

FEDERAL CONSTITUTIONAL COURT OF PAKISTAN
(Appellate Jurisdiction)

PRESENT:

Justice AAMER FAROOQ
Justice ROZI KHAN BARRECH

Civil Petition No.2202 of 2025

*(Against Order of the Sindh High Court dated 05.05.2025 in
C.M.A No. 28869/2023 in Constitution Petition No. D-6169 of 2023)*

Khalid Mehmood

...Petitioner(s)

Versus

Pakistan, through Secretary, Ministry of Finance and others

...Respondent(s)

For Petitioner(s): Mr. Faisal Siddiqi, ASC

For Respondent(s): Mr. Shah Nawaz, ASC

Assisted by: Barrister Zarrar Haider Bhatti, Law Clerk

Date of Hearing: 27.11.2025

JUDGMENT

Aamer Farooq, J.:

1. The petitioner has challenged the order passed on 05.05.2025 by the Constitutional Bench of the Sindh High Court constituted under Article 202A of the Constitution of the Islamic Republic of Pakistan, 1973 (**“the Constitution, 1973”**). This order effectively recalled the *ad-interim* stay earlier granted by the Sindh High Court on 20.12.2023. The impugned order was subsequently brought before the Supreme Court of Pakistan through a petition for leave to appeal under Article 185(3) of the Constitution, 1973. However, after the passage of Constitution (twenty-seventh) Amendment Act, 2025 the matter now stands transferred to the Federal Constitutional Court of Pakistan pursuant to Article 175F(1)(c)¹.

¹ **175F. Appellate jurisdiction of the Federal Constitutional Court.** __ (1) The Federal Constitutional Court shall have jurisdiction to hear and determine appeals from judgments, decrees, final orders or sentences of a High Court as provided herein below

(a) where an Act of Majlis-e-Shoora (Parliament) so provides;
(b) if the High Court certifies that the case involves a substantial question of law as to the interpretation of the Constitution; or

2. Under the 2018 Amnesty Scheme, the petitioner submitted a declaration, paid a certain amount, and disclosed ownership of a foreign company, Red Castle. Subsequently, however, the Petitioner was issued a notice under Section 109-A of the Income Tax Ordinance, 2001 (**“the ITO”**), a provision introduced through the Finance Act, 2018. Aggrieved by this notice, the Petitioner filed C.P. No. D-6169 of 2023, challenging both the validity of section 109-A of the ITO and the impugned notice itself on independent legal grounds in addition to the *vires* challenge.
3. When C.P. No. D-6169 of 2023 was taken up before the Sindh High Court, the court issued an *ad-interim* order on 20.12.2023 restraining the respondents from passing any final adverse order pursuant to the impugned notice. The matter was later listed before the Constitutional Bench of the Sindh High Court (after the passage of Constitution (twenty-sixth) Amendment Act, 2024) on 05.05.2025, and after hearing the parties, the Constitutional Bench recalled the order dated 20.12.2023 in the following terms:

“The petitioner has challenged the vires of Section 109-A of the Income Tax Ordinance, 2001 and predicated thereupon has obtained ad-interim orders, having the effect of suspending the very enactment / provision under consideration.

The Supreme Court has deprecated the tendency to render interim orders having the effect of suspending a law. It has been consistently maintained, especially in revenue matters, that interim orders, having the effect of suspending a law, ought not to be passed. There is a plethora of edicts to such effect, including PLD 1989 SC 61, 1993 SCMR 2350 and AIR 1985 SC 330, and recently the same has been emphasized in the order dated 29.02 2024, passed in the case of Commissioner Inland Revenue, Large Taxpayers Office vs Pakistan Oilfields Ltd. Rawalpindi & Others (Civil Petitions No. 3472 to 3475 of 2023).

In mutatis mutandis application of the binding edicts, referred to supra, interim orders passed herein are recalled and CMA 28869 of 2023, is hereby dismissed”. (Emphasis supplied)

(c) from a judgment or an order of a High Court made under Article 199 only if the Federal Constitutional Court grants leave to appeal: Provided that no appeal shall lie against a judgment or an order of a High Court made under Article 199, in a case which relates to rent and family except guardianship and such other matters as may be determined by law.

