

IN THE SUPREME COURT OF PAKISTAN
(Original Jurisdiction)

PRESENT

Mr. Justice Sh. Riaz Ahmed, C.J.
Mr. Justice Qazi Muhammad Farooq
Mr. Justice Mian Muhammad Ajmal
Mr. Justice Syed Deedar Hussain Shah
Mr. Justice Abdul Hameed Dogar

CONSTITUTION PETITION NO.1/2002

Supreme Court Bar Association *through*
its President Mr. Hamid Khan. ...Petitioner.

VERSUS

The Federation of Pakistan & others. ...Respondents.

CONSTITUTION PETITION NO. 6/2002

Pakistan Lawyers Forum through its President. ...Petitioner.

VERSUS

General Pervez Musharraf
President of Pakistan & others. ...Respondents.

CONSTITUTION PETITION NO. 7/2002

Wattan Party through its President
Zafarullah Khan. ...Petitioner.

VERSUS

Federation of Pakistan through
Secretary, Ministry of Law, Justice &
Parliamentary Affairs & others. ...Respondents.

CONSTITUTION PETITION NO. 8/2002

Rai Muhammad Nawaz Kharal, ASC. ...Petitioner

VERSUS

Federation of Pakistan & others. ...Respondents

CONSTITUTION PETITION NO. 12/2002

Pakistan Bar Council through its Chairman
Mr. Hadi Shakeel Ahmed.

...Petitioner.

VERSUS

Federation of Pakistan through
Secretary, Ministry of Law, Justice &
Parliamentary Affairs & others.

...Respondents.

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For the petitioners:
(in CP 1/2002)

Mr. Hamid Khan, Sr. ASC.
Mr.M.A.Zafar, ASC
Mr. Ejaz Ahmed Khan, AOR (absent).

For the petitioner:
(in CP 6/2002)

Mr. A.K. Dogar, ASC.
Mr. S. Abul Asim Jafri, AOR (absent).

For the petitioner:
(in CP 7/2002)
For the Petitioner:
(in CP 8/2002)

Mian Allah Nawaz, ASC.
Mr. Mehmoodul Islam, AOR (absent).
Dr.Farooq Hasan, ASC.
Rai Muhammad Nawaz Kharal, ASC.

For the petitioner:
(in CP 12/2002)

Mr. Rashid A. Rizvi, ASC.
Mr. M.A. Zaidi, AOR.

For the Federation:

Mr. Abdul Hafeez Pirzada, Sr. ASC.
Mr. Abdul Mujeeb Pirzada, ASC
Mr.M.S.Khattak, AOR.

For Respondent No.7:
(in CP 1/2002)

Mr.K.M.A.Samdani, ASC.
Ch.Akhtar Ali, AOR.

For Respondents No.9, 10
& 11 (in CP 1/2002)

Mr.M.Jafar Hashmi, ASC
Mr.M.Ghani, ASC.
Mr.Imtiaz Muhammad Khan, AOR.

On Court's notice:

Mr. Makhdoom Ali Khan,
Attorney General for Pakistan.

Mr. Maqbool Elahi Malik,
Advocate General, Punjab.
Rao Muhammad Yusuf Khan, AOR.

Dates of Hearing:

18, 19, 20 & 21st March, 2002, and
1, 2, 3, 4, 5, 8 & 9th April 2002

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JUDGMENT

SH. RIAZ AHMED, CJ. - By virtue of notification No.1(4)/2001-All dated 26th December, 2001, issued by the Government of Pakistan Law, Justice and Human Rights Division, the President of Pakistan appointed the following Judges of the Peshawar High Court and the Lahore High Court as Judges of the Supreme Court of Pakistan with effect from 10th January, 2002:-

- (i) Mr. Justice Sardar Muhammad Raza Khan,
Chief Justice, Peshawar High Court, Peshawar.
- (ii) Mr. Justice Khalil ur Rehman Ramday,
Judge, Lahore High Court, Lahore.
- (ii) Mr. Justice Muhammad Nawaz Abbasi,
Judge, Lahore High Court, Lahore.
- (iv) Mr. Justice Faqir Muhammad Khokhar,
Judge, Lahore High Court, Lahore.

2. The Supreme Court Bar Association through its President Mr. Hamid Khan, Pakistan Lawyers Forum through its President Mr. A.K. Dogar, Wattan Party through its President Mr. Zafarullah Khan Barrister-at-Law, Rai Muhammad Nawaz Kharal, Advocate Supreme Court of Pakistan and Pakistan Bar Council through its Vice President Mr. H. Shakeel Ahmed have challenged the validity of the appointments to the extent of the three Judges elevated from the Lahore High Court by filing the above-mentioned Constitution Petitions under Article 184(3) of the Constitution of the Islamic republic of Pakistan, hereinafter referred to as the Constitution. The appointment of Mr. Justice Sardar Muhammad Raza has not been challenged for the reason that being the Chief Justice he was the most senior amongst the Judges of the Peshawar High Court.

3. The factual matrix in all the petitions relates to the number of available vacancies, details of appointments, seniority

position of the elevated Judges and the incidence of supersession. The assertions prominently highlighted therein are that the names of Mr. Justice Khalil ur Rehman Ramday, Mr. Justice Muhammad Nawaz Abbasi and Mr. Justice Faqir Muhammad Khokhar appear at Serial No.3, 4 and 13 respectively of the seniority list of the Judges of the Lahore High Court, Mr. Justice Khalil ur Rehman Ramday and Mr. Justice Muhammad Nawaz Abbasi have superseded the Chief Justice and the senior puisne Judge of the Lahore High Court and Mr. Justice Faqir Muhammad Khokhar, who was the Secretary Law Justice and Human Rights Division at the crucial time, has not only superseded the Chief Justice and the senior puisne Judge but also eight other Judges senior to him.

4. The appointments have been challenged mainly on the following grounds:-

- (a) In view of the well established constitutional convention and the law laid down by this Court in Al-Jehad Trust v. Federation of Pakistan (PLD 1996 SC 324), hereinafter referred to as the Judges case, and Malik Asad Ali v. Federation of Pakistan (PLD 1998 SC 161), hereinafter referred to as Asad Ali's case the concerned constitutional functionaries are bound to elevate Judges from the High Court to the Supreme Court on the basis of their seniority and in the event of departure from the principle of seniority they are obliged to record reasons which are justiciable. The appointments of Judges from the Lahore High Court have been made in violation of the principle of seniority;
- (b) The recommendations made by the judicial consultee and the reasons recorded by him as well as the President of Pakistan for appointing

junior Judges of the Lahore High Court and ignoring the senior Judges have not been disclosed or communicated to the superseded Judges which shows that the process was not transparent;

- (c) The appointments militate against the doctrine of legitimate expectancy, enunciated in the aforesaid two cases, on which the principle of seniority is essentially based. The Chief Justice and other senior Judges of a High Court have a legitimate expectancy to be appointed as Judges of the Supreme Court according to their respective seniority and any deviation therefrom renders the appointment invalid and unconstitutional;
- (d) The appointments have introduced an arbitrary practice of 'pick and choose' which is fraught with disastrous consequences as on the one hand it will undermine the independence of judiciary, create an anarchic situation within the judiciary, lead to an unhealthy competition amongst Judges of the High Court to achieve coveted positions and out of turn elevations to the Supreme Court and on the other lead to the public perception of the Government having packed the Supreme Court with pliant and pliable Judges of its own liking;
- (e) The fundamental rights of 'equality before law' and 'equal protection of law' of the superseded Judges have been violated as they have been ignored and superseded without affording them an opportunity of being heard;
- (f) The superseded Judges have been disqualified from elevation in future and if elevated in future

they will rank junior in the Supreme Court to the junior Judges who have superseded them;

- (g) The impugned notification is illegal to the extent of two vacancies which had occurred after the retirement of the Chief Justice of Pakistan in respect of whom he was not the judicial consultee at all. The Chief Justice can be a consultee only in respect of those vacancies which exist or occur during his own tenure and not those which are to occur after his retirement;
- (h) The appointment of Mr. Justice Faqir Muhammad Khokhar is *void ab initio* because, firstly, he was not qualified for appointment as a Judge of the Supreme Court having not performed judicial duties and functions for a period of five years and, secondly, being the Secretary Law, Justice and Human Rights Division he had played an important role in the process of appointments in question and as such his appointment offended the principle of natural justice, *viz.*, ‘no one should be a judge in his own cause’;
- (i) The office of Judge of the Supreme Court has been devalued by retaining the Chief Justice of the Lahore High Court and elevating his juniors to the Supreme Court;
- (j) The main object of the judgments of this Court in the Judges case and Asad Ali’s case was to make the judiciary independent and self-operative but the same has been defeated by the impugned appointments; and
- (k) The fundamental right of the citizens of Pakistan to have access to impartial and independent Supreme Court has been infringed by appointment of junior Judges.

5. It has been prayed in all the petitions that the impugned appointments except that of Mr. Justice Sardar Muhammad Raza be declared as void being unconstitutional and a direction be issued for initiation of the process of appointment against the available vacancies afresh. It has been further prayed in Constitution Petition No.8 of 2002 that while making fresh appointments the petitioner and other lawyers should also be considered in view of the provisions of Article 177(2)(b) of the Constitution.

6. The Federation of Pakistan in its concise statement did not dispute the factual assertions in regard to seniority and supersession of the concerned Judges but resisted the petitions on the following pleas: -

- i) The appointments in question were made by the President of Pakistan strictly in accordance with the letter and spirit of the Constitution fully adhering to the recommendations made by the Chief Justice of Pakistan;
- ii) The petitions are not maintainable as the recommendations of the Chief Justice of Pakistan in the process of constitutional consultation in the matter of appointment of Judges of the Supreme Court are not justiciable; and
- iii) The principles of legitimate expectancy and natural justice are not attracted.

7. At this juncture it will be pertinent to refer to CMA No.399/2002 moved in Constitution Petition No. 1 of 2002 and record reasons for its dismissal. Through the said CMA it was prayed that on account of the importance and sensitive nature of the matter the petition be heard by the Full Court excluding the newly appointed

Judges. The prayer was adopted and joined in by the learned counsel representing the petitioners in the connected petitions. The application was turned down, after hearing learned counsel for the parties and the learned Attorney General, with the observation that reasons for its dismissal will be recorded in the main judgment.

8. In support of the application Mr. Hamid Ali Khan, Sr.ASC, learned counsel for the petitioner in Constitution Petition No.1 of 2002, contended that no doubt the constitution of Benches for hearing cases is the prerogative of the Chief Justice of Pakistan but a practice has developed over the years that all important constitutional matters are heard by the Full Court. Reliance was placed on the cases reported as Reference by H.E. the Governor General (PLD 1955 FC 435), Reference by the President of Pakistan (PLD 1957 SC 219), Special Reference under Article 187 of the Interim Constitution of the Islamic Republic of Pakistan (PLD 1973 SC 563), Reference No.1 of 1988 made by the President of Pakistan (PLD 1989 SC 75) and Federal Government of Pakistan v. M.D. Tahir Advocate (1990 SCMR 189). He also laid emphasis on Asad Ali's case and submitted with vehemence that the entire Court had heard the said matter, therefore, whenever the question of appointment of Judges of the Supreme Court is involved/raised in any case all the Judges of the Supreme Court should hear the case. He also, though half-heartedly, tried to argue that Judges of all the Provinces should sit on the Bench to decide the questions raised in these petitions.

9. Mr. A. K. Dogar, learned counsel for petitioner in Constitution Petition No.6 of 2002 referred to Articles 176 and 177 of the Constitution to contend that the concept of Benches is unconstitutional and the Supreme Court must hold its sitting as one

body because it is a single unit and entity as an institution and the Court as defined in Article 176 of the Constitution should hear the cases as is done in the United States of America. He also read out the definition of the expression “quorum” from the Black’s Law Dictionary and contended that the provisions in regard to constitution of Benches contained in the Supreme Court Rules, 1980 particularly Order XI thereof are *ultra vires* the Constitution. He concluded his arguments with the submission that whenever an important question cropped up this Court leaned in favour of a larger Bench. Since the present case involved issues of general public importance, therefore, all the Judges should be associated by constituting a larger Bench.

10. Dr. Farooq Hasan, learned counsel for the petitioner in Constitution Petition No.8 of 2002, stated at the outset that the proposition advanced by Mr. A.K. Dogar had no constitutional or legal basis and the rules framed by the Supreme Court with a view to regulating its working were *intra vires* the Constitution and did not suffer from any legal infirmity. However, he contended that the matter of appointment of Judges was very serious and involved legitimacy of the Court itself, therefore, the petitions should be heard by the Full Court or a larger Bench.

11. M/S Razhid Rizvi, Mian Allah Nawaz and Hafiz Abdur Rehman Ansari learned counsel representing other petitioners adopted the contentions of Mr. Hamid Khan.

