

Stereo. H C J D A 38.

IN THE LAHORE HIGH COURT LAHORE

JUDICIAL DEPARTMENT.

W.P. No.37394 of 2015.

JUDGMENT:

United Bank Limited

VERSUS

Federation of Pakistan and others

Date of hearing.....17.11.2017.

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| Petitioners by | M/s Muhammad Wasif Majeed, Imran Aziz Khan, Barrister Muhammad Ahmad Pansota, Shehzada Mazhar, Tehsin Yousaf Advocate Muhammad Asif Ismail, Barrister Haroon Dughal, Azmat Lodhi, Sheikh Muhammad Ali, Munawar ul Islam, Miss. Amina Warsi and Ayesha Warsi, Advocates for petitioners. |
| Respondents by | Mr. Muhammad Zakria Sheikh Deputy Attorney General. M/s Shahyar Kasuri, Raza Imtiaz Siddiqui, Ahsan Masood, Rehan Nawaz, Aatif Ali Bukhari, Aish Bahadar Rana, Raja Zafar Iqbal, Usman Ali Cheema, Sajid Ejaz Hotiyana, Syed Ali Akbar Shah, Mr. Ali Raza Kabir, Mian Sultan Tanveer Ahmad, Qadeer Kalyar, Rao Orangzeb Rashid, Rai Nazakat Abbas Bhatti Advocate, Ch. Muhammad Yaqoob, Muhammad Sohail Dar, Aamer Aziz Syed, Ch. Muhammad Naseer, Amjad Pervez Chaudhary, Mr. Fahad Khan, Faisal Naseem Chaudhary, Ch. Tasneem Bari Saleemi Advocates for the respondents. |

Shams Mehmood Mirza, J. Aggrieved

by the assumption of jurisdiction by the Banking Mohtasib and the consequential order passed by him, the petitioner bank has challenged the said order as also the vires of Federal Ombudsman Institutional Reforms Act, 2013 (**FOIRA**). In some of the connected petitions, only the orders passed by the Banking Mohtasib have been impugned whereas in some of the petitions the orders of the President of Pakistan passed on representation filed under the provisions of FOIRA have also been challenged.

This judgment shall also decide the writ petitions mentioned in Schedule A hereto as common questions of law have arisen, which are required to be adjudicated by this Court.

2. The broader issue involved in this writ petition pertains to the separation of powers between the executive and judicial branches of the Government. More particularly, the question that requires determination is whether an administrative tribunal can exercise and be vested with judicial power in determining the rights and obligations of the parties.

3. It is neither desirable nor practicable to give details of the facts of individual cases. The disputes raised by the parties before the Banking Mohtasib and orders passed thereon, can be classified into the following categories for the purposes of shining light on the powers being exercised by the Banking Mohtasib, which are under challenge in these writ petitions.

a. The bank officials allegedly committed fraud with the account holders and on complaints filed before the Banking Mohtasib, the bank was held to be vicariously liable and was thus directed to pay the alleged defrauded amounts together with profit to the account holders (writ petition No. 1702/12, writ petition No. 2143/12, writ petition No.18160 of 2016, writ petition No.13371 of 2016, writ petition No.51751 of 2017, writ petition No.4479 of 2017 & writ petition No.2142 of 2012).

b. Assumption of jurisdiction by the Banking Mohtasib in a complaint filed in respect of unauthorized electronic transfer of funds in a Visa Debit Card although the bank had already approached the relevant

court under the provisions of Payment System and Funds Transfer Act 2007 (writ petition No. 50/14).

- c. Assumption of jurisdiction by the Banking Mohtasib on a complaint filed by defaulters although the bank has already referred the matter for arbitration under section 54 of the Cooperative Societies Act, 1925. The Banking Mohtasib decided the matter by himself comparing the signatures of the complainants with those appearing on the disputed documents (writ petition No.33732 of 2016).
- d. The bank made payment of premium to the Insurance company under an insurance policy obtained by the consumer against which a complaint was lodged by the consumer and the Banking Mohtasih ordered the bank to refund the amount to the consumer. The order was upheld by the President on a representation filed by the bank (writ petition No.26426 of 2017).
- e. Dispute in respect of transfer of funds under Visa Debit Card was brought before the Banking Mohtasib who without recording of evidence held that the consumer was not the user of MCB Mobile Banking Service. The order was challenged by the bank by filing its representation before the President which representation was dismissed (writ petition No.28631 of 2016).
- f. The Banking Mohtasib on a complaint filed by the consumers with regard to the dispute for non-credit of amounts in the account of the consumer passed orders directing the bank to reimburse the amounts to the consumers with up to date profit (writ petition No.37338 of 2016,

writ petition No.4102 of 2017, writ petition No.4103 of 2017)

- g.** The Banking Mohtasib on a complaint filed by the consumer regarding blocking of account to the extent of credit of a disputed entry directed the bank to unblock the account, which order was upheld by the President of Pakistan (writ petition No.37339 of 2016)
- h.** The President of Pakistan overturned the decision of the Banking Mohtasib and directed the bank to reimburse the amount to the consumer although the dispute was purely of a factual nature (writ petition No.10599 of 2017).
- i.** The consumer filed the complaint that cheque book was unauthorizedly issued by the bank and that amounts were withdrawn through cheques. The Banking Mohtasib compared the signatures of the consumer with those appearing on the disputed cheques and held that the same to be forged and accordingly held that the bank was grossly negligent and ordered it to repay the amount thereof together with opportunity loss and profit. The representation filed by the bank was also dismissed by the President (writ petition No.7185 of 2015, writ petition No.7179 of 2015 and writ petition No.37394 of 2015).
- j.** The consumer filed the complaint alleging the bank responsible for the loss of Rs.2,034,000/- on account of theft in her locker. The Banking Mohtasib directed the bank to pay to her Rs.1,500,000/- together with opportunity loss and profit based on State Bank of Pakistan's BPD Circular No.27 which advised the banks to arrange group insurance for their lockers even though the said circular was

issued after the incident of theft. In the process, the Banking Mohtasib also declared clause 6 of the agreement between the parties to be void and against the public policy in terms of section 23 of the Contract Act (writ petition No.16989 of 2010).

- k. The complaint involved the allegation that funds were withdrawn fraudulently through fake ATM Debit Card transactions. The Banking Mohtasib without recording evidence allowed the complaint and ordered the bank to refund the amount together with profit. The representation filed by the bank before the President was also dismissed (writ petition No.3469 of 2017).

Needless to point out that in all the cases, the parties were at issue over the material factual aspects of the case. Regardless of the dispute on facts *inter se* the parties, the Banking Mohtasib proceeded to pass decisions on the complaints filed against the banks.

4. In writ petition No.37394 of 2015, writ petition No.4103 of 2017, writ petition No.37339 of 2016, writ petition No.4102 of 2017 and writ petition No.37338 of 2016, a challenge has been made to the constitutionality of sections 10, 11, 12 and 15 of FIORA which lays down the powers of the Banking Mohtasib to, *inter alia*, grant temporary injunctions and the punish a person for contempt. The rest of the petitions simply challenge the orders passed by the Banking Mohtasib whereby disputes of the customers with the banks were adjudicated upon and in some instances the banks were directed to repay the amounts together with compensation. In other cases the decisions by the President of Pakistan on representations filed in terms of section 14 of FIORA have also been challenged.

