IN THE SUPREME COURT OF PAKISTAN
(Original Jurisdiction)

1. Workers Party Pakistan through Mr Akhtar Hussain Advocate, General Secretary, 5 Mc Leod Road, Lahore.

2. Senator Mir Hasil Bizenjo, Senior Vice President, National Party, E-207, Parliamentary Lodges, Islamabad.

3. Khursheed Ahmad, General Secretary, Pakistan Workers Confederation, Bakhtiar Labour Hall, 28 Nisbet Road, Lahore.

4. Kaniz Fatima, President, Pakistan Trade Union Federation (Regd), KMC Building, Gujroo Nala, Khamosh Colony, Karachi.

5. Chaudhry Fateh Muhammad, President, Pakistan Kisaan Committee, Chak 305 GB, Toba Tek Singh.

6. Tahira Mazhar Ali Khan, President, Democratic Women's Association, 3 Shah Jamal, Lahore.

7. Dr Osama Siddique, Associate Professor, Faculty of Law & Policy, Lahore University of Management Sciences (LUMS), 6/2 College Road, GOR I, Lahore.

...PETITIONERS

Versus

1. The Federation of Pakistan.
2. Ministry of Law, Justice & Parliamentary Affairs.
3. Election Commission of Pakistan, Islamabad.

...RESPONDENTS

PETITION UNDER ARTICLE 184 (3) OF THE CONSTITUTION OF PAKISTAN, 1973

Respectfully Sheweth:

1. That Petitioner No: 1 is a political party that believes in and works towards the emancipation of the working classes. Its membership comprises largely of middle, lower middle and working class people who cannot imagine participating in the game of elections that goes on in this country now and then to produce the farce called "representative government". While Petitioner No: 1, the party, stands formed, it will continue to be denied the full realization of its Fundamental Right guaranteed by Article 17 of the Constitution unless it ***can meaningfully participate*** in the process that leads to the formation of government in this country i.e unless elections begin to be held in a way that enables not just a certain ruling elite, but the broadest spectrum of people to participate in them.

(Manifesto of Workers Party Pakistan is Annex A)

2. That Petitioner No: 2 is a Senator from Balochistan. He is the duly elected Senior Vice President of National Party, a party committed to the establishment of a welfare state free from feudal, tribal and other anti people influences. National Party works for a truly representative democracy in a genuine federal set up with equal rights to all federating units.

(Manifesto of National Party is Annex B)

3. That Petitioner No: 3 is a trade unionist with almost half a century behind him of struggling for the rights of the working class. Currently, he is General Secretary of Pakistan WAPDA Hydro Electric Central Labour Union (CBA). He is also the General Secretary of Pakistan Workers Confederation which unites eight trade union federations of Pakistan. Petitioner No: 3 has represented Pakistan on the Executive Board of the International Labour Organisation (ILO) for several years.

4. That Petitioner No: 4 has been a trade unionist for the last fifty years. She is the President of the Pakistan Trade Union Federation (Regd) a body with more than fifty affiliated Trade Unions across the country. She has represented workers in tripartite conferences held by the Government of Pakistan from time to time and has also represented the Pakistani working class in various world bodies including the ILO.

5. That Petitioner No: 5 is a longtime political worker particularly concerned with the tillers of the land including tenants, landless labourers and small land owners. He is the elected President of Pakistan Kisan Committee which stands for the abolition of feudal system through land reforms and for a true representation of the toiling masses in elected bodies.

6. That Petitioner No: 6 is a veteran political and women's rights' activist. She is the founder and current President of the Democratic Women's Association of Pakistan (affiliated with the world Federation of Democratic Women). She is also one of the founding members of Women's Action Forum (WAF) and Joint Action Committee (JAC) for Peoples' Rights.

7. That Petitioner No: 7 is a legal academic and justice sector reform expert. He is the founding Chair of and an Associate Professor at the Department of Law and Policy at the Lahore University of Management Sciences (LUMS). He was Rhodes Scholar at the University of Oxford and holds a doctorate in law from Harvard University.

8. That this petition under Article 184 (3) of the Constitution raises questions of public importance with reference, *inter alia*, to the enforcement of the Petitioners' and the general citizenry's Fundamental Rights. The present Petitioners have also filed another petition under Article 184 (3) of the Constitution calling in question the permissible electoral practices in Pakistan. It is submitted that the instant petition be viewed, not only in its own right as one that raises the immensely important question of feudalism and land reforms in Pakistan but also that it be viewed in the context of electoral practices as well.

