

IN THE SUPREME COURT OF PAKISTAN
(ORIGINAL JURISDICTION)

PRESENT:

MR. JUSTICE TASSADUQ HUSSAIN JILLANI, HCJ
MR. JUSTICE NASIR-UL-MULK
MR. JUSTICE ANWAR ZAHEER JAMALI
MR. JUSTICE ASIF SAEED KHAN KHOSA
MR. JUSTICE EJAZ AFZAL KHAN

CONSTITUTION PETITION NO. 9 OF 2014

(Constitution petition under Article 184 of the Constitution regarding seniority of the Judges of Lahore High Court, Lahore)

Muhammad Aslam Awan, ASC ... Petitioner

VERSUS

Federation of Pakistan and others ... Respondents

For the Petitioner: Mr. Zaka ur Rehman Awan, ASC

On Court Notice: Mr. Salman Aslam Butt, Attorney General
Mr. Taimur Khan, Consultant to Attorney General
Sardar Dilnawaz Cheema, Consultant to Attorney General

Dates of Hearing: 05 & 06.05.2014

ORDER

TASSADUQ HUSSAIN JILLANI, CJ.- The question of *inter se* seniority of High Court Judges has been raised off and on either on the administrative side in the respective High Courts or through representations addressed to the President of Pakistan. Such issues though important for the Judges concerned, yet have a potential to cause some ripple in the comity of Judges and it is imperative that those be resolved in the light of some objective criterion to be laid down by this Court.

2. Leaving the question of seniority to be decided by the President or by the concerned Chief Justice of a High Court without reference to any objective criterion may raise issues of judicial independence which is mandated under the Constitution and is essential in a democracy. Judicial independence both of the

individual Judge and of the Judiciary as an institution is essential so that those who bring their causes / cases before the Judges and the public in general have confidence that their cases would be decided justly and in accordance with law. Judicial independence is one of the foundational values of the Constitution of Islamic Republic of Pakistan which is based on trichotomy of powers in which the functions of each organ of the State have been constitutionally delineated. The very Preamble of the Constitution pledges "*wherein the independence of judiciary shall be fully secured*". The Constitution makers conferred this independence because they wanted the Judges to "*do right to all manner of people, according to law, without fear or favour, affection or ill-will*" (Oath of office of Judges). The fundamental rights guaranteed under the Constitution cannot be secured unless Judiciary is independent because the enforcement of these rights has been left to Judiciary in terms of Articles 184(3) & 199 of the Constitution and the relevant law. Judiciary has not been made part of the Executive or the Legislature (Article 7). The separation of Judiciary from the Executive was made a Constitutional mandate (Article 175(3)). So jealously this independence has been guarded that even in the appointment of Judges (Article 175A) and in their removal (Article 209) the primacy is that of the Judiciary. The Judicial Commission is headed by the Chief Justice of Pakistan and its Members comprise of four senior most Judges of the Supreme Court, a former Chief Justice or Judge of the Supreme Court, Chief Justices and senior puisne Judges of the respective High Courts (if the appointment is that of the Judge of the High Court), Minister for Law and Attorney General for Pakistan as also representative of

the Bar. The recommendations made by the Judicial Commission are sent to the Parliamentary Committee which is to decide within 14 days, failing which the recommendations made by the Judicial Commission are deemed to have been affirmed. The primacy in the entire process of appointment of Judges is still with the Judiciary. The Court through this judgment in laying down a criterion / guideline to determine the *inter se* seniority of the Judges of the High Courts has partly been influenced to protect and preserve this seminal Constitutional value.

3. The questions raised in this petition are two fold: (i) From which date the *inter se* seniority of Judges of the High Court appointed under Article 193 of the Constitution vide the same order and date be reckoned i.e. from the date of their appointment as Additional Judges under Article 197 or from the date they are appointed as Judges under Article 193 of the Constitution, and (ii) what should be the criterion to determine the *inter se* seniority of Judges appointed the same day and vide the same order both from the Bar and District Judiciary? These questions have been raised in the following set of circumstances:

On 14.9.2009, the President of Pakistan in exercise of his powers under Article 197 of the Constitution of Islamic Republic of Pakistan appointed following 12 Additional Judges of the Lahore High Court "*for a period of one year, with effect from the date they take oath of their offices*":

1. Mr. Justice Syed Mansoor Ali Shah
2. Mr. Justice Sh. Najam ul Hassan
3. Mr. Justice Manzoor Ahmad Malik
4. Mr. Justice Asad Munir
5. Mr. Justice Ijaz ul Ahsan
6. Mr. Justice Hafiz Abdul Rehman Ansari
7. Mr. Justice Sardar Tariq Masood
8. Mr. Justice Tariq Javaid

9. Mr. Justice Nasir Saeed Sheikh
10. Mr. Justice Mansoor Akbar Kokab
11. Mr. Justice Kh. Imtiaz Ahmad
12. Mr. Justice Sagheer Ahmad Qadri

4. On 17.2.2010 yet another notification was issued with regard to the appointment of 22 Additional Judges under Article 197 of the Constitution *"for a period of one year"* with effect from the date they took oath of their offices. Their names are:-

1. Mr. Justice Mian Shahid Iqbal
2. Mr. Justice M. Farrukh Irfan Khan
3. Mr. Justice Mamoon Rashid Shaikh
4. Mr. Justice Shaukat Umar Pirzada
5. Mr. Justice Waqar Hassan Mir
6. Mr. Justice Yawar Ali Khan
7. Mr. Justice Muhammad Khalid Mahmood
8. Mr. Justice Ch. Shahid Saeed
9. Mr. Justice M. Anwar Bhour
10. Mr. Justice Ijaz Ahmad
11. Mr. Justice Sardar Muhammad Shamim Khan
12. Mr. Justice Hassan Raza Pasha
13. Mr. Justice Syed Mazahar Ali Akbar Naqvi
14. Mr. Justice Muhammad Anwar ul Haq
15. Mr. Justice Muhammad Qasim Khan
16. Mr. Justice Shahid Hameed Dar
17. Mr. Justice Ch. Muhammad Tariq
18. Mr. Justice Mazhar Iqbal Sidhu
19. Mr. Justice Rauf Ahmad Shaikh
20. Mr. Justice Shaikh Ahmad Farooq
21. Mr. Justice Muhammad Naseem Akhtar
22. Mr. Justice Syed Akhlaq Ahmad

5. The President vide the notification dated 17.2.2011 under Article 197 of the Constitution, extended the period of following 18 out of 34 Additional Judges (appointed vide the notifications referred to above) as Additional Judges *"for a period of one year with effect from the date their present term expires"*:

1. Mr. Justice Sagheer Ahmad Qadri
2. Mr. Justice Nasir Saeed Sheikh
3. Mr. Justice Sh. Najam ul Hassan
4. Mr. Justice Kh. Imtiaz Ahmad
5. Mr. Justice Manzoor Ahmad Malik
6. Mr. Justice Sardar Tariq Masood
7. Mr. Justice Ijaz ul Ahsan
8. Mr. Justice Syed Mansoor Ali Shah
9. Mr. Justice Sheikh Ahmad Farooq
10. Mr. Justice Ch. Shahid Saeed

11. Mr. Justice Rauf Ahmad Shaikh
12. Mr. Justice Ijaz Ahmad
13. Mr. Justice Muhammad Khalid Mehmood Khan
14. Mr. Justice Shahid Hameed Dar
15. Mr. Justice Muhammad Anwaarul Haq
16. Mr. Justice Sardar Muhammad Shamim Khan
17. Mr. Justice Muhammad Qasim Khan
18. Mr. Justice Mazhar Iqbal Sidhu

6. Out of the afore-mentioned 18 Judges, 15 were appointed as Judges under Article 193 of the Constitution vide the notification dated 11.5.2011 on the recommendation of Judicial Commission, who are as follows:-

1. Mr. Justice Nasir Saeed Sheikh
2. Mr. Justice Sh. Najam ul Hassan
3. Mr. Justice Manzoor Ahmad Malik
4. Mr. Justice Sardar Tariq Masood
5. Mr. Justice Ijaz ul Ahsan
6. Mr. Justice Syed Mansoor Ali Shah
7. Mr. Justice Sheikh Ahmad Farooq
8. Mr. Justice Ch. Shahid Saeed
9. Mr. Justice Rauf Ahmad Shaikh
10. Mr. Justice Ijaz Ahmad
11. Mr. Justice Muhammad Khalid Mehmood Khan
12. Mr. Justice Shahid Hameed Dar
13. Mr. Justice Muhammad Anwaarul Haq
14. Mr. Justice Sardar Muhammad Shamim Khan
15. Mr. Justice Mazhar Iqbal Sidhu

7. On 25.8.2011 the President (on the recommendation of the Judicial Commission and Parliamentary Committee) appointed another three Additional Judges as Judges of the High Court under Article 193 of the Constitution with effect from the date they make oath of their offices and they took oath on 5.9.2011. Those are:-

1. Mr. Justice Sagheer Ahmad Qadri
2. Mr. Justice Kh. Imtiaz Ahmad
3. Mr. Justice Muhammad Qasim Khan

8. On 2.12.2013, the Hon'ble Senior Puisne Judge of the Lahore High Court Mr. Justice Nasir Saeed Sheikh requested the Hon'ble Chief Justice of the Lahore High Court that the *inter se* seniority of the Judges appointed under Article 193 of the

Constitution be determined in conformity with the law laid down by this Court and, thereafter, the Administration Committee of the High Court be reconstituted. The Administration Committee was reconstituted on 14.12.2013.