5. The counsels for the petitioners emphasized that the exercise of judicial power and function is the sole domain of courts and tribunals constituted under Articles 175 and 212 of the Constitution of the Islamic Republic of Pakistan, 1973 (the **Constitution**). It is contended that the office of Banking Mohtasib which has been created through a statute cannot exercise judicial functions and powers by determining the rights of the private parties as it is not a court constituted under Article 175 of the Constitution. It was submitted that in passing decisions on the complaints filed by the customers of the bank, the Banking Mohtasib adjudicated upon disputed questions of fact which is the sole prerogative of courts. It is furthermore contended that the exercise of judicial powers and functions conferred on the Banking Mohtasib through Sections 10, 11, 12, 18 and 24 of the FIORA are in violation of the provisions of the Constitution. It was also stated that the jurisdiction of the Banking Mohtasib in respect of matters covered by Sections 82A and 82B of the Banking Companies Ordinance, 1962 (the **Ordinance**) was ousted after the promulgation of the Payment System and Funds Transfer Act 2007 that pertains to Electronic Funds Transfer and all the matters are now to be decided by the court of competent jurisdiction under section 55 thereof. The vires of section 15 of the FIORA was challenged as it denied personal hearing to the parties

6. The learned counsels appearing on behalf of Banking Mohtasib as well as private respondents, on the contrary, supported the orders challenged in these writ petitions. It was contended that the office of the Banking Mohtasib acted strictly within the confines of law in

passing the orders impugned before this Court to which no exception can be taken. It was also pointed out that jurisdiction was not exceeded by the Banking Mohtasib in exercising power under sections 82A, 82B and 82C of the Ordinance, which power in any case is not judicial power. It was also stated that the petitioners had alternate remedy of filing a representation available to them and as such the writ petitions were not maintainable.

7. Since the vires of sections 10 to 12 and 15 of FIORA were under challenge, notice under section 27-A CPC was issued to the learned Attorney General of Pakistan. The learned Deputy Attorney General adopted the arguments of the co-counsels.

8. Before proceeding to any appreciable length, it would be expedient to set out the legal provisions with which we are dealing with. Section 82A of the Ordinance deals with the appointment of Banking Mohtasib and the matters over which it can take cognizance. The relevant portions of the said provision read as under

82A. Appointment of Mohtasib.—There shall be a Banking Mohtasib who shall be appointed by the President in consultation with the Governor of the State Bank of Pakistan.

- (2)
- (3) The jurisdiction of the Banking Mohtasib in relation to banking transactions shall be to—
 - (a) enquire into complaints of banking malpractices;
 - (b) perverse, arbitrary or discriminatory actions;
 - (c) violations of banking laws, rules, regulations or guidelines;
 - (d) inordinate delays or inefficiency; and
 - (e) corruption, nepotism or other forms of maladministration.
- (4) The Banking Mohtasib shall hold office a period of three years and shall not be eligible for any extension of tenure or for reappointment under any circumstances whatsoever.
- (5)

Similarly, 82B sets out the power and authority of the Banking Mohtasib. Its operative part reads as under

82B. Terms and conditions of the Banking Mohtasib.—

- (1)
- (2)
- (3)
- (4) The Banking Mohtasib shall have the power and responsibility—
 - (a) to entertain complaints from customers, borrowers, banks or from any concerned body or organization;
 - (b) to facilitate the amicable resolution of complaints after giving hearings to the complainant and the concerned bank;
 - (c) to receive evidence on affidavit;
 - (d) to issue commission for the examination of witnesses; and
 - (e) in the event that complaints cannot be resolved by consent, to give finding which shall be acted upon in the manner set out herein.
- (5) The Banking Mohtasib shall exercise his powers and authority in the following manner:-
 - (a) In relation to all banks operating in Pakistan:-
The Banking Mohtasib shall be authorised to entertain complaints of the nature set out herein below:-
 - (i) failure to act in accordance with banking laws and regulations including policy directives or guidelines issued by the State bank from time to time.
Provided that if there is a dispute as to the proper interpretation of any regulations, directions or guidelines, the same shall be referred to the State Bank for clarification.
 - (ii) delays or fraud in relation to the payment or collection of cheques, drafts or other banking instruments or the transfer of funds;
 - (iii) fraudulent or unauthorised withdrawals or debit entries in accounts;
 - (iv) complaints from exporters or importers relating to banking services and obligations including letter of credits;
 - (v) complaints from holders of foreign currency accounts, whether maintained by residents or non-residents;
 - (vi) complaints relating to remittances to or from abroad;
 - (vii) complaints relating to mark-up or interest rates based on the ground of a violation of an agreement or of State Bank directives; and

- (viii) complaints relating to the payment of utility bills.
- (b) In relation to banks in the public sector.— The Banking Mohtasib shall be authorized to entertain complaints against such banks on the following additional grounds as well—
 - (i) corrupt or malafide practices by bank officers;
 - (ii) gross dereliction of duty in dealing with customers; and
 - (iii) inordinate delays in taking decisions; and
- (c) The Banking Mohtasib shall not entertain any complaint or application which has already been disposed of by the State Bank, or any court in Pakistan.

The cursory perusal of section 82A shows that the jurisdiction conferred on the Banking Mohtasib relates primarily to enquire into the complaints filed by the customers on the mal-practice and mal-administration of the banks/financial institutions and their officials with regard to the banking laws and regulations and policy directives issued by the State Bank of Pakistan. Section 82B, however, significantly expands the area of jurisdiction of Banking Mohtasib and allows him to exercise power and authority to entertain and adjudicate upon complaints filed, *inter alia*, regarding cases of fraud or delay in relation to banking instruments and/or transfer of funds, fraudulent/unauthorized entries or withdrawals from accounts etc.

9. The actions that Banking Mohtasib can take on the complaints filed before it against the banks are stipulated in section 82E of the Ordinance, which provision reads as under:

- 82E. Recommendations for implementation.— (1)**
In the event the Banking Mohtasib comes to the conclusion that the complaint is justified, in part or in whole, he shall try and facilitate an amicable resolution or settlement by resort to mediation and failing that communicate his

findings to the concerned bank with the direction—

- (a) to reconsider the matter;
 - (b) to modify or cancel the earlier decision, action or failure to take the appropriate action;
 - (c) to pay reasonable compensation to the complainant as fixed by the Banking Mohtasib;
 - (d) to take the requisite steps to improve the functioning or efficiency of the bank; and
 - (e) to take such other remedial steps or actions as may be specified by the Banking Mohtasib.
- (2) The Banking Mohtasib may, in any case, he deems fit or proper, forward a report to the State Bank recommending—
- (a) an inquiry, or the taking of the requisite steps or legal proceedings against a bank which has acted in violation of banking laws, procedure, regulations or directives of the State Bank; and
 - (b) in the case of a bank in the public sector in cases of banking malpractices or corruption, nepotism or gross and flagrant dereliction by bank officers of their duties and responsibilities, the initiation of such action including a criminal prosecution or disciplinary proceedings as the State Bank may deem fit, either by itself, or through filing a report with the Government of Pakistan.
- (3) In no case whatsoever shall be Banking Mohtasib have the power to direct that loans, advances or finances be given to a complainant.
- (4) Any bank, or official of a bank, or a complainant aggrieved by any order passed by the Banking Mohtasib may, within thirty days of the order, prefer an appeal to the Governor State Bank, who shall decide the appeal within sixty days.
- (5) The findings of Banking Mohtasib shall be implemented by the concerned bank or financial institution within forty days and compliance thereof shall be submitted accordingly. In case an appeal against the decision of the Banking Mohtasib is preferred to the Governor State Bank the aforesaid period of forty days shall be reckoned from the date of decision of appeal.
- (6) Any order passed by the Banking Mohtasib which has not been appealed against within a period of thirty days from the date of order, or any order passed by the State Bank in appeal, as the case may be, shall become final and

operative and if not implemented shall render the bank concerned to such action including the imposition of a fine or penalty as the State bank may deem fit, and in relation to a bank officer, to the appropriate disciplinary or other proceedings.

- (7) Nothing contained herein shall prevent a complainant from filing a suit against a bank in the event his complaint is rejected.