12. On the other hand, Mr. Abdul Hafeez Pirzada, Sr.ASC, learned counsel for the Federation of Pakistan contended that all the learned counsel for the petitioners except Mr. A. K. Dogar had conceded that the rules governing constitution of Benches were *intra vires* and it is the sole prerogative of the Chief Justice of Pakistan to

constitute Benches. He further contended that the Judges case from which these petitions had flown was decided by a Bench of five Judges, there was no allegation of bias and the matter was not complex, therefore, the present Bench constituted by the Chief Justice of Pakistan was proper and in accordance with law and the Constitution.

13. The learned Attorney General for Pakistan contended that the points of law involved in these petitions were not complex and all the major judgments relating to appointment of Judges of the Superior Courts were rendered by Benches of five Judges. In support of the contention he cited Abrar Hassan's v. Government of Pakistan (PLD 1976 SC 315), the Judges case, Muhammad Ikram Chaudhry and others v. Federation of Pakistan and others (PLD 1998 SC 103) and Ghulam Hyder Lakho v. Federation of Pakistan (PLD 2000 SC 179). He further argued that Asad Ali's case stood on a different footing as it pertained to a writ of *quo warranto*.

14. It was rightly argued by Dr. Farooq Hasan that there is a clear distinction between the judicial system of the United States and that of Pakistan. The Supreme Court of Pakistan works in Benches. All petitions for leave to appeal and appeals from appellate and revisional judgments and orders made by a Single Judge in the High Court are heard by a Bench of two Judges of this Court. The petitions against acquittal and appeals decided by a Division Bench of the High Court are heard by three Judges of this Court. However, depending upon the nature of the controversy involved in any particular case, the Chief Justice has the sole prerogative to constitute a larger Bench consisting of any number of Judges. The objections raised at the Bar are neither new nor have been raised for

the first time. Such objections were raised in the past in a number of cases but were repelled by this Court. In any case, it was conceded by all the learned counsel that it was the prerogative of the Chief Justice to constitute any Bench with any number of Judges and the same cannot be questioned. The contentions raised by the learned counsel for the petitioners are devoid of force and have no merit whatsoever. The attention of the learned counsel was drawn to the Judges case, which was decided by five Judges of this Court, out of whom one was an *ad hoc* Judge. Likewise the case of Abrar Hassan's case, wherein a Judge of this Court was appointed as Acting Chief Justice of the High Court of Sindh and the notification of his appointment kept his lien/seniority in this Court, was heard by four Judges of this Court. As far as Asad Ali's case is concerned, it was heard by ten Judges while four Judges refused to sit on the Bench. In course of hearing of Asad Ali's case, an attempt was made to argue that the other Judges should also sit on the Bench but it was pointed out that since four learned Judges of this Court had refused to hear the case, therefore, they could not be forced to sit on the Bench. It is important to note that Asad Ali's case revolved around the appointment of Mr. Justice Sajjad Ali Shah as the Chief Justice of Pakistan, who could not have been appointed as such being junior to three other Judges. It is further important to observe here that while laying down that the rule of seniority should prevail because a Judge has legitimate expectancy to become the Chief Justice, the then Chief Justice, who was junior to three other Judges, did not opt to step down. That is why at a subsequent stage when appointment of Mr. Justice Sajjad Ali Shah as the Chief Justice of Pakistan was challenged, a larger Bench was constituted to hear and decide the said case in a situation when the notification of appointment of

Mr. Justice Sajjad Ali Shah stood suspended and he had been restrained from performing the functions as the Chief Justice of Pakistan. We reiterate here that this Court not once but on a number of occasions has laid down that it is the sole prerogative of the Chief Justice of Pakistan to constitute a Bench of any number of Judges to hear any particular case and neither an objection can be raised nor is any party entitled to ask for constitution of a Bench of its own choice. We are fortified in this view by the judgments reported as Mr. Zulfiqar Ali Bhutto v. State (PLD 1978 SC 125), In re: M.A. No.657 of 1996 in References Nos.1 and 2 of 1996 (PLD 1997 SC 80) and Hamid Sarfaraz v. Federation of Pakistan (PLD 1979 SC 991). Similarly, in the matter of constitution of Benches of this Court, it is inappropriate to raise the question of parochialism and provincialism. This was deprecated in Hamid Sarfaraz's case.

15. Mr. Hamid Khan, learned Sr. ASC and President Supreme Court Bar Association has addressed the Court with the following contentions in support of Constitution Petition No. 1 of 2001: -

- (a) The Federation of Pakistan in its written statement, filed pursuant to the order of this Court, had not disclosed all the facts relevant and necessary for setting the controversy at rest. It was altogether silent about the recommendations of the Chief Justice of Pakistan and reasons for recommending the junior and ignoring the senior Judges. There are no state secrets involved in judicial appointments, therefore, the record should be produced so that it could be seen as to why the senior Judges were ignored. The entire process of appointments has to be transparent so that the public at large has confidence in the independence of the judicial system. To the

similar effect are the observations made in the Judges case at page 404 that “the process of appointment of a Judge must be made transparent so that the litigant public and people at large should have faith in the independence of Judiciary.” The impugned appointments were diametrically opposed to the dictum laid down in the Judges case that there should be no room for complaint of arbitrariness or unfair play;

- (b) The notification in question was issued on 26th December, 2001 whereas the appointments were to take effect from 10th January, 2002. At the time of issuance of the notification, the strength of the Court was Chief Justice plus fourteen Judges whereas the sanctioned strength is Chief Justice plus sixteen Judges. Two vacancies had occurred on the retirement of Mr. Justice Rashid Aziz Khan in July 2001 followed by the retirement of Mr. Justice Abdur Rehman Khan in September 2001 but the same were not filled within 30 days as directed in the Judges case. The consultee Chief Justice retired on 6th January, 2002 and another learned Judge retired on 9th January, 2002. It was not within the competence of the then learned Chief Justice to make recommendations for appointments that were to take effect in future, particularly after his retirement. The lawyers generally and the Supreme Court Bar Association in particular have a strong stake that the principles laid down and the conventions recognized in the landmark judgment in the Judges case, which was implemented through their efforts, are preserved. As a matter of fact under Rule 165 of Pakistan Legal Practitioners and Bar Councils Rules framed under Section 55 of the Bar

Councils Act, 1973, which has been given judicial recognition in the Judges case, it is the duty of the lawyers to endeavour to prevent political considerations from outweighing judicial fitness in the appointment and selection of Judges. It is also the duty of the members of the Bar to ensure that the judiciary remains independent and this objective can only be achieved if the process of appointment of Judges is clean, transparent and not arbitrary. This principle was also reiterated and further fortified at page 245 (para 54) of the judgment in Asad Ali's case. In that case this proposition has been firmly and finally settled that the independence of judiciary is inextricably connected with the manner and process of the appointment of the Judges of the Supreme Court because they are the persons in the country who are burdened with the responsibility of protecting and preserving the Constitution;

(c) On 26th December, 2001 the seniority position of the Judges of the Lahore High Court was as under:-

1. Mr. Justice Falak Sher, Chief Justice
2. Mr. Justice Mian Nazir Akhtar
3. Mr. Justice Khalilur Rehman Ramday
4. Mr. Justice Muhammad Nawaz Abbasi
5. Mr. Justice Karamat Nazir Bhandari
6. Justice Mrs. Fakhrun Nisa Khokhar
7. Mr. Justice Iftikhar Hussain Chaudhry
8. Mr. Justice M. Javed Butter
9. Mr. Justice Tasadduq Hussain Jillani
10. Mr. Justice Raja Muhammad Sabir
11. Mr. Justice Sh. Abdul Razzaq
12. Mr. Zafar Pasha Chaudhry
13. Mr. Justice Faqir Muhammad Khokhar

The Judges at serial No.1 and 2 were ignored in favour of those at serial No.3 and 4 and Judges at serial No.1, 2 and 5 to 12 were ignored in favour of the Judge at serial No.13. Thus, in two appointments two senior Judges were ignored and in the third appointment, 10 senior Judges were ignored and in doing so, no reasons whatsoever have been advanced;

- (e) The judgments rendered by this Court in the Judges case and Asad Ali's case make it manifest that the entire exercise undertaken by this Court was to make the judicial system healthy and self-operative so as to ensure access to justice and preservation of the fundamental rights of all the citizens. The first step for making the judiciary self-operative is induction on merits and without personal considerations or political pressure of persons as Judges of the High Court whose integrity and competence are beyond question. The second step is that once the appointments are made in the High Court a seniority list of the Judges is to be maintained and the principle of seniority which is *sine qua non* for the maintenance of order and regularity, must be adhered to strictly. The third step is the legitimate expectancy to become the Chief Justice of the High Court and elevation to the Supreme Court. The fourth step is that whenever a vacancy occurs in the Supreme Court, the Chief Justice of the High Court from where the vacancy is to be filled should be appointed and the way for the next senior Judge to attain his *legitimate expectancy* should be cleared. The fifth step in the self-operative Judiciary is maintenance of seniority list of the Judges of the Supreme Court and preservation of their legitimate expectancy to be appointed as

Chief Justice of Pakistan. It is only when the self-operative system is in vogue the judiciary would become independent and no Judge will look up to the government to make him the Chief Justice. If this is not followed every Judge would be prone to nurturing the ambition of becoming Chief Justice out of turn which would be disastrous for the judiciary. The Judges case covers the first three steps i.e. (i) induction in the High Court on merits; (ii) maintenance of seniority amongst the High Court Judges; (iii) appointment of the senior puisne Judge of a High Court as Chief Justice of the High Court on the basis of the principle of legitimate expectancy whereas the last two steps i.e. (iv) elevation of the Chief Justice of High Court whenever a position is required to be filled from any High Court to the Supreme Court and if more than one Judges are to be elevated, on the basis of seniority, and (v) maintenance of seniority list of the Judges of the Supreme Court and the legitimate expectancy of the Judges to be appointed as Chief Justice of Pakistan according to the seniority are covered by Asad Ali's case. Any breach of these steps would throw the entire judicial system and the judicial scheme of things in a state of anarchy and disorder and even if one of these five elements is disturbed, the whole system will collapse and we will go back to square one, i.e. the situation prevailing prior to the Judges case. The appointment of three junior Judges of the Lahore High Court as Judges of the Supreme Court involves breach of third and fourth steps which has disturbed the judicial order;

- (f) According to the observations made in para 7(i) at page 364 of the Judges case, in the case of

elevation of the Supreme Court Judges the 'consensus' means the consensus of three consultees *viz.*, the Chief Justice of Pakistan, the Prime Minister and the President. The Prime Minister, whose advice is binding on the President is missing, so there was no consensus within the purview of the Judges case. At present there is *de facto* Presidential system which is not akin to the Parliamentary system. It does not mean that no appointments should have been made in the last two and half years because that would not be in the interest of the people but after the exit of the President in June 2001, it was even more important that no appointment generating any controversy should have been made whereas the impugned appointments have created controversy. In this particular situation, where consensus cannot be created because one of the constitutional functionaries is missing, the appointments should be made strictly on the basis of the criteria of seniority laid down in the two judgments. In the Judges case, primacy has been given to the opinion of the Chief Justice of Pakistan, but at the same time, it does not mean exclusiveness;

- (g) The impugned appointments are *ex facie* violative of the established constitutional conventions that the Judges are to be appointed/elevated in accordance with the principle of seniority. The conventions are at a pedestal higher than the ordinary law as held at pages 179 and 313 of Asad Ali's case. The word 'Judge' as defined in Article 260 of the Constitution includes Chief Justice and there is no difference between a Judge and Chief Justice of the Supreme Court except that the latter

performs some administrative functions. The rule of seniority enunciated in Asad Ali's case must, therefore, be extended to appointment of the Judges of the Supreme Court and if the rule is not applied in the case of appointment of a Judge of the Supreme Court then the entire exercise undertaken by this Court in the Judges case and Asad Ali's case will be rendered meaningless. The appointment of a Judge of the High Court as Chief Justice and that of Chief Justice of a High Court as Judge of the Supreme Court, is generally termed as 'elevation' but the word 'elevation' has not been used in the Constitution. The word 'elevation' has not been used either in the Constitution of the United States of America or that of India. It is appointment, akin to promotion, but it is not a fresh appointment and it can be said to be an appointment by promotion, i.e. appointment to a higher position. New oath is administered for the reason that the incumbent is required to perform different kind of functions. The doctrine of *legitimate expectancy* laid down and provided for in the Judges case and Asad Ali's case applies to all stages and it cannot be said that a senior Judge has *legitimate expectancy* of being appointed as Chief Justice of the High Court or the Supreme Court but not as a Judge of the Supreme Court;

- (h) The doctrine of justiciability, which has certain judicial and legal connotations, is applicable to the recommendations of the judicial consultee if the same are not within the parameters of reasonable, determinable and justifiable criteria and concept of separation of powers between the various organs of the State. The meanings of the word 'justiciable' given in the Black's Law