9. Learned counsel for the petitioner contended that the notification dated 14.12.2013 wherein the Administration Committee was reconstituted is violative of the Constitution and the law laid down by this Court in Nadeem Ahmed vs. Federation of Pakistan (2013 SCMR 1062) and Federation of Pakistan through Secretary, Ministry of Law and Parliamentary Affairs and Justice Vs. Sindh High Court Bar Association through President (PLD 2012 SC 1067); that the *inter se* seniority of the Judges had to be determined by the Chief Justice; that it's a long standing practice of the High Court that the Judges whose appointments are made by a single order take seniority according to age; that an Additional Judge appointed under Article 197 of the Constitution is a specie apart; that if he is made permanent, a fresh appointment order is made under Article 193 of the Constitution and his service as Additional Judge cannot be counted towards his seniority; that the *inter se* seniority has to be reckoned from the date when an Additional Judge is made permanent Judge of the High Court under Article 193 of the Constitution. He contended that when a person is appointed as Judge of the High Court under Article 193 of the Constitution, he has to take fresh oath and, therefore, it is a fresh appointment. He referred to Article 255(3) of the Constitution to contend that it has specifically been provided that "*where, under the Constitution, a person is required to make an oath before he enters upon an office, he shall be deemed to have entered upon the*

office on the day on which he makes the oath". The effect of the afore-referred provision, according to learned counsel, is that it is only the day a person becomes a Judge under Article 193 of the Constitution when he can be considered as a permanent Judge and, therefore, the *inter se* seniority has to be reckoned from the said date.

ATTORNEY GENERAL FOR PAKISTAN

10. Learned Attorney General for Pakistan traced the history of appointment of Additional Judges in India which dates back to East India (High Courts of Judicature) Act, 1861, under which the Judges of the High Courts were appointed by Her Majesty and held office during Her Majesty's pleasure; that there was a provision of appointing an Acting Judge in absence of a permanent Judge who was to perform the duties until the return of the said Judge or until the Governor General cancels the appointment of the Acting Judge. This arrangement continued till the Government of India Act, 1935, when the expression 'Additional Judges' was used for the first time in Section 222 of the Act and that appointment was to be made when the office of any Judge was vacant and the Judges so appointed were for a period "*not exceeding two years*" as the case may be. In India the Constitution was promulgated in 1950, Article 217 of which empowered the President to appoint a Judge of the High Court and there was no mention of Additional or Acting Judge. Under Article 224 of the said Constitution, however, the Chief Justice of a High Court with the consent of the President could request any person who had held the office of a Judge of the High Court '*to sit and act as a Judge of the High Court for that State*'. In 1956, Article 224

was amended and it was provided that *"if by reason of any temporary increase in the business of a High Court or by reason of arrears of work therein, it appears to the President that the number of the Judges of that Court should be for the time being increased, the President may appoint duly qualified persons to be additional Judges of the Court for such period not exceeding two years as he may specify."* In India, now, every Additional Judge becomes permanent when vacancy occurs. The first Constitution of Pakistan was promulgated in 1956, Article 165 of which provided for the appointment of a Judge of the High Court. On 18.11.1958 by virtue of Presidential Order No. 3 (The Courts (Additional Judges) Order, 1958) issued by General Muhammad Ayub Khan it was stipulated that *"if by reason of any temporary increase in the business of the Supreme Court or of a High Court or by reason of arrears of work in any such Court it appears to the President that the number of the Judges of the court should be for the time being increased, the President may appoint persons duly qualified for appointment as Judges to be additional Judges of the Court for such period not exceeding two years as he may specify."* The mode of appointment of Additional Judge became *pari materia* with Article 224 of the Indian Constitution. In 1962, the second Constitution was promulgated, Article 96 of which codified in pith and substance what was provided in Presidential Order No. 3 of 1958 regarding mode of appointment of Additional Judge of the High Court. In 1973, the Constitution of Pakistan which is in vogue today was promulgated. However, Article 193 regarding the mode of appointment of Chief Justice and Judges of the High Court was amended and it was laid down that the President shall appoint

these Judges in accordance with Article 175A of the Constitution. After such an appointment, oath is administered to such an appointee in terms of Article 194 which mandates that "*before entering upon office, the Chief Justice of a High Court shall make before the Governor, and any other Judge of the Court shall make before the Chief Justice, oath in the form set out in the Third Schedule*". Learned Attorney General submitted that Article 194 makes no difference between an Additional Judge and a permanent Judge. In support of his submission that the Constitution does not make a difference between the two offices, he referred to (i) Article 160, (ii) Article 177(2)(a), (iii) the wording of oath of office, and (iv) the mode of appointment provided in terms of Article 175A of the Constitution.

11. Learned Attorney General for Pakistan cited the case of appointment of Mr. Justice Faqir Muhammad Khokhar, Hon'ble former Judge, as Judge of the Supreme Court which appointment was challenged before this Court Supreme Court Bar Association Vs. Federation of Pakistan (PLD 2002 SC 939) to submit that in the said case the petitioner / President of the Supreme Court Bar Association had challenged the appointment *inter alia* on the ground that he had not completed five years of service as Judge of the High Court to be eligible for appointment to the Supreme Court but this Court while computing the requisite service of five years as Judge of the High Court included the period he served as Additional Judge.

12. Learned Attorney General referred to many precedents in the Lahore High Court in which the seniority of Judges went along with their appointment as Additional Judges. He contended

that a Judge of the High Court enters the office from the day he makes oath as Judge of the said Court as Additional Judge. This Constitutional intent is evident from Article 194 of the Constitution which provides as under:-

"194. Before entering upon office, the Chief Justice of a High Court shall make before the Governor, and any other Judge of the Court shall make before the Chief Justice, oath in the form set out in the Third Schedule."

13. This intent is further reinforced in Article 255(3) of the Constitution which reads as follows:-

"where, under the Constitution, a person is required to make an oath before he enters upon an office, he shall be deemed to have entered upon the office on the day on which he makes the oath"

14. Similar is the import, according to him, of Article 275(4) of the Constitution. In support of the submissions made, learned Attorney General relied on Begum Tahira Sultan in Re: (1989 MLD 4701), para 2 & 3 of which reads as follow:-

2. I requested the immediate presence of Mr. Abdul Hafeez Memon, the Advocate-General of Sindh, because although I could not expect him to argue the question at such short notice I wanted a clear statement on behalf of the Government whether it was their stand that this Court continues to exist or not. He assured me in categorical terms on behalf of the Government of Sindh, that Government regarded this Court as a continuing body with all the powers and functions that it had so far enjoyed and performed. In this view of the matter Mr. Niamat Ullah Molvi agreed to file another application expressly challenging our jurisdiction and it was agreed that the question would be argued today as it has been done.

3. Today Mr. Molvi has filed an application in which it is expressly stated that this Court has no jurisdiction to take up any matter unless a fresh oath is taken by the Court, by which I suppose he meant the judges of this Court, on the ground that the Constitution of 1972 stood repealed as on 10-4-1973 the date of its enactment. Without prejudice to this contention, it was also urged in the application that the Constitution of 1973 had already come into force and that we could not function unless we took oath under that Constitution. So far as the last question is concerned it is easily dealt with because, even assuming that the Constitution of 1973 has come into force Article 275 of that Constitution expressly continues in office the Chief Justice and other Judges of the High Courts and sub-Article (4) of that Article does not require that an oath be taken before any

functions are performed by such an official but only that he shall take as soon as is practicable after the commencing date, the prescribed oath. It is to be noted that in the Constitution of 1973, as in the Constitution of the 1972, certain functionaries enter upon their office only after taking an oath but that both these Constitutions provided in respect of such persons as were already in office that they would continue to be in office and that they would take oath as soon as was practicable. In point of fact even when the 1972 Constitution came into force, the Judges of this Court including myself, did not take the oath upon the commencing date but a few days later."

15. In support of the above contention, he relied upon yet another judgment in Hira Singh and others Vs. Jai Singh etc (AIR 1937 Allahabad 588).

16. He also referred to Muhammad Siddique Ahmed Khan vs. Pakistan Railways (1997 SCMR 1514) to contend that even in civil service, the seniority in grade of an officer is with effect from his continuous officiation in that grade and not from his confirmation. At page 1520 of the judgment, this Court observed as follows:-

"It is settled position of law that seniority in a grade will be accorded to an officer with effect from the date of his continuous officiation in that grade and not from the date of his confirmation. Similar view was taken in the case Araab Mukhtar Ahmed v. Secretary to Government of Pakistan, Establishments Division, Rawalpindi (1983 PLC (C.S.) 104). Learned counsel for the appellants Engineering Officers' Association and others v. State Maharashtra and others (AIR 1990 SC 1607), (sic) where it was observed by the Supreme Court of India that once an incumbent is appointed to a post, his seniority has to be counted from the date of his appointment and not from the date of confirmation. It was also observed that where an appointment is not made by following the procedure laid down by the rules but the appointee continues in the post uninterruptedly till the regularization of his service in accordance with the rules, the period of officiating service will be counted."

17. He also referred to the Indian judgment reported at The Director Recruits Class-II Engineering Officers Association and others Vs. State of Maharashtra and others (AIR 1990 SC 1607) wherein the seniority of a civil servant was counted from the date

of his appointment and not from the date of his confirmation, relevant portion of the judgment is as under:-

"44. To sum up, we hold that:

(A) Once an incumbent is appointed to a post according to rule, his seniority has to be counted from the date of his appointment and not according to the date of his confirmation. The corollary of the above rule is that where the initial appointment is only ad hoc and not according to rules and made as a stop-gap arrangement, the officiation in such post cannot be taken into account for considering the seniority.

(B) If the initial appointment is not made by following the procedure laid down by the rules but the appointee continues in the post uninterruptedly till the regularisation of his service in accordance with the rules, the period of officiating service will be counted.