10. The afore-mentioned provisions make it evident that the Banking Mohtashib in the discharge of his functions has been vested with powers by the statute, which powers by definition are normally exercised by the courts. It is also clear that that is the purpose of the afore-mentioned provisions when the Banking Mohtashib adjudicates upon a dispute between a bank and its customer. But if this is not enough, one only has to look at section 10 to 12 of FIORA which, in addition to sections 82B and 82E of the Ordinance, further augment the powers of the Banking Mohtashib. The relevant provisions of FIORA are reproduced hereunder:

- (c) "**relevant legislation**" means, the Office of Wafaqi Mohtasib (Ombudsman) Order, 1983 (P.O. No.1 of 1983), the Establishment of the Office of Federal Tax Ombudsman Ordinance, 2000 (XXXV of 2000), the Insurance Ordinance, 2000 (Ordinance No. XXXIX of 2000), the Banking Companies Ordinance, 1962 (LVII of 1962), and the Protection against Harassment of Women at the Workplace Act, 2010 (IV of 2010).

10. Powers of Ombudsman.—In addition to powers exercised by Ombudsman under the relevant legislation, he shall also have following powers of a civil Court, namely:—

- (i) granting temporary injunctions; and
- (ii) implementation of the recommendations, orders or decisions.

- 11. Temporary Injunction.**—The Ombudsman may stay operation of the impugned order or decision for a period not exceeding sixty days.
- 12. Power to punish for contempt.**—An Ombudsman shall have power to punish for contempt as provided in the Contempt of Court Ordinance, 2003 (V of 2003).
- 15. Personal hearing.**— It shall not be necessary for the President or the Ombudsman to give personal hearing to the parties and the matter may be decided on the basis of available record and written comments filed by the Agency.

No other provision is required to be mentioned as it becomes clear that just as administrative, arbitral and executive powers and functions are vested in the Banking Mohtasib so also is judicial power vested in the said office even to the extent of rendering decisions against banks and also finding their officials to be in contempt and depriving them of their liberty. Furthermore, the Banking Mohtasib under the FIORA has been granted the power of the civil court to implement its orders/decisions and recommendations.

11. In the context of the afore-mentioned provisions, the question that arises is whether Banking Mohtasib is a court and can perform judicial functions by determining rights and obligations of parties before it and to award compensation/profit to the customers of the banks. The next question that would arise and which is of fundamental importance is whether the office of Banking Mohtasib can be termed as a “court” and if it is an administrative tribunal, can it be conferred judicial powers to be exercised in adjudicating disputes between private individuals.

12. Article 175 of the Constitution relates to the establishment of courts and provides the jurisdiction that can be exercised by them. It reads as under

175. Establishment and Jurisdiction of Courts.—

- (1) There shall be a Supreme Court of Pakistan, a High Court for each Province and a High Court for the Islamabad Capital Territory, and such other courts as may be established by law.
Explanation:-- Unless the context otherwise, the words "High Court" wherever occurring in the constitution shall include "Islamabad High Court"
- (2) No court shall have any jurisdiction save as is or may be conferred on it by the Constitution or by or under any law.
- (3) The Judiciary shall be separated progressively from the Executive within fourteen years from the commencing day.

13. It is clear that a court can be constituted through legislation, which legislation would also determine its contours as also the limitations on the exercise of such jurisdiction. Before proceeding further in the matter, it would be expedient and indeed necessary to understand and elaborate the interaction between *jurisdiction* and *judicial power* as these expressions often times are used as a synonymous. The term *jurisdiction* is often termed as the power and capacity of a court to entertain, hear, determine and decide upon the subject matter in controversy between parties to a suit (see *United States v. Arrendondo* 6 Pet. (31 U.S.) 691 (1832). Similarly, in *General Investment Co. v. New York Central R. Co.*, 271 U.S.228 (1926), *jurisdiction* has been held as the "power to entertain the suit, consider the merits and render a binding decision thereon".

14. *Judicial power* is referred to as all the consequent things which a court may do after assuming jurisdiction. Judicial power is thus the totality of powers the court

exercises when it adjudicates upon a case [see *William v. United States* 289 U.S.553 (1933) and *Yakus v. United States* 321 U.S.414 (1944)]. In the constitution of United States of America, the term “judicial power” has been used to denote the sovereign power of the state that is “....vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”

15. In *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361, the concept of judicial power was described in the following terms:

[J]udicial power involves, as a general rule, a decision settling for the future, as between defined persons or classes of persons, a question as to the existence of a right or obligation, so that an exercise of the power creates a new charter by reference to which that question is in future to be decided as between those persons or classes of persons. In other words, the process to be followed must generally be an inquiry concerning the law as it is and the facts as they are, followed by an application of the law as determined to the facts as determined; and the end to be reached must be an act which, so long as it stands, entitles and obliges the persons between whom it intervenes, to observance of the rights and obligations that the application of law to facts has shown to exist.

The expression “judicial power” has often posed difficulties for the Court to articulate it precisely and exhaustively. One way the Courts have approached this topic is by taking into account the traditional functions of a court which encompass within its fold adjudication and settlement of disputes between parties in accordance with law. The following passage from *Huddart, Parker & Co*

Pty Ltd v Moorehead (1909) 8 CLR 330, 357, which is often repeated in the judgments, shines some light on the concept of judicial power:

I am of opinion that the words 'judicial power' as used in sec. 71 of the Constitution mean the power which every sovereign authority must of necessity have to decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property. The exercise of this power does and authoritative decision (whether subject to appeal or not) is called upon to take action.

16. *Jurisdiction*, on the other hand, has much wider connotation than *judicial power* at least in the context of our Constitution. One area where the distinction is brought into sharp focus is the right to appeal, which is the creation of statute. The jurisdiction to entertain and adjudicate upon an appeal does not exist unless it is conferred by statute. Likewise the scope and ambit of the right to appeal can only be conferred by statute. Before the Supreme Court, in certain instances, leave to appeal is required to be obtained. Similarly, the right to appeal may be restricted on the questions of law and not on errors of fact or where the order or judgment does not finally dispose of the matter etc. There are certain other aspects of jurisdiction that may briefly be touched upon. The parties are not allowed to re-litigate issues that have already been decided by courts in earlier rounds of litigation between the same parties on the principle of *res judicata*. In criminal matters, the plea of previous acquittal or conviction, or the principle of double jeopardy would restrain the court from proceeding in the matter. Another feature of grant of jurisdiction through statute is both the conferral of power to act and

limitations placed on the ambit of that power which essentially means that judicial actions beyond the ambit of that power will be a nullity which can be set aside. Similarly, the decision by a court to refuse to exercise jurisdiction vested in it can also be set. It may also be noted that the parties cannot by their agreement or consent confer on court's jurisdiction to hear and adjudicate matters which they would otherwise do not possess.

17. Under our Constitution, there is no apparent vesting of judicial power in Article 175 Courts. Mr. Justice ® Fazal Karim in his book "*Judicial Review of Public Actions*" while referring to our constitutional structure which vests powers in the three branches of the Government viz., Legislature, Executive and Judiciary under the doctrine of separation of power stated that '*The absence of the expression "judicial power" from the Constitution of Pakistan, particularly Article 175, is not of any significance.*'. And rightly so for there cannot be exercised judicial power in the absence of vesting of jurisdiction in the court. Mr. Justice ® Fazal Karim also made a reference to the Privy Council's decision in *Liyanage v. Reginam* (1966) 1 All ER 650 where it was held that the provisions of the Sri Lankan Constitution vesting powers in the judicature "*.....manifests an intention to secure in the Judiciary a freedom from political, legislative and executive control.*" This statement stems out of the recognition and affirmation of the principle of separation of powers which is often found in federal, democratic constitutions all across the world.