Dictionary, 6th Edition advance the proposition that opinion of the Chief Justice is a ‘matter appropriate for court review’ particularly when it suffers from arbitrariness, unreasonableness, unfairness and obvious mistake. The opinion of the Chief Justice whether it is a matter of ‘objective’ or ‘subjective’ satisfaction, is in effect an exercise of discretion which cannot be wanton and has to be exercised reasonably, in complete good faith and it should not frustrate the ultimate object, i.e. appointment on merit and merit includes seniority. In Chairman, Regional Transport Authority v. Pakistan Mutual Insurance Co. (PLD 1991 SC 14), Government of N.W.F.P through Secretary and 3 others v. Mejee Flour and General Mills (Pvt.) Ltd. Mardan and others (1997 SCMR 1804) and Director, Food, NWFP & others v. M/S Madina Flour Mills, through General Manager (PLJ 2001 SC 9) the subject of structuring of discretion has been dealt with and it has been held that the discretionary powers delegated to an officer are held in trust for the people and whenever circumstances clearly point to bias, *mala fide* or dubious exercise, the exercise of discretion would not be proper; and

- (i) That apart from the principle of seniority, the appointment of Mr. Justice Faqir Muhammad Khokhar, who at the relevant time was at serial No.13 in the seniority list of the Judges of the Lahore High Court, was hit by the provisions of Article 177 of the Constitution. The said learned Judge was appointed in December 1996 as an Additional Judge of the Lahore High Court and as a Judge in December 1997. On 11th January 2000, he was appointed as Federal Law Secretary. He worked as an Additional Judge

for one year and as a Judge of the High Court for two years and a few days and thus he did not complete five years service as a Judge of the High Court as contemplated under Article 177 of the Constitution. The period spent by him as the Federal Law Secretary cannot be counted in his service as a Judge of the High Court. The situation is similar to that of certain Judges of the High Courts who were laid off in view of the Judges case on the ground that their 10 years practice at the Bar was simpliciter and not effective. The appointment of Mr. Justice Faqir Muhammad Khokhar, apart from suffering from the constitutional flaw, was defective inasmuch as being the Federal Law Secretary he was instrumental in the process of appointments of the Judges and other constitutional functionaries, such as the Chief Election Commissioner, the Auditor General of Pakistan, Chairman, Federal Public Service Commission, etc and as such he had not only made mileage from his status as the Law Secretary but was also a judge in his own cause.

16(1) The learned counsel in the remaining petitions while adopting the arguments of Mr. Hamid Khan, learned Sr. ASC, have argued the additional grounds. Mr A.K Dogar, ASC made the following submissions: -

- (a) All the Constitution Petitions filed in this Court challenging the impugned appointments may be stayed pending decision of the writ petitions filed in the Lahore High Court. The Pakistan Lawyers Forum had filed a writ petition in the Lahore High Court which was admitted to regular hearing, notices were issued to the Federation and the learned Attorney General and a date was also fixed for hearing sometime

in the month of February. Two similar writ petitions were filed at Bahawalpur and Rawalpindi Benches of the Lahore High Court which too were admitted to regular hearing and an order had been passed that a larger Bench of five Judges be constituted for hearing the same. An order was also passed by the learned Chief Justice of the Lahore High Court that all the cases be heard together by the learned Division Bench already hearing the case of Pakistan Lawyers Forum. However, it transpired before the hearing that record of all the petitions had been forwarded to this Court. In support of the prayer he referred to the observations made in the case reported as Manzoor Elahi v. Federation of Pakistan (PLD 1975 S.C.66 at 79) that: (i) if two Courts have concurrent jurisdiction and the petitioner elects to invoke jurisdiction of one of such Courts then he should be bound by such election; (ii) if there are two Courts vested with concurrent jurisdiction, but one is subject to appellate jurisdiction of the other, as in the case of High Court and the Supreme Court the litigant cannot be deprived of his vested right of appeal; (iii) it is an established principle of law that the lowest Court or Tribunal must be approached in the first instance; and (iv) the language used in Article 184(3) of the Constitution is so strong that despite petition filed in the Supreme Court the one filed in the High Court can only proceed. He submitted that the judgment in Manzoor Elahi's case was rendered by the Full Court whereas the case reported as Pakistan Lawyers Forum v. Pervez Musharraf (2000 SCMR 897) was decided by three learned Judges of this Court and the case of Manzoor Elahi was merely distinguished and not revisited. The provisions

of Article 184(3) of the Constitution make it manifest that the jurisdiction of the High Court under Article 199 of the Constitution is much wider than that of the Supreme Court under Article 184(3) of the Constitution;

- (b) The petitioners were well within their right to examine the record as in the absence of record the questions raised in the petition cannot be determined. According to him, the record i.e. the correspondence between the Chief Justice of Pakistan and the Ministry of Law should have been appended with the concise statement. The Federal Government had kept the process of impugned appointments secret and confidential, therefore, production of the record was essential and an adverse inference will have to be drawn in the event of its non-production as was done in the *Judges Case*. The Federal Govt. was obliged to proceed in the matter in accordance with the Islamic principles. In Islam, absolute justice is required, which means absolute fairness. Absolute justice in Islam is distinguished from the 'remedial justice of the Greeks', the 'formal justice of the Anglo-Saxons' and the 'natural justice of the Romans'. He submitted that fairness demands that the entire record should be produced by the Federal government;
- (c) Under Article 177 of the Constitution the appointment of a Judge of the Supreme Court is neither promotion nor involves the process of confirmation. It is just an 'appointment' in contradistinction with 'nomination'. The difference between the two is that the appointment is made according to certain criteria while nomination is arbitrary, capricious, haphazard, without any criterion,

merit and is just pick and choose. In the present case the Judges have been nominated because the appointments have not been based upon any tangible criteria;

- (d) The word 'seniority' in relation to the appointment of the Judges of the Supreme Court has not been used anywhere in the Constitution and for the proposition that only the most senior Judges of the High Courts are to be appointed as Judges of the Supreme Court dependence would mainly rest upon the convention regarding appointments of the seniors in preference to the juniors. The principle of seniority is in-built in Article 177 inasmuch as for appointment as a Judge of the Supreme Court five years service as a Judge of the High Court or fifteen years practice at the Bar have been laid down. These are clear pointers to the fact that the framers of the Constitution wanted the number of years to be relevant for the purposes of these appointments, therefore, if a person has greater years of service or practice, he has a better right to be appointed as such. The longer the experience the more meritorious a Judge is which is a matter of common experience and thus the rule of seniority is a constituent element of merit. Appointments made in violation of the principle of seniority have serious and dangerous consequences and if the appointing authority or a consultee deviates from that principle he must give cogent reasons for such deviation and public at large and the lawyer community in particular have a right to know such reasons;
- (e) The opinion of the Chief Justice of Pakistan is an opinion of the Judiciary, therefore, it is to be made in consultation with the senior Judges of

the Supreme Court. In the present case opinion of the Chief Justice of Pakistan appears to have been made without consultation with the senior Judges of the Supreme Court. According to the observations made in re Presidential Reference (AIR 1999 SC1) the opinion of the Chief Justice of India with regard to appointment of Judges of the Supreme Court is formed in consultation with collegium of Judges which consists of four senior most Judges of the Supreme Court. While forming the opinion *inter se* seniority of the Judges is given due weight and strong reasons are recorded in case of departure from the order of seniority; and

- (f) In Amanullah Khan and others v. Federal Government of Pakistan and others (1990 SC 1092) seven principles for guidance of exercise of discretion have been laid down and it has been held that the discretionary power without rules to regulate its exercise is taken to be an enhancement of power. In the same string is the case of Inamur Rehman (1992 SCMR 563) wherein it has been ruled that unguided discretion and the practice of 'pick and choose' are *ex facie* discriminatory and arbitrary and cannot be constitutionally recognized. The judiciary besides being self-operative, as emphasized by Mr Hamid Khan, should also have a self-executory and automatic system in place with the least room for arbitrary pick and choose.

(2) Dr. Farooq Hasan, Sr. ASC submitted as under:-

- (a) The term 'legitimate' is synonymous with the word 'reason', therefore, the burden is on the Federation to prove that the appointments were reasonable. The senior Judges of the Lahore High Court had legitimate expectancy to be

elevated as Judges of the Supreme Court but they were ignored and thus the principle of legitimate expectancy laid down in the Judges case and Asad Ali's case was violated;

- (b) There is a classification of Judges in a Court and within that classification there is an order of sequential preference, which applies to the length and breadth of all kinds of activity that the Court undertakes. The way the Judges sit, walk, etc there is a methodology. In terms of 'discretion' it starts with the Chief Justice and in terms of voting the order is *vice versa*, therefore, order is very important. The passages occurring at pages 341 and 352 of the Judges case, read many times during hearing, deal with disastrous consequences such as heart-burning, psychological disadvantages, etc., that would follow in case the principle of seniority is violated. While ignoring the senior Judges and picking junior Judges strong reasons are required to be given because higher position in seniority is reached going by the rungs of the ladder one by one;
- (c) The word 'opinion' occurring para 7(i) at page 364 of the judgment in the Judges case has been used in a legal sense in which judgments are given and it is like a judgment of a Court. The Courts always have jurisdiction in all matters and it is for them to withhold scrutiny by self-imposed standards. The ouster of jurisdiction has not stood in the way of the Courts of Pakistan inasmuch as even double *non obstante* clauses in the Constitution have not prevented them from examining the matters brought before them. The jurisdiction of this Court under Article 184 (3) is all encompassing and there are no contours on its provisions as

held in Mahmood Khan Achakzai's case (PLD 1997 SC 426), Syed Zafar Ali Shah's case (PLD 2000 SC 869) Muhammad Sharif v. Federation of Paksitan (PLD 1988 Lah. 725) and Haji Saifullah Khan's case (PLD 1989 SC 166). The recommendations made by the Chief Justice of Pakistan cannot be termed as 'subjective' and being 'objective' are judicially reviewable. The principles of natural justice are applicable to the exercise of discretion according to the book titled 'Administrative Law' by H.W.R. Wade. The Courts do not allow abuse of discretionary power. In the present case, the discretionary power has been exceeded, therefore, the impugned appointments are liable to be struck down;

- (d) The issue of 'bias and the conflict of interest', has been commented upon elaborately in Asad Ali's case. This is a fundamental point in this case because the beneficiary i.e. Mr. Justice Faqir Muhammad Khokhar somehow is involved in the process. According to the definition of the expression 'conflict of interest' given in the Black's Law Dictionary a public official is in a fiduciary relationship and the concept of trust is most important in law. In the present case the said learned Judge stood at the relevant time in a fiduciary relationship, therefore, there is a clash between the public interest and private interest;
- (e) Article 177 of the Constitution, which is *pari materia* with Article 193 *ibid*, provides two pools of candidates for judgeship of the Supreme Court, viz., Judges of the High Courts with not less than five years service and lawyers with not less than 15 years standing at the Bar. However, no lawyer has so far been appointed as a Judge

of the Supreme Court with the result that the provisions contained in Article 177(2)(b) have become redundant. The members of the legal fraternity should also be considered for appointment as Judges of the Supreme Court; and

- (f) On the day the impugned notification was issued the incumbent President was not lawfully authorized to make the appointments.

(3) Mian Allah Nawaz, ASC made the following submissions:-

- (a) The Judges case was the result of overbearing struggle between the two wings of the government, i.e. the executive and the judiciary and for the first time certain restrictions, limits and parameters between the two organs of the State were laid down. The Judges case may be revisited and the defects which have come to light with passage of time may be removed; and
- (b) Since on the day of the notification there existed two vacancies, therefore, two appointments, i.e., one from the Peshawar High Court and the other from the Lahore High Court may be allowed to stand and the remaining two appointments from the Lahore High Court must be de-notified because the learned Chief Justice was not a consultee in relation thereto.

(4) Mr. Rashid A. Rizvi, ASC made the following submissions:-

- (a) Consultation with the Chief Justice of Pakistan can be made only in respect of existing vacancies in the Supreme Court, the doctrine of legitimate expectancy is fully applicable in the matter of appointment of the Judges of the Supreme Court, the criteria for elevation to the Supreme

Court should be the rule of seniority as it is recognized by law as well as the Constitution, and the matter of elevation of High Court Judges to the Supreme Court may not be left to the absolute and unfettered discretion of the Hon'ble Chief Justice in view of the well known maxim, '*absolute power corrupts absolutely*';

- (b) In the light of para 7 (i) of the short order in the Judges case and the detailed discussion occurring at page 491 of the judgment effective, meaningful, purposive and consensus oriented consultation requires the Chief Justice to give sound reasons while formulating his recommendations for appointment of the Judges of the Supreme Court and for ignoring the senior Judges of the High Court which should be made public; and
- (c) The questions of legitimate expectancy and the rule of seniority are inter-connected and the concept of legitimate expectancy is part of the principles of natural justice. The rule of seniority laid down for the appointment of the Chief Justice of the High Court and the Chief Justice of Pakistan should be applicable to the appointment of the Judges of the Supreme Court. The rule of seniority is also recognized by Article 209 of the Constitution, which provides for the composition of the Supreme Judicial Council, i.e. the Chief Justice of Pakistan, two most senior Judges of the Supreme Court and two most senior Chief Justices of the High Courts.