18. He also relied on Al-Jehad Trust Vs. Federation of Pakistan (PLD 1996 SC 324) wherein this Court dilated upon the distinguishing feature of the appointment of Judges in the High Court made under the Indian Constitution and appointment of Additional Judges of the High Court in Pakistan, wherein at page 506, it was held as follows:-

"It will not be out of context to mention that the above provision was lifted from clause (1) of Article 224 of the Indian Constitution, 1950, which reads as follows:-

"224. Appointment of-additional and acting Judges.---(1) If by reason of any temporary increase in the business of a High Court or by reason of arrears of work therein, it appears to the President that-the number of the Judges of that Court should be for the time being increased, the President may appoint duly qualified persons to be additional Judges of the Court for such period not exceeding two years as he may specify."

At this juncture, it may be pertinent to mention that in 1956 Constitution, there was no provision for appointment of Additional Judges in view of above speech of Quaid-e-Azam made by him in 1931 in the aforesaid Sub-Committee deprecating the practice of appointing Additional Judges. But in 1958, the then President Ayub Khan issued the above President Order. Article 96 was incorporated in 1962 Constitution for appointment of Additional Judges even against permanent vacancies. This provision has been lifted

in 1972 Interim Constitution and 1973 Permanent Constitution.

It may be noticed that under the above President Order of 1958 and under clause (1) of Article 224 of the Indian Constitution, an Additional Judge could be appointed in the following, two contingencies: --

(i) temporary increase in the business of a High Court; and

(ii) temporary increase in arrears of work.

Whereas under Article 197 of the Constitution, an Additional Judge can be appointed against a permanent vacancy or when a High Court Judge is absent or is unable to perform the functions of his office due to any other cause or for any reason it is necessary to increase the number of Judges of a High Court. In other words, under Article 224(I) of the Indian Constitution, the appointment of an Additional Judge is purely temporary to achieve the above two objects, whereas under our Constitution, though the appointment of an Additional Judge is to be made for a period not exceeding two years but an Additional Judge can be appointed against a permanent vacancy. This makes a lot of difference.

I may observe that the parity of reasoning for not appointing an Acting Chief Justice or an Acting Judge in the Supreme Court against, permanent vacancies for a long period is equally applicable to an appointment of an Additional Judge in the High Court against a permanent vacancy. However, I may point out that a practice/convention has developed in Pakistan that in the High Courts Judges are first appointed as Additional Judges; either for a period of one year initially and then this period is extended to two years or they are initially appointed for a period of two years (during 1977 Martial Law this period was extended to three years) and then they are appointed as permanent Judges. Since there was no provision in the late Pakistan Constitution of 1956, which remained operative for a short period, for appointment of Additional Judges, in those days Judges in the High Courts initially were appointed permanently." (Emphasis is supplied)

19. He added that even in India when an Additional Judge of the High Court is appointed as Judge / (permanent) Judge his seniority is reckoned from the date of his initial appointment as an Additional Judge. He relied on Shanti Bhushan and another Vs. Union of India (AIR 2008 SC (Supp) 895) wherein at page 904 it is observed as under:-

"10. It is to be noted that an Additional Judge cannot be said to be on probation for the purpose of appointment as a Permanent Judge. This position is clear from the fact that when an Additional Judge is appointed there may not be

vacancy for a Permanent Judge. The moment a vacancy arises, the Chief Justice of the concerned High Court is required to send a proposal for appointment of the Additional Judge as Permanent Judge along with material as indicated in para 13. The rigour of the scrutiny and the process of selection initially as an Additional Judge and a Permanent Judge are not different. The yardsticks are the same. Whether a person is appointed as an Additional Judge or a Permanent Judge on the same date, he has to satisfy the high standards expected to be maintained as a Judge. Additionally, on being made permanent, the effect of such permanency relates back to the date of initial appointment as an Additional Judge. The parameters of paragraph 12 of the memorandum cannot be transported in its entirety to paragraph 13. To being with, while making the recommendations for appointment of an Additional Judge as a permanent Judge, Chief Justice of the High Court is not required to consult the collegium of the High Court. (Emphasis is supplied)

20. On being asked by this Court, learned Attorney General submitted that ever since the creation of this country, the practice is that the seniority of Judges of the High Courts is reckoned from the date of their initial appointment as Additional Judges. He cited the example of late former Chief Justice of Pakistan Mr. Justice Anwar ul Haq who was appointed as Additional Judge of the West Pakistan High Court on 24.10.1959 and was made a Judge / permanent Judge on 24.10.1962. As against this, two Hon'ble Judges of the High Court Mr. Justice Moulvi Mushtaq Hussain and Mr. Justice Sardar Muhammad Iqbal were directly appointed as Judges of the High Court on 1.10.1962 which is before Mr. Justice Anwar ul Haq was made a Judge / permanent Judge (i.e. 24.10.1962) but he always ranked senior to the former Judges. He added that he did not find any contrary practice in this regard. This practice, he further contended, has become almost a Constitutional convention and it has to be considered accordingly. In this regard he referred to a judgment of this Court reported at Malik Asad Ali and others Vs. Federation of Pakistan (PLD 1998 SC 161).

21. He also referred to another judgment of this Court reported at Federation of Pakistan Vs. Sindh High Court Bar Association (PLD 2012 SC 1067) wherein this Court reiterated the view that the seniority of Judges shall be reckoned from the date of their initial appointment.

22. In the case regarding pensionary benefits of the Judges of Superior Courts (PLD 2013 SC 829), this Court candidly held that an Additional Judge is covered under the definition of a Judge and, therefore, entitled to pension similarly as Judge of the High Court. In para 84, the Court observed as under:-

"84. The submissions made by some of the learned Advocate Supreme Courts that "Additional Judges" of the High Court, being covered with the definition of "Judge" as defined under Article 260(1)(c) of the Constitution, are equally entitled for right to pension like permanent judges of the High Court, have much force as at one place the definition of 'Judge' in the above referred Article of the Constitution clearly defines that in relation to the High Court, a person who is an Additional Judge of the High Court, is also included in the definition of a Judge and at the other place under Article 197 of the Constitution, relating to appointment of Additional Judges also, no discrimination is identified for the purpose of holding them disentitled for right to pension like any permanent judge of the High Court, who, in terms of Article 195 of the Constitution, will retire on attaining the age of 62 years, unless he resigns sooner or removed from the office in accordance with the Constitution. It will be also pertinent to mention here that under paragraph-2 of the President's Order 3 of 1997, "Additional Judge" and "Judge" of the High Court have been separately defined as under:-

"2(c) "Additional Judge" means a Judge appointed by the President to be an Additional Judge."

"2(f) "Judge" means a Judge of High Court and include the Chief Justice, and Acting Chief Justice and an Additional Judge."

From the reading of above two definitions, again it is clear that definition of a Judge of the High Court also includes additional judge, therefore, no exception could be taken in determination of his right to pension for the reason that he has not yet been appointed as permanent judge of the High Court in terms of Article 193 of the Constitution. Another added reason in support of this conclusion emerges from the combined reading of paragraph-2 of the Fifth Schedule to Article 205 of the Constitution, speaking about "every judge", and the definitions of

"judge" under Article 260(1)(c)(b) of the Constitution and paragraph-2(f) of President's Order 3 of 1997, which leave no room for exclusion of "Additional Judge" from the category of "every judge" within the meaning of paragraph-2 (ibid). However, it is necessary to state and clarify here that in such eventuality, for claiming right to pension a retired judge of the High Court "additional judge" will also have to have minimum five years actual service to this credit."

23. On Court query, learned Attorney General informed that none of the Judges of the Lahore High Court whose seniority is a point in issue in this case has filed any representation qua his seniority.

24. Mr. Zakar ur Rehman Awan, petitioner's learned counsel in his right of reply submitted that the practice of treating seniority of Judges from the date they were appointed as Additional Judges is not a Constitutional / legal convention and, therefore, cannot be sanctified by this Court, because of following reasons:-

- "1. While the practice under question may no doubt have been consistently followed over a long period of time, it is well-settled that mere practice cannot automatically acquire the status of "Constitutional convention" unless some other requirements are met.*
- 2. It cannot truly be said that the Chief Justice acts deliberately when he treats a Judge's date of appointment as Additional Judge to be the starting point for purposes of determining inter se seniority of High Court Judges. There may in fact be no element of "deliberation" at all in his determination.*
- 3. Additionally, given the fact that neither the Constitution has fixed any rules for determination of inter se seniority of High Court Judges, nor the legislature has sought to lay down criteria for the same, it cannot be said that the Chief Justice acts "in accordance to a rule" when he endeavours to make such a determination. As has already been established, the existence of "obligations" and "rules" lies at the very heart of determining whether or not a practice is in fact a "Constitutional convention".*
- 4. Even if the Chief Justice, in fixing inter se seniority in the manner that he does, feels bound by a rule not laid down by the Constitution or the legislature, but by general principles of equity, there must be some good reason behind the rule. In other words, there must be some good reason that compels the Chief Justice to*

treat the date of appointment as Additional Judge to be the starting point for purposes of determining inter se seniority of High Court Judges, rather than the date of appointment as (permanent) Judge. If there is no good reason at all, then the practice in question is merely an anomalous/erroneous application of a mistaken 'rule', not worthy of being deemed a "Constitutional convention".