18. Professor W. W. Willoughby's treatise on the Constitution of the United States of America *The Constitutional Law of the United States* (2nd Edition 1929) 1616-1635 said this about the principle of separation of powers:

Thus it is not a correct statement of the principle of the separation of powers to say that it prohibits absolutely the performance by one department of acts which, by their essential nature, belong to another. Rather, the correct statement is that a department may constitutionally exercise any power, whatever its essential nature, which has, by the Constitution, been delegated to it, but that it may not exercise powers not so constitutionally granted, which, from their essential nature, do not fall within its division of governmental functions unless such powers are properly incidental to the performance by it of its own appropriate functions. From the rule, as thus stated, it appears that in very many cases the propriety of the exercise of a power by a given department does not depend upon whether, in its essential nature, the power is executive, legislative or judicial, but whether it has been specifically vested by the Constitution in that department, or whether it is properly incidental to the performance of the appropriate functions of the department into whose hands its exercise has been given. Generally speaking, it may be said that when a power is not peculiarly and distinctively legislative, executive or judicial, it lies within the authority of the legislature to determine where its exercise shall be vested.

19. Our Courts too have in a string of remarkable cases starting from Sharf Faridi v. The Federation of Pakistan **PLD 1989 Karachi 404** down to Government of Balochistan v. Azizullah Memon **PLD 1993 SC 341** and Mehram Ali v. The Federation of Pakistan **PLD 1998 SC 1445** while relying on the principle of separation of judiciary from executive enshrined in sub-

clause of Article 175 (3) held that the Constitution is based on the principle of trichotomy of powers in which *Legislature, Executive and Judiciary* have their own specific and independent functions. These cases firmly established the principle that the Constitution embodied the allocation of legislative, executive and judicial functions and powers between the Parliament, the Executive and the Courts and that Part VII of the Constitution was the only repository of jurisdiction of the Courts and the sole determinant of the manner of its exercise. The statutes that were under challenge in these cases which created various courts, it was held, could not be invested with judicial power. It was also held that the expression “*such other courts as may be established by law*” contained in Clause (1) of Article 175 would encompass within its purview the courts that were under the supervision of and over which the respective High Courts exercised control under Article 203 of the Constitution. The only other courts/tribunals which could said to have been invested with judicial power were specified in the Constitution itself namely the Federal Shariat Court (Chapter 3-A), Tribunals constituted under Article 212 and Election Tribunals established under Article 225. Any court or tribunal, howsoever named or described, and even created through a legislative instrument, which exercises judicial powers and is not under the supervisory control of the High Court cannot perform judicial functions. The various provisions contained in Part VII of the Constitution and particularly the language of Article 175 unambiguously affirms the Courts in which the judicial power of the State shall vest and also limits the jurisdiction to be exercised by them.

This negatives the option of vesting of such power and jurisdiction in any other body or authority howsoever named. It follows that the Parliament cannot confer judicial power on anybody or authority or to regulate its exercise except in accordance with Article 175 of the Constitution. The conclusions reached by the aforementioned judgments by the Hon'ble Supreme Court lead irresistibly to the conclusion that it is only in Part VII of the Constitution that legislative authority is to be found which would vest in the Courts with the jurisdiction and judicial power of the State. Barring the afore-referred courts/tribunals, it is virtually impossible, in view of the ratio of the decisions referred to above, to confer judicial functions upon any other body which in its essential character is not an Article 175 Court.

20. Reference now may be made to some judgments from the Australian jurisdiction as these decisions bear remarkable resemblance to the debate that continues in our Country regarding conferral of judicial powers onto administrative tribunals. In this regard, the decision in *Chu Kheng Lim v. Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 may be referred in which it was held as follows:

It is one thing for the Parliament, within the limits of the legislative power conferred upon it by the Constitution, to grant or withhold jurisdiction. It is a quite different thing for the Parliament to purport to direct the courts as to the manner and outcome of the exercise of their jurisdiction. The former falls within the legislative power which the Constitution, including Ch III itself, entrusts to the Parliament. The latter constitutes an impermissible intrusion into the judicial power which Ch III vests exclusively in the courts which it designates.

In the case of *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 607 Deane J opined that the objective for separating judicial power would only be achieved if judicial power was exercised “*in accordance with the essential attributes of the curial process*”. In this very case, Gaudron J determined the essential aspects of “judicial process” requirements for the exercise of federal judicial power. It was stated that:

An essential feature of judicial power is that it be exercised in accordance with the judicial process. I attempted to identify the features of that process in *Harris v Caladine* [(1991) [1991] HCA 9; 172 CLR 84, 150-2], and in *Re Nolan; Ex parte Young* [1991] HCA 29; [(1991) 172 CLR 460, 496]. To adopt the words of Kitto J in *[R] v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* [1970] HCA 8; [(1970) 123 CLR 361, 374], the essential features of that process include the determination of legal rights, obligations or consequences by the ascertainment of the facts as they are and as they bear on the matter for determination, and the identification of the applicable law, followed by an application of that law to those facts. (Emphasis supplied)

In the case of *Leeth v Commonwealth* (1992) 174 CLR 455, Deane J and Toohey J further analyzed the exercise of judicial power by stating the following:

Those provisions [of Chapter III] not only identify the possible repositories of Commonwealth judicial power. They also dictate and control the manner of its exercise. They are not concerned with mere labels or superficialities. They are concerned with matters of substance. Thus, in Ch III's exclusive vesting of the judicial power of the Commonwealth in the 'courts' which it designates, there is implicit a requirement that those 'courts' exhibit the essential attributes of a court and observe, in the exercise of that

judicial power, the essential requirements of the curial process, including the obligation to act judicially. (Emphasis supplied)

21. It is vitally important to note that the Courts while establishing what judicial power is have often made a distinction between the power to determine existing rights from the power to create and establish new rights and obligations. It is held that it is only the former which tantamount to exercise of judicial power. In *Precision Data Holdings Ltd v. Wills* (1991) 173 CLR 167, it was argued on behalf of the plaintiffs that the Corporations and Securities Panel was exercising judicial power when it declared that an acquisition or conduct was unacceptable under the Corporations Act and by subsequently passing any order for protecting the rights and interests of any person affected by the acquisition or conduct. The High Court repelled the submission and held that although the Corporations and Securities Panel made declarations about past events or conduct, the object of the inquiry and determination was to create a new set of rights and obligations which did not exist antecedently and independently of the making of the orders. Similarly, the High Court of Australia in *Re Ranger Uranium Mines Pty Ltd; Ex parte Federated Miscellaneous Workers' Union of Australia* (1987) 163 CLR 656, while deciding that the Conciliation and Arbitration Commission did not exercise judicial power, held as follows:

In our view the fact that the Commission is involved in making a determination of matters that could have been made by a court ... does not ipso facto mean that the Commission has usurped judicial power, for the purpose of inquiry and determination is necessarily different depending on whether the task is undertaken by the

Commission or by a court. The purpose of the Commission's inquiry is to determine whether rights and obligations should be created. The purpose of a court's inquiry is to decide whether a pre-existing legal obligation has been breached, and if so, what penalty should attach to the breach.

22. Reference may now be made to the landmark decision rendered in Australian jurisdiction in the case of *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, which case was about the Commonwealth Court of Conciliation and Arbitration in charge of preventing and settling industrial disputes. The Court was granted the power to determine the terms and conditions of industrial awards and also to enforce compliance of the awards so made by it. One of the issues in the case was whether Commonwealth Court of Conciliation and Arbitration could be granted judicial powers like the power to issue injunctions or the power to find people guilty of contempt. Delivering the majority judgment, Chief Justice Dixon, and Justices McTiernan, Fullagar, and Kitto cited the *Alexander's* case, where the Court held that:

Arbitral powers are essentially different from the judicial power. Both of them rest for their ultimate validity and efficacy on the legislative power. Both presuppose a dispute, and a hearing or investigation, and a decision.

But the essential difference is that that judicial power is concerned with the ascertainment, declaration, and enforcement of the rights and responsibilities of the parties as they exist, or are deemed to exist, at the moment the proceedings are instituted; whereas the function of arbitral power in relation to industrial disputes is to ascertain and declare, but not enforce, what, in the opinion of the arbitrator, ought to be the respective rights

and liabilities of the parties in relation to each other.