(5) Mr. K.M.A. Samdani, ASC filed written arguments in support of the case of his client. According to him: -

- (a) The appointment of three junior Judges of the Lahore High Court as Judges of the Supreme

Court of Pakistan is against the law and precedents of the superior courts. The seniority of the Judges of different High Courts in Pakistan must be reckoned w.e.f. the dates of their appointment, i.e. their seniority must be determined on all Pakistan basis for appointment as Judges of the Supreme Court of Pakistan. The position of *inter se* seniority of the Judges of the Lahore High Court is admitted and as a result of the violation of the rule of seniority, the superior judiciary of the country has sunk into frustration and disappointment;

- (b) The ultimate responsibility in the matter of appointment of Judges of the Supreme Court of Pakistan is that of the President of Pakistan. He was supposed to consult the Chief Justice of Pakistan in the matter of appointment against the existing vacancies and was not legally required to ditto the recommendation without examining whether it was just and fair or whether it was erroneous and arbitrary. The then Chief Justice did not assign any reason for superseding either the Chief Justice of the Lahore High Court or the other Judges of the Lahore High Court and arbitrarily followed the rule of pick and choose which is detrimental to the independence of judiciary and against all canons of justice and fair play; and
- (c) The recommendation of the Ex-Chief Justice has merged into the final order/notification issued by the President of Pakistan, which is justiciable under the constitutional jurisdiction of the Supreme Court of Pakistan. If these illegal appointments are not undone, then in future the Judges of High Courts in Pakistan will tend to become subservient to the wishes of the executive. In that eventuality, judiciary will lose

its confidence. Needless to add that if judiciary loses its independence and confidence in the eyes of the litigants/general public, then people resort to self-help, which promotes crime and terrorism in the society. Moreover, foreign investment is stopped because in case of a dispute, the foreign investor does not expect a fair and impartial decision from the judiciary.

17(1) Mr. Abdul Hafeez Pirzada, Sr. ASC, representing the Federation of Pakistan submitted that the Court must take judicial notice of the fact that the Judges case was decided at a time when there was a virtual state of confrontation between the judiciary and the executive and the judgment in Asad Ali's case was also the result of confrontation between the then Chief Justice and the executive. It is also known and noted in Asad Ali's case that Mr. Justice Ajmal Mian, J. (as he then was) had not accepted the appointment of Mr. Justice Sajjad Ali Shah as Chief Justice of Pakistan and the persons who were aggrieved by the elevation of the then Chief Justice had not waived their right. He submitted that the things were not good between the Bar and the former Chief Justice and the impugned notification has left a little heart burning in the Bar.

(2) He next submitted that in December, 1972 the Constitution Committee, in which representatives of all the political parties in the Constituent Assembly were present, had unanimously recommended that the removal of the Judges of the Superior Courts, as in India, be made by the Parliament and the conduct of the Judges must be debated publicly. The recommendation was resisted by the Judiciary. Mr. Justice Hamoodur Rehman, Chief Justice of Pakistan, Mr. Justice Sardar Muhammad Iqbal, Chief Justice of the Lahore High Court and Mr. Justice Tufail Ali Abdur Rehman, Chief Justice of

the High Court of Sindh threatened to resign in the event of acceptance of recommendation. He submitted that the sum total of the Judges case is that the power of appointment of the Judges of the superior courts did not rest with the executive and primacy was conceded to the opinion of the Chief Justice of Pakistan. On the basis of the observations made in the Judges case it has been held in Ghulam Hyder Lakho's case (PLD 2000 SC 179) that the views of the Chief Justice of Pakistan are subjective and his opinion is not justiciable. The primacy conceded to the Chief Justice went to such an extent that it became non-justiciable and the irony of the fate is that it was the pressure from the Bar, which had transferred the power resting with the President to the Chief Justice. However, if the demand of the Bar of making the appointment of the Judges of the Supreme Court on the principle of seniority is accepted their next demand would be that the Bar be consulted in the matter of appointment of Judges of Superior Courts and one wonders what will happen if the question of appointment of Judges is debated in the Bar.

(3) He further submitted that a wrong precedent was set by this Court in the Judges case and Asad Ali's case by making them applicable *ex post facto* and the result is that petitions are being filed to challenge the appointment of the Judges of the Superior Courts. The closest constitutional arrangement to that of Pakistan in respect of the appointment of Judges is that of India. They virtually follow the same practice, although there are certain different provisions regarding collegium of Judges. However, none of the judgments of the Indian Supreme Court have been made retrospectively applicable and not a single sitting Judge has ever been de-notified and whatever they have laid down, has been made applicable to future. In the

AORs case (AIR 1994 SC 268) the provision of Article 124(2) of the Constitution of India, which lays down that the Chief Justice of India while making recommendation for the appointment of the Judges will consult the senior Judges of the Supreme Court, was interpreted and from there emerged the concept of collegium of Judges. Such a provision does not exist in the Constitution of Pakistan and the entire consultative power has been vested in the Chief Justice of Pakistan. The concept of collegium of Judges can be adopted for the future but in order to avoid any controversy in the power of the Chief Justice of Pakistan, the matter can be considered by the Pakistan Law Commission, which is the appropriate forum for the purpose. Mr. Pirzada raised the following further contentions:-

- (a) The appointment of Mr. Justice Faqir Muhammad Khokhar, which appears to have been singled out as against the other three Judges, does not suffer from any legal defect or constitutional disqualification. He was enrolled as an Advocate of the Supreme Court in June, 1975 and was appointed as Deputy Attorney General on 24.7.1990. Under section 3 of the Central Law Officers Ordinance, 1970 (Ordinance VII of 1970), the qualifications for appointment as Deputy Attorney General are same as that of a Judge of the Supreme Court, so he was eligible for appointment as a Judge of the Supreme Court in the year 1990. Mr. Justice (Late) S. A. Nusrat had rendered less than five years service as a Judge of the High Court but he was appointed a Judge of the Supreme Court in view of his 29 years practice at the Bar. The contention that a person in order to be qualified for appointment as a Judge of Supreme Court must have had experience of functioning as a Judge of High Court for five

years was not correct as held in Malik Ghulam Jilani v. Mr. Justice Muhammad Gul (1978 SCMR 110) Mr. Justice Muhammad Gul as well as Mr. Justice (Late) S. A. Nusrat were appointed as Judges of the Supreme Court while serving as Secretary, Ministry of Law and Parliamentary Affairs;

- (b) As to the non-availability of two vacancies on 26th December 2001, the issuance of notification in anticipation of the vacancies is not an unusual act as it has happened many a times in the past, such as the appointment of Mr. Justice M. R. Khan and Mr. Justice Saiduzzaman Siddiqui, the former Chief Justice of Pakistan, which was notified 2/3 months in advance. Unless an appointee makes oath of his office, he cannot perform the functions of his office and the provisions of Article 178 of the Constitution are very clear on the subject. In the present case, although the notification was issued on 26th December 2001, yet the notification itself recited that the appointments will take effect from 10th January 2002, i.e. the day when four vacancies would be available in the Supreme Court. The Judges case in fact mandates that the process of appointments against the vacancies foreseeable in the near future ought to be initiated in advance. Article 177 of the Constitution refers to the appointment of Judges of the Supreme Court and there is no reference to the occurrence of vacancies. As far as appointment against vacant office of the Chief Justice of Pakistan or a Judge of the Supreme Court is concerned, it is governed by Articles 180 & 181 of the Constitution. No doubt such an appointment is to be made when the concerned office is vacant but in these cases too

the process of appointment has to be initiated before the actual occurrence of the vacancy. If the process is to be initiated on or after the occurrence of vacancies as is canvassed by the learned counsel for the petitioners, it will upset the scheme of things. In all such cases, the appointment is made before the occurrence of the vacancy but the appointment takes effect from the date mentioned in the notification;

- (c) The principle of seniority in the appointment of the Judges of the Supreme Court has not been accepted in the Judges case and Asad Ali's case. Rather it has been categorically held that there is no such convention. In Asad Ali's case, after tracing the entire history of the appointments of the Chief Justices of Pakistan it was found that there was a long practice of appointment of the most senior Judge of the Supreme Court as the Chief Justice of Pakistan and it was held that this practice had become a constitutional convention which was enforced as part of the Constitution;
- (d) An Additional Judge of the High Court has legitimate expectancy to become a permanent Judge if a permanent vacancy occurs during his tenure as an Additional Judge. The most senior Judge of a High Court has legitimate expectancy to be appointed as Chief Justice of High Court in the absence of sound reasons to be recorded by the executive which have been made justiciable. The most senior Judge of the High Court has not been conferred dual legitimate expectancy, in the first place to be appointed as Chief Justice of High Court, or in the second, to be appointed as a Judge of the Supreme Court. If the principle of seniority is made applicable to the appointment of Judges in the Supreme

Court then integrated seniority list of all the High Courts would per force be required to be maintained which may not be desirable in our context;

- (e) The appointments of Mr. Justice Mukhtar Ahmed Junejo, Mr. Justice Raja Afrasiab Khan and Mr. Justice Muhammad Bashir Jehangiri, immediately after the Judges case and then the appointment of Mr. Justice Tanvir Ahmed Khan, superseding Mr. Justice Falak Sher, establish that no constitutional convention exists for appointing the most senior Judge of a High Court as a Judge of the Supreme Court;
- (f) The appointment of Judges of the Supreme Court is made on the basis of merit and the Chief Justice of Pakistan is best qualified to assess the merits of any person for judgeship in the Supreme Court. The opinion of the Chief Justice, being subjective, is not open to judicial review, more so in the present case because it has been reinforced by the succeeding Chief Justice who accepted it and administered oath of office to the four Judges;
- (g) Article 177(2)(b) of the Constitution is not redundant. Competent, able, fairly senior Advocates of the Supreme Court have a legitimate expectancy to be considered for appointment as Judges of the Supreme Court and several Hon'ble Chief Justices have seriously considered the question of appointment of senior lawyers as Judges of the Supreme Court. Merit should not be sacrificed for the sake of seniority. Guidelines may be laid down so that the provisions of Article 177 (2)(b) of the Constitution are not rendered redundant;

- (h) The judgment in Asad Ali's case has closed the door on the question of issuance of writ against brother Judges and it was held that this power may be available to the Supreme Court but not to the High Court. In Abrar Hassan's case, this factor was clearly deprecated and a caution was sounded;
- (i) Transparency in the context of appointment of Judges of the Supreme Court connotes that in case the executive differs with the recommendation of the Chief Justice, valid reasons are required to be given which are justiciable but the Court cannot substitute its opinion for that of the constitutional consultee. In the present case the Federation is under no moral pressure because it is the record of the Chief Justice and the Court and as happens in India, the process of appointment of the Judges of the Supreme Court of Pakistan starts with the recommendation of the Chief Justice of Pakistan and with the Chief Justice of a High Court if the appointment of a Judge of the High Court is to be made;
- (j) After the two judgments, as reiterated in Ghulam Hyder Lakho's case, it is for the Court to weigh the evil and the good that may possibly result in opening up the record which is not the norm but an aberration because if the recommendation of the Chief Justice is made public it will put undue and unbearable strain and burden not only on the Chief Justice but also on the Judge concerned. In the past, on the rule of propriety, this Court has refrained from destroying the confidentiality of the recommendations of the Chief Justice. Injustices happen in a system that is governed by human beings but balance is required to be struck in the interest of the

institution. In Ghulam Hyder Lakho's case, Mr. Justice Muhammad Bashir Jehangiri, (as he then was) had expressed unhappiness over the harm done to some of the Judges and made harsh observations but notwithstanding the same it was held that the opinion of the Chief Justice of Pakistan is not justiciable. Protection to the opinion of the Chief Justice has been given by a judgment of this Court, which can only be undone by this Court, that too prospectively and not retrospectively;

- (k) On the issue of existence of vacancies, the scheme, intent and mandate of the Constitution is that it does not countenance occurrence of vacancies for the tenure appointments, particularly where the vacancies are anticipated ones. The distinction between the anticipated and unanticipated vacancies has been recognized by this Court in the Judges case, inasmuch as it talks of two types of vacancies, i.e. a determinative vacancy which is reasonably assured on a particular date (retirement of a Judge) and unanticipated vacancy which may result from death, disability, resignation or removal of a Judge. An anticipated vacancy is required to be filled up within 30 days and an unanticipated vacancy within 90 days. Article 177 of the Constitution does not countenance prior occurrence of the vacancies, but it talks of appointment of Judges by the President in consultation with the Chief Justice of Pakistan. The appointment of Mr. Justice Hamoodur Rehman was notified in advance. Mr. Justice Fazle Akbar, the then Chief Justice of Pakistan had recommended the appointment of Mr. Justice M. R. Khan against his own vacancy, who was a junior Judge from East Pakistan and

the notification was issued one and a half months before the vacancy occurred. In this behalf, the practice is well established that the retiring Chief Justice in anticipation makes the recommendations which are accepted and appointments made but oath is administered and vacancy filled on the retirement of the incumbent. There is nothing on record to show that Mr. Justice Hamoodur Rehman had declined to make recommendations before his retirement, as stated by one of the counsel for the petitioners. In some countries, the list is issued in the beginning of the year for the appointments to be made during the whole year. There is no impediment in the way of the Chief Justice making recommendations for filling vacancies that are to occur after his own retirement;