25. We have heard learned counsel for the petitioner and learned Attorney General for Pakistan.

26. The question *inter alia* as to from which date the seniority of a Judge appointed under Article 193 of the Constitution of Islamic Republic of Pakistan should be reckoned i.e. from the date of his initial appointment as Additional Judge under Article 197 of the Constitution or from the date of his appointment under Article 193 of the Constitution, would of necessity require reference to both these provisions, which are as under:-

"193. [(1) *The Chief Justice and each of other Judges of a High Court shall be appointed by the President in accordance with Article 175A.*]

(2) *A person shall not be appointed a Judge of a High Court unless he is a citizen of Pakistan, is not less than [forty-five] years of age, and---*

(a) *he has for a period of, or for periods aggregating, not less than ten years been an advocate of a High Court (including a High Court which existed in Pakistan at any time before the commencing day); or*

(b) *he is, and has for a period of not less than ten years been, a member of a civil service prescribed by law for the purposes of this paragraph, and has, for a period of not less than three years, served as or exercised the functions of a District Judge in Pakistan; or*

(c) *he has, for a period of not less than ten years, held a*

197. – At any time when---

(a) *the office of a Judge of a High Court is vacant; or*

(b) *a Judge of a High Court is absent or is unable to perform the functions of his office due to any other cause; or*

(c) *for any reason it is necessary to increase the number of Judges of a High Court, the President may, in the manner provided in clause (1) of Article 193, appoint a person qualified for appointment as a Judge of the High Court to be Additional Judge of the Court for such period as the President may determine, being a period not exceeding such period, if any, as may be prescribed by law."*

judicial office in Pakistan.

Explanation.- *In computing the period during which a person has been an advocate of a High Court or held judicial office, there shall be included any period during which he has held judicial office after he became an advocate or, as the case may be, the period during which he has been an advocate after having held judicial office.*

(3) *In this Article, "District Judge" means Judge of a principal civil court of original jurisdiction.*

27. The qualification for a person to be appointed as Additional Judge is the same as provided under Article 193 of the Constitution because Article 197 provides that *"the President may, in the manner provided in clause (1) of Article 193, appoint a person qualified for appointment as a Judge of the High Court to be Additional Judge of the Court for such period as the President may determine, being a period not exceeding such period, if any, as may be prescribed by law."* As defined under Article 260(1)(c) of the Constitution, a 'Judge' in relation to a High Court includes the Chief Justice of the Court and also *"a person who is an Additional Judge of the Court"*. A similar oath is prescribed for both the offices in terms of Article 194 of the Constitution and both are *"deemed to have entered upon the office"* on the day on which they make the oath (Article 255(3)). Thus when an Additional Judge enters upon the office having taken oath in terms of Article 194 of the Constitution and is later appointed as a Judge (under Article 193), his service in the office continues, there is no break in service and, therefore, the period spent as Additional Judge has to be counted towards his seniority while computing the period of service of a permanent Judge in the High Court. This is also evident from

Article 177(2)(a) of the Constitution relatable to the appointment of a Judge of the Supreme Court, which provides as follows:-

"177(2) A person shall not be appointed 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)" (Emphasis is supplied)

28. The expression used in Article 177(2)(a) "*for periods aggregating, not less than five years been a judge of a High Court*" indicates that both the periods i.e. as Additional Judge and as Judge have to be counted for the requisite qualifying period of five years. It was precisely for this reason that this Court in the case of a challenge to the appointment of Mr. Justice Muhammad Gul as Judge of the Supreme Court on the ground that he had not completed the requisite service of five years as Judge of the High Court in Ghulam Jillani Vs. Mr. Justice Muhammad Gul (1978 SCMR 110) held as under:-

"Mr. Justice Muhammad Gul was thus appointed a Judge of the High Court of Pakistan more than five years before his elevation to this Court which fulfilled the requirement of Article 178(2) (a) but the petitioner contended that it was necessary that he should have functioned as a Judge of the High Court for five years. In his opinion mere appointment as a Judge did not achieve the object underlying Article 178(2) (a) viz., experience of functioning as a Judge for five years which would equip sufficiently a Judge of the High Court to be considered for elevation to the Supreme Court.

The phraseology of Article 178(2) (a) 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."

29. This view has been reiterated in a later judgment reported at Supreme Court Bar Association Vs. Federation of

Pakistan (PLD 2002 SC 939) when the question of appointment of Mr. Justice Faqir Muhammad Khokhar as Judge of the Supreme Court was raised before this Court and the Court held as follows:-

"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."

Somewhat similar principle was laid in Hira Singh and others Vs. Jai Singh etc (AIR 1937 Allahabad 588) wherein at page 590 it is held as follows:-

"4. All that Section 220(4) requires is that every person appointed to be a Judge of a High Court shall, before he enters upon his office, make and subscribe before the Governor or some other person appointed by him an oath according to the form prescribed. The oath is necessary before entering upon his office as a Judge. As already pointed out, Bajpai, J. entered upon his office as a Judge of this Court long ago and took the oath which was then prescribed under Clause 3 of our Letters Patent. The mere fact that he has now been made a permanent Judge does not mean that he "enters upon his office" as a Judge of this Court afresh, necessitating a fresh oath which is required for a person who enters upon his office for the first time. If this were not the correct interpretation, then the result would be that every time that an additional Judge's term is extended, he would have to take a fresh oath. This is contrary to the established practice of this Court. It may also be pointed out that under Section 223 of the Act the powers of the Judges of a High Court in relation to the administration of justice in this Court are the same as immediately before the commencement of Part 3 of this Act." (Emphasis is supplied)

30. In Federation of Pakistan Vs. Sindh High Court Bar Association (PLD 2012 SC 1067), this Court held that notification for appointment as permanent Judge of the High Court shall have effect from an earlier date when four other Judges were notified.

The Court observed as follows:-

"Referring to the arguments of Mr. Makhdoom Ali Khan, Senior Advocate Supreme Court, we may further add here that it is well recognized and settled principle of legal jurisprudence that if an illegal action/wrong is struck down by the Court, as a consequence, it is also to be ensured that no undue harm is caused to any individual due to such illegality/wrong or as a result of delay in the redress of his grievance. It is for this reason that in number of judgments of the apex Court, out of which two have been referred to above, in service matters, concept of reinstatement into service with original seniority and back benefits has been developed and followed on case to case basis to give complete relief to an aggrieved party. Following the same equitable principle, while passing our short order, we have specifically mentioned that the issuance of notification for permanent appointment of the two Judges shall have its

effect from 17-9-2011 when four other recommended of the Commission in the same batch were notified after clearance by the Committee, so that they shall have their respective seniority and all other benefits as permanent judges of the High Court.” (Emphasis is supplied)

31. Similarly in Application by Abdul Rehman Farooq Pirzada regarding pensionary benefits of the Judges of Superior Courts from the date of their respective retirements, irrespective of their length of service as such Judges (PLD 2013 SC 829), this Court granted equal pensionary benefits to Additional Judges as it found no difference between the two as defined in Article 260(1)(c)(b) of the Constitution. We find that even in service matters, while considering the seniority of civil servants, the seniority is reckoned from the date of initial appointment and not from the date of confirmation or regularization.

32. There is force in the argument of learned Attorney General that ever since the creation of this country, the practice has been to reckon the seniority from the date of initial appointment as Additional Judge of the High Court. The appointment of Mr. Justice Anwar ul Haq, the former Chief Justice of Pakistan is a case in point. He was appointed as an Additional Judge of the West Pakistan High Court on 24.10.1959 and was made a permanent Judge on 24.10.1962 whereas the other two Judges of the same Court namely Mr. Justice Moulvi Mushtaq Hussain and Mr. Justice Sardar Muhammad Iqbal were appointed as permanent Judges directly on 1.10.1962 which is prior to the date when Mr. Justice Anwar ul Haq was made permanent i.e. on 24.10.1962. However, he always ranked senior to both of them. He confirmed on Court query that there is no contrary precedent. No wonder, learned Attorney General further confirms, that none of

the Judges whose seniority is a point in issue in the instant case of the Lahore High Court has made any representation with regard to their seniority as Judge, which presently has been determined from the date of their initial appointment as Additional Judges of the Lahore High Court. In the history of the Lahore High Court (<http://courtsofpakistan.wordpress.com/all-courts-of-pakistan/lahore-high-court-history>), it is recorded that:-

“On 10th February 1985, the Administration Committee of the High Court considered the recommendations of a Sub-Committee appointed to look into the question of inter se seniority of the Judges of the High Court and decided (i) that Judge who was younger in age, when the appointment was made in the same batch, whether from the Bar or from the Service; (ii) that if two or more Judges were appointed from the Service in the same batch, they would retain their Service seniority as existing on the day of their appointment and, (iii) that if two or more Judges were appointed from the Bar and from the Service in the same batch, then the junior Judge from the Service would rank after the senior Judge from the service, even though he may be older in age to any Judge appointed from the Bar.

In 1985, one of the Judges who had come in the batch in November, 1981, and had claimed seniority over three others, attempted to settle his account vis-a-vis another brother Judge by seating himself as the senior Judge. This resulted in an unhappy situation, on coming to know of it, the Chief Justice, Mr. Justice Javed Iqbal, hurriedly convened a meeting of the Administration Committee on 10th February, 1985, where the above decision regarding seniority was taken. This decision required confirmation of the Full Court. Apprehending unpleasantness at the meeting that would be held for the purpose, it was decided that views of all the Judges be obtained by circulation. On receipt of the views, the Chief Justice referred the matter to the Law Ministry. The Ministry took it to the President, who was the appointing authority for the High Court Judges. It was directed by the President that an equitable principle consistently adopted in regard to inter se seniority of Judges, appointed by a single order, was that service Judges appointed with that of candidates from the Bar, the Service Judges should retain their existing seniority in the Department, regardless of their age, which of course would be determining factor in respect of their seniority vis-a-vis candidates from the Bar. While conveying this directive of the President to the High Court, vide letter No. 12(5)/86-All, dated 20th April, 1987, the Ministry asked the High Court to revise its seniority list accordingly and send the revised list to the Ministry for onward transmission to the President's Secretariat (Public), but this was never done and the further batch of Judges that came in July, 1983, march, 1984, and October 1988, had some complaints and though all the Judges aggrieved by

their incorrect rankings attempted to secure justice, all the Chief Justices, one after the other, felt paralysed and avoided to take a decision. The oldest High Court in the country could not find a Chief Justice brave enough to implement the President's letter, or have the matter solved one way or the other.