It was held by the majority judgment in *Boilermaker's* case that

.....when an exercise of legislative powers is directed to the judicial power of the Commonwealth it must operate through or in conformity with Chap. III. For that reason it is beyond the competence of the Parliament to invest with any part of the judicial power anybody or person except a court created pursuant to s. 71 and constituted in accordance with s. 72.....Indeed to study Chap. III is to see at once that it is an exhaustive statement of the manner in which the judicial power of the Commonwealth is or may be vested. It is true that it is expressed in the affirmative but its very nature puts out of question the possibility that the legislature may be at liberty to turn away from Chap. III to any other source of power when it makes a law giving judicial power exercisable within the Federal Commonwealth of Australia. No part of the judicial power can be conferred in virtue of any other authority or otherwise than in accordance with the provisions of Chap. III.

23. While rendering the decision in *Brandy v. Human Rights and Equal Opportunity Commission* (1995) 127 ALR 1, the High Court of Australia once again found that the statutory scheme invalidly conferred judicial power on the Commission which was a body not established under Chapter III of the Australian Constitution. In arriving at this conclusion, the High Court held that one of the incidents of the exercise of judicial power by a Tribunal was its ability to make binding and enforceable decisions. The relevant statutory scheme provided for registration of the determination made by the Commission with the Federal Court which was subsequently enforced as a decision of the said Court.

Mason CJ, Brennan and Toohey JJ in their joint judgment concluded that subsection 25Z(2) did not mean that the holding of an inquiry and the making of a determination under the Act itself was an exercise of judicial power rather the enforcement mechanism through registration of the determination with the Federal Court read with section 25ZAB which provided that the registered determination has effect “as if it were an order by the Federal Court”, made it so. The following passage in their judgment is of utmost importance to understand what constitutes judicial power and how it is distinguished from the power exercised by the Administrative Tribunals.

[W]hen A alleges that he or she has suffered loss or damage as a result of B's unlawful conduct and a court determines that B is to pay a sum of money to A by way of compensation, there is an exercise of judicial power. The determination involves an exercise of such power not simply because it is made by a court but because the determination is made by reference to the application of principles and standards "supposed already to exist". And the determination is binding and authoritative in the sense that there is what has been described as an immediately enforceable liability of B to pay A the sum in question. Consequently, even if the determination in such a case were to be made by an administrative tribunal and not by a court, the determination would constitute an exercise of judicial power, although not one in conformity with Ch.III of the constitution.

In the present case, the determinations by the Commission for the payment of damages by the appellant and ATSIC were made by reference to the application of the pre-existing principles and standards prescribed by the provisions of ss 9 and 15 of the Act. Accordingly, the only distinction between the determination supposed in the last sentence of the preceding paragraph and the determinations by the Commission in the present case is that the Commission's determinations only

become binding on the parties and enforceable after registration of the determinations in the Federal Court.

Deane, Dawson, Gaudron and McHugh JJ also wrote a separate judgment but there is little to distinguish between their approach with that of the other justices on the bench and they reached on exactly the same conclusion as the judgment of Mason CJ. Brennan and Toohey JJ. The following passage from their judgment would illustrate this point:

However, if it were not for the provisions providing for the registration and enforcement of the Commission's determinations, it would be plain that the Commission does not exercise judicial power. That is because, under S 25Z(2), its determination would not be binding or conclusive between any of the parties and would be unenforceable. That situation is we think, reversed by the registration provisions.

Under s25ZAA registration of a determination is compulsory and under s25ZAB the automatic effect of registration is, subject to review, to make the determination binding upon the parties and enforceable as an order of the Federal Court. Nothing that the Federal Court does gives a determination the effect of an order..... It is the determination of the Commission which is enforceable and it is not significant that the mechanism for enforcement is provided by the Federal Court.

24. To sum up, the courts have expounded various indicia of judicial power which are available only to the Courts and not to the administrative tribunals. A conclusive and binding determination of disputes between parties is held to be a key feature of judicial power. Ascertaining the existing rights and rendering the consequential declaration in respect thereof by applying the established legal principles is deemed to fall within the purview of judicial power. The decision in respect to

new rights and liabilities, on the other hand, with reference to policy considerations is considered to be an exercise of administrative or legislative power. According to Pamela McAlister in her essay “The demise of the Superannuation Complaints Tribunal”, it is acknowledged by the courts “.....*that both a court and an administrative body can form an opinion about legal rights and obligations, but have held that it is the object of the adjudication which characterises their function as judicial or administrative..... The ascertainment and declaration of existing rights by application of legal principles and standards is considered to be substitutive and an exercise of judicial power, while the creation of new rights and liabilities by reference to either a broad discretion or policy considerations is considered to be constitutive and an exercise of administrative or legislative power.*” Similarly, the presence of an enforcement mechanism is also determinative of judicial power. In *Brandy’s* case, the High Court of Australia held as follows with reference to the enforceability of decisions:

However, there is one aspect of judicial power which may serve to characterize a function as judicial when it is otherwise equivocal. That is the enforceability of decisions given in the exercise of judicial power.

25. In the influential essay titled “Judicial Power and Administrative Tribunals: The Decision in *Brandy v HREOC*” by Janice Nand (AIAL Forum 12), the following conclusions were drawn after review of the judgments rendered in Australian jurisdiction on judicial power:

- (1) There are some powers, whether they be called legislative, executive or judicial, which so clearly belong to one organ of government that they must be exercised by the appropriate organ.
- (2) Subject to (1), the legislature may delegate legislative powers to the executive, provided that the matter delegated is referable to a definite head of Commonwealth power and is exercised in accordance with the statute authorizing the delegation.
- (3) The judicial power is exclusive of the legislative and executive powers, in the sense that such power can be exercised only by courts.
- (4) The courts which can exercise the judicial power, and the nature and contents of their jurisdiction, are (subject to the exceptions to be mentioned) governed exclusively by Chapter III of the Constitution.

26. Having laid down the foundation of the principle of separation of powers which dictates that the judicial power of the State shall vest in the Article 175 Courts, the next question that requires consideration is as to what are the attributes of a “Court”. The Hon’ble Supreme Court has in a number of judgments, some of which relate to the jurisdiction of Wafaqi Mohtasib, set down the attributes of a “court”. In a judgment reported as Shafaat Ullah etc v. Federation of Pakistan **PLD 2001 SC 142**, the Hon’ble Supreme Court was dealing with the question whether the office of Wafaqi Mohtasib was a “court/judicial Tribunal”. After reviewing a number of judgments on the subject, the Hon’ble Supreme Court held that the office of Wafaqi Mohtasib is not a Court and cannot exercise judicial powers. In arriving at the said conclusion, the Hon’ble Supreme Court relied on the judgment reported as Jia Ram v. Smt. Kundana Wanti and 4 others **PLD 1998 Quetta 91** in which the expression ‘court’ was defined to be a place where justice

is administered and the “Judge” was meant to be a person who exercises judicial powers. It was further observed that in the statutes the expressions “court” or “judge” are used as synonymous and interchangeable. The Supreme Court also made reference to the judgment in Nasir Mahmood v. Murad Ali **PLD 1960 Lahore 756**, where a Division Bench of this Court had defined the word ‘Court’ to include the Presiding Officer or the whole of the court including the Presiding Officer or a place where the cases are heard. The Ballentine’s Law Dictionary in which the following three elements essential to constitute a court was also referred by the Supreme Court:

- (i) time when judicial functions may be exercised
- (ii) a place for the exercise of judicial functions and
- (iii) a person or persons exercising judicial functions.