- (l) The appointment of Judges consists of five parts: (i) recommendation/initiation of consultation process by the Chief Justice of Pakistan in the case of a Judge of the Supreme Court and by the Chief Justice of High Court in the case of a Judge of the High Court; (ii) consideration of the recommendation by the President, agreement or disagreement and giving reasons in the latter case. For a meaningful consultation, it is possible that the President may refer the matter to the Chief Justice to reconsider his recommendation and the Chief Justice may alter his recommendations; (iii) issuance of the notification of appointment; (iv) communication of the appointment to the Judge designate, who may accept the appointment or refuse it; and (v) administration of oath of office to the Judge by the Chief Justice of Pakistan, as

commanded by Article 178 of the Constitution which is not in the hands of the executive;

- (m) The appointment can be present or in future and can take effect immediately or on a certain contingency and until the final stage of appointment, i.e. oath has occurred no vested right is created in the Judge. A person who has been appointed as a Judge of the Supreme Court cannot enter upon his office unless he takes oath which is the last process of appointment. That is why in the impugned notification Mr. Justice Faqir Muhammad Khokhar was addressed as Secretary, Law, Justice & Human Rights, i.e. as a Judge of the High Court and not that of the Supreme Court. It is quite possible that before oath takes place the notification may be withdrawn as for example where the sitting Chief Justice says that he has not been consulted;
- (n) Mr. Justice Muhammad Bashir Jehangiri took over as Chief Justice of Pakistan on 7th January 2002 and administered oath to the Judges appointed through the impugned notification on 10th January 2002. He neither wrote to the President to withdraw the notification on the ground that he was not in agreement with the appointments nor had he sent his own recommendations. He could have refused to administer the oath of office, reconsidered the recommendations or made new recommendations in the exercise of his powers. He also did not suspend the impugned notification in the exercise of his judicial power while presiding over the Bench which had heard the Constitutional Petition on 31st January 2002 and issued notices;

- (o) The period of 30 days given in the judgment presupposes that the process is initiated much earlier. The Constitution is to be interpreted as a whole. On the tenure appointments, as with the office of the President (Article 44), the process precedes the actual occurrence of vacancy but the term of his office starts the day he takes the oath, although he is elected earlier. Similarly, the term of the office of a Judge starts when he takes oath. The provisions of Article 224 of the Constitution are also a case in point. In the United States, the President is elected three months before the vacancy occurs;
- (p) The impugned notification is not severable. It is either wholly good or wholly bad. If it is good in respect of Mr. Justice Sardar Muhammad Raza, as conceded by the learned counsel for the petitioners, then it is good in respect of the remaining three Judges as well; and
- (q) The Court ought to decline to exercise jurisdiction under Article 184(3), which is discretionary and equitable if its exercise perpetrates unconstitutionality and injustice.

18(1) Mr. Makhdoom Ali Khan, the learned Attorney General for Pakistan while appearing on Court notice, stated that the proposal was initiated by the Chief Justice of Pakistan, the recommendations were strictly followed, the impugned notification was issued which recited that the Judges were to be appointed with effect from 10th January 2002 and on that date they were administered oath by Mr. Justice Muhammad Bashir Jehangiri, the succeeding Chief Justice. He submitted that learned counsel for the petitioners had sought striking down of the impugned notification on the basis of the application of the judgments in the Judges case and

Asad Ali's case except Mian Allah Nawaz, learned counsel for the petitioner in Constitution Petition No. 7/2002, who had candidly stated at the Bar that these judgments did not cover the point and sought an extension and not application of these precedents.

(2) The situation at the time of the Judges case was that the executive ignored the time honoured practice that the consultation/recommendations made by the Chief Justice were followed. In Asad Ali's case, the convention of appointing the most senior Judge of the Supreme Court as the Chief Justice of Pakistan was enforced. The principles invoked were the principles of independence of judiciary and the constitutional conventions. Therefore, in order to succeed in these petitions on the basis of the principles laid down in the two judgments, burden is on the petitioners to show the convention that Judges of the Supreme Court have always been appointed from amongst the most senior Judges of the High Courts and that this principle, either on the basis of consistency or judicial precedents, has evolved into a convention. Once the convention is established in the manner given in the two judgments only then it can be enforced. The petitioners have not established that there is any such constitutional convention, inasmuch as they have not shown that in the past there has been no deviation from the seniority principle or that the deviation was in the rarest cases. In Asad Ali's case, the rule of seniority has been recognized vis-à-vis the Chief Justice of Pakistan and in case this is made applicable to the Judges of the Supreme Court it will be extension and not application of the judgments.

(3) The learned Attorney General placed on record two charts - one containing names of the Judges of the High Courts appointed to the Supreme Court where the seniority principle was not

followed, and the other containing the list of ad hoc/Acting Judges who were not made permanent to contend that right from the time of appointment of Mr. Justice Abdul Rehman made on 7th February 1950 till the appointment of Mr. Justice Tanvir Ahmed Khan on 27th September 2000 the principle of seniority was not adhered to in 25 appointments. Mr. Justice Mukhtar Ahmed Junejo was not the most senior Judge at the time when he was appointed as Acting Judge of the Supreme Court. Mr. Justice Qazi Muhammad Gul was appointed as a Judge of the Supreme Court bypassing four of his seniors and so was Mr. Justice Muhammad Afzal Cheema. Mr. Justice Abdul Kadir Shaikh bypassed two of his seniors whereas Mr. Justice Muhammad Akram bypassed three of his seniors.

(4) He also filed a list of six Judges, where, with one exception of Mr. Justice Mushtaq Hussain the then Chief Justice of the Lahore High Court, the principle of seniority was not followed even in terms of ad hoc and acting appointments. Among them, Mr. Justice Fakhruddin G. Ebrahim was not the most senior Judge of the High Court of Sindh. Out of 93 appointments, six were those of ad hoc and Acting Judges and remaining 87 were permanent. The principle of seniority was not followed in the case of 9 retired Judges and 25 serving Judges, so more than 30 percent of the appointments were not made in accordance with this principle. Four appointments were made after the Judges case, out of which three appointments were made of the Judges who were not the most senior Judges of the High Court and those appointments were made by the Chief Justice and the Judges who were party to the Judges case. Therefore, the Judges case does not recognize any such principle or any such constitutional convention as is evident from the practice of the very authors of that case. As such, no convention or practice to the

satisfaction of the Court, which is operative, exists. If the principle of seniority is accepted as argued by the learned counsel for the petitioners the Chief Justices of Pakistan would be left with no function to perform and in any case it would not lead to a better judiciary which is self-operative and independent.

(5) He further submitted that in case the argument of the petitioners that the executive should not have abdicated its power and ought to have rejected the recommendation of the Chief Justice is accepted, it would open the door which was closed by the Judges case. He placed reliance on the direction/conclusion given in the Judges case at page 364, para 7(i), which gives primacy to the opinion of the Chief Justice. The discretion of the executive is confined only to the antecedents of a candidate, in the case of appointment of a Judge of a High Court, based on the intelligence reports and in matters of fitness and suitability the views of the Chief Justice(s) must prevail. In case the scope of discretion of the executive is extended by this Court in the present case, it would inevitably lead to executive interference in the judicial appointments.

(6) The learned Attorney General next submitted that akin to the above argument is the submission of the petitioners that the recommendation of the Chief Justice is subject to judicial review. It is well-settled that the recommendations of the Chief Justice of Pakistan are not justiciable. In case the petitioners' submission is upheld, it would open the door for issuing writs of *mandamus* and *certiorari* as well. The concept of 'collegium' in India is based on the constitutional provision whereas the Constitution of Pakistan does not have any such provision. If the opinion of the Chief Justice is held to be justiciable, the opinion of the collegium would also be

justiciable and subsequently a writ would be filed against the opinion of the collegium and an objection taken that the members of the collegium should not sit on the Bench. He submitted that Mr. Justice Ajmal Mian (as he then was) had held in the Judges case that the opinion of the Chief Justice was subjective and for this reason the Supreme Court in Ghulam Hyder Lakho's case held that the views of the Chief Justice are not justiciable.

(7) Another submission made with vehemence was that it was absolutely unnecessary to issue notice to any of the Judges and the principle of natural justice would not be violated if notice was not issued to the concerned Judges. Reliance was placed on the Judges case, Asad Ali's case and Ghulam Hyder Lakho's case.

(8) Regarding production of the record of the case the learned Attorney General for Pakistan submitted that in the Judges case this Court had directed the Federation to produce the documents but inspection was not allowed. He submitted that record in the present case, which is none other than the letter of the Chief Justice of Pakistan, was available and the Court was at liberty to examine it but such letter has never been made public in the history of the Supreme Court nor inspection thereof ever granted to the parties because of the confidentiality attached to it. The Government in England had ordered an inquiry into the appointment procedures relating to Judges. The Lord Chancellor appeared before the Inquiry Committee to give his evidence. On a query from the Committee as to how many of the recommendations of Lord Chancellor were acted upon and how many ignored the Lord Chancellor refused to answer it saying he had made the recommendations in the strictest confidentiality and in case the recommendations are made public the independence of the judiciary would be undermined. He submitted

that there are examples when Judges ignored at one time were appointed subsequently and if such a document was made public it would hurt the chances of Judges in future.

(9) The learned Attorney General placed reliance on the Judges case to contend that appointments can be made in advance. According to him several appointments in the past were made against anticipated vacancies. The appointments of Mr. Justice Fazle Akbar, Mr. Justice M. R. Khan, Mr. Justice Hamoodur Rehman, Mr. Justice Muhammad Yaqoob Ali, Mr. Justice Waheeduddin Ahmed, Mr. Justice Sardar Muhammad Iqbal, Mr. Justice Mushtaq Hussain, Mr. Justice Saleem Akhtar and most recently Mr. Justice Saiduzzaman Siddiqui were notified in advance. The ratio of the Judges case is that normally permanent vacancies should be filled in advance.

(10) He also submitted that the impugned notification would stand or fall in entirety and there is no principle of law on which it can be severed.

(11) He further submitted that both the judgments, i.e. the Judges case and Ghulam Hyder Lakho's case are binding on this Court in view of the principle laid down in Ardeshir Cowasjee's case (1999 SCMR 2883) that a Bench of equal number of Judges must follow earlier judgment given by a similar number of Judges. He also vehemently urged that the gains secured through the two judgments followed by Ghulam Hyder Lakho's case should be consolidated and not lost.

(12) On the question of appointment of the Federal Law Secretary as a Judge of the Supreme Court, he submitted that Mr. Justice S. A. Nusrat, at the time of his elevation to the Supreme Court, had not completed five years service as a Judge of the High

Court of Sindh and his standing at the Bar was taken into consideration. In the case of Justice Muhammad Gul, it was held that the period spent by a Judge of the High Court as Federal Law Secretary would be counted towards his tenure as a Judge of the High Court. The judgment in the case of Justice Muhammad Gul, having been delivered by a five-member Bench is binding on this Bench.

19. Before we proceed to appreciate the rival contentions and examine the grounds on which the impugned appointments have been assailed it will be appropriate to highlight the background of the Judges case as well as Asad Ali's case and the law laid down therein as both sides have pressed into service these cases in support of their respective contentions and the petitions have in fact flown from these cases.

20. In the year 1994, the President of Pakistan on the advice of the Prime Minister Mohtarama Benazir Bhutto appointed 20 Judges in the Lahore High Court and in addition thereto, Acting Chief Justices were appointed in the Lahore High Court and the High Court of Sindh instead of permanent Chief Justices. Mr. Justice M. Mahboob Ahmed, the then Chief Justice of Lahore High Court was transferred to the Federal Shariat Court and Mr. Justice Muhammad Ilyas, who was discharging functions as a Judge of the Federal Shariat Court, was appointed as a Judge of the Supreme Court and then appointed as Acting Chief Justice of the Lahore High Court. Later, he was recalled to the Supreme Court and Mr. Justice Irshad Hasan Khan, a Judge of the Supreme Court (as he then was) was appointed as Acting Chief Justice of the Lahore High Court. Mr. Justice Nasir Aslam Zahid, the then Chief Justice of the High Court of Sindh was transferred to the Federal Shariat Court and Mr. Justice

Abdul Hafeez Memon, a Judge of the Supreme Court was appointed as Acting Chief Justice of the High Court of Sindh. These appointments were resented by all quarters including the judiciary and various Bar Associations of the country. Further, six Additional Judges of the Lahore High Court who were appointed as Additional Judges for a period of two years in August 1992 were not confirmed on the expiry of their term of initial appointment and they ceased to hold office in August 1994. Mr. Habibul Wahabul Khairi, head of Al-Jehad Trust and an Advocate of this Court filed Constitution Petition No. 29 of 1995 under Article 184(3) of the Constitution challenging, *inter alia*, the appointment of the Acting Chief Justice of Pakistan, appointment of Mr. Justice Nasir Aslam Zahid as a Judge of the Federal Shariat Court. Mr. Habibul Wahabul Khairi also filed C.P.L.A. No. 11 of 1995 against the judgment passed by a Division Bench of the Lahore High Court whereby Writ Petitions No. 875/94, 101-86/94 and 9893/94 preferred against the non-confirmation of aforesaid six Additional Judges of the Lahore High Court, the appointment of 20 Additional Judges and the appointment of Acting Chief Justice of the Lahore High Court were dismissed *in limine*. These matters remained pending till second half of 1995 when this Court while taking up the same for hearing issued notices to all concerned. A Bench of five Judges headed by Mr. Justice Sajjad Ali Shah, the then Chief Justice of Pakistan, which included Mr. Justice Mir Hazar Khan Khoso, an ad hoc Judge of this Court was constituted for the purpose. Besides the counsel for the parties, eminent lawyers, namely, Syed Sharifuddin Pirzada, S.M. Zafar and Fakhruddin G. Ebrahim, Senior Advocates Supreme Court assisted the Court as *amicus curiae*.