(2) All petitions for leave to appeal, appeals or review applications, to which clause (1) apply or any other proceedings falling within the jurisdiction of the Federal Constitutional Court, filed or pending before the Supreme Court prior to commencement of the Constitution (Twenty-seventh Amendment) Act, 2025, stand transferred to the Federal Constitutional Court and shall only be heard and decided by that Court.

4. Learned counsel for the Petitioner, Mr. Faisal Siddique, ASC, contended that the case should be remanded for a fresh hearing. He argued that the Constitutional Bench of Sindh High Court which rendered the impugned order lacked jurisdiction under Article 202A of the Constitution, 1973, as it did not then possess the authority to issue a writ of *certiorari* (which it does now after the passage of Constitution (twenty-seventh) Amendment Act, 2025). He argued that the case ought to have been heard by a Regular Bench of the Sindh High Court, which possessed the necessary authority to issue writs of *certiorari*, and he relied on two relevant judgments of the Sindh High Court in support of his submission. Conversely, learned counsel for the Respondents, Mr. Shah Nawaz, ASC, objected to the arguments raised and argued that this court cannot interfere with the interim order of the High Court. He referred to various precedents to substantiate his position. We have considered the arguments of both learned counsel and appreciate their assistance in this regard.

5. The question that we are inclined to decide in the instant case is; whether the impugned order of the High Court was without jurisdiction under the erstwhile Article 202A of the Constitution, 1973 and whether an *ad-interim* orders passed by the High Court could be challenged before this court.

a. Whether the impugned order of the High Court was without Jurisdiction?

6. It is a well-established principle of law, consistently reaffirmed, that a court cannot issue any order, judgment, or exercise an authority in a matter unless it is legally competent to adjudicate upon it (see *Kh. Muhammad Fazil v. Mumtaz Munnawar Khan Niazi (deceased) through his legal heirs*²). For a court to decide a case, the matter must fall within its jurisdiction; and where a court is internally divided into different benches, the case must also fall within the jurisdiction of the specific bench assigned to hear it. For example, if a matter that is required to be heard by a Constitutional Bench of a High Court (constituted under Article 202A of the Constitution, 1973) is instead heard by a Regular Bench, the High Court as an institution may have jurisdiction over the subject matter involved, but the bench hearing the case does not. Any order passed in such circumstances would therefore be without jurisdiction.

² 2024 SCMR 1059, Para 13 (Per Muhammad Ali Mazhar J.)

7. Jurisdiction is a foundational issue that must be determined at the very beginning of any proceeding and the court that is authorized to render a final judgment or order on the *lis* is the one vested with the competence to adjudicate it. This is because the legitimacy and finality of any judgment depend on whether the bench delivering it had the lawful authority to do so. Such jurisdictional certainty is essential not only for the validity of judicial decisions but also for safeguarding the right to a fair trial under Article 10A of the Constitution, 1973, and for ensuring due process.
8. In the instant case, the impugned order was passed by Sindh High Courts' Constitutional Bench established under the Constitution (twenty-sixth Amendment) Act, 2024. Article 202A at the time, as it stood, read as follows:

“202A. (1) *There shall be Constitutional Benches of a High Court comprising such Judges of a High Court and for such term as may be nominated and determined by the Judicial Commission of Pakistan as constituted under clause (5) of Article 175A, from time to time.*

(2) *The most senior Judge amongst Judges nominated under clause (1) shall be the Head of the Constitutional Benches.*

(3) No Bench of a High Court other than a Constitutional Bench shall exercise jurisdiction vested in the High Court under sub-paragraph (i) of paragraph (a) and paragraph (c) of clause (1) of Article 199.