It was stated that judicial function is the common characteristics to each of the characteristic. In *Shell Co. of Australia Limited v. Federation Commissioner of Taxation* (1930) All ER 671, judicial powers was defined as the power which every sovereign authority possesses to decide the controversy between its subject, or between itself or its subject where they rights relate to life, liberty or the property. This power can only be exercised by a tribunal which has the power to give binding and authoritative decisions. The Hon’ble Supreme Court thus held that judicial power is an essential feature of a court which distinguishes it from an administrative tribunal. It was further held that giving a definitive and binding judgment is an essential concomitant of judicial powers. Similarly, in the case of Rehman Khan v. Asadullah Khan **PLD 1983 Quetta 52**, the term “Courts” was

described to be “..... *such organs of State which administer justice strictly in accordance with law, meaning thereby that while applying laws to the controversies, they follow certain rules with regard to procedures and evidence and are not left altogether unguided and uncontrolled to act on their own whims and fancies.....*”. This Court in United Bank Limited through Manager v. Banking Mohtasib Pakistan and another **2006 CLD 1226** while acknowledging that the office of Banking Mohtasib was not a court held that damages cannot be awarded without proof and thus for the recovery thereof resort can only be had to a civil court.

27. In Mohammad Saeed and 4 others v. Election Petitions Tribunal West Pakistan and others **PLD 1957 SC 91**, the expression *judicial functions* was defined as follows:

Generally speaking a person performs judicial functions, if he is enjoying by the law to adjudicate upon and determine as between the parties from controversy relating to existence or non-existence of right or liability, whether such right or liability be the creation of common law or statute, provided the right or liability is actionable either under the general law or special law and the duty to determine the controversy is derived from the state.

In a full bench judgment of the Hon’ble Supreme Court titled Messrs Faridsons Limited, Karachi and another v. Government of Pakistan through its Secretary, Ministry of Commerce, Karachi and another **PLD 1961 SC 537**, the issue as to how a tribunal acts judicially was stated in the following terms:-

The criteria to ascertain whether a particular act is a judicial or an administrative one has been laid down with clarity in Rex v. Electricity

Commissioner (1), Rex v. London County Council Ex-Parte Entertainments Protection Association Ltd. (2) and authoritatively restated by this Court in the case of Tariq Transport Company v. Sargodha-Bhera Bus Services and others (3).

In the above case, this Court observed at Page 95:- A tribunal acts judicially in the full sense of the term if;

- (1) It has to determine a dispute;
- (2) The dispute relates to a right or liability which, whatever, its immediate aspect, is ultimately referable to some right or liability, recognized by the Constitution or Statute or by custom or equity which by domestic law is declared to be the rule of decision;
- (3) Since every right or liability depends upon facts, the Tribunal is under an obligation to discover relevant facts;
- (4) The ascertainment of the facts in the presence of the parties either of whom is entitled to produce evidence in support of its respective case and to question the truth of the evidence produced by his opponent; and
- (5) After an investigation of the facts and hearing legal arguments the Tribunal renders a judgment which so far as the tribunal is concerned terminates the dispute.

Similarly, in judgment reported as Khawaj Din v. Rationing Controller, Faisalabad and 2 others **PLD 1980 Lahore 15**, the expression “judicial actions” were defined to state that “*A judicial action may be defined as an adjudication upon rights of parties who in general appear or are brought before a tribunal by notice or process and upon whose claim some decision or judgment is rendered.*” In the said judgment, “judicial function” was defined as “*An authority acts in a judicial capacity when after investigation and deliberation, it performs an act or makes a decision that is binding and*

conclusive and imposes obligations upon or affects the rights of individuals.” Similarly, it was stated that the word “judicial” has two meanings i.e. discharge of duties by a judge or justices in Court or to administrative duties which need to be performed in Court but in respect of which it is necessary to bring to bear a judicial mind.

28. In an extremely relevant judgment reported as Iftikhar Ahmad v. Muslim Commercial Bank Limited **PLD 1984 Lahore 69**, this Court held that judicial powers and judicial functions can only be exercised by courts established under Article 175 of the Constitution and not otherwise. It was stated that an authority or court “.....*shall be deemed to be a Court, constituted in pursuance to Article 175 (2) of the Constitution and subject to the superintendence and control of the High Court of the Province, in which it is situate, if it exercises judicial powers of the State, under an Act of a Legislature, and its existence is not specifically provided for by any other provision of the Constitution.*”. While elaborating on the definition of “judicial power” it was stated that it is

....the legal right, ability and authority to hear and decide, objectively and after allowing opportunity to produce evidence, a justiciable issue, dispute, or controversy, concerning the existing legal rights, duties, or interests of persons or property, arising out of relations and dealings between two or more parties, who bring the same for an authoritative decision, binding on them and may include the authority to execute or get executed its decisions and protect rights, prevent and redress wrongs and punish offences through legal processes.....
The authority or body in which this power is vested is generally called a ‘Court’ and in performing its judicial functions it declares, construes and applies law or custom or usage, having the force of law.

The 'judicial power' is thus the instrument to be used by the Court.

29. The problem arises when judicial power to be exercised by Article 175 Courts is granted to the administrative bodies. These administrative bodies cannot, in the performance of their functions, exercise any part of the judicial power of the Article 175 courts as has been held in a number of judgments rendered by the Hon'ble Supreme Court. The constitutional inadmissibility of exercise of such a power stems out of Article 175 which does not allow such judicial powers to be allocated to any other court/tribunal not created under the said provision. In *Mehram Ali's* case (PLD 1998 SC 1445), it was held by the Supreme Court that any court or tribunal run by executive authorities without control or supervision of the High Court would violate Articles 175 and 203 of the Constitution. The Constitution recognized only specific tribunals constituted under Articles 212 and 225 to exercise judicial powers along side Article 175 Courts. Barring such tribunals, vesting of judicial power in any other tribunal howsoever named shall be unconstitutional. Similarly, In the matter of: Reference No.2 of 2005 by the President of Pakistan **PLD 2005 SC 873**, the Supreme Court was dealing with powers of Mohtasib constituted under the Hisba Bill given in terms of sections 10 and 12 which allowed him to give findings on complaints and also empowered him to issue directions for implementation of the orders. Similarly, section 14 of the Hisba Bill gave the power to the Mohtasib to commit and punish a person for contempt of court. The Supreme Court held that plurality of power distinguished Mohtasib under Hisba Bill from other Mohtasibs who could only make recommendations

having no binding effect. Article 175 of the Constitution, it was held by the Supreme Court, mandates that judicial power is of binding nature and, therefore, could not be conferred upon executive authorities. The power to implement its orders under section 12 of the Hisba Bill would tantamount to conferring judicial power onto Mohtasib. Sections 10 and 12 of the Hisba Bill were thus found to be in violation of the Article 175 of the Constitution.

30. The reason underlying these decisions is not hard to fathom. It is often stated that fairness, impartiality and independence from the executive government are hallmarks of an independent judiciary. In countries that have written, federal Constitutions, the Courts have given a strict application to the principle of separation of powers. It appears that while delivering these decisions on the interpretation of Article 175, the focus of the Supreme Court was largely centred on the guarantees of right to due process, right to fair trial and right to equality which are available to a litigant before a judiciary independent of the executive. In United States of America and Australia, the Courts emphasized the independent and exclusive character of the federal judicial power for historical and traditional reasons. It was said

"..... we have inherited and were intended by our Constitution to live under a system of law and government which has traditionally protected the rights of persons by ensuring that those rights are determined by a judiciary independent of the parliament and the executive" [see The Queen v Quinn; ex parte Consolidated Food Corporation (1977) 138 CLR I, II].

The idea is to protect the role of an independent judiciary and to safeguard the right of litigants to have their claims adjudicated by courts free from potential influence and domination by the other branches of government. In this endeavour, the approach appears to focus on the essential characteristics of a court and its power. The general principle underlying this approach, in the opinion of this Court was rightly stated by McHugh J in *Nicholas v The Queen* (1998) 193 CLR 173 as follows

If the doctrine of the separation of powers is to be effective, the exercise of judicial power needs to be more than separate from the exercise of legislative and executive power. To be fully effective, it must also be free of legislative or executive interference in its exercise. As a result, legislation that is properly characterized as an interference with or infringement of judicial power... contravenes the Constitution's mandate of a separation of judicial from legislative and executive power.