21. Through a long debate, Articles 196, 177, 193, 180, 181, 182 and 197 of the Constitution of Islamic Republic of Pakistan 1973 were discussed and interpreted with reference to the term 'consultation' used in Article 177 and 193 *ibid*. After considerable deliberations it was held that the word 'consultation' employed in Articles 177 and 193 of the Constitution connotes that 'consultation' should be effective, meaningful, purposive, consensus-oriented, leaving no room for complaint of arbitrariness or unfair play. It was also laid down that the opinion of the Chief Justice of Pakistan and the Chief Justice of High Court regarding fitness and suitability of a candidate for judgeship was entitled to be accepted in the absence of very sound reasons to be recorded by the appointing authority and if the President/Executive appoints a candidate found to be unfit by the Chief Justice of Pakistan and Chief Justice of High Court concerned, it will not be a proper exercise of power under the relevant Articles of the Constitution. It was further held that in case of disagreement, the executive was required to record sound reasons, which will be justiciable. The crux of the matter was dilated upon and it was held that as far as fitness and suitability of a candidate for judgeship were concerned, the opinion of the Chief Justice was binding and had primacy. However, the President could refuse to appoint a person as a Judge of the High Court if the Governor had expressed negative opinion on the basis of information received by him about his antecedents. In the context of the appointment of the Acting Chief Justices, it was held that such appointment on the face of it smacked *mala fide* although there was a provision in the Constitution to appoint a Judge of the Supreme Court as Acting Chief Justice and this Court while placing embargo on such appointments held that such appointments could not last for more than 90 days. It

was also held that the most senior Judge of the High Court had legitimate expectancy to be considered for appointment as Chief Justice and such legitimate expectancy could not be defeated in the absence of concrete and valid reasons to be recorded by the President/Executive. However, it was reiterated that the President/Executive could refuse to recognize the principle of legitimate expectancy provided they had information with regard to antecedents of a Judge in relation to his extra-professional activities but as a rule of law it was laid down that the most senior Judge in the High Court was entitled to be appointed as Chief Justice on the doctrine of legitimate expectancy and Additional Judges in the High Court had legitimate expectancy to be made permanent Judges. It was also held that appointment of a sitting Chief Justice of a High Court or a Judge thereof as a Judge of the Federal Shariat Court under Article 203C of the Constitution without his consent being violative of Article 209 which guaranteed the tenure of office was void. It was found that the judicial consultees in regard to appointment of 20 Judges of the Lahore High Court had not been taken into confidence or consulted before making these appointments and consequently all appointments were declared to be unconstitutional and it was directed that the cases of those Judges should be re-processed in accordance with the Constitution for regularization of their appointments/confirmations. It was also held that affiliation of a person with a political party was not a bar for appointment as a Judge of the High Court provided he was otherwise qualified to be appointed as Judge of the High Court. The cases of five Additional Judges who were appointed in August 1992 and were not confirmed and dropped on the expiry of their initial term of appointment in the year 1994 were directed to be processed for their

confirmation/permanent appointment as Judges of the High Court. It would be advantageous to reproduce the relevant portions of the Short Order in the Judges case, which read as follows: -

“2. In these two cases some appointment of Judges in the Superior Judiciary are challenged and called in question on the ground that they have been made in contravention of the procedure and guidelines laid down in the Constitution, and in this context we are called upon to examine in detail the relevant Articles pertaining to the Judiciary specified in Part VII of the Constitution to render an authoritative decision on the question of interpretation of such Articles in the light of other co-related Articles.

.....

“7. Our conclusions and directions in nutshell are as under:-

- (i) The words “after consultation” employed inter alia in Article 177 and 193 of the Constitution connote that the consultation should be effective, meaningful, purposive, consensus oriented, leaving no room for complaint of arbitrariness or unfair play. The opinion of the Chief Justice of Pakistan and the Chief Justice of a High Court as to the fitness and suitability of a candidate for judgeship is entitled to be accepted in the absence of very sound reasons to be recorded by the President/Executive.
- (ii) That if the President/Executive appoints a candidate found to be unfit and unsuitable for judgeship by the Chief Justice of Pakistan and the Chief Justice of the High Court concerned, it will not be a proper exercise of power under the relevant Article of the Constitution.
- (iii) That the permanent vacancies occurring in the offices of Chief Justice and Judges

normally should be filled in immediately not later than 30 days but a vacancy occurring before the due date on account of death or for any other reasons, should be filled in within 90 days on permanent basis.

(iv) That no ad hoc Judges can be appointed in the Supreme Court while permanent vacancies exist.

(v) That in view of the relevant provisions of the Constitution and established conventions/practice, the most senior Judge of a High Court has a legitimate expectancy to be considered for appointment as the Chief Justice and in the absence of any concrete or valid reasons to be recorded by the President/Executive, he is entitled to be appointed as such in the Court concerned.

(vi) An Acting Chief Justice is not a consultee as envisaged by the relevant Articles of Constitution and, therefore, mandatory Constitutional requirement of consultation is not fulfilled by consulting as Acting Chief Justice except in case the permanent Chief Justice concerned is unable to resume his functions within 90 days from the date of commencement of his sick leave because of his continuous sickness.

(vii) That Additional Judges appointed in the High Court against permanent vacancies or if permanent vacancies occur while they are acting as Additional Judges, acquire legitimate expectancy and they are entitled to be considered for permanent appointment upon the expiry of their period of appointment as Additional Judges and they are entitled to be

appointed as such if they are recommended by the Chief Justice of the High Court concerned and the Chief Justice of Pakistan in the absence of strong valid reason/reasons to be recorded by the President/Executive.

(viii) That an appointment of a sitting Chief Justice of a High Court or a Judge thereof in the Federal Shariat Court under Article 203-C of the Constitution without his consent is violative of Article 209, which guarantees the tenure of office. Since the former Article was incorporated by the Chief Martial Law Administrator and the latter Article was enacted by the Framers of the Constitution, the small shall prevail and, hence, such an appointment will be void.

(ix) That transfer of Judge of one High Court to another can only be made in the public interest and not as a punishment.

(x) That the requirement of 10 years' practice under Article 193(2)(a) of the Constitution relates to the experience/practice at the Bar and not simpliciter the period of enrolment.

(xi) That the simpliciter political affiliation of a candidate for judgeship of the superior Courts may be a disqualification provided the candidate is of an unimpeachable integrity, having sound knowledge in law and is recommended by the Chief Justice of the High Court concerned and the Chief Justice of Pakistan.

(xii) That it is not desirable to send a Supreme Court Judge as an Acting Chief Justice to a High Court in view of clear adverse observation of this Court in the case of *Abrar Hassan v. Government of Pakistan and others* PLD 1976 SC 315 at 342.

(xiii) That since consultation for the appointment/confirmation of Judge of a Superior Court by the President/Executive with consultees mentioned in the relevant Articles of the Constitution is mandatory, any appointment/confirmation made without consulting any of the consultees as interpreted above would be violative of the Constitution and, therefore, would be invalid.

In view of what is stated above, we direct:

- (a) That permanent Chief Justices should be appointed in terms of the above conclusion No.(iii) in the High Courts where there is no permanent appointment incumbent of the office of the Chief Justice.
- (b) That the cases of appellants Nos.3 to 7 in Civil Appeal No.805 of 1995 (i.e. Additional Judges who are dropped) shall be proceeded and considered for their permanent appointment by the Chief Justice within one month from the date of assumption of office by him as such.
- (c) That appropriate action be initiated for filling in permanent vacancies of Judges in terms of above conclusion No.(iii).
- (d) That ad hoc Judges working at present in the Supreme Court either be confirmed against permanent vacancies in terms of Article 177 of the Constitution within the sanctioned strength or they should be sent back to their respective High Courts in view of above conclusion No.(iv).
- (e) That the cases of the appointees of the Federal Shariat Court be processed and the same be brought in line with the above conclusion No.(viii); and

- (f) That upon the appointment of the permanent Chief Justices in the High Courts where there is no permanent incumbent or where there are permanent incumbents already, they shall process the cases of the High Courts' Judges in terms of the above declaration No.13 within one month from the date of this order or within one month from the date of assumption of office by a permanent incumbent whichever is later in time and to take action for regularizing the appointments/confirmation of the Judges recently appointed/confirmed inter alia of respondents Nos.7 to 28 in Civil Appeal No.805/95 in the light of this short order. In like manner, the Chief Justice of Pakistan will take appropriate action for recalling permanent Judges of the Supreme Court from the High Courts where they are performing functions as Acting Chief Justices and also consider desirability of continuation or not of appointment in the Supreme Court of ad hoc/Acting Judges.

Resultantly, the direct petition and the appeal captioned above are allowed in the terms and the extent indicated above.”

It was also held that recommendations made by the Chief Justice of Pakistan are not justiciable and a normal permanent vacancy should be filled in advance.

22. In the light of the verdict given by this Court in the Judges case that the most senior Judge in the High Court and the Supreme Court have a legitimate expectancy to become the Chief Justice of the respective Court, the appointment of Mr. Justice Sajjad Ali Shah as Chief Justice of Pakistan was declared unconstitutional in Asad Ali's case. The appointment of Mr. Justice Sajjad Ali Shah

as the Chief Justice of Pakistan was made in June 1994 in supersession of three senior Judges, but was temporarily saved in the Judges case on the grounds that the matter was *sub judice* in the Peshawar High Court and the prayer to that extent had been withdrawn. The ratio of Asad Ali's case is fully spelt out by the following observations made therein: -

“101. From the preceding discussion, it follows that the convention to appoint the senior most Judge of the Supreme Court as the Chief Justice of Pakistan, has come to be recognized as the well-established constitutional convention, and therefore, any deviation or breach of this convention by the Appointing Authority under the provisions of Article 177 of the Constitution, would amount to the violation of the constitutional provisions relating to the appointment of Chief Justice of Pakistan. We, therefore, find no room for the argument that the rule of seniority cannot be extended while interpreting the provisions of Article 177 of the Constitution.”

23. In this backdrop, we proceed to consider the first common contention of the petitioners that appointment of Judges from the Lahore High Court has been made in violation of the principles of seniority and legitimate expectancy. We are afraid the contention is misconceived and travels beyond the parameters indicated in the Judges case and Asad Ali's case. In our considered view, the scope of the principles of seniority and legitimate expectancy enunciated in those cases is restricted to the appointment of Chief Justice of a High Court and the Chief Justice of Pakistan and these principles neither apply nor can be extended to the appointment of Judges of the Supreme Court. It is nowhere mentioned in those judgments that the principles of seniority and

legitimate expectancy shall also apply in the matter of appointment of Judges of the Supreme Court. The omission appears to be intentional and not accidental in view of the line of reasoning in the said judgments. In the Judges case while interpreting Article 193 of the Constitution it was held that there is no constitutional requirement to appoint the most senior Judge as Chief Justice of a High Court whenever permanent vacancy occurs but there is a constitutional convention in this context which has developed by continuous usage and practice over a long period of time and must be followed in the interest of independence of judiciary. In Asad Ali's case this view was applied with greater force in the case of appointment of the Chief Justice of Pakistan under Article 177 of the Constitution on the strength of the constitutional convention and past practice and the analogy of Article 180 of the Constitution which provides that in absence of the Chief Justice of Pakistan the most senior Judge of the Supreme Court shall be appointed as Acting Chief Justice of Pakistan. There exists no constitutional convention or past practice to appoint the most senior Judge of a High Court as a Judge of the Supreme Court. The Constitution makers were aware of the expression 'the most senior' used in Article 180 of the Constitution and in the light of the well-established principle of interpretation of the Constitution and law, the absence of the words, 'the most senior' in Article 177 for appointment of Judges of the Supreme Court would show that seniority of a Judge in the High Court is not a *sine qua non* for his appointment as a Judge of the Supreme Court. If for the purpose of appointment of Judges in the Supreme Court, the seniority of the judges *inter se* in the High Courts would have been the rule, there was no impediment in the way of the Constitution makers to use the expression, 'the most senior' in Article 177 of the

Constitution. Even, juristically speaking and analyzing the rationale of the principle of appointment of Judges in the Supreme Court, it becomes very clear that the Chief Justice of Pakistan being the *pater familia* of the judiciary of the country is the best judge to ascertain and gauge the fitness and suitability of the Judges working in the High Court for appointment as Judges of the Supreme Court. We are clear in our mind that neither the principle of seniority is applicable as a mandatory rule for appointment of Judges in the Supreme Court nor the said rule has attained the status of a convention.