(4) *For the purposes of clause (1), a Bench, to be nominated by a committee comprising the Head of the Constitutional Benches and next two most senior Judges from amongst the Judges nominated under clause (1), shall hear and dispose of such matters.*

(5) *All petitions under sub-paragraph (i) of paragraph (a) and paragraph (c) of clause (1) of Article 199 or appeals therefrom, pending or filed in a High Court prior to commencement of the Constitution (Twenty-sixth Amendment) Act, 2024 (XXVI of 2024), subject to clause (7), forthwith stand transferred to the Constitutional Benches and shall only be heard and decided by Benches constituted under clause (4).*

(6) *Notwithstanding anything contained in the Constitution but subject to an Act of Majlis-e-Shoora (Parliament) in respect of the Islamabad High Court and an Act of Provincial Assembly in respect of other respective High Courts, a High Court may make rules regulating the practice and procedure of the Constitutional Benches.*

(7) *This Article shall come into force, if in respect of—*

(a) the Islamabad High Court, both Houses of Majlis-e-Shoora (Parliament) in the joint sitting; and

(b) a High Court, the respective Provincial Assembly,

through a resolution passed by majority of the total membership of the joint sitting or the respective Provincial Assembly, as the case may be, give effect to the provisions of this Article.” (Emphasis supplied)

9. However, the position regarding Article 202A has altered significantly after the passage of Constitution (twenty-seventh) Amendment, Act 2025. The erstwhile article 202A has been amended to read as follows:

“202A. Constitutional Benches of High Courts. — (1) *There shall be Constitutional Benches of a High Court comprising such Judges of a High Court and for such term as may be nominated and determined by the Judicial Commission of Pakistan as constituted under clause (5) of Article 175A, from time to time.*

(2) The most senior Judge amongst Judges nominated under clause (1) shall be the Head of the Constitutional Benches.

(3) No Bench of a High Court other than a Constitutional Bench shall exercise jurisdiction vested in the High Court under Article 199.

(4) For the purposes of clause (1), a Bench, to be nominated by a committee comprising the Head of the Constitutional Benches and next two most senior Judges from amongst the Judges nominated under clause (1), shall hear and dispose of such matters.

(5) All petitions under sub-paragraph (i) of paragraph (a) and paragraph (c) of clause (1) of Article 199 or appeals therefrom, pending or filed in a High Court prior to commencement of the Constitution (Twenty-sixth Amendment) Act, 2024 (XXVI of 2024), subject to clause (7), forthwith stand transferred to the Constitutional Benches and shall only be heard and decided by Benches constituted under clause (4).

(6) Notwithstanding anything contained in the Constitution but subject to an Act of Majlis-e-Shoora (Parliament) in respect of the Islamabad High Court and an Act of Provincial Assembly in respect of other respective High Courts, a High Court may make rules regulating the practice and procedure of the Constitutional Benches.

(7) This Article shall come into force, if in respect of—

*(a) the Islamabad High Court, both Houses of *[Majlis-e-Shoora] (Parliament) in the joint sitting; and*

(b) a High Court, the respective Provincial Assembly, through a resolution passed by majority of the total membership of the joint sitting or the respective Provincial Assembly, as the case may be, give effect to the provisions of this Article.” (Emphasis supplied)

10. A comparison of the two versions of Article 202A shows that, prior to the 27th Constitutional Amendment, the Constitutional Bench of the High Courts were authorized to hear only those matters falling under Article 199(1)(a)(i) and Article 199(1)(c), which correspond to the well-known writs of *mandamus*, *prohibition* and to enforce fundamental

rights envisaged in Part II, Chapter I of the Constitution, 1973. After the 27th Constitutional Amendment, however, Article 202A has been expanded, and the Constitutional Benches of the High Court (provided they are established under Article 202A (7)), now possess exclusive jurisdiction over the full range of writ matters exercised under Article 199.

11. Since the impugned order was passed prior to the enactment of the 27th Constitutional Amendment, it must be examined in light of the former Article 202A. To determine whether a matter fell within the jurisdiction of the Regular Benches or the Constitutional Benches, the Sindh High Court in its various pronouncements relied on the “*dominant object theory*.” The theory essentially requires the Court to look at the primary relief sought in a constitutional petition in order to identify the appropriate forum. Under this approach, when the relief requested was one of *certiorari* (Article 199(1)(a)(ii)), *habeas corpus* (Article 199(1)(b)(i)), or *quo warranto* (Article 199(1)(b)(ii)), only the Regular Benches were competent to entertain the matter. Conversely, where the petitioner sought relief in the nature of *mandamus* or *prohibition* (Article 199(1)(a)(i)), the jurisdiction rested exclusively with the Constitutional Benches of the High Court. Thus, it was the “character of the relief” claimed that determined which bench had the authority to hear the petition. The Sindh High Court appropriately invoked this “dominant object theory” in the *Attock Cement case*³ and observed as follows:

*“In a petition where the petitioner both seeks directions of prohibitory or mandamus relief under Article 199(1)(a)(i) as well as declaratory relief under Articles 199(1)(a)(ii), then which constitutional bench of the High Court will have jurisdiction to decide the matter, i.e. either Constitution Bench “A” or “B”? An analogy can be drawn to the tests of “dominant object” and “ultimate relief” developed in jurisprudence on territorial jurisdiction. In a recent 4-member bench judgement of the Supreme Court in the case of *Taufiq Asif v General (Retd.) Pervez Musharraf*, the test was laid down by the apex Court to determine the territorial jurisdiction of the High Courts. The judgement reviewed past precedents on the subject and held that “the ratio of these cases is that it is the dominant object of the petition, i.e., the main grievance agitated and the ultimate relief sought in the petition, which determines the territorial jurisdiction of the High Courts.” The aforementioned precedent can be analogized in the instant issue by using a similar test to determine whether the lis is beyond the jurisdiction of the other benches after the 26th Amendment. Thus, in our*

³ 2024 SHC 1302 (Per Muhammad Shafi Siddique CJ.)

opinion, the matter may be decided in terms of the dominant relief being sought. Is the dominant relief in the petition declaratory or directory (prohibitory or mandamus)? If the dominant relief is declaratory and the directory prohibitory or mandamus relief is merely consequential to such declaratory relief, then the Constitutional Bench “A” of the High Court, i.e., will have the Roster, but if the directory prohibitory or mandamus relief is dominant, then the Constitutional Bench “B” will deal with the assignment/work. Ultimately, the exercise may be an art rather than an exact science. For example, take the case of a petition filed for a missing person or free will. First, is the relative of the missing person seeking relief under Article 199(1)(b)(i) for directions to produce the detenu? Or, is s/he seeking positive directions under Article 199(1)(c) for enforcement of Fundamental Rights conferred under Article 8 (security of persons), Article 9 (safeguards as to arrests and detention), Article 14 (inviolability of dignity of man), etc.? What will be the dominant relief since both writs seek to issue directions from the Court? Chapter 2, Article 35 of the 1973 Constitution (protection of family, etc.) may also be in play. The dominant relief can fall in either of the two benches, i.e., the Constitutional High Court’s Constitutional Bench “A”, or the Article 202A “Constitutional Benches”, Constitutional Bench “B”. In either case, the exercise will involve an examination of the petition, hearing(s), etc. or, at the very least, perusing the prayer clause of the petition, ultimately, with the view of understanding what is the dominant relief being claimed by the petitioner and which bench is best suited to hear the lis. Suffice it to say that there can be no hard and fast rules and is incapable of a complete and exhaustive protocol that comprehends all the permutations to which such protocol would apply, which in fact will vary depending upon the facts and circumstances of the matter at the time of examination of the petition”. (Emphasis supplied)

12. The Sindh High Court was right to rely on the “dominant object theory”, as it provides a clear method for determining which bench has jurisdiction over a particular matter. Dominant object theory provides the appropriate framework towards understanding which bench was to hear a given case. It requires the Court to identify the primary or dominant relief by examining the pleadings and, in particular, the prayer clause, while also considering the ultimate effect of granting the relief, so as to determine which relief is merely ancillary and which is substantive. In another case, *Sharjeel Inam Memon*⁴, the Sindh High Court explained this approach as follows:

⁴ CP D-473 of 2025 and connected matters.

“Para 12. The obvious issue to address next is the remit of a bench, other than the Constitutional bench; colloquially referred to as the Regular bench. An interim order rendered in Attock Cement attempted to address this question vide resort to the dominant object or relief theory. The concept theorizes that the dominant object / relief of a petition shall determine the question of jurisdiction. The apparent consequence of application of this theory to the present scenario is that petitions seeking the dominant object / relief of writs of mandamus, prohibition and / or enforcement of fundamental rights must be placed before the Constitutional bench; whereas the remaining matters may be placed before the Regular bench.