The Hon'ble Supreme Court in a judgment rendered in Civil Appeals No.1646 & 2000/2006 and Civil Petition No.782-K/2009 titled M/s MFMY Industries Limited etc v. The Federation of Pakistan through Ministry of Commerce etc has also held that

I may like to add here that one of the most important differences between developed countries on one hand and developing or under developed countries on the other is the respect for, adherence to and enforcement of THE RULE OF LAW. I have no doubt in my mind that this ideal can only be achieved through an independent and capable judiciary, which is beyond the reach, control and influence of other branches of the State. The judicature has to act as a natural umpire who keeps a check on the exercise of power by other organs of the State so as to ensure that the rights of citizens/persons are not affected and trampled contrarily to law. (Emphasis supplied)

31. Reference may also be made to some judgment from Indian jurisdiction and the principles propounded therein which bear close resemblance to the issue raised in these cases insofar as the principles of separation of power and independence of judiciary are concerned. *Union of India v. R. Gandhi, President, Madras Bar Association* (2010) 11 SCC 1 was a case in which constitutionality of the National Company Law Tribunal and the National Company Law Appellate Tribunal were in issue. The Indian Supreme Court held as follows:

But when we say that Legislature has the competence to make laws, providing which disputes will be decided by courts, and which disputes will be decided by Tribunals, it is subject to constitutional limitations, without encroaching upon the independence of judiciary and keeping in view the principles of Rule of Law and separation of powers. If Tribunals are to be vested with judicial power hitherto vested in or exercised by courts, such Tribunals should possess the independence, security and capacity associated with courts. If the Tribunals are intended to serve an area which requires specialized knowledge or expertise, no doubt there can be Technical Members in addition to Judicial Members. Where however jurisdiction to try certain category of cases are transferred from Courts to Tribunals only to expedite the hearing and disposal or relieve from the rigours of the Evidence Act and procedural laws, there is obviously no need to have any non-judicial Technical Member. In respect of such Tribunals, only members of the Judiciary should be the Presiding Officers/members. Typical examples of such special Tribunals are Rent Tribunals, Motor Accident Tribunals and Special Courts under several Enactments. Therefore, when transferring the jurisdiction exercised by Courts to Tribunals, which does not involve any specialized knowledge or expertise in any field and expediting the disposal and relaxing the

procedure is the only object, a provision for technical members in addition to or in substitution of judicial members would clearly be a case of dilution of and encroachment upon the independence of the Judiciary and Rule of Law and would be unconstitutional.

The Indian Supreme Court proceeded to hold whenever any judicial power of a court is transferred to a Tribunal, its members must have their rank, capacity and status akin to that of a Court. It was held thus

Independent judicial tribunals for determination of the rights of citizens, and for adjudication of the disputes and complaints of the citizens, is a necessary concomitant of the Rule of Law. Rule of Law has several facets, one of which is that disputes of citizens will be decided by Judges who are independent and impartial; and that disputes as to legality of acts of the Government will be decided by Judges who are independent of the Executive. Another facet of Rule of Law is equality before law. The essence of equality is that it must be capable of being enforced and adjudicated by an independent judicial forum. Judicial independence and separation of judicial power from the Executive are part of the common law traditions implicit in a Constitution like ours which is based on the Westminster model.

It was also held in the said judgment that the technical member should be one with expertise in the field of law instead of having experience in civil service. The Indian Supreme Court further observed that eligibility criteria of the technical member prescribed by the Legislature shall be subject to judicial review. The provisions of Chapters IB and 1C of the Companies Act, 1956 relating to the appointment of technical member without adequate experience in law were thus held to be bad and it was accordingly held that the function of the

Tribunal being judicial in nature, preference ought to be given to the members of the judiciary.

32. Next in line is the judgment reported as *Madras Bar Association v. Union of India* (2014) 10 SCC 1 where the challenge was thrown at the formation of National Tax Tribunal and its constitution for being in violation of basic structure of the Constitution. While referring to its earlier judgment dealing with the constitution of National Company Law Tribunal and the National Company Law Appellate Tribunal, it was held as follows:

107. In *Union of India v. Madras Bar Assn.*, ((2010) 11 SCC 1), all the conclusions/propositions narrated above were reiterated and followed, whereupon the fundamental requirements which need to be kept in mind while transferring adjudicatory functions from courts to tribunals were further crystallised. It came to be unequivocally recorded that tribunals vested with judicial power (hitherto before vested in, or exercised by courts) should possess the same independence, security and capacity, as the courts which the tribunals are mandated to substitute. The members of the tribunals discharging judicial functions could only be drawn from sources possessed of expertise in law and competent to discharge judicial functions. Technical members can be appointed to tribunals where technical expertise is essential for disposal of matters, and not otherwise. Therefore, it was held that where the adjudicatory process transferred to tribunals did not involve any specialised skill, knowledge or expertise, a provision for appointment of technical members (in addition to, or in substitution of judicial members) would constitute a clear case of delusion and encroachment upon the independence of the judiciary and the "rule of law". The conditions of service of the members should be such that they are in a position to discharge their duties in an independent and impartial manner. The manner of their appointment and removal including their transfer,

and tenure of their employment, should have adequate protection so as to be shorn of legislative and executive interference. The functioning of the tribunals, their infrastructure and responsibility of fulfilling their administrative requirements ought to be assigned to the ministry of Law and Justice. Neither the tribunals nor their members, should be required to seek any facilities from the parent ministries or department concerned. Even though the legislature can reorganise the jurisdiction of judicial tribunals, and can prescribe the qualifications/ eligibility of members thereof, the same would be subject to "judicial review" wherein it would be open to a court to hold that the tribunalisation would adversely affect the adjudicatory standards, whereupon it would be open to a court to interfere therewith. Such an exercise would naturally be a part of the checks and balances measures conferred by the Constitution on the judiciary to maintain the rule of "separation of powers" to prevent any encroachment by the legislature or the executive.

It was also stated in the said judgment that:

The "basic structure" of the Constitution will stand violated if while enacting legislation pertaining to transfer of judicial power, Parliament does not ensure that the newly created court/tribunal conforms with the salient characteristics and standards of the court sought to be substituted.

These judgments by the Indian Supreme Court, while relying on past precedents and upon the text of the Indian Constitution, recognized that the State's judicial power was capable of being transferred away from the Courts to Tribunals. Since these Tribunals were exercising judicial power usually reserved for courts, the prescribed qualifications for the persons heading these Tribunals were that of judicial officers and it was held that Tribunals must partake of the same attributes as that of the court which is being substituted.

33. The Hon'ble Supreme Court of Pakistan in a judgment reported as Riaz-ul-Haq vs. Federation of Pakistan etc **PLD 2013 SC 501** came to the conclusion that Services Tribunals although constituted by the Federation as well as the Provinces in terms of Article 212 of the Constitution nonetheless perform judicial functions and as such “.....*Tribunal should not be under the administrative or financial control of the Executive. On the analogy of the judges of the High Courts and Federal Shariat Court, the terms and conditions of the Chairman and Members of the Tribunal may be independently determined so as to make them outside the Executive influence and to ensure uniformity.*” It was accordingly directed by the Hon'ble Supreme Court that “*To make the Chairman and the Members of the Service Tribunal independent, it is necessary to make their appointment with the meaningful consultation of the Chief Justice i.e. for the purpose of Federal Service Tribunal, with the Chief Justice of Pakistan and for Provincial Service Tribunals, with the Chief Justice of the respective High Court.*”

34. Coming back to the merits of the disputes on which determination was made by the Banking Mohtasib, this Court on perusal of the record of the various writ petitions filed before it is satisfied that the complaints filed before the Banking Mohtasib involved facts and disputes which could only be adjudicated by the Article 175 Courts and not by a non-judicial authority like Banking Mohtasib. In some instances, the Banking Mohtasib has held the banks to be vicariously liable for the fraudulent actions of ex-employees and awarded damages and in many other cases orders have been

passed on matters pertaining to allegations of fraud and forgery. Now, in all such cases the parties were at issue with respect to the material facts which would have required recording of evidence by them. The Banking Mohtasib, however, passed order on all such complaints without recording the evidence of the parties by exercising powers, which were made available to the said office by sections 82B, 82E of the Ordinance read with sections 10 to 12 of FIORA.