24. The role and functions of the Chief Justice of Pakistan in the process of appointment of the Judges of the Superior Courts have been described in detail in the Judges case in the following words: -

“The object of providing consultation, inter alia, in Articles 177 and 193 of the Constitution of Pakistan (1973) for the appointment of Judges in the Supreme Court and in the High Courts was to accord constitutional recognition to the practice/convention of consulting the Chief Justice of the High Court concerned and the Chief Justice of the Federal Court, which was obtaining prior to the independence of India and post-independence period, in order to ensure that competent and capable people of known integrity should be inducted in the superior judiciary which has been assigned very difficult and delicate task of acting as watch dogs for ensuring that all the functionaries of the State act within the limits delineated by the Constitution and also to eliminate political considerations. The power of appointment of Judges in the superior Courts had direct nexus with the independence of Judiciary. Since the Chief Justice of the High Court concerned and the Chief Justice of Pakistan have expertise knowledge about the ability

and competency of a candidate for judgeship, their recommendations, have been consistently accepted during pre-partition days as well as post-partition period in India and Pakistan. The words “ after consultation” referred to, inter alia, in Article 177 and 193 of the Constitution involve participatory consultative process between the consultees and also with the Executive. It should be effective, meaningful, purposive, consensus-oriented, leaving no room for complaint or arbitrariness or unfair play. The Chief Justice of a High Court and the Chief Justice of Pakistan are well equipped to assess as to the knowledge and suitability of a candidate for judgeship in the superior Courts, whereas the Governor of a Province and the Federal Government are better equipped to find out about the antecedents of a candidate and to acquire other information as to his character/conduct. No one of the above consultees/functionaries is less important or inferior to the other. All are important in their respective spheres. The Chief Justice of Pakistan, being Paterfamilias i.e. head of the judiciary, having expertise knowledge about the ability and suitability of a candidate, definitely, his views deserve due deference. The object of the above participatory consultative process should be to arrive at a consensus to select best persons for the judgeship of a superior Court keeping in view the object enshrined in the Preamble of the Constitution, which is part of the Constitution by virtue of Article 2A thereof, and ordained by Islam to ensure independence of judiciary.”

The above role and functions of the Chief Justice of Pakistan will become redundant and superfluous if the rule of seniority is held applicable to the appointment of the Judges of the Supreme Court because in that eventuality the process would become automatic and

mechanical. Such a situation would certainly affect the self-operativeness and independence of judiciary adversely.

25. The mode of appointment of the Judges of the Supreme Court, the requisite qualifications for appointment and instances of appointment of retired Judges of the High Court as Judges of the Supreme Court also exclude the application of the principle of seniority. Under Article 177 of the Constitution a person shall not be appointed as a Judge of the Supreme Court unless he is a citizen of Pakistan and -

- (a) has for a period of, or for periods aggregating, not less than five years been a judge of a High Court (including a High Court which existed in Pakistan at any time before the commencing day); or
- (b) has for a period of, or for periods aggregating, not less than fifteen years been an advocate of a High Court (including a High Court which existed in Pakistan at any time before the commencing day).

26. It is not necessary that the appointment of the Judges in the Supreme Court should invariably be made from amongst the Judges of the High Courts. An advocate of the standing of fifteen years in the High Court, subject to his suitability in the opinion of the Chief Justice of Pakistan, can also be appointed as a Judge of the Supreme Court. There are also instances of appointment of retired Judges of the High Court as Judges of the Supreme Court. Mr. Justice Muhammad Sharif, Mr. Justice Qaiser Khan, Mr. Justice G. Safdar Shah, Mr. Justice Rustam S. Sidhwa, Mr. Justice Manzoor Hussain Sial, Mr. Justice Muhammad Ilyas, Mr. Justice Ch. Fazal Karim, Mr. Justice Zia Mahmood Mirza and Mr. Justice Qazi Muhammad Farooq were appointed permanent Judges of the Supreme Court after their retirement.

27. There are yet two other factors which give the rule of fitness and suitability an edge over the principles of seniority and legitimate expectancy. First, the appointment of a Judge of the High

Court as a Judge of the Supreme Court is a fresh appointment and not a promotion and, secondly, supersession of senior Judges of the High Court is not unprecedented as is evident from the following chart:-

S.No.	Name of the Supreme Court Judge	Date of appointment as Permanent Judge of Supreme Court	Name of High Court from where elevated	Name(s) of Senior Judges of High Court who were bypassed
Before the Judges case				
1.	Mr.Justice Abdul Rehman	07.02.1950	Lahore High Court	Chief Justice Muhammad Munir
2.	Mr.Justice Fazle Akbar	18.05.1960	East Pakistan High Court	Chief Justice I.H.Chawdhury
3.	Mr.Justice B.Z.Kaikus	25.07.1960	Lahore High Court	Chief Justice M.R.Kayani Mr.Justice Shabbir Ahmed
4.	Mr.Justice Hamood-ur-Rehman	22.12.1960	East Pakistan High Court	Chief Justice I.H.Chawdhury
5.	Mr.Justice Sajjad Ahmad Jan	18.03.1968	Lahore High Court	Chief Justice Waheeduddin Ahmed
6.	Mr.Justice Abdus Sattar	04.06.1968	East Pakistan High Court	Chief Justice Murshed Mr.Justice K.M.Hassan
7.	Mr.Justice M.R.Khan	18.11.1968	East Pakistan High Court	Chief Justice B.A.Siddiqui
8.	Mr.Justice Salahuddin Ahmad	01.03.1971	East Pakistan High Court	Chief Justice B.A.Siddiqui
9.	Mr.Justice Qazi Muhammad Gul	14.04.1973	Lahore High Court	Chief Justice Sardar Muhammad Iqbal Mr.Justice Mushtaq Hussain Mr.Justice A.R.Sheikh Mr.Justice Muhammad Akram
10.	Mr.Justice M.Afzal Cheema	08.10.1974	Lahore High Court	Chief Justice Sardar Muhammad Iqbal Mr.Justice Mushtaq Hussain Mr.Justice A.R.Sheikh Mr.Justice Muhammad Akram
11.	Mr.Justice Abdul Kadir Sheikh	08.10.1974	High Court of Sindh	Chief Justice Tufail Ali A.Rehman Mr.Justice Noorul Arfin
12.	Mr.Justice Malik Muhammad Akram	26.12.1975	Lahore High Court	Chief Justice Sardar Muhammad Iqbal Mr.Justice Mushtaq Hussain Mr.Justice A.R.Sheikh
13.	Mr.Justice Dorab Patel	07.10.1976	High Court of Sindh	Chief Justice Abdul Kadir Sheikh
14.	Mr.Justice Muhammad Haleem	07.01.1977	High Court of Sindh	Chief Justice Abdul Kadir Sheikh
15.	Mr.Justice Karam Elahi Chauhan	14.06.1979	Lahore High Court	Chief Justice Mushtaq Hussain
16.	Mr.Justice Muhammad Afzal Zullah	14.06.1979	Lahore High Court	Chief Justice Mushtaq Hussain Mr.Justice Shamim Hussain Kadri
17.	Mr.Justice Dr.Nasim Hasan Shah	14.06.1979	Lahore High Court	Chief Justice Mushtaq Hussain Mr.Justice Shamim Hussain Kadri
18.	Mr.Justice Shafi ur Rehman	31.07.1981	Lahore High Court	Mr.Justice Shamim Hussain Kadri
19.	Mr.Jutice S.A.Nusrat	04.08.1981	Lahore High Court	Mr.Justice Abdul Hayee Qureshi Mr.Justice Naeemuddin
20.	Mr.Justice Zafar Hussain Mirza	04.08.1981	High Court of Sindh	Mr.Justice Abul Hayee Qureshi
21.	Mr.Justice Muhammad Saleem Akhtar	25.03.1991	High Court of Sindh	Mr.Justice Saeeduzzaman Siddiqui Mr.Justice Nasir Aslam Zahid
After the Judges case				
22.	Mr.Justice Mukhtar Ahmed Junejo	31.03.1996	High Court of Sindh	Mr.Justice Nasir Aslam Zahid Mr.Justice Mamoon Kazi
23.	Mr.Justice Raja Afrasaib Khan	31.03.1996	Lahore High Court	Mr.Justice Sh.Ijaz Nisar Mr.Justice Sh.Riaz Ahmed
24.	Mr.Justice Muhammad Bashir Jehangiri	31.03.1996	Peshawar High Court	Mr.Justice Syed Ibne Ali Mr.Justice Abdur Rehman Khan
25.	Mr.Justice Tanvir Ahmed Khan	27.09.2000	Lahore High Court	Chief Justice Falak Sher

NOTE

➤ The names of those who were not elevated as permanent judges are not included in the list.

It has been rightly pointed out by the learned Attorney General for Pakistan that out of 93 appointments made in this Court so far, six being those of ad-hoc and acting Judges, the principle of seniority was not followed in the case of 9 retired Judges and 25 serving Judges.

28. It was held in the Judges case that the views of the Chief Justice of Pakistan cannot be rejected arbitrarily for extraneous consideration and if the executive wished to disagree with his views, it has to record strong reasons which will be justiciable. In the present case while making the impugned appointments the President of Pakistan had fully adhered to the recommendations made by the Chief Justice of Pakistan. The main and vital question which arises for decision, therefore, is whether the recommendations of the Chief Justice of Pakistan in the process of constitutional consultation in the matter of appointment of Judges of the Supreme Court are justiciable. This question had arisen in the Judges case as well and was determined with the observation that the recommendations of the Chief Justice were not justiciable. The opinion rendered by Ajmal Mian, J. (as he then was) reads as under:-

“In any case, it is a matter for consideration by the Chief Justice of the High Court concerned and the Chief Justice of Pakistan. They have to decide, whether a particular candidate has requisite experience and once they form the view that the candidate has the requisite experience as envisaged by sub-clause (a) of clause (2) of Article 193, this issue will not be justiciable before the Court of law. The Court cannot sit and decide, whether a particular person has the requisite experience or not? It is a matter of subjective satisfaction of the Chief Justice of

the High Court concerned and the Chief Justice of Pakistan.”

This question had again arisen in Ghulam Hyder Lakho's case and was answered in the negative by reiterating the law on the subject laid down in the Judges case. The observations made in this context are worded thus:-

“In view of the above-quoted observations of Ajmal Mian, J. it is quite clear that the recommendations of the Chief Justice of the High Court and that of Chief Justice of Pakistan are not justiciable.”

The rationale behind making the recommendations of the Chief Justice of Pakistan non-justiciable is multifaceted. The main justification is contained in the above-quoted observations of Ajmal Mian, J. (as he then was) in the Judges case that the recommendations are the outcome of subjective satisfaction of the Chief Justice of Pakistan. The other dimensions are that if the recommendations are made justiciable the primacy of the opinion of the Chief Justice of Pakistan will be undermined directly or indirectly, embarrassment will be caused to the judicial consultee as well as the recommendees, independence of judiciary and smooth working of the Court will be affected, pressure groups will emerge at different levels and we will go back to the situation prevailing before the Judges case, which will be more unsavoury than the one portrayed in these petitions.

29. The next question for determination is equally important. It relates to advance appointment of Judges against the anticipated vacancies and has arisen from the second common contention of the petitioners that the Chief Justice of Pakistan who had made the recommendations was not the judicial consultee to the

extent of two vacancies which had occurred after his retirement and as such appointments against the said vacancies were *void ab initio*. It is true that appointments against two anticipated vacancies were made in advance but the appointments cannot be termed as illegal or void as an anticipated permanent vacancy can be filled in advance. Reference in this context may be made to the observations made at page 501 of the judgment in the Judges case which read as under:-

“I am, therefore, of the view that a normal permanent vacancy should be filled in advance and, in any case, not later than 30 days whereas vacancy occurring on account of death or for any unforeseen cause, at the most, should be filled in within 90 days, which is generally considered to be a reasonable period period.”