The above President's ruling is clear that Judges who come in one batch, should first be ranked in order of seniority by age. The next question as to how a Service Judge who is junior in age to another Service Judge, but otherwise senior to him in Service, is to be placed, has not been clearly stated is the senior Service Judge to be taken out of his normal place and placed one position ahead of the junior Service Judge, or the junior Service Judge to be taken out of his normal place and placed one position below the senior Service Judge. Till this is answered, the difficulty will remain."

33. However, notwithstanding the disconcerting episode referred to above in the history of the Lahore High Court, the fact remained that by and large in all the High Courts of Pakistan the *inter se* seniority of Judges of the High Courts was determined with reference to the order / date of their initial appointment as Additional Judges under Article 197 of the Constitution. On a query from this Court, the Registrar of the Lahore High Court intimated that vide notification dated 4.8.1994, following 20 persons were appointed as Additional Judges of the Lahore High Court under Article 197 of the Constitution, which incidently included the author:-

1. *Ch. Khurshid Ahmad
Advocate, Faisalabad.*
2. *Raja Abdul Aziz Bhatti,
Advocate, Rawalpindi*
3. *Rao Naeem Hashim Khan
Advocate, Sahiwal*
4. *Miss Fakhar-un-Nisa Begum
Advocate, Multan*
5. *Mr. Arif Iqbal Bhatti
Advocate, Lahore*
6. *Mr. Amir Alam Khan*

President, Lahore High Court Bar Association, Lahore

7. *Mr. Tassaduq Hussain Jillani
Addl. Advocate General Punjab,
Multan*
8. *Miss Talat Yaqub
Advocate Lahore*
9. *Mr. Mohammad Asif Jan
Advocate, Lahore*
10. *Mr. Sharif Hussain Bokhari
Advocate Lahore*
11. *Mrs. Nasira Javed Iqbal
Advocate Lahore*
12. *Mr. Ahmad Saeed Awan
Advocate, Faisalabad*
13. *Ch. Iftikhar Hussain
Dy Attorney General
Islamabad/Rawalpindi*
14. *Mr. Javed Ahmad Butter
Advocate, Lahore*
15. *Mr. Riaz Hussain
Advocate, Jampur*
16. *Mr. Mohammad Aaqil Mirza
Advocate Lahore*
17. *Mr. Karamat Nazir Bhindari
Advocate Lahore*
18. *Rana Mohammad Arshad Khan
Addl. Advocate General Punjab*
19. *Mr. Abdul Hafeez Cheema
District and Sessions Judge
Lahore*
20. *Ch. Mohammad Nasim
District & Sessions Judge,
Bahawalpur*

34. On 1st of June, 1995, following 11 out of 20 Judges were made Judges while the remaining in the same batch continued to be Additional Judges:

1. *Mr. Justice Ch. Mushtaq Ahmed Khan*

2. *Mr. Justice Raja Abdul Aziz Bhatti*
3. *Mr. Justice Arif Iqbal Hussain Bhatti*
4. *Mr. Justice Abdul Hafeez Cheema*
5. *Mr. Justice Ch. Muhammad Naseem*
6. *Mr. Justice Ch. Khurshid Ahmed*
7. *Mr. Justice Ahmed Saeed Awan*
8. *Mr. Justice Fakhur-un-Nisa Khokhar*
9. *Mr. Justice Iftikhar Hussain Chaudhry*
10. *Mr. Justice Tassaduq Hussain Jillani*
11. *Mr. Justice Muhammad Aqil Mirza*

35. For a short period, by order of the then Chief Justice of the Lahore High Court, the afore-mentioned Judges were made senior to those of the same batch who continued to be Additional Judges. However, subsequently on 19th of March, 1996, when those Additional Judges were made Judges of the Lahore High Court under Article 193 of the Constitution, the seniority list of those who were made Judges earlier on vide notification dated 1st of June, 1995 was altered and the seniority was re-determined with effect from the date when they were appointed as Additional Judges.

36. Similarly on a query from this Court, the Registrar of the Peshawar High Court confirmed this practice. Vide his letter dated 13.5.2014 addressed to the Registrar of this Court, he has referred to various instances in which this principle was followed. The letter reads as follows:-

*"Subject: **SENIORITY OF HON'BLE JUDGES***

Dear Sir,

Apropos telephonic, the following instances have been found:-

1. In the year 1994, the following three Hon'ble Judges were elevated vide notification dated 5.6.1994 as Additional Judges of this Court;

- i. Hon'ble Mr. Justice Jawaid Nawaz Khan Gandapur (From Cadre, Date of Birth 17.1.1943)*
- ii. Hon'ble Justice Mrs. Khalida Rachid (From cadre, Date of Birth 25.09.1949)*

- iii. *Hon'ble Mr. Justice Nasir-ul-Mulk (From Bar, Date of Birth 17.08.1950)*

Accordingly seniority list was issued in the same order.

Subsequently vide notification dated 31.5.1995, Hon'ble, Justice Mrs. Khalida Rachid and Mr. Justice Nasir-ul-Mulk were confirmed while the tenure of Hon'ble Mr. Justice Jawaid Nawaz Khan Gandapur as Additional Judge was extended vide notification dated 31.5.1995. On this a fresh seniority list was issued on 18.10.1995 in which Hon'ble Mr. Justice Jawaid Nawaz Khan Gandapur was placed junior to the other two Hon'ble Judges.

Vide notification dated 30.9.1996 the appointment of Hon'ble Mr. Justice Jawaid Nawaz Khan Gandapur was regularized, therefore, a fresh seniority list was issued on 8.10.1996 in which again Hon'ble Mr. Justice Jawaid Nawaz Khan Gandapur was placed senior to the other two Hon'ble Judges on the basis of age.

2. *The second instance is that vide No. F.8(1)/97-All dated 1.2.1997, the following Hon'ble Judges were elevated:-*

- i. *Hon'ble Mr. Justice Malik Hamid Saeed (From Bar, Date of Birth 4.4.1943)*
- ii. *Hon'ble Mr. Justice Shah Jehan Khan (From Bar, dated 3.4.1950)*
- iii. *Hon'ble Mr. Justice Tariq Pervez Khan (From Bar, date of Birth 15.2.1948)*

The then Hon'ble Chief Justice of this Court vide letter dated 24.2.1997 brought to the notice of Minister of Law, Justice and Parliamentary Affairs that since Hon'ble Mr. Justice Tariq Pervez Khan was elder than Hon'ble Mr. Justice Shah Jehan Khan, therefore, the seniority was re-determined vide notification dated 17.3.1997 and Hon'ble Mr. Justice Tariq Pervez Khan was placed senior to Mr. Justice Shah Jehan Khan.

3. *The third instance is that vide notification dated 13.12.2007 the following Hon'ble Judges were elevated:-*

- i. *Hon'ble Mr. Justice Shaji Rehman Khan (From Cadre, Date of Birth 14.08.1949)*
- ii. *Hon'ble Mr. Justice Ghulam Mohayuddin Malik (From Cadre, Date of Birth 13.01.1950)*
- iii. *Hon'ble Mr. Justice Syed Yahya Zahid Gillani (From Cadre, Date of Birth 27.04.1953)*
- iv. *Hon'ble Mr. Justice Ziauddin Khattak (From Cadre, Date of Birth 19.02.1995)*
- v. *Hon'ble Mr. Justice Syed Mussaddiq Hussain Gillani (From Cadre, Date of Birth 01.01.1953)*

- vi. *Hon'ble Mr. Justice Muhammad Alam Khan
(From Bar, Date of Birth 15.01.1949)*

Subsequently, another seniority list was issued on 18.8.2008 wherein Mr. Justice Muhammad Alam Khan being elder than the other Hon'ble Judges of his batch was placed senior to them."

37. Vide notification dated 1.2.1997 following Judges were appointed as Additional Judges of the Peshawar High Court and the *inter se* seniority mentioned in the notification dated 1.2.1997 was as under:-

1. Malik Hamid Saeed
2. Shah Jehan Khan
3. Tariq Pervez

38. However, the Hon'ble Chief Justice of Peshawar High Court sent a letter on 24.2.1997 to the then Secretary Law with a request that their *inter se* seniority be determined on the basis of age since all the afore-referred Judges were appointed the same day. The letter reads as follows:-

"My dear Law Secretary,

Please refer to your Notification No. F.8(1)/97-All dated 1st February, 1997 whereby Mr. Justice Malik Hamid Saeed, Mr. Justice Shah Jehan Khan and Mr. Justice Tariq Pervez were appointed as additional Judges of this Court.

The inter se seniority mentioned in the Notification is as under:

1. *Malik Hamid Saeed*
2. *Shah Jehan Khan*
3. *Tariq Pervez*

The date of birth of the 3 additional Judges is as under:-

- | | |
|---|------------------|
| 1. <i>Mr. Justice Malik Hamid Saeed</i> | <i>4.4.1943</i> |
| 2. <i>Mr. Justice Shah Jehan Khan</i> | <i>3.4.1950</i> |
| 3. <i>Mr. Justice Tariq Pervez</i> | <i>15.2.1948</i> |

All the 3 additional Judges had taken oath of office on one and the same day, namely, 1st of February, 1997. Therefore, Mr. Justice Tariq Pervez being elder in age is to rank senior to Mr. Justice Shah Jehan Khan. Their inter se seniority may, therefore, be re-determined accordingly."