35. In view of what has been stated above, there remains no doubt that the determination made by the Banking Mohtashib on a complaint filed before him partakes the character of a judicial decision. Similarly, the powers made available to the Banking Mohtasib in terms of sections 82B and 82E of the Ordinance read with sections 10 to 12 of FIORA in as much as he is empowered to receive evidence, grant temporary injunctions, implement his orders/decisions, make recommendations and hold a party in contempt of court if the orders/decisions are not implemented are all indeed judicial powers when exercised for adjudication of factual disputes *inter se* private parties which powers are only available to and can be exercised by Article 175 Courts. Section 82D (3) of the Ordinance grants to the Banking Mohtasib the freedom to adopt any procedure appropriate for investigating a complaint. Similarly, in terms of section 82D (5) of the Ordinance, the Banking Mohtasib may summarily reject any complaint or he may accept the same or pass any order as he may deem fit. Likewise, section 15 of FIORA empowers the Banking Mohtasib to decide the cases even on the basis of documents without any personal hearing to the interested

parties. Bare reading of the above referred provisions contained in the Ordinance and FIORA disclose that the powers of the Banking Mohtasib are unguided by any elaborate procedure to be followed from the stage of receiving the complaint till its termination by final decision. The legislature has not specifically allowed the Banking Mohtasib to follow the rules of procedure as contained in Code of Civil Procedure, 1908 (CPC). Ordinarily when courts are created through a special statute, the legislature for their guidance makes the provisions of CPC applicable to those matters of procedure where the law is silent. Although, it is settled law that the rules of procedure set out in CPC and the matters to be dealt with by application thereof would apply to the proceedings under a special law if the context of the law so admits, it is equally settled law that the courts constituted under special statutes can only function and operate within the confines of the powers granted to them under the said law and cannot travel beyond the scope of such powers. The provisions of the Ordinance and FIORA do not reserve for the Banking Mohtasib the procedure laid down in CPC and in fact empower the said authority to device its own procedure for decision of the complaints. CPC enshrines the principles of law applicable to dispute resolution processes through efficient and appropriate procedures. It embodies the principles of natural justice by providing equal opportunity to both the parties in the trial of a case. It also enjoins upon the courts to pass judgments after evaluating the evidence of the parties and through a reasoned order by proper application and interpretation of law. The provisions of the Ordinance, as noted above, do

not bind the Banking Mohtasib to make a determination about the admissibility, relevancy etc of the evidence on the touchstone of the provisions of CPC or Qanun-e-Shahdat, 1984 or to pass the judgments/orders on the objective criteria expected of a judge of Article 175 Court. To sum up, the Banking Mohtasib exercises judicial functions without being aided by CPC or the Qanun-e-Shahadat, 1984. The office of Banking Mohtasib also operates without the supervision and control of the Supreme Court or the High Court. The principles set out in the decisions referred to above which hold that a non-judicial authority outside the ambit, control and superintendence of a High Court in terms of Article 203 of the Constitution cannot exercise judicial powers are, therefore, fully applicable to the office of the Banking Mohtasib. The law laid down by various judgments, noted above, regarding the attributes of a Court makes it obvious that the office of Banking Mohtasib cannot be termed as a Court and, therefore, is precluded from exercising judicial powers conferred through sections 82B and 82E of the Ordinance.

36. In the cases that have been brought before this Court, it has been observed that the Banking Mohtasib has indulged in giving decisions on fairly complicated factual disputes which would require application and interpretation of legal principles that could only be done by Article 175 Courts. As stated earlier, section 82A of the Ordinance confers jurisdiction upon the Banking Mohtasib and also prescribes the limits of such jurisdiction. The jurisdiction conferred through section 82A is fairly limited to entertaining complaints relating to banking malpractices and violation of banking laws,

rules and guidelines. However, through section 82B and 82E, the ambit and scope of the powers was expanded exponentially by granting Banking Mohtasib powers to adjudicate and pass orders on complaints even where fraud was alleged. The power to award compensation/damages was also conferred on the Banking Mohtasib. Section 82E furthermore provides that the findings of the Banking Mohtasib shall be implemented within forty five days by the concerned bank and that if no appeal is filed against the said decision it shall become final and operative. This provision *per se* takes the orders/findings of the Banking Mohtasib beyond the scope of recommendations. In view of the decisions mentioned above and the ratio laid down therein, there ought not to be any doubt that passing of a binding decision *inter se* the parties on a disputed question of fact being a judicial power is the sole mandate of Article 175 Courts. The non-compliance of the recommendations of the Banking Mohtasib in terms of section 82E entails drastic action by the State Bank of Pakistan including imposition of fine or penalty. Of course by virtue of section 10 of FIORA, the Banking Mohtasib has also been granted the powers of the civil court, *amongst others*, to implement its orders and decisions. These judicial powers could not be granted to the Banking Mohtasib which is a non-judicial authority and is not under the supervision and control of either the Supreme Court or the High Courts.

37. After the introduction of Article 10-A in the Constitution guaranteeing due process and fair trial, any provision akin to and in the nature of section 15 of FIORA denying and restricting the right of representation

before a forum determining rights and obligations of parties cannot be sustained. Section 15 of FIORA is clearly in conflict with and *ultra vires* to Article 10-A of the Constitution. Similarly, any provisions contained in sections 82B and 82E of the Ordinance which have the trappings of judicial power empowering the Banking Mohtasib to render binding decisions on complicated and disputed questions of fact *inter se* the parties is to be read down on the principles laid down in Haroon-ur-Rashid v. Lahore Development Authority and others **2016 SCMR 38**. Insofar as the performance of non-judicial functions by the Banking Mohtasib, there can be no dispute that such functions are within the scope and purview of his powers particularly when the exercise thereof relates to overseeing the observance by the banks of the policy directives of the State Bank of Pakistan in respect to various banking operations. Similarly, the Banking Mohtasib is also competent and empowered to facilitate amicable resolution of disputes brought before it through consent of the parties. The Banking Mohtasib can enquire into complaints of banking malpractices by the officials of the banks involving corruption, nepotism, inordinate delays or inefficiency etc which do not involve resolution of any disputed factual issues and can make recommendations/suggestions for corrective and remedial measures to be undertaken either by the State Bank of Pakistan or by the administration of the banks in respect thereof. In view of the discussion on the scope and ambit of judicial powers made above that is the only remit of a Banking Mohtasib under the provisions of the Ordinance and FIORA. The objection regarding the maintainability of these writ petitions on the ground of

availability of alternate remedy of representation before the President has no merit in it. It is settled law that where the proceedings are coram non-judice or the order passed is without jurisdiction, a party can approach this Court in writ jurisdiction. Be that as it may, in most of the cases, the petitioners have challenged the orders of the President passed on the representation filed by them. The constitutionality of the provisions of FIORA are also under challenge in some of the petitions, therefore, the petitions before this Court are maintainable.

39. In the circumstances, this writ petition and the connected writ petitions are *allowed* and sections 10, 11, 12 and 15 of FIORA are declared to be *ultra vires* the Constitution. It is furthermore declared that the Banking Mohtasib cannot give any binding decisions on the complaints brought before it involving disputed questions of fact by resorting to the provisions contained in sections 82B and 82E of the Ordinance. Orders dated 08.10.2013 and 30.09.2015 passed by the Banking Mohtasib and President of Pakistan are accordingly set aside.

(Shams Mehmood Mirza)
Judge.

Announced in open Court on 29.12.2017.

Judge.

Approved for reporting.

Judge.