No doubt, the words “in advance” are not mentioned in Para 7(iii) of the Short Order in the Judges case but the omission is immaterial inasmuch as in the absence of any inconsistency between the short order and the detailed reasons, both are to be read together. The view gets support from the following observations made in Ghulam Hyder Lakho’s case:-

“4. Before considering the above contentions, it would be appropriate to first decide the plea of the petitioners that only short order dated 20th March 1996 in Judges’ case is to be treated as the order of the Court and that the reasons recorded subsequently by the learned Judges separately are to be ignored while implementing the direction of the Court. We are unable to subscribe to this view. The short order in a case is the summary of the findings of the Court while detailed reasons are elaboration of that summary. Unless there is any conflict between the short order and the detailed reasons, both are to be read together to understand the real import and scope of the

judgment. We have carefully gone through the short order and the detailed reasons recorded in support of the short order by Sajjad Ali Shah, C.J. and Ajmal Mian, J. and are of the view that there is no conflict between the short order and the detailed reasons recorded subsequently by the learned Judges of the Bench in support of the short order. We are, therefore, of the view that the short order dated 20th March, 1996 and the reasons recorded in support thereof by the learned Judges (Sajjad Ali Shah, C.J. and Ajmal Mian, J.) subsequently are to be read together to give effect to the judgment in Judges' case."

30. Appointments in advance were not made for the first time in the present case. Several appointments were made in the past in advance against anticipated vacancies. Mr. Justice Fazle Akbar was appointed as a Judge of the Supreme Court vide notification dated 25th April, 1960 against the post which was to fall vacant on 12th May, 1960 on the retirement of Mr. Justice Shahab-ud-Din. Mr. Justice Hamood-ur-Rehman assumed the office of Judge of the Supreme court on 22nd December, 1960 vide notification dated 16th June, 1960 against the vacancy occurred on 21st December, 1960 on the retirement of Mr. Justice Amir-ud-Din Ahmed. Mr. Justice Mujib-ur-Rehman Khan was notified on 21st October, 1968 to be the Judge of Supreme Court against the vacancy to occur on 18th November, 1968 on the retirement of Mr. Justice Hamood-ur-Rehman. Mr. Justice Saleem Akhtar was appointed as a Judge of the Supreme Court vide notification dated 7th February, 1991 against the post to fall vacant on 24th March, 1991 on the retirement of Mr. Justice Abdul Kadir Shaikh. The appointment of Mr. Justice Waheed-ud-Din Ahmed was notified on 30th August, 1969. The notification provided that he will assume the office of a Judge of the Supreme

Court on his retirement as the Chief Justice of the High Court of West Pakistan. He accordingly entered upon office as a Judge of the Supreme Court on 22nd September, 1969. The appointment of Mr. Justice Sardar Muhammad Iqbal and Mr. Justice Mushtaq Hussain as Judges of the High Court of West Pakistan was notified on 13th September, 1962 with effect from 1st October, 1962. Mr. Justice Muhammad Yaqoob Ali was notified as a Judge of the Supreme Court on 5th August, 1965 but had entered upon office on 4th January, 1966 on the retirement of Mr. Justice B.Z. Kaikaus. These appointments were made before the Judges case and thereafter vide notification No. F.2(1)/99-All. dated 11th May, 1999 Mr. Justice Saeed-uz-Zaman Siddiqui was appointed as Chief Justice of Pakistan with effect from 1st July, 1999.

31. Last but not the least the appointments in question had the blessings of the succeeding Chief Justice and judicial consultee Mr. Justice Muhammad Bashir Jehangiri who was consulted by the then Chief Justice of Pakistan at the initial stage and before whom all the four Judges made oath at the final stage i.e. on 10th January, 2002. The impugned notification was issued on 26th December, 2001 with an explicit recital that the appointments will take effect from 10th January, 2002, namely, the day when four vacancies were available. Mr. Justice Muhammad Bashir Jehangiri had taken oath as Chief Justice of Pakistan on 7th January, 2002 but he did not make any move for withdrawal of the impugned notification. Had he not endorsed the recommendations and the appointments he would have certainly asked for a back reference or sent his own recommendations or refused to administer the oath of office to the appointees. Another noteworthy circumstance which points to ratification by Mr. Justice Muhammad Bashir Jehangiri of the

appointments made in advance is that on 31st January, 2002 he had presided over the Bench which had heard one of the above-mentioned Constitution Petitions but had not suspended the impugned notification.

32. This brings us to the next common contention that the senior Judges of the Lahore High Court were condemned unheard and even in these petitions notices have not been issued to them. It is rather unnecessary to consider the contention as we have already held that the recommendations of the judicial consultee are not justiciable. Be that as it may, the contention is misconceived. The recommendations in question were manifestation of subjective satisfaction of the judicial consultee, therefore, the principle of natural justice '*audi alteram partem*' was not attracted. Moreover, the contention in essence is identical with contentions No (iv) and (vii) raised in the case of Ghulam Hyder Lakho which read as under:-

“(iv) That the petitioners were de-notified or the appointments were nullified by the Government without hearing them and as such the action of Government nullifying their appointments as Judges of the High Court offended against the principles of natural justice.”

“(vii) That the removal of the petitioners from the office of Judges of the High Court in the above manner amounted to a stigma and as such the petitioners were entitled to be heard.”

The above contentions were held to be devoid of force as is evident from the following observations at page 196 of the judgment: -

“In these circumstances, we are inclined to hold that where the Chief Justice of the High Court concerned and the Chief Justice of Pakistan do not recommend a particular incumbent for confirmation or appointment

as a Judge of the High Court and these recommendations are accepted by the President/ Executive the same cannot be brought under challenge in the Court on the ground that the incumbent was not heard before making such recommendations.”

33. As regards the question of notices we are of the considered view that issuance of notices to the concerned Judges will do more harm than good. This question was considered in the Judges case also and it was clearly held at page 534 of the judgment that the principle of natural justice is not violated if notice is not issued to the concerned Judges. The observations in Asad Ali's case at page 327 of the judgment are also relevant which read as under:-

“It must be borne in mind that Judges of superior Courts by their tradition, maintain high degree of comity amongst themselves. They are not expected to go public on their differences over any issue. They are also not expected to litigate in Courts like ordinary litigant in case of denial of a right connected with their offices. Article VI of the Code of Conduct signed by every judge of the superior Courts also enjoins upon them to avoid as far as possible any litigation on their behalf or on behalf of others. Therefore, in keeping with the high tradition of their office and their exalted image in the public eye, the judges of superior Courts can only express their disapproval, resentment or reservations on an issue either in their judgment or order if the opportunity so arises....”

34. We will now take up the contention urged by the learned counsel for the petitioners against the appointment of Mr. Justice Faqir Muhammad Khokhar who was serving as Secretary, Law, Justice and Human rights Division at the time of his elevation to the Supreme Court. The precise contention is that having not performed

judicial functions as a Judge of the Lahore High Court for a period of five years he was not qualified for appointment as a Judge of the Supreme Court and his appointment was also hit by the cardinal principle of natural justice 'no one should be a judge in his own cause' on account of the pivotal role of the incumbent of the office of Law Secretary in the process of the constitutional appointments. This contention too is without any substance as it is incompatible with the provisions of Article 177 of the Constitution and ignores the law laid down by this Court in Malik Ghulam Jilani v. Mr Justice Muhammad Gul (1978 SCMR 110). With regard to experience, Article 177 of the Constitution only provides that a person shall not be appointed as a Judge of the Supreme Court unless he has been a Judge of a High Court for a period of or for periods aggregating not less than five years and does not prohibit appointment of a Judge of a High Court as a Judge of the Supreme Court who has not worked as a Judge of the High Court for a period of five years. The disqualification set up by the petitioners cannot be read into Article 177 of the Constitution. Mr. Justice Faqir Muhammad Khokhar was appointed as a Judge of the Lahore High Court on 10th December, 1996 and as Secretary Law, Justice and Human Rights Division on 1st January, 2000. Having held the office as a Judge of the Lahore High Court for a period of five years he fulfilled the experience-related constitutional requirement on the eve of his appointment as a Judge of the Supreme Court. Besides, the issue was addressed and settled in the case of Justice Muhammad Gul wherein it was held that contention that a person in order to be qualified for appointment as a Judge of the Supreme Court must have had experience of functioning as a Judge of High Court for five years was not correct. In that case also Mr. Justice Muhammad Gul was Secretary, Ministry of Law and

Parliamentary Affairs, Government of Pakistan at the time of his appointment as a Judge of the Supreme Court and the appointment was challenged through a writ petition under Article 199 of the Constitution on the ground that he did not fulfill the requirement of Article 178(2) of the Interim Constitution, 1972 that a person shall not be appointed as a Judge of the Supreme Court unless he has for a period of or for periods aggregating not less than five years been a Judge of a High Court. The writ petition was dismissed *in limine* by a Division Bench of the Peshawar High Court and the petition for special leave to appeal was dismissed by this Court, *inter alia*, with the following observations: -

“The phraseology of Article 178(2) of the Interim Constitution does not bear out the intent attributed to it by the petitioner. The words used are “he has for a period of, or for periods aggregating not less than five years been a Judge of the High Court’. If the authors of the Constitution had so intended they would have used some other words to indicate that not only has he held the office of a Judge but also functioned or worked as a Judge”.

35. Article 177(2) (a) of the Constitution is *pari materia* with Article 178 (2) (a) of the Interim Constitution, therefore, the ratio of the case of Justice Muhammad Gul is fully applicable to the present case and cannot be termed as a weak precedent as contended by Mr. Hamid Khan. Mr. Justice S.A. Nusrat was also serving as Secretary, Ministry of Law and Parliamentary Affairs when he was elevated to the Supreme Court. We would, therefore, reiterate that appointment of a Judge of a High Court as Secretary Law, Justice and Human Rights Division cannot stand in his way for appointment as a Judge of the Supreme Court if he has been a Judge of the High Court for a

period of or for periods aggregating not less than five years. The period of his service as Secretary, Law Justice and Human Rights Division has to be counted towards his tenure as a Judge of the High Court and not excluded therefrom.

36. It was repeatedly submitted by the learned counsel for the petitioners that the record pertaining to the appointments in question should be made public to enable them to meet the views of the judicial consultee and the appointing authority in regard to the concerned Judges. The insistence was based on the ground that the said record being public record, the petitioners as also the concerned Judges cannot be deprived from its inspection. The submission was opposed by the learned Attorney General and the learned counsel for the Federation. It has already been held that the recommendations culminating in the impugned appointments are not justiciable in the absence of difference of opinion between the President and the Chief Justice of Pakistan. In the face of these findings the issue of inspection of record has become redundant. In any case, we are of the view that apart from the element of confidentiality, making the record of the impugned appointments public would not be in the interest of the institution, the judicial consultee and the concerned Judges for reasons which are too obvious to need elucidation. In the Judges case also the relevant record was made available pursuant to the order of the Court but was not perused even by the members of the Bench. The relevant observations appear at page 369 of the judgment and read as under: -

“The Federal Ministry of Law cooperated and made the record available to be produced in the court on an hour’s notice. We did not feel it necessary to peruse the record.”

The learned Attorney General and the learned counsel for the Federation have advanced sound and convincing reasons in support of the proposition that making the record of appointments public would not be in the interest of the judiciary. Disclosure of such record if adverse to a Judge would indeed block his way for elevation in future. Furthermore, such course of action would not only put a Judge under the vestige of a stigma but also militate against the public interest and shake public confidence in the judiciary.

37. Now two questions remain to be considered. The first question pertains to severability or otherwise of the impugned notification and the second to the collegium of Judges comprising the Chief Justice of India and four senior-most Judges of the Supreme Court which is consulted by the Chief Justice in the process of appointment of Judges of the Supreme Court of India. The first question need not be determined in view of settled proposition that recommendations of the judicial consultee are not justiciable. As regards the second question suffice it to say that the consultative process in vogue in India cannot be adopted in Pakistan as there exists no provision in our Constitution akin to Article 124(2) of the Constitution of India on the strength whereof collegium of Judges has been formed in India. Article 124(2) of the Constitution of India reads as under:-

“(2) Every Judge of the Supreme Court shall be appointed by the President by warrant under his hand and seal after consultation with such of the Judges of the Supreme Court and of the High Courts in the States as the President may deem necessary for the purpose and shall hold office until he attains the age of sixty-five years:

Provided that in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of India shall always be consulted:

Provided further that-

- (a) a Judge may, by writing under his hand addressed to the President, resign his office;
- (b) a Judge may be removed from his office in the manner provided in clause (4)."

It may, however, be observed in passing that a practice has emerged over the years that while making recommendation for appointment of a Judge of the Supreme Court the Chief Justice of Pakistan consults the senior *puisne* Judge, as was done in the present case.

38. In view of the judgment passed by this Court, no order is required to be made in respect of the writ petitions summoned from the Lahore High Court, which may be returned.

39. The above are the reasons in support of the Short Order dated 10th April, 2002 of this Court whereby these petitions were dismissed. The Short Order reads as under: -

"For reasons to be recorded later in the detailed judgment, the above petitions are dismissed."

40. Before parting with the judgment we would like to record our appreciation for the valuable assistance rendered by the learned counsel for the parties and the learned Attorney General for Pakistan and their associates.

C.J.

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Islamabad
April 10, 2002
APPROVED FOR REPORTING