

BEFORE THE SUPREME COURT OF PAKISTAN
[Constitutional Jurisdiction]

Constitution Petition. NO. _____ OF 2012

1. Pakistan Institute of Legislative Development and Transparency (PILDAT) no.7, 9th Avenue, Sector F-9/1, Islamabad through its Executive Director Mr. Ahmed Bilal Mehboob.
2. PILDAT's Citizen Group on Electoral Process [comprising its 24 members] through its authorized Member Mr. Mujeeb-ur-Rehman Shami.

.... Petitioners

Versus

1. Federation of Pakistan through Secretary Cabinet Division, Government of Pakistan, Pak Secretariat, Islamabad.
2. Election Commission of Pakistan, Constitution Avenue G-5/2, Islamabad through its Secretary.
3. Province of the Punjab through its Chief Secretary, Government of the Punjab, Civil Secretariat, Lahore.
4. Province of Sindh through its Chief Secretary, Government of Sindh, Civil Secretariat, Karachi.
5. Province of Khyber Pakhtunkhwa through its Chief Secretary, Government of Pakhtunkhwa, Civil Secretariat, Peshawar.
6. Province of Balochistan through its Chief Secretary, Government of Balochistan, Civil Secretariat, Quetta.

7. Leader of the Opposition, National Assembly of Pakistan, Islamabad.
8. Leader of the Opposition, Punjab Provincial Assembly, Lahore
9. Leader of the Opposition, Sindh Provincial Assembly, Karachi.
10. Leader of the Opposition, Khyber Pakhtunkhwa provincial Assembly, Peshawar.
11. Leader of the Opposition, Balochistan Provincial Assembly, Quetta.

.... Respondents

PETITION UNDER ARTICLE 184(3) OF THE CONSTITUTION OF ISLAMIC REPUBLIC OF PAKISTAN 1973.

It is respectfully submitted:-

1. The petitioner PILDAT is an independent, voluntary, non-profit organization, which is not associated nor affiliated with the Government or any political party. It is a society registered under the Societies Registration Act 1860. Copies of petitioner no.1's Memorandum of Association and Certificate of Registration dated 19.9.2002 are attached as **Annexures-A&B** respectively.
2. As part of its activities for furtherance of its objectives as set out in its Memorandum of Association the petitioner PILDAT formed in 2006 a Citizens Group on Electoral Process (CGEP) with the avowed goal of contributing towards the holding of free, fair and credible elections in Pakistan. Copy of a PILDAT publication introducing the CGEP, describing the work done by the CGEP,

listing the CGEP publications and, amongst other things, its list of members is attached as **Annexure-C**.

3. At its last meeting held on 29th November 2011 the petitioner CGEP inter-alia noted that neutral caretaker governments at both the federal and provincial levels were a sine qua non for the holding of free, fair and transparent elections in Pakistan. After passage of the 18th Amendment to the Constitution, the caretaker Prime Minister, and the caretaker Chief Ministers, are to be selected/appointed by the President and the concerned Governors respectively in consultation with the Prime Minister/ Chief Ministers and Leaders of Opposition in the out-going Assemblies but there is no definition of the word „consultation“ in the relevant Article 224(1A). The definition of the word „consultation“ which was inserted in Article 260 of the Constitution by the Legal Frame-work Order 2002 (CE“s Order No.24 of 2002) has been omitted by the 18th Amendment to the Constitution with the result that the expression “consultation” is no more defined in the Constitution, leaving room for its interpretation by the authorities concerned and finally by the Courts. The disputes that had arisen in connection with the interpretation of this word in regard to the appointment of Chairman NAB were not a happy augury of what might happen if, at the relevant time, there was no agreement/consensus between the out-going Prime Minister/ Chief Ministers and Leaders of Opposition. In the circumstances it would be fit and appropriate if the Apex Court were to be approached for an authoritative pronouncement of the manner in which appointments of the caretaker Prime Minister/Chief Ministers were

to be made. A copy of minutes of CGEP meeting held on 29.11.2011 is attached as **Annexure-D**.

4. The decision of the petitioner CGEP has been endorsed by the Board of Directors of the petitioner PILDAT who has authorized its Executive Director Mr. Ahmed Bilal Mehboob to file the present petition. A copy of PILDAT's Board of Directors Resolution through circulation is attached as **Annexure-E**.
5. After passage of the 18th Amendment Act 2010 Article 224(1A) reads as under:-

“224. Time of election and by-election.

