrative matter'***, and find legislation distributing these powers to a committee of the CJP and two senior-most judges outside parliament's competence and an assault on the independence of the judiciary. How such committee constituted under the law would work and demonstrate how far issues related to bench formation and case allocation have been addressed. *At least this much is clear that the CJP giving up his power as the 'master of the roster' and sharing it with other Supreme Court judges strengthens 'internal' judicial independence.*

It remains to be seen whether there has indeed been a paradigm shift in how the Supreme Court (and perhaps the high courts too) understand the independence of the judiciary, as many other issues continue to hamper 'internal' independence and need reform. Reema Omar once more pointed out:

"...These include opacity in the judicial appointments process and the CJP's power of 'initiation', which makes him the sole authority that can recommend names of candidates that the Judicial Commission can consider for appointment to the superior courts. Similarly, urgent reform of the judicial accountability system is also required, including through legislative as well as procedural changes to the Supreme Judicial Council, to safeguard both 'internal' judicial independence and the independence of individual judges."

Ideally, any judicial and legislative attempts to address such issues - should be based on a holistic, contemporary understanding of judicial independence that also includes its 'internal' aspect, instead of an outdated, knee-jerk view that is captivated by a CJP as the headman and equates independence with complete insulation of the judiciary in Pakistan.

SC (P & P) AMENDMENT ORDINANCE 2024

On 20th September 2024: President of Pakistan Asif Ali Zardari signed off the Supreme Court (Practice and Procedure) Amendment Ordinance 2024 that allowed changes to the committee formulated to regulate the affairs of the top court. In April 2023, the PDM-led government had passed the SC (Practice & Procedure) Act, 2023 which was dubbed by the opposition parties as an attempt to ***'clip the top judge's powers of bench formation.'*** The said bill of 2023 was immediately challenged in the Supreme Court. However, the apex court had, on 11th October 2023, dismissed the petitions filed against it declaring the Act LEGAL in accordance with the Constitution.

Under the law, a three-member bench, comprising the chief justice of Pakistan (CJP) and the two senior-most judges of the apex court, will decide whether or not to take up a matter *suo-motu*; previously, it was solely the prerogative of the CJP. The Act had further given the right to file an appeal within 30 days of the judgement in *suo-moto* cases.

That day of September 2024, the federal information minister told on TV that the president had signed off on changes to the law, following the federal cabinet's approval of the ordinance. Further, that the right of appeal was also granted for any judgment to be passed by the apex court in a case under Article 184(3). A transcript of the proceedings for each case was also to be prepared for the knowledge of the public. As per PMLN government's version, the said ordinance was passed to bring more transparency in the judicial proceedings.

A committee was set up under the Practice and Procedure Act headed by the CJP, senior puisne judge and the third senior judge as its members AND under the ordinance, the CJP would head the committee BUT would nominate one of the judges of the Supreme Court as a member of this committee from time to time.

Immediately after the approval of the ordinance, Chief Justice of Pakistan Qazi Faez Isa nominated Justice Aminuddin Khan of the apex court as the third member of the judges' committee. According to a notification issued on the same day of 20th September 2024 by the Registrar of the Supreme Court, the CJP changed the composition of the judges' committee under Section 2 (1) of the Supreme Court (Practice and Procedure) Act, 2023 as amended by the Ordinance No VIII of 2024. Justice Aminuddin was part of the minority view with Justice Naeem Akhtar Afghan (making a like-minded group with CJP Qazi Isa) who had rejected the appeals of the *Sunni Ittehad Council* in the reserved seats case and denied allotment of the seats.

On 26th September 2024: The said 'Amendment Ordinance' was challenged in SC. The apex Court was asked to declare that: ***'The Section 2 of the SC (Practice and Procedure) Amendment Ordinance regarding constitution of the Committee violates fundamental rights and is ultra vires and should be struck down.'*** Afrasiab Khattak, former senator and chairperson of the Human Rights Commission of Pakistan, and one Farieha Aziz, a Karachi-based journalist, filed a petition under Article 184(3) of the constitution and cited the Secretary to the President, and the Federation through the Secretary Ministry of Law and Justice as respondents.

The petitioners requested that their petition be heard by the Full Court which had earlier endorsed the 2023 Act by a majority decision. If not, the CJP (who was granted extra powers by the Impugned Section), Justice Aminuddin (who has been nominated by the CJP as a member of the Committee under the Impugned Section) and Justice Munib Akhtar (who could be a member of the Committee if the impugned section got struck down) ***should not be part of any bench constituted to hear this petition.***

The petitioners also urged that the fundamental rights conferred under the Constitution had lost meaning in the absence of an independent judiciary to enforce them. Through the impugned section (changed Sec 2), the executive had attempted to undermine judicial independence. The impugned section targeted one Judge, the third most senior judge of the then Supreme Court. The petitioners argued that in case of the impugned section, there was a specific and obvious design to exclude one specific judge and grant controlling power to another, the CJP Qazi Isa. It was a blatant interference in judicial independence.

A year earlier, the same CJP Qazi Isa had declared his candid opinion in a similar case that:

"....if an ordinance is being brought by the sitting government while the National Assembly and Parliament are there in existence – the parliament should go home."

The petitioners further stressed that:

"The Supreme Court had noted that the power to promulgate ordinances is limited to 'emergent matters', and the Constitution states that this is limited to situations where 'immediate action' is required. There was no such emergency in the case of changing the composition of the Committee, and nor has the same been identified.

The impugned section violates Article 175(3) of the Constitution which commands that the judiciary shall be separated from the executive. The impugned section is a blatant attempt by the executive to encroach in the internal workings of the judiciary, and to undermine judicial independence."

The legal fraternity raised their voices on that ordinance taking it as an attack on judicial independence; an attack on access to justice while violating inter-alia Articles 4, 9, 10, 10-A and 25 of the Constitution. It was a deliberate effort to impact ***access to justice*** and thus the fundamental rights.

[The independence of the judiciary is a salient feature of Pakistani Constitution, and must be safeguarded. The Objectives Resolution, which is now a substantive part of the Constitution by means of Article 2A of the Constitution, also states that independence of the judiciary shall be fully secured. The people have given to themselves a supreme document which guards judicial independence.]

A full bench of the Supreme Court had upheld the 2023 Act less than a year ago. The very rationale for upholding the law was to ensure that '***one man – the CJP***' should not be exercising absolute power as far as the constitution of benches is concerned. The Full Bench linked such democratising of decision-making with the legitimacy and the credibility of the apex Court. ***The Impugned Section was contrary to the judgment of the Full Bench in Raja Amer Khan and another vs. Federation of Pakistan (PLJ 2024 SC 114)*** – for further details media reports dated 26th September 2024 is referred.