Para 13. Notwithstanding that the preponderant authority, referred to in Attock Cement, applied the theory to determine territorial jurisdiction, as opposed to distribution of jurisdiction within the same territory as is the case herein; however, to the extent of such invocation it appears consonant with the Constitutional scheme. While the application of the theory would require matters in which the dominant relief pertains to writs of certiorari, habeas corpus, quo warranto etc. to be placed before a Regular bench, the same could not be construed to denude a Constitutional bench of concurrent jurisdiction in such matters, given the right circumstances.

Para 14. The right circumstances may be illustrated to encompass a scenario wherein two or more equi-dominant objects / relief are sought in a petition. If one of these objects falls within the exclusive remit of a Constitutional bench then the entire matter would be heard and determined by the said bench. Other than the scenario envisaged herein matters where the dominant object does not fall within the exclusive remit of the Constitutional bench ought to be heard by the Regular bench. So if the dominant relief / object sought in a petition is the writ of certiorari, habeas corpus, quo warranto etc then the matter may be placed before the Regular bench.”.

Para 15. While there is no apparent cavil to the application of the dominant object theory in determining whether a matter is to be heard by a Constitutional bench or not, however, such a determination is eventually judicial and not rested upon a petitioner's statement or masquerade of pleadings.” (Emphasis supplied)

13. While identifying the dominant object of a plaint is indeed a judicial exercise, the prayer clause and the pleadings are the primary tools for conducting that inquiry. However, it is the practical effect of the relief, if granted, that ultimately reveals the true dominant relief sought. For example, in a petition seeking the production of a *detenu*, the matter certainly involves fundamental rights and their enforcement, but the principal outcome being pursued is the actual production of the *detenu*

making it a writ of *habeas corpus*. Thus, when interpreting the erstwhile Article 202A, it is the end result or final impact of the relief that must guide the determination of the dominant relief.

14. When the validity of a law is challenged (as it is in this case) and a writ is filed before the High Court seeking judicial review, the Court is, in substance, exercising its authority under Article 199(1)(a)(ii), namely the power to issue a writ of *certiorari* i.e., assessing the action to be “without lawful authority” and “of no legal effect”. While it is settled in *Benazir Bhutto case*⁵, that the High Court’s possess the power of determining the *vires* of a law, however, it was never assessed (or maybe it never became a point of tension) that in which particular clause of the Article 199 the High Court’s strike down the statutes. Throughout the time, the High Courts exercised a broad and inherent jurisdiction under Article 199 to strike down any statute found to be *ultra vires*. However, with the introduction of the erstwhile Article 202A, which created a division between Constitutional Benches and Regular Benches, it became necessary for the courts to identify the precise clause of Article 199 under which the High Court was, in substance, invalidating a statute, so that the matter could be placed before the appropriate bench of the High Court that was legally competent to hear it. In the *Attock Cement case*, the Sindh High Court, while discussing this contention stated:

“Para 35. The Petitions before us impugn the vires of the statute, specifically Section 31(8) of the NEPRA Act, 1997, and this is the only relief now sought by the Petitioners which is in play, as articulated by the petitioners. The challenge to ultra vires falls within the words “without lawful authority” or “of no legal effect” as found in Article 199(1)(a)(ii) and it is the principle and dominant (as well as the only) relief/remedy prayed by the petitioners. Prima facie, as the petitioners are seeking a declaration that Section 31(8) is ultra vires, in other words, the provision enacted by the Legislature “without lawful authority” and “is of no legal effect”, the petitioners’ dominant relief/remedy would appear to fall within the relief of declaration under Article 199(1)(a)(ii). But, on closer examination, “without lawful authority” or “of no legal effect” according to Article 199(1)(a)(ii) normally arises out of an inquiry of whether a court or quasi-judicial body or purely executive or administrative tribunal or other bodies or officer have, in doing the act or undertaking the proceedings, acted in accordance with the law or exceeded their jurisdiction.