In that context, it is submitted, that the existing feudal landowning system in this country makes the current election process largely meaningless as a process that is supposed to entitle people to freely choose their true representatives. This is especially true for rural constituencies where the landlords reign supreme.

This system is such that even if this Court were to grant all the reliefs prayed for in the Petitioners' previous petition relating to electoral campaigns, they will be of little benefit in areas dominated by the big landowners. For this important reason, but also for the primary and more important reason that this system of land owning is fundamentally inhuman and exploitative, it is not just desirable, but necessary and absolutely according to the mandate of the Constitution that it should be abolished.

Ideally, there should be legislation requiring the unscrupulous beneficiaries of this system to account for all that they have amassed under this system for the last 64 years. But that would have to be the work of a truly representative peoples' government. This petition concerns itself with legislation that was actually made to bring about land reforms in this country, a step so important and necessary that without it, the economic exploitation of a huge mass of population cannot end, the freedom guaranteed by Article 17 cannot be fully enjoyed, and the mandate of Articles 51 and 224 that elections shall be "free" cannot be fulfilled.

1. That the fundamentals of a democratic election process must presuppose **a level playing field** for each and every candidate. Not only does the landowning system impede free vote, it actually ensures that no one in a rural constituency can begin to consider contesting elections unless his/her social and political influence matches that of the land owner. The landowning structure in this country ipso facto deprives the rural citizens, not only of the right to vote freely, but also of the level playing field that would enable them to contest for elections.

The right to elect and choose ones representatives is the essence of representative democracy and such a democracy cannot even begin to be perceived if it is clogged by artificial hurdles such as those placed on the electoral system by the very existence of the land owning system in Pakistan.

2. That land reforms sought to be implemented by MLR 115 of 1972 ("Regulations") and the Land Reforms Act 1977 (the "Act" or the "Land Reforms Act") were, in large part, declared unislamic by a judgment in appeal (i.e the Qazalbash Waqf Case (PLD 1990 SC 99)) from a decision of the Federal Shariat Court (PLD 1981 FSC 23). It is submitted that the appeal was wrongly decided on merits, but more importantly, on an erroneous assumption of jurisdiction. It is submitted that the decision requires reconsideration, inter alia, for the reason that it has affected Article 17 and Article 51 of the Constitution, rendered Article 24 (3) (f) and Article 253 (1) redundant and nugatory and affected the jurisdiction of this honourable Court and that this goes to the root of the submission that jurisdiction was wrongly assumed by the Appellate Court.

3. That in the judgment of the first instance the Federal Shariat Court, besides dismissing the challenge to MLR 115 and the Land Reforms Act 1977 on merits, also held that it did not have jurisdiction to examine these laws. This was held, inter alia, for the reason that Chapter 3-A excludes the "constitution" from the definition of "laws" that the FSC has jurisdiction to examine on the touchstone of Islam and assumption of jurisdiction to examine these laws would inevitably affect provisions of the Constitution including Articles 24, 253 and

269. Unfortunately, the Appellate Court found otherwise and assumed jurisdiction regardless of the fact that doing so rendered at least two provisions of the Constitution completely nugatory and affected several other provisions also by cutting down their ambit.

Jurisdiction:

The only elaborate note on the question of jurisdiction in the Appellate Court was written by Mr Justice Shafi ur Rehman. The honourble judge's reasons---for holding that the FSC had jurisdiction to examine the Regulations and the Land Reforms Act 1977 despite the mandate of Article 253 and its reinforcement and validation by sub-clause (f) of Article 24 (3)-- and the Petitioners' submissions as to why the reasons are flawed and must be revisited, are as follows:

i. In large part, the case hinged on the interpretation of Article 253, the relevant part of which is as follows:

> *253 (1) Majlis e Shoora may by law:*
>
> *(a) Prescribe the maximum limits as to property or any class thereof which may be owned, held, possessed or controlled by any person; and*
>
> *(b)----------*

(2) Any law which permits a person to own beneficially or possess beneficially an area of land greater than that which, immediately before the commencing day, he could have lawfully owned beneficially or possessed beneficially, shall be invalid.

It will be apparent that the first part, i.e clause (1) (a) is the provision under which the Act was made while clause (2) protects the redistribution of land under the Regulations.

The learned judge accepts that assuming jurisdiction in this case and declaring provisions of the Regulations and the Land Reforms Act repugnant to Islam would contravene what is prescribed in Article 253. He states that the question is whether or not "judicial pronouncements" are included in the word "law" used in Article 253 (2). He goes on to state that if the word "law" in this clause does not include "judicial pronouncements", then the FSC is entitled to make such a pronouncement and strike down land reforms as unislamic. According to him the protection provided by clause (2) is from "laws" enacted by Parliament and not from judicial pronouncements. He then proceeds to hold that the term law in that clause does not include "judicial pronouncements" and for this he relies on two arguments.