[(1A) On dissolution of the Assembly on completion of its term, or in case it is dissolved under Article 58 or Article 112, the President, or the Governor, as the case may be, shall appoint a care-taker Cabinet:

Provided that the care-taker Prime Minister shall be selected by the President in consultation with the Prime Minister and the Leader of the Opposition in the outgoing National Assembly, and a care-taker Chief Minister shall be appointed by the Governor in consultation with the Chief Minister and the Leader of the Opposition in the outgoing Provincial Assembly:

Provided further that the Members of the Federal and Provincial care-taker Cabinets shall be appointed on the advice of the care-taker Prime Minister or the care-taker Chief Minister, as the case may be.”

It would be noticed that in the case of the caretaker Prime Minister the President is to select whereas in the case of caretaker Chief Ministers the Governors are to appoint but in both cases in consultation with the Leaders of the Opposition.

6. The primary object of sub-article (1A) *ibid* is evidently to ensure the neutrality of the Federal and Provincial caretaker set-ups during the process of elections to the National and Provincial Assemblies and thus to assist the Election Commission of Pakistan to fulfill its constitutional mandate enshrined in Article 218(3) viz to ensure that the elections are conducted honestly, justly, fairly and in accordance with law, and that corrupt practices are guarded against. It is to be noted that historically all general elections held in Pakistan, have been disputed by the political parties both winning and losing the elections, and therefore, it is desirable that every effort is made to make the process of election so transparent and meaningful that it leaves least room for such criticism by the political parties, or any other person, after the process of election is over.
7. The word „consultation“ as used in Articles 177 and 193 of the Constitution prior to amendment of these articles vide the 18th Amendment Act 2010 did come up for judicial interpretation in the case of *Al-Jehad Trust vs Federation of Pakistan* PLD 1996 SC 324 and while interpreting the expression “consultation” in Articles 177 and 193 of the Constitution this August Court held that consultation must be effective, meaningful, purposive, consensus-oriented, leaving no room for complaint of arbitrariness or unfair play and

involving participatory consultative process between the consultees and also with the executive.

8. The meaning of the word „consultation“ as used in section 6(b) (i) of the National Accountability Bureau Ordinance 1999 came up for interpretation before the Apex Court in the case of Shahid Orakzai vs Pakistan PLD 2011 SC 365. The Court held (para 36 at pages 402-403) as under:-

“36. The scope and interpretation of the word „consultation“ used in section 6(b)(i) of the National Accountability Ordinance, 1999 been intensely debated before us and, therefore, we must clarify the position in that regard. Section 6(b)(i) of the National Accountability Ordinance, 1999 provides for appointment of Chairman, National Accountability Bureau “by the President in consultation with the Leader of the House and the Leader of the Opposition in the National Assembly”. Before passage of the 18th Amendment of the Constitution the word „consultation“ had repeatedly been used in the Constitution particularly in the context of appointment of Chief Justice and Judges of the superior judiciary and in the case of Al-Jehad Trust and others vs Federation of Pakistan and others (PLD 1996 SC 324) this Court had held that a „consultation“ has to be “effective, meaningful, purposive, consensus-oriented, leaving no room for complaint of arbitrariness or unfair play” and an identical interpretation of that word had also been advanced in the case of Al-Jehad Trust and another vs Federation of Pakistan and others (PLD 1997 SC 84). Subsequently in the case of Sindh High Court Bar Association v. Federation of Pakistan and 4 others (PLD 2009 Karachi 409) the High Court of Sindh had held that for a consultation to be meaningful and purposive an “attempt should be made to reach at some consensus” and that the required