⁵ PLD 1988 SC 416 (Per Muhammad Haleem CJ)

*Para 38. With the petitioners knocking at the door of the Constitutional High Court for a declaration, the question arises as to how this bench of the Constitutional High Court can grant declaratory relief when “no act is done” or “proceeding taken” has occurred strictly within the framework of Article 199(1)(a)(ii). A review of the judgments of the past suggests that till the recent 26th Amendment, the jurisdiction under Article 199 of the 1973 Constitution was, most of the time, read by the High Courts as a whole without much stress on terms used in Article 199, such as, “declaration”, “direction” and “without lawful authority” or is of no legal effect”. The Constitutional High Court did not identify each individual sub-article of Article 199 based on which it would grant relief/remedy to the petitioner. It took a more holistic view. For example, a plain reading of Article 199(1)(c) shows that the said sub-article is restricted to “enforcement of any of the Fundamental Rights conferred by Chapter 1 of Part II” and not to the enforcement of any other provision of the 1973 Constitution which jurisdiction will arise either from the other sub-article(s) of Article 199 or from other provisions of the 1973 Constitution. However, the Supreme Court of Pakistan in *Benazir Bhutto (Miss) v. Federation of Pakistan*, PLD 1988 SC 416, clarified that the High Court can declare a law ultra vires to the fundamental rights in the exercise of its jurisdiction under Article 199(1)(c). This is inspite of the words “declaration” appearing nowhere in Article 199(1)(c). There is no detailed discussion regarding how the relief/remedy may have to be curated to fit as a good case for directions under Article 199(1)(c). After the 26th Amendment, the utility of precedents like the one in *Miss Benazir Bhutto case (supra)* has to be read in a limited context to the extent that it shows that a law can only be declared ultra vires for violation of fundamental rights under Article 199(1)(c). Yet, just because there is a precedent like the *Miss Benazir Bhutto case (supra)* wherein a law has been “declared” ultra vires by the Constitutional High Court exercising power under Articles 199(1)(c) or even Article 199(1)(a)(i), which sub-articles refer to “directions” only and do not deal with “declaration” that alone does not exclude the vested exercise of powers of the Constitutional High Court that in fact are obvious”. (Emphasis supplied)*

15. The *Attock Cement case* emphasizes that when the vires of a law is examined, the High Court is, in substance, exercising a relief inherently vested in it. Although this specific relief is not expressly mentioned in the Constitution, 1973, the High Courts have consistently exercised it for decades. This naturally raises the question: does the High Court act without jurisdiction when it strikes down a statute? The answer is plainly in the negative. Through a long line of precedents and the development of common law, High Courts have derived their power of judicial review as an inherent feature of the constitutional framework.

As guardians and protectors of the Constitution, they possess, under Article 8 read along with Article 199(1)(c) of the Constitution of 1973, the authority to scrutinize legislation on the touchstone of fundamental rights. Even in situations where no specific fundamental right is directly involved, this does not divest the High Courts of the power to invalidate legislation that is *ultra vires*; they continue to hold, under our constitutional scheme, the inherent authority to declare the law *ultra vires*, if it is in conflict with any provision of the Constitution, 1973 directly or indirectly. Indeed, common law is valid because it depicts the opinion of learned Justices; a procession of sages and savants.

16. When we speak of the High Court's "inherent power", the question then arises: how do we arrive at this conclusion that the power is inherent in the High Courts? In this regard, reference is made to the landmark judgment in *Marbury v. Madison*⁶, in which the United States Supreme Court, for the first time, articulated the doctrine of judicial review and asserted its authority to strike down legislation as *ultra vires*, despite the absence of an explicit or clearly defined provision to that effect in the U.S. Constitution. Chief Justice John Marshall grounded this authority in the judges' constitutional oath, reasoning that their duty to uphold the Constitution necessarily implied the power to invalidate laws that contravene it. He stated;

"Why otherwise does it direct the judges to take an oath to support it? This oath certainly applies in an especial manner to their conduct in their official character. How immoral to impose it on them if they were to be used as the instruments, and the knowing instruments, for violating what they swear to support.

The oath of office, too, imposed by the Legislature, is completely demonstrative of the legislative opinion on this subject. It is in these words: "I do solemnly swear that I will administer justice without respect to persons, and do equal right to the poor and to the rich; and that I will faithfully and impartially discharge all the duties incumbent on me as according to the best of my abilities and understanding, agreeably to the Constitution and laws of the United States."