39. The Judicial Commission of Pakistan in its meeting dated 13.02.2014 while deciding the question of confirmation of Additional Judges / their appointment as Judges followed this practice and held that the *inter se* seniority of Judges shall be reckoned from the date of their initial appointment as Additional Judges. A reference to the minutes of the said meeting would be pertinent in this regard, which record as under:-

"2. The Secretary informed that Chief Justice, Peshawar High Court has recommended the names of the two batches of Additional Judges for confirmation. The Additional Judges in the first batch were initially appointed in 2012 but their tenure was extended for another year, whereas the Additional Judges in the second batch were appointed in March 2013 and therefore are due for confirmation or otherwise. The names are:-

First Batch

- (1) Mrs. Irshad Qaiser
- (2) Mr. Shah Jehan Khan Akhunzada
- (3) Mr. Asadullah Khan Chamkani
- (4) Mr. Roohul Amin Khan

Second Batch

- (5) Syed Afsar Shah
- (6) Mr. Muhammad Daud Khan
- (7) Mr. Abdul Latif Khan
- (8) Malik Manzoor Hussain
- (9) Mr. Ikramullah Khan
- (10) Ms. Musarrat Hilali
- (11) Mr. Lal Jan Khattak

3. The Chairman invited the Chief Justice, Peshawar High Court to brief the members about the nominations initiated by him. The Chief Justice responded that he has, in consultation with the Senior Puisne Judge, considered and initiated simultaneously the names of both the batches of Additional Judges for confirmation, so as to ensure that inter se seniority of Additional Judges in the two batches is not disturbed. The Senior Puisne Judge endorsed the views of the Chief Justice, Peshawar High Court."

40. The Commission ultimately decided to confirm Additional Judges as Judges in terms as follows:-

"5. The Commission had in-depth discussions about the professional caliber, legal acumen, judicial skills, quality / quantum of judgments, commitment / devotion to duty of the Additional Judges, and decided by consensus as follows:

- A. *The Additional Judges at serial 1 to 4 and 7 to 11 are recommended for confirmation.*
- B. *The Additional Judges at serial No. 5 & 6 are recommended for extension for one year with effect from the date of expiry of their tenure.*
- C. *The seniority of the Additional Judges in the two batches shall be reckoned from the date of their initial appointment, and so reflected in the notification."*

41. There is yet another letter dated 25.7.2012 which the Registrar of the Peshawar High Court, Peshawar had sent to the Secretary Law, Government of Pakistan requesting that the seniority of Additional Judges appointed the same day should be determined on the basis of age and not the length of their practice at the Bar. The letter reads as follows:-

*"Subject: **SENIORITY AMONG THE JUDGES OF PESHAWAR HIGH COURT***

Dear Madam,

The President of Pakistan vide Notification No. F.7 (1)/2012-All dated 19/07/2012 has appointed four new additional judges of this court in the sequence as under:

- 1. *Mrs. Irshad Qaiser*
- 2. *Mr. Shah Jehan Khan Akhunzada*
- 3. *Mr. Rooh ul Amin Khan*
- 4. *Mr. Asadullah Khan Chamkani*

I am directed to say that appointment of a judge or additional judge of the High Court, being a Constitutional post, is an elevation and not promotion, therefore, length of service or practice as an advocate at the Bar is not the criteria to be taken as yardstick for fixing seniority among them when some of the judges are from service and some from the Bar. The reasonable criteria would be that a judge senior in age has to be considered senior to younger one in the above mentioned circumstances. However, judges from service when are elevated to the bench, then of course their seniority is to be reckoned on the basis of length of continuous service.

Keeping in view the practice prevailing in this court and the letter of Mr. Justice Irshad Hassan Khan the then Federal Secretary Law bearing No. 126 of the year 1986 Secretary (L) dated 12/06/1986, the seniority of the above mentioned additional judges would be as under:-

S #	Name of Hon'ble Judges	From	Date of Birth
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1	Mr. Justice Asadullah Khan Chamkani	Bar	21/03/1954
2	Mrs. Justice Irshad Qaiser	Service	16/06/1954
3	Mr. Justice Shah Jehan Khan Akhunzada	Service	21/01/1957
4	Mr. Justice Rooh-ul-Amin Khan	Bar	01/04/1961

I am, therefore, to request you to refix the seniority and also inform this court if any other uniform policy has been adopted for the determination of seniority among the judges of the High Court."

42. It appears that the then Secretary Law, Government of Pakistan was conscious of this long standing practice and in response to a query from the High Courts in this context, addressed letters to Hon'ble Chief Justices of all the High Courts and apprised them of this long standing practice. The letter addressed to the Chief Justice of Sindh High Court reads as follows:-

"No.F.12(5)186-All,

Dated 20.4.1987

**GOVERNMENT OF PAKISTAN
MINISTRY OF JUSTICE AND PARLIAMENTARY AFFAIRS
(JUSTICE DIVISION)**

Subject: SENIORITY LIST OF HIGH COURT JUDGES

My dear Chief Justice,

Please refer to the correspondence resting with High Court of Sindh letter No. Gaz-IV, Z.14(i) dated the 30th March, 1987, on the subject noted above.

(2) An equitable principle consistently adopted in this regard is that Judges whose appointments are made by a single order, take seniority according to age. If the appointment of two or more service candidates is also simultaneously made with that of candidate from the Bar, the service Judges will retain their existing seniority in the department regardless of their age which of course would be the determining factor in respect of their seniority vis-à-vis candidates from the Bar. This principle has the approval of the President.

(3) I am to request you to please confirm whether the seniority list of Sindh High Court Judges has been prepared in the light of the above principle.

With kind regards.

Yours sincerely,

*-sd-
(Irshad Hasan Khan)"*

43. It would be pertinent to refer to yet another letter dated 6.8.1997 from Registrar of the High Court of Balochistan, Quetta, addressed to the Registrar of the High Court of Sindh, Karachi, which reads as follows:-

"With reference to your letter No. GAZ/IV.8.26 (Seniority) dated 31.7.1997, on the subject captioned above, it is submitted that this Court has been following the decision of Lahore High Court, on the question of inter se seniority of Judges who are elevated to the Bench on the same day that "a Judge older in age shall rank senior to a Judge who is younger in age when an appointment is made in the same batch whether from the Bar or from the Services". On this formula, the question of inter se seniority of Hon'ble Mr. Justice (Retd) Mir Hazar Khan Khoso and Mr. Justice Munawar Ahmed Mirza, was determined. It may further be pointed out that in the meeting of Chief Justices' Committee held on 31st October, 1996 at Murree, it was decided that "such disputes relating to seniority of Judges can be resolved by the Chief Justices of the concerned High Courts."

44. On a query from this Court about the principle being followed in determining the *inter se* seniority of Judges appointed as Additional Judges (under Article 197) and made Judges (under Article 193) on later dates, the Hon'ble Chief Justice of the Sindh High Court vide his letter dated 16.5.2014 has candidly stated that barring one exception, the seniority lists of the Judges of the High Court of Sindh, issued from time to time, seem to be consistent with the criteria laid in the aforesaid order (short order of this Court dated 6.5.2014 in the instant case). **(Emphasis is supplied)**

The letter reads as follows:-

"Karachi, dated: 16th May, 2014

*Mr. Justice Tassaduq Hussain Jillani,
Honourable Chief Justice of Pakistan
Supreme Court Building,
Islamabad.*

Dear Sir,

As directed by your Lordship, I am enclosing herewith documents pertaining to the seniority of the High Court Judges from our record as per the list attached hereto.

Amongst the documents, the two letters at Sr. No. 1 and 2 are self-explanatory, whereas reading of the second para at page-55 of the Minutes of the meeting, listed at Sr. No. 3, would convey the gist of the decision as contained therein. However, the dissenting note attached to the said Minutes seems to be more in line with the order dated 06.05.2014, authored by your Lordship in C.P. No. 09/2014.

The other documents are seniority lists of the Judges of the High Court of Sindh, issued from time to time, which seem to be consistent with the criteria laid down in the aforesaid order." (Emphasis is supplied)

I remain

Yours faithfully,
-sd-

(Maqbool Baqar)
Chief Justice
Sindh High Court"

45. The only exception to which the learned Chief Justice of the Sindh High Court has alluded to is the decision of the Administration Committee dated 12.11.1997. The reasoning given by the Committee was:-

"In this background, it was manifest that when two sets of persons were separately appointed, one as regular Judges under Article 193 and the other as Additional Judges under Article 197, such appointments could not be equated for determination of seniority, more so when the appointments were not in the same batch. In this context it was obvious to the Committee that an Additional Judge, if and when subsequently appointed as a Judge, would rank as a Judge from the date of his appointment and from the date he took oath of his office as such Judge and the appointment as Judge could not be related back to the point of time when his appointment as Additional Judge or administration of oath as such Additional Judge came about. The conclusion, therefore, was that Mr. Justice Nazim Hussain Siddiqui, who was appointed independently under a notification pursuant to Article 193, as a Judge, was senior to those who were appointed on the same date through a separate notification under Article 197, as Additional Judges."