First, he finds that the word law used in clause (1) of Article 253 clearly means only a law framed by parliament and that the same

word, "law", used in clause (2) should also be taken to refer only to laws framed by parliament because, according to him, the "*two clauses of this, Article (253), are co-extensive with regard to the source of the law and there is no reason to extend the connotation of law in clause (2) to judicial pronouncements*".

It is submitted with respect that this reasoning is fundamentally flawed. There is every reason to understand that the word law in clause (2) includes judicial pronouncements while in clause (1) it doesn't, simply because it does not have to. The purpose of clause (1) is to enable the state to make laws, inter alia, prescribing maximum limits as to property that may be owned, held or posseesssed. Since a court cannot make such a law, or any law, the question of whether the word "law" in clause (1) includes judicial pronouncements does not even arise and no aid can be had from the use of the word "law" in the first clause to interpret the same word in the second clause. The contexts of the two clauses are completely different and the word "law" used in the first clause has no bearing on the meaning of the same word as used in the second clause.

The purpose and intent of clause (2) is to ensure that the limit on ceiling of land owned as on the commencing day by virtue of an existing law (i.e the Regulations) is not violated. It is this intent and purpose which must be read or considered in interpreting this clause and it would be a strange conclusion indeed that while the Constitution does not allow the parliament to make a law for holding

more property than was permissible on the commencing day, it allows a court to declare to the contrary. The learned judge's reasoning completely negates the meaning, purpose and intent of Article 253 and at least three other articles of the Constitution i.e Article 24 (3) (f), Article 17 and Article 51. It is submitted that this interpretation of the Constitution whereby the Appellate Court assumed jurisdiction to strike down the single most significant reform in Pakistan's history is wholly incorrect.

Second, the learned judge draws support from two judgments of this Court; F. B Ali's case (PLD 1975 SC 506) and Hyesons Sugar Mills case (PLD 1977 SC 397). According to the learned judge, these cases decide that the word "law" used in the Constitution only includes "positive" law and not judicial pronouncements. It is submitted that the two cases decide absolutely NOTHING of this sort. The question in both cases was whether the term "law" includes judicial "*practices*" and NOT if it includes judicial *pronouncements*. It was in this context that the Courts concluded that the term law only includes positive law. It is submitted that there was no occasion in these cases to discuss judicial pronouncements because a judicial pronouncement is no more than a declaration as to what the law is. This was so well understood as an established jurisprudential principle that it was completely unnecessary for the honorable judges to even mention, let alone discuss "judicial pronouncements". The learned judge may not have fallen into error if it had been submitted to him that the "judicial pronouncement" that he was himself called upon to make in the

appeal was itself nothing more than a declaration as to what "Islamic Law" was on the question of land reforms.

The learned judge also holds that if the Appellate Court declares the Regulations and the Act unislamic it is not the same thing as "framing" a law and it is only the "framing" of a law that is prohibited by clause (2) of Article 253. It is submitted that this conclusion is not borne out of the text or purpose of the said constitutional provision at all and it is reiterated that a "judicial pronouncement" is no more than a declaration as to what the "law" is. It is respectfully submitted that the difference sought to be established by the learned judge between "framing" a law and making a "judicial pronouncement" is illusory and jurisprudentially incorrect in this context. It is further submitted that had the Constitution makers imagined that a court might fall into the error of interpreting the words "judicial pronouncement" in a way that would enable it to do what the parliament itself was prohibited by the Constitution from doing, and that such an interpretation would render at least two provisions of the Constitution (and laws framed under their mandate) completely nugatory, they might have taken the trouble to add the unnecessary words "judicial pronouncements/declarations" to Article 253.

It is submitted that if the learned judge's reasoning is accepted it would also imply that the guarantee in Article 8 that the State shall not make a law inconsistent with Fundamental Rights also only applies to "positive" law and that a court may decide a case in a manner that it

violates a Fundamental Right or renders a Fundamental Right redundant or nugatory.

ii. The jurisdiction claimed by the Appellate Court was by virtue of Chapter 3-A, especially its non obstante clause, but it is submitted, that the introduction of that chapter does not, and cannot change the intent and purpose of the original Constitution which provided specific provisions mandating and protecting land reforms.