consultative process should be in writing. The last occasion on which this Court had interpreted the word „consultation“ was in the case of Sindh High Court Bar Association and another vs Federation of Pakistan and others (PLD 2009 SC 879) wherein this Court had observed that “by all means the first priority has to be directed to evolving consensus between the consultees by mutual discussion of the merits and demerits of the concerned candidate.” In India it was held in the case of Justice K. P. Mohapatra v. Sri Ram Chandra Nayak and others (AIR 2002 SC 3578) that „consultation“ means “meeting of minds.” The context in the case of the National Accountability Ordinance, 1999 and the National Accountability Bureau however, been found by us to be somewhat different from the above mentioned constitutional context. In the past not too distant complaints of persecution of the political opposition in the country by the government of the day through utilization of the National Accountability Bureau or its predecessor institutions had unfortunately been too many and willingness of the heads of such institutions to slavishly carry out and execute the vendetta of the government of the day against its opponents had also been shamefully rampant. It was in that background that at a time when there was no Parliament in existence this Court had recommended in the case of Khan Asfandyar Wali and others v. Federation of Pakistan and others (PLD 2001 SC 607) that in the matter of appointment of Chairman, National Accountability Bureau consultation ought to be made by the President with the Chief Justice of Pakistan and that recommendation had been given effect to through the National Accountability Bureau (Amendment) Ordinance XXXV of 2001 but subsequently through (Amendment) Ordinance CXXXIII of 2002 the Chief Justice of Pakistan had been excluded from the list of consultees and he was substituted by the Leader of House and the Leader of the Opposition in the National Assembly who were to be

consulted by the President before making an appointment of Chairman, National Accountability Bureau. That deletion had come about because by that time the Parliament had once again come into existence and consultation with the Leader of Opposition in the National Assembly was expected to go a long way in allaying fears and apprehensions of the political opposition regarding its possible persecution and victimization by the government of the day through the National Accountability Bureau and its Chairman. The spirit of the amended provisions, thus, was that the Leader of the Opposition would be given due weight and consideration and he would have an effective say in the matter.”

9. In the recent appointment of Admiral (R) Fasih Bokhari as Chairman NAB the Federation/President/Prime Minister have opined that it is sufficient to intimate a name to the Leader of the Opposition and if, in the opinion of the appointing authority, the Leader of the Opposition is not able to come up with a meaningful reason for non-acceptance of the nomination, the appointing authority can go ahead with the appointment of its nominee. In a letter [published in the daily “Express Tribune” on 16.10.2011] to the Leader of the Opposition (Ch. Nisar Ali Khan) regarding the nomination of Admiral (R) Fasih Bokhari as Chairman NAB the President inter-alia wrote:-

“The sense of various judgments of the superior courts is that the consultation shall be meaningful and for this purpose there is no necessity of sending a panel of nominees. Therefore meaningful consultation can be done even on a single person and for that purpose you are taken on board quite candidly. Sending of a panel for consultation does not

have any legal cover as well, there being no legal requirement as such. I have consulted the Leader of the House in the National Assembly on the subject who has concurred to the proposal.”

“It is pertinent to mention here that no comments have been given on the profile and integrity of the nominee which in fact is the material aspect of the consultation.”

“In the light of the afore-going lego-factual position, it is expected that the nominee would serve the institution in the best manner. I take this opportunity to thank you for taking part in the consultative process, as mandated by law.”

A petition is pending in this August Court in regard to the aforesaid appointment and therefore, as yet there is no final pronouncement interpreting the expression “consultation” in the context of the appointment of the present Chairman NAB.

A copy of the President’s letter published in the press on 16.10.2011 is attached as **Annexure-F**.

10. If such non-meeting of minds/non-agreement on nominees takes place in the matter of appointments of caretaker Prime Minister/Chief Ministers it is more than likely, indeed probable, then there will be a public outcry and possible boycott of elections by one or more of the opposition parties and, as a consequence, the constitutional mandate enshrined in Article 218(3) shall be jeopardized and frustrated.

11. The need to ensure the appointment of credible caretaker Prime Minister/Chief Ministers to assist and facilitate the holding of free, fair and transparent elections by the Election Commission of Pakistan, caretakers who will see to it that the Federal and Provincial Governments are completely neutral in the election process, is a matter of high public importance. Free, fair and transparent elections in accordance with the mandate enshrined in Article 218(3) and paras 3, 4 and 8 of the Objectives Resolution read with Articles 2A and 4 of the Constitution are a fundamental right of the citizens of Pakistan inclusive of the petitioners as guaranteed by Articles 9, 14, 17 and 25 of the Constitution. The fundamental rights of life, liberty and dignity of man include in their compass the right of the people to elect Assemblies/Governments of their choice free from executive pressure and influence. Political rights and liberties are integral part and parcel of right of life and liberty and dignity of man. Access to justice includes access to political justice. The holding of free and fair elections is closely linked with the appointment of neutral Prime Minister/Chief Minister and indeed not possible without such neutrality.
12. The citizens of Pakistan, the petitioner and all its CGEP members have a vested right and interest that the next general elections to the national and provincial assemblies are held in an honest, free, fair, just and transparent manner and that these elections are seen and perceived to be credible both at home and abroad which is possible only if the general elections are held under caretaker set-ups who enjoy the confidence of ruling and opposition members in the