46. In the light of the above, the Committee determined the *inter se* seniority of 5 Judges in terms as under:-

- 1) Justice Nazir Hussain Siddiqui
- 2) Justice Mrs. Majida Rizvi
- 3) Justice Ali Mohammad Baloch
- 4) Justice Deedar Hussain Shah
- 5) Justice Rana Bhagwandas

47. The reasoning given by the Administration Committee, we may observe with respect, is against the Constitutional intent and the law declared. Because, first, it does not take into account Article 260(1)(c) wherein a Judge in relation to a High Court includes an Additional Judge. Second, when an Additional Judge is made a Judge (permanent) and takes fresh oath, it does not mean that he has entered the office of a Judge freshly. Third, the decision of the Administration Committee is not in accord with the law laid down in Ghulam Jilani Vs. Mr. Justice Muhammad Gul (1978 SCMR 110) & Supreme Court Bar Association Vs. Federation of Pakistan (PLD 2002 SC 939, Justice Faqir Muhammad Khokhar's case) wherein the service as Additional Judge was treated at par with service as Judge of the High Court in view of Article 177(2)(a) which lays down qualifying period for a Judge of the Supreme Court of at-least 5 years as Additional Judge or Judge of the High Court "*for periods aggregating, not less than five years*".

48. It may be pointed out that an Hon'ble Judge of the Sindh High Court had given a dissenting opinion (Mr. Justice Amanullah Abbasi). This appears to be in consonance with Constitutional provisions and practice being followed. The dissenting opinion was:-

"The meeting of special administrative committee was held on 12.11.1997. I had agreed to the minutes which were to be recorded. After the meeting I reconsidered the entire matter again and I feel that there are some areas of difficulty.

The first area of difficulty is that the honorable Chief Justices in the meeting held on 31st August 1996 had decided that the disputes relating to seniority of Judges can be resolved by the chief justices of the concerned High Courts. The then chief justice of High Court of Sindh Mr. Justice Mamoon Qazi was present in the same meeting and in pursuance of decision he decided the dispute of seniority by his order dated 1.11.97. The Para No. 7 of his order is as under:-

"Consequently, unless the full court before which the matter is still pending final decision or the appointing authority as the case may be, comes to a different conclusion, Justice Ms. Majda Rizvi, Mr. Justice Ali Muhammad Balouch, Mr. Justice Deedar Hussain Shah and Mr. Justice Rana Bhagwandas are to be considered senior to Mr. Justice Nazim Hussain Siddiqi."

The then honorable Chief Justice has left it for the full court to come to different conclusion and till full court takes contrary view, the order of the then Chief Justice will have to prevail. It has not lapsed as full court has not taken a contrary decision. The grievance of Mr. Justice Nazim Hussain may be placed before full court because this is one way where by contrary decision can be arrived at. In case full court agrees with the order of the then Chief Justice then the matter will stand resolved in accordance with decision of Chief Justices dated 31.8.1996.

The 2nd era of difficulty relates to the dispute of seniority, Mr. Justice Nazim Hussain was appointed as permanent Judge by notification dated 5.6.1994. The other honorable Judges who are claiming to be senior to Mr. Justice Nazim Hussain were also appointed on the same date that is 5.6.1994 as additional Judges. Mr. Justice Nazim Hussain claims seniority on the ground that he was appointed as permanent Judge under Article 193 of the Constitution and other honorable Judges were appointed as additional Judges under article 197, his case was separate and different. As against this the case of honorable Judges is that they and Mr. Justice Nazim Hussain were appointed on the same date, regularized on the same date from the date of initial appointment and took oath on same date, therefore, the principal mentioned in letter of Ministry of Justice and Parliamentary Affairs dated 20.4.1987 be followed as according to this principle senior in age will become senior. At this stage I find it necessary to reproduce relevant portions of notifications dated 30.9.1996.

1st Notification

"The President is pleased to regularize the appointment of Mr. Justice Nazim Hussain Siddiqi Judge of the High Court of Sindh from the date of his appointment as such"

2nd Notification

"The President is pleased to regularize the appointment of following Judges of the High Court of Sindh as additional Judges and appoint them Judges of the said Court from the date of their appointment as additional Judges.

The 2nd Notification includes names of Justice Ms. Majda Rizvi, Mr. Justice Ali Muhammad Balouch, Mr. Justice Deedar Hussain Shah and Mr. Justice Rana Bhagwandas. They have been appointed as Judges from the date of appointment as additional Judges that is 5.6.1994. Therefore the initial appointment of Mr. Justice Nazim Hussain as

Judge and the other honorable Judges is on the same date. The other honorable Judges have been made Judges from the date of their initial appointment. Although there are separate notifications but one seniority list has to be maintained. Therefore the principle of senior in age to be senior is to be followed.

On administrative side we cannot say that 2nd notification is incorrect. There is no bar in Constitution which restricts the power of President to give retrospective effect to appointment so far as the notification remains in field. It has to be followed and decision will have to be taken in accordance with the rights conferred by the notification. Apart from this the two notifications were issued in pursuance of decision of the Supreme Court reported in PLD 1996 SC 324. This fact is also mentioned in the two notifications mentioned above."

49. An examination of the practices / precedents from the High Courts in determining the *inter se* seniority of Judges (appointed under Article 193 and 197 of the Constitution) would indicate that in all cases seniority was determined with effect from the date of the initial appointment as Additional Judges and in accordance with the principle laid down in the letter dated 20.4.1987 issued by the Ministry of Justice and Parliamentary Affairs. The solitary exception from Sindh would not offset the effect of the consistent practice being followed by the High Courts in this regard and the said practice may qualify to be called a Constitutional convention. Moreover the order of the Administration Committee of the Sindh High Court was an administrative order and does not have even the trappings of a judicial order. An administrative decision would not assume the character of a precedent to be followed but a judicial decision may assume such a character. To appreciate the distinction (between an administrative and judicial decision), a reference may be made to a judgment of Indian Supreme Court reported as Jaswant Sugar

Mills Vs. Lakshmi Chand (AIR 1963 SC 677) wherein while defining

a judicial decision, it was held:-

"A judicial decision is not always the act of a judge or a tribunal invested with power to determine questions of law or fact: it must however be the act of a body or authority invested by law with authority to determine questions of disputes affecting the rights of citizens and under a duty to act judicially. A judicial decision always postulates the existence of a duty laid upon the authority to act judicially. Administrative authorities are often invested with authority or power to determine questions, which affect the rights of citizens. The authority may have to invite objections to the course of action proposed by him, he may be under a duty to hear the objectors, and his decision may seriously affect the rights of citizens but unless in arriving at his decision he is required to act judicially, his decision will be executive or administrative. Legal authority to determine questions affecting the rights of citizens, does not make the determination judicial; it is the duty to act judicially which invests it with that character. What distinguishes an act judicial from administrative is therefore the duty imposed upon the authority to act judicially. AIR 1950 SC 222, Rel. on.

To make a decision or an act judicial, the following criteria must be satisfied:

(1) it is in substance a determination upon investigation of a question by the application of objective standards to facts found in the light of pre-existing legal rules;

(2) it declares rights or imposes upon parties obligations affecting their civil rights; and

(3) that the investigation is subject to certain procedural attributes contemplating an opportunity of presenting its case to a party, ascertainment of facts by means of evidence if a dispute be on question of fact, and if the dispute be on question of law on the presentation of legal argument, and a decision resulting in the disposal of the matter on findings based upon those questions of law and fact."

50. Can the consistent practice being followed in determining the *inter se* seniority of Judges be called a Constitutional convention? The question as to what is a Constitutional convention has been a subject of judicial debate in several jurisdictions. In a case decided by the Supreme Court of Canada reported at [1981] 2 S.C.R. 753, the Court while

elaborating the concept of convention observed that requirements for establishing a convention are:-

"2. Requirements for establishing a convention

The requirements for establishing a convention bear some resemblance with those which apply to customary law. Precedents and usage are necessary but do not suffice. They must be normative. We adopt the following passage of Sir W. Ivor Jennings, The Law and the Constitution (5th ed., 1959) at p.136:

We have to ask ourselves three questions: first, what are the precedents; secondly, did the actors in the precedents believe that they were bound by a rule; and thirdly, is there a reason for the rule? A single precedent with a good reason may be enough to establish the rule. A whole string of precedents without such a reason will be of no avail, unless it is perfectly certain that the persons concerned regarded them as bound by it."

51. The Court referred to Professor W. Hogg (Constitutional Law of Canada, 1977), who while explaining the concept of Constitutional convention, said:-

"Conventions are rules of the constitution which are not enforced by the law courts. Because they are not enforced by the law courts they are best regarded as non-legal rules, but because they do in fact regulate the working of the constitution they are an important concern of the constitutional lawyer. What conventions do is to prescribe the way in which legal powers shall be exercised. Some conventions have the effect of transferring effective power from the legal holder to another official or institution. Other conventions limit an apparently broad legal power, or even prescribe that a legal power shall not be exercised at all. If a convention is disobeyed by an official, then it is common, especially in the United Kingdom, to describe the official's act or omission as "unconstitutional". But this use of the term unconstitutional must be carefully distinguished from the case where a legal rule of the constitution has been disobeyed. Where unconstitutionally springs from a breach of law, the purported act is normally a nullity and there is a remedy available in the courts. But where "unconstitutionality" springs merely from a breach of convention, no breach of the law has occurred and no legal remedy will be available. If a court did give a remedy for a breach of convention, for example, by

declaring invalid a statute enacted for Canada by the United Kingdom Parliament without Canada's request or consent, or by ordering an unwilling Governor General to give his assent to a bill enacted by both houses of Parliament, then we would have to change our language and describe the rule which used to be thought of as a convention as a rule of the common law. In other words a judicial decision could have the effect of transforming a conventional rule into a legal rule. A convention may also be transformed into law by being enacted as a statute."