Chapter 3-A and its non obstante clause (in Article 203A) cannot override other, original provisions of the Constitution and where they conflict with them, the original provisions will prevail. The best that the non obstante clause of Chapter 3-A does is to enable the provisions of that chapter to "take effect" notwithstanding the other provisions of the Constitution relating to judicature i.e all it does is to provide for another court with a very limited jurisdiction. It does nothing else and does not, in any case, permit the subsequently, newly established court to affect an article of the Constitution in the exercise of its limited jurisdiction. Reference may be made to the Al Jehad case (PLD 1996 SC 324) in which a majority of three judges of the Supreme Court took the view that where there is a contradiction between two provisions of the Constitution, one of them being the original or properly promulgated provision and the other being a provision introduced by a dictator (i.e via the 8th Amendment), the latter would give way to the former (per Ajmal Mian J; Fazal Ilahi

Khan J and Manzoor Hussain Sial J concurring and no contra observation by any other judge).

In the Al Jehad case, the conflict was between Article 209 of the Constitution which provided that a superior court judge may only be removed by the procedure provided by that article itself while Article 203 C (5) provided that a High Court judge who did not accept appointment as a FSC judge would be deemed to have retired. Article 209 had been a part of the original Constitution while 203 C was inserted by General Zia. The Supreme Court found that the two articles were inconsistent because automatic retirement under 203 C violated the security of tenure granted by 209 (7) which states that a judge may not be removed except through the procedure provided in Article 209. Mr Justice Ajmal Mian (whose judgment was concurred to by two other honourable judges) specifically states that where one provision had been part of the original Constitution and the other the work of a dictator, he would discard the otherwise applicable principle that the latter-in-time provision (203-C) would prevail over the older (209), and it was held that the provision contained in the original Constitution must prevail over that introduced by a dictator in the interest of justice and fair play.

For the above reasoning and on the basis of Al Jehad it is submitted that the non obstante clause of Chapter 3-A is of little consequence and where it clashes with an "original" provision of the Constitution, the latter would prevail. Further, on the strength of the same principle,

it is submitted that if a clause of the Constitution, introduced by a dictator must give way to an original provision, then it need hardly be added that exercise of jurisdiction under such a clause cannot and must not be permitted to render original provisions of the Constitution superfluous or nugatory, or even remotely affect those provisions or things done or laws passed under their mandate. This would be truer for provisions of the Constitution that were enacted to provide specific mandates e.g Article 253, or which confer a Fundamental Right e.g Article 17 or those that create clear exceptions e.g Article 24 (3) (f).

i. On sub-clause (f) of Article 24 (3), which excludes laws made in pursuance of Article 253 from the guarantees provided by its (Article 24's) clauses (1) and (2) , the Appellate Court's judgment maintains a **total silence**. It does not discuss how that clause would be affected by the judgement given by it i.e. it would be rendered redundant---and how that consequence would be justified. This, despite the fact that the FSC had specifically relied upon this provision i.e sub-clause (f) of Article 24 (3) while coming to the conclusion that it did not have jurisdiction to examine laws which had been made in pursuance of Article 253. It is extremely surprising that there is no discussion of this provision, in the Appellate Court's judgment, nor any critique of the FSC's reliance on this provision while declining jurisdiction.

It is also noteworthy that none of the Honorable Judges/Members of the Appellate Court examined the preamble of the Land Reforms Act 1977 which lays out the purposes of the Act while specifically

referring to Article 253. It is submitted that the issues which the Act aims to address are not just confined to clinching private property. They have a higher purpose, a purpose which takes its mandate from Article 253 of the Constitution. Not one honourable Judge/Member in the Appellate Court took note of this.

ii. In this petition this honourable Court is being urged to reconsider the Qazalbash case on grounds that while assuming jurisdiction, the Appellate Court made substantive interpretations of several provisions of the Constitution and omitted to consider several others: i.e Article 17, 24 (3) (f), 25, 253 and 269. It would be anomalous if it were held that the Supreme Court did not have jurisdiction to reconsider these interpretations in its general jurisdiction, original or appellate.

j. That even on merits, the Appellate Court's judgment provides ample ground for reconsideration. It may be noted that Mr Justice Muhammad Afzal Zullah, Chairman of the Appellate Court straight away says that the Court was inadequately assisted and he has hesitated in calling the decision a final one on the subject. Yet, in a case of such huge importance, he chose to dispose of the matter by agreeing with the views of Member, Maulana Taqi Usmani, rather than call for further assistance to ensure that the judgment was based on sufficient scholarly input representing all schools of thought. It is submitted that alternate points of view on the question of land reforms were not duly considered by the Appellate Court except to the extent of refuting some of the points that the FSC made the bases of its judgment.