Parliament and Provincial Assemblies, and of the voting public. This involves enforcement of various fundamental rights including right to life, right to liberty, dignity of man, right to due process of law, access to justice and right to form a political party and to take part and vote in the elections to elect Assemblies/Governments of their choice without any interference from executive authorities through a free, fair and transparent election process as inter-alia guaranteed by Articles 9, 14, 17 and 25 of the Constitution read with its Objectives Resolution and Article 2A and Article 4 and Article 218(3). The sovereign power delegated by Almighty Allah to the People of Pakistan to be exercised by them through their chosen representatives in a democratic parliamentary system wherein fundamental rights are guaranteed cannot be ensured unless the representatives are elected in a free, fair and transparent manner without being pressurized or influenced by executive authorities.

13. In the humble submission of the petitioners the word „consultation“ used in Article 224(1A) of the Constitution is to be interpreted in a manner which ensures fulfillment of the mandate enshrined in Article 218(3) of the Constitution and thus to protect the fundamental rights of all citizens of Pakistan in this matter of high public importance.
14. The matter requires that all the listed respondents be given notice and heard. Insofar as the petitioners are concerned they rely on the interpretation of the word “consultation” as adopted in the precedent Al-Jehad Trust and Shahid Orakzai cases. Reliance is also inter-alia placed on the authorities reported titled **Benazir Bhutto vs**

Federation Pakistan etc PLD 1988 SC 416, Benazir Bhutto vs Federation Pakistan etc PLD 1989 SC 66, Muhammad Nawaz Sharif vs President of Pakistan etc PLD 1993 SC 473, Al-Jehad Trust vs Federation of Pakistan etc PLD 1996 SC 324, Al-Jehad Trust vs Federation of Pakistan etc PLD 1997 SC 84, Sindh High Court Bar Association vs Federation of Pakistan etc PLD 2009 Karachi 409, Sindh High Court Bar Association vs Federation of Pakistan etc PLD 2009 SC 8790, Muhammad Nasir Mahmood etc vs Federation of Pakistan etc PLD 2009 SC 107 and Shahid Orakazi vs Pakistan etc PLD 2011 SC 365. The petitioners seek indulgence of the Court to place more cases relevant on the subject at the time of hearing of the case.

A partial list of cases decided by the August Supreme Court in 2010 & 2011 relating to Articles 9, 14 and 25 of the Constitution is attached herewith as **Annexure-G**.

15. The Government has recently indicated that elections may be held during this calendar year and in the submission of the petitioners in order to avoid any deadlock in the process of elections this Honorable Court may be pleased to declare that like the right to access to justice, the citizens have an inalienable fundamental right to elect Assemblies/Government of their choice through free, fair and transparent elections free from pressure and influence of executive authorities and be further pleased to hand down an authoritative interpretation of the expression “consultation” used in Article 224 of the Constitution to facilitate the formation of truly neutral Caretaker Governments at the level of Federation and the

Provinces to make the election process credible and in accord with the constitutional mandate.

16. Any other relief which this Honorable think just and equitable in the circumstances of the case.

It is prayed accordingly.

DRAWN BY

(Abid Aziz Sheikh)
Advocate Supreme Court,
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SETTLED BY

FILED BY

(Shahid Hamid)
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(Ejaz Muhammad Khan)
Advocate-on-Record
Supreme Court Building,

Certified as required under Order XXV Rule 6 of the Supreme Court Rules 1980 that this is the first constitutional petition filed by the petitioners before the Supreme Court of Pakistan in this matter and that no such or similar petition has been filed in any of the High Courts by the petitioners.

Advocate-on-Record