52. In a book edited by Dawn Oliver and Carlo Fusaro titled as 'How Constitutions Change', the authors have adverted to the conventions in Constitutional law in Canada and said as under:-

"The Constitution of Canada also includes informal principles. These are Constitutional conventions that inform the way in which the formal Constitutional powers are to be exercised. A well established institution in the UK, conventions guide most government behaviour and detail the aspects of governance that the written Constitution does not address. They are not legally binding and hence, by definition, cannot form part of the formal Constitution. That said, they enjoy de facto Constitutional supremacy because the political culture in Canada has rendered them binding. Moreover, while a court will not enforce conventions, it also will not shy away from considering them in interpreting formal principles. Finally, the court may transform a convention into a common law rule.

It is difficult to account for the creation of Constitutional conventions. Indeed, by virtue of their informality, they require no set procedure to be followed prior to their recognition. Generally, conventions come into existence in two different ways; through practice over time or through an explicit agreement between all the relevant actors. For conventions that come about through practice, there is no established period of time that must pass before the practice obtains 'convention' status. Some scholars have argued that a reliable indicator of convention status is the moral obligation that attaches itself to the practice over time. For example, the fact that members of Parliament feel bound to follow the practice because they believe it is a principle of higher law, is evidence that the practice has in fact obtained that higher law status."

53. The Canadian Supreme Court adopted the definition of constitutional convention propounded by the Chief Justice of Manitoba, Freedman C.J.M. in the Manitoba Reference, *supra*, and at pp. 13-14, held as under:-

"What is a constitutional convention? There is a fairly lengthy literature on the subject. Although there may be shades of difference among the constitutional lawyers, political scientists, and Judges who have contributed to that literature, the essential features of a convention may be set forth with some degree of confidence. Thus there is general agreement that a convention occupies a position somewhere in between a usage or custom on the one hand and a constitutional law on the other. There is general agreement that if one sought to fix that position with greater precision he would place convention nearer to law than to usage or custom. There is also general agreement that "a convention is a rule which is regarded as obligatory by the officials to whom it applies". Hogg, Constitutional Law of Canada (1977), p.9. There is, if not general agreement, at least weighty authority, that the sanction for breach of a convention will be political rather than legal.

It should be borne in mind however that, while they are not laws, some conventions may be more important than some laws. Their importance depends on that of the value or principle which they are meant to safeguard. Also they form an integral part of the constitution and of the constitutional system. They come within the meaning of the word "Constitution" in the preamble of the British North America Act, 1867."

54. The mode of determining *inter se* seniority of High Court Judges has been consistent in all the four Provinces, barring one time deviation when the Administration Committee of Sindh High Court followed a different course. It is normative because it has been found by us to be more in accord with equity and Constitutional intent reflected in various provisions of the Constitution. Thus it has assumed the character of a Constitutional convention.

55. For what has been discussed above, this petition is dismissed. These are the detailed reasons of our short order dated 6.5.2014, which reads as follows:

"For reasons to be recorded later in the detailed judgment, we hold and declare as under:-

- i) that the inter se seniority of Judges of a High Court shall reckon from the order and date of*

their appointment as Additional Judges of that Court;

- ii) that the inter se seniority of Additional Judges of a High Court appointed vide the same order and date shall reckon from their seniority in age. If appointment of two or more service candidates is simultaneously made with that of the candidates from the Bar, the service Judges shall retain their existing seniority in the department regardless of their age, though that would be the determining factor in respect of their seniority viz a viz the candidates from the Bar. This principle has consistently been followed without exception ever-since the establishment of the High Courts in Pakistan and is even otherwise in accord with the equitable dispensation of justice.*

2. With the above observations and declaration, this petition is dismissed."

CHIEF JUSTICE

JUDGE (HJ-1)

JUDGE (HJ-3)

JUDGE (HJ-5)

JUDGE (HJ-8)

Islamabad, the
6th of May, 2014
Approved For Reporting
Khurram

Asif Saeed Khan Khosa, J.: I have had the privilege of perusing the proposed judgment authored by the Honourable Chief Justice and I am in respectful agreement with the conclusions drawn and the declarations made therein. I may, however, very briefly record some supplemental reasons for reaching such conclusions and making such declarations.

2. It is proverbial and universally acknowledged that the Constitution of a country is a living organism and the case in hand is a case in point. It demonstrates how the original words of a Constitution assume different meanings, the initial concepts envisaged therein undergo metamorphosis and the earlier schemes contained in the same evolve and transform into different mechanisms with passage of time, changed circumstances and sprouting requirements.

3. There is no denying the fact that over the last century and a half since 1861 the concept and utility of the office of an Additional Judge of a High Court in the Indo-Pak subcontinent have undergone a significant transformation and the same is manifestly evident from the changing and varying provisions of section 7 of the East India (High Courts of Judicature) Act, 1861, section 3 of Act No. 18 of 1911 amending the Indian High Courts Act, 1861, section 222 of the Government of India Act, 1935, Articles 217 and 224 of the Constitution of India, 1950, Articles 166 and 168(2) of the Constitution of Pakistan, 1956, Article 2 of the Courts (Additional Judges) Order, 1958, Article 96 of the Constitution of Pakistan, 1962 and Articles 193, 197 and 175A of the Constitution of the Islamic Republic of Pakistan, 1973. A Judge who was initially required only to “act” as a Judge of a High Court and was meant to be only a temporary Judge appointed by way of a stop-gap arrangement for a period of a few days, weeks or months in order to cater for a temporary exigency in a High Court later on came to be known as an “Additional Judge”, his services became time bound rather than being exigency based and all and sundry started accepting that his appointment was not by way of a stop-gap arrangement but he was passing through different stages of

appointment as a Judge which stages could span over a period of one year, two years or sometimes even three years. Over time some changes introduced through different Constitutions or constitutional instruments themselves started indicating that instead of an exigency based appointment an appointment of an Additional Judge of a High Court could be made for a period to be fixed by a law and later on in the case of Al-Jehad Trust through Raeesul Mujahideen Habib-ul-Wahab-ul-Khairi and others v. Federation of Pakistan and others [PLD 1996 SC 324] this Court had declared that “a practice/convention had developed in Pakistan that in the High Courts Judges are first appointed as Additional Judges ----- and then they are appointed as permanent Judges” and that upon satisfactory completion of his term as an Additional Judge of a High Court a person could entertain a legitimate expectation of being appointed as a Judge of that Court on a permanent basis. This metamorphosis in the concept attached to an Additional Judge of a High Court has gradually led to a conceptual readjustment *vis-à-vis* the initial constitutional scheme pertaining to the said office and the practice developed in this field over the last many decades has been so consistent that it can be said to have matured into a convention which has been accepted by all concerned without any demur or departure.

4. It has been argued by the learned counsel for the petitioner that at the time of his appointment to the office of an Additional Judge of a High Court a person enters upon that office upon making of an oath and then upon his appointment as a Judge such Additional Judge makes another oath before entering upon that office and, thus, the two offices are different and by virtue of the provisions of Article 194 read with clause (3) of Article 255 of the Constitution of the Islamic Republic of Pakistan, 1973 a term of office of a Judge starts from the day he makes oath of the office of a Judge and, therefore, his seniority in that office cannot be reckoned with reference to the earlier date of his appointment as an Additional Judge. Such an argument may appear to be quite appealing at its surface but the same cannot withstand deeper

judicial scrutiny, particularly in the backdrop of the transformed concept and utility of an Additional Judge as observed above. Such an argument conveniently overlooks the fact that the qualifications now prescribed by the Constitution for an Additional Judge of a High Court are the same as those stipulated for a Judge of such Court, the process of appointment of an Additional Judge is the same as that of appointment of a Judge, the Constitution does not provide for a separate and different oath of office for an Additional Judge and before entering upon the said office an Additional Judge has to make the same oath which is prescribed by the Constitution for a Judge of a High Court. Apart from that the said oath of office is prescribed by the Constitution itself and by virtue of the provisions of clause (1) of Article 260 of the Constitution a "Judge" in relation to a High Court includes an "Additional Judge" of that Court. In this view of the matter on the basis of the changed and altered concept and utility of an Additional Judge of a High Court and also on account of an evolved understanding of the constitutional scheme in this regard besides the practice *vis-à-vis* such appointments developed over the last many decades I feel no hesitation in holding that now a Judge of a High Court is appointed in many stages and that his appointment as an Additional Judge marks the first and initial stage and his final and formal appointment as a Judge is the culminating stage of such appointment. Under the present dispensation and understanding an Additional Judge's subsequent appointment as a Judge is not an appointment to a new office but through such appointment his initial appointment as an Additional Judge matures and merges into the office of a Judge. Looked at from this angle and perspective the subsequent oath made by such Judge is nothing but in continuation of his earlier oath, particularly when the subsequent oath is the selfsame oath which he had already made before entering upon the office of an Additional Judge. By making the said oath as an Additional Judge he had already entered the office of a Judge and his subsequent oath as a Judge only reinforces and confirms his position in that office. It is, thus, with reference to making of the first oath as an Additional Judge that

seniority of a Judge is to be reckoned and such is the spirit of the transformed scheme of the Constitution as we understand it today.

5. Apart from what has been observed above I consider such mode of determination of seniority of a Judge of a High Court to be a safer mode for the purpose as it obviates the chances of tinkering or fiddling with the seniority of a Judge by the Judicial Commission of Pakistan or the Parliamentary Committee by delaying the matter of his nomination and confirmation as such or by the Government of Pakistan by delaying issuance of the notification of appointment of an Additional Judge as a Judge for reasons which may be manufactured or contrived. Considered from this angle the mode of determination of seniority of a Judge of a High Court being declared through the judgment in the present case is likely to foster and advance the constitutional mandate regarding "fully" securing the independence of the judiciary.

(Asif Saeed Khan Khosa)
Judge