Why does a judge swear to discharge his duties agreeably to the Constitution of the United States if that Constitution forms no rule for his government? if it is closed upon him and cannot be inspected by him? If such be the real state of things, this is worse than solemn mockery. To prescribe or to take this oath becomes equally a crime.

It is also not entirely unworthy of observation that, in declaring what shall be the supreme law of the land, the Constitution itself

⁶ 5 U.S. 137 (1803) (Per John Marshall CJ.)

is first mentioned, and not the laws of the United States generally, but those only which shall be made in pursuance of the Constitution, have that rank.

Thus, the particular phraseology of the Constitution of the United States confirms and strengthens the principle, supposed to be essential to all written Constitutions, that a law repugnant to the Constitution is void, and that courts, as well as other departments, are bound by that instrument.”)Emphasis supplied)

A closer examination shows that the oath taken by judges is not a mere formality. Its wording clearly binds the judges to “preserve, protect and defend the Constitution of the Islamic Republic of Pakistan⁷”. This indicates that the oath is directed not towards protecting statutes (although this certainly does not mean that the laws enacted by Parliament are not to be followed or upheld), but specifically toward safeguarding the Constitution itself. If a judge of the High Court is faced with a situation in which a statute conflicts with the Constitution, then the question arises: how can he truly ‘preserve, protect and defend’ the Constitution if he is unable to strike down the impugned law? The reality is that he cannot. The moment a judge bows to a law that is inconsistent with the Constitution, he turns his oath into nothing more than words recited before assuming office. Therefore, it is inherent in the jurisdiction and duty of the High Court to strike down laws that are *ultra vires* to the Constitution, 1973.

17. Nevertheless, despite the inherent nature of this power, the former Article 202A required a precise determination of which bench of the High Court, the Regular Bench or the Constitutional Bench, had jurisdiction over a petition challenging the *vires* of a statute. In this regard, we agree with the reasoning adopted by the High Court in the *Attock Cement case*, namely, that a declaration concerning the *vires* of a law falls within the ambit of Article 199(1)(a)(ii). This is because the act of striking down a law is not in the nature of a “direction” under Article 199(1)(a)(i), nor does it correspond to *habeas corpus*, *prohibition*, or *quo warranto*. When a statute is invalidated, the Court effectively holds that “X,” the impugned legislative provision, “is struck down” and is “without lawful authority and of no legal effect,” language that encapsulates the concept of *ultra vires*.
18. A writ of certiorari, that is more or less envisaged in *article 199(1)(a)(ii)*, may be issued against any individual performing functions connected with the affairs of the Federal, Provincial, or local authorities. It is not

⁷ Third Schedule (Constitution of the Islamic Republic of Pakistan, 1973)

necessary that such a person be acting in a judicial or quasi-judicial capacity. The High Court is empowered to intervene whenever an act or proceeding is undertaken in violation of the law or any well-established legal principle (see *Rahim Shah v. Chief Election Commissioner*⁸). The Sindh High Court in *Attock Cement case* extended the definition of “person” mentioned in *article 199(1)(a)(ii)* to include the Legislature as they are within the ambit of “body politic” mentioned in *article 199(5)*.

19. In the present matter, the petitioner has assailed the *vires* of section 109-A of the ITO, for it being contrary to Entry 47 and 31 of the Federal Legislative List mentioned in the Constitution, 1973, as well as the notice issued under that provision on multiple legal grounds. This, in substance, amounts to seeking a writ under Article 199(1)(a)(ii). If the High Court were to allow the petition, section 109-A would be declared “without lawful authority” and “of no legal effect” and, as a result, the notice issued thereunder would automatically become ineffective as an ancillary consequence. Even if the provision itself is upheld, the notice has independently been challenged on separate legal grounds that the High Court is competent to examine. Nevertheless, the central relief sought in this petition is the challenge to the *vires* of the law, which constitutes a relief under Article 199(1)(a)(ii), namely a declaration that the impugned law is *ultra vires*. Under the erstwhile Article 202A, such a relief did not fall within the jurisdiction of the Constitutional Bench. It follows that interim relief may only be granted by a forum that is empowered to render the final decision. In this case, the Constitutional Bench from the start lacked competence to hear a matter involving the issuance of a writ under Article 199(1)(a)(ii), and the interim order it passed was therefore without jurisdiction.
20. However, at this juncture, it is pertinent to mention that after the enactment of the Constitution (Twenty-Seventh) Amendment Act, 2025, exclusive writ jurisdiction lies solely with the Constitutional Benches, and the Regular Benches of the High Court no longer possess this authority (see *para 9 above*). Consequently, a case similar to the present case will “now” fall to be heard by a Constitutional Bench of the Sindh High Court, which by virtue of the 27th Constitutional Amendment, is fully competent to adjudicate it.