The Petitioners have annexed with this petition two Notes/Opinions prepared on the questions involved in this matter which establish the permissibility of Land Reforms in Islam. The first Note/Opinion is authored jointly by Mr Sajid Hameed, Head of Department of the Department of Islamic & Religious Studies, University of Central Punjab, Lahore and Dr Khalid Zaheer, Dean, Faculty of Arts and Social Sciences, at the same University while the Second Note/Opinion is authored by Mr Justice (Retd) Syed Afzal Haider, a Senior Advocate of the Supreme Court of Pakistan, a former judge of the Federal Shariat Court and a former Member of the Council of Islamic Ideology.

It is submitted that the contents of the note of Mr Justice Muhammad Afzal Zullah provide sufficient reason for a reconsideration of the case even on merits. It may further be noted that this judgment requires reconsideration on merits also for the reason that at best it appears to be a "reluctant" judgment in that out of a total of five appeal judges, one honourable judge dismissed the appeals, one honourable judge expressed reservations on the assistance provided and the finality of the decision being made and one honourable judge only declared a small number of the provisions unislamic.

(The Notes/Opinions referred in the para above are filed as Annexes C-1 and C-2)

k. That the judgment of Member, Maulana Taqi Usmani, seems, in all aspects to be predicated on the assumption that the matter of land reforms is being considered with reference to a "truly Islamic state", a state which has specific duties of welfare towards its subjects and fulfills those duties. Also, his judgment considers the question of a state redistributing

land in the abstract and not specifically where the system of land owning as it exists in Pakistan has itself become an evil that subjugates people and prevents them from even being able to achieve a minimally respectable living standard, let alone where it prevents them from freely choosing their governing representatives. These submissions may be read in conjunction with the note annexed herewith and referred to in the preceding para.

l. That the judgment did not also consider that in most cases the huge ownerships of the big feudal and landowners are illegitimate to begin with and that they came about as largesse extended to them by the British colonists for services rendered---services that often comprised of conspiring with the British against the local populace. Another way in which the colonists rewarded these feudal lords was by exempting their (agricultural) income from tax as provided for in the Government of India Act 1935. This exemption survives to date and the parasitic beneficiaries of it ensure—with their power and influence----that it is not taken away from them. As submitted above, the judgment of the Appellate Court looked at the issue in the abstract and did not take into account how this system has become a cancer for this country.

m. That there is no bar on this Court to examine if jurisdiction was properly assumed by the FSC or the Appellate Court so as to see whether in doing so and in rendering their judgments on merits the FSC or the Appellate Court have made interpretations and drawn conclusions that affect provisions of the Constitution such as Article 17, Article 24, Article 51

and Article 253. In this regard it is submitted that the bar of Article 203-G is only in respect to matters *that fall within the jurisdiction* of the FSC (and the Appellate Court) i.e no other court is to have jurisdiction in respect to a matter in regard to which the FSC or the Appellate Court do have jurisdiction. This merely means that only the FSC may examine a law on the touchstone of Islam. However, where in assuming jurisdiction, or in deciding a matter on merits, the FSC or the Appellate Court affect--- directly or indirectly--- even a single provision of the Constitution, they would have transgressed their jurisdiction and the Supreme Court would have jurisdiction to reconsider such decisions in its original as well as appellate powers. To say the contrary would mean that an interpretation of a Constitutional provision made by the Shariat Appellate Bench bars the Supreme Court from reconsidering the same even if it be sitting as a full court of seventeen judges.

It is further submitted that such decisions of the FSC or the Appellate Court that affect provisions of the Constitution would also have been challengeable under Article 199 but for the fact that Article 203GG makes the decisions of the FSC binding on the high courts.

n. That the Petitioners seek leave to urge further grounds at the time of hearing.

In view of the above submissions it is respectfully prayed that this honourable Court be pleased to:

a. Order that PLD 1990 SC 99 was decided on an erroneous assumption of jurisdiction and set aside the said judgment.

b. Order, in consequence of "a" that the Respondent No: 1 take appropriate steps to implement and complete the land reforms brought about by the Regulations and the Act.

c. Allow other reliefs that it deems fit even though not prayed for.

Settled By:	Drawn By:	Filed By:
Abid Hassan Minto	Bilal Hassan Minto	Mahmood A Sheikh
Senior Advocate Supreme Court	Advocate Supreme Court	Advocate on Record
Ch. Naeem Shakir		
Advocate Supreme Court		