⁸ PLD 1973 SC 24 (Per Muhammad Yaqub Ali Khan J.)

b. Whether an *ad-interim* order passed herein could be challenged before the court?

21. The learned counsel for the Respondents has objected to the arguments advanced by the learned counsel for the Petitioners on the basis that *ad-interim* relief cannot be challenged before this Court, a contention with which we do not concur. To begin with, the High Court, while exercising Constitutional jurisdiction under the earlier form of Article 202A (though without jurisdiction), rightly proceeded on the assumption that the order dated 20.12.2023 had the effect of suspending the operation of law. The impugned order restrained the Respondents from passing any adverse orders against the Petitioner till the next date of hearing. This in essence suspended the operation of law and the same could not have been done. No authority acting legally could be refrained by the courts from acting until the *vires* of the law has been determined by the Courts. It is either that the law that is *ultra vires*, which causes its operation to be extinguished, or it operates in its full might. In this regard, the Supreme Court in *Federation of Pakistan v. Aitzaz Ahsan*⁹ rightly so, while allowing leave to appeal in a case wherein provisions of Ordinances No. XXVI and XXVII were called into question on grounds of it being contrary to Article 51(2), held:

“We have heard the learned Attorney-General and the learned counsel for the respondent at great length on this aspect of the matter. It is a well-settled principle of constitutional interpretation that until a law is finally held to be ultra vires for any reason it should have its normal operation. Besides, the balance of convenience is also in favour of petitioner in so far as the voters who are able to establish their identity through the identity cards should alone be allowed to cast their vote. This would prevent large scale bogus voting which may, but for such requirement, take place. It will also lend greater credibility to the election process in the country by ensuring the compliance of constitutional requirement of Article 218(3) that "the election is conducted honestly, justly, fairly and in accordance with law and that corrupt practices are guarded against". The operation of the impugned judgment is, therefore, suspended till the hearing and decision of this appeal”. (Emphasis supplied)

22. In our view, the High Court although proceeded on the right assumption that the effect of the s.109-A of the ITO was suspended *via* order dated 20.12.2023, however, as the Bench acted without jurisdiction (as discussed in *paragraph 19* above), it committed a significant error i.e., passing an *ad-interim* order without jurisdiction. Although it is generally

⁹ 1989 PLD SC 61 (Per Muhammad Haleem CJ.)

correct that *ad-interim* orders are not ordinarily disturbed due to their temporary nature, such orders may nevertheless be interfered with where a jurisdictional defect is present or an illegality has occurred, therefore, empowering this Court to assess interim orders provided the preceding conditions are met. In this regard, reference may be made to *Khawaja Adnan Zafar v. Hina Bashir*¹⁰, which affirmed this principle.

“It is observed that the application of the petitioner under section 25 of the Act of 1890 for permanent custody of minors is still pending decision before the Guardian Judge. The orders of the Courts below assailed by the petitioner in the instant petitions are interim in nature. According to the established practice, settled principles of law and policy of this Court, ordinarily interim orders passed by the high Court are not interfered under Article 185(3) of the Constitution of the Islamic Republic of Pakistan 1973 and such intervention is warranted only in exceptional circumstances involving flagrant violation of law, wrongful exercise of jurisdiction or a manifest grave injustice.” (Emphasis supplied)

c. Conclusion:

23. In light of the aforementioned discussion, the instant petition is allowed, converted into appeal and is accepted; consequently, the impugned order is set aside, and the matter is remanded to the Sindh High Court for its fresh adjudication on the application for interim relief, before the Constitutional Bench.

Judge

Islamabad
Zawar
APPROVED FOR REPORTING

Judge

¹⁰ 2024 SCMR 1295 (Per Naeem Akhtar Afghan J.)