

**IN THE SUPREME COURT OF PAKISTAN**  
(Appellate Jurisdiction)

**PRESENT:**

MR. JUSTICE MUNIB AKHTAR  
MR. JUSTICE MUHAMMAD ALI MAZHAR  
MR. JUSTICE ATHAR MINALLAH

**C.Ps. No.2314, 2317, 2318 of 2022**

(Against judgment dated 10.05.2022 passed by the Peshawar High Court, Peshawar in W.P. No.712-P/2022, 370-P/2022 and 377-P/2022.)

**AND**

**C.M.A.863-P, 866-P & 869-P/2022**

**IN C.Ps. NIL OF 2022**

(Permission to file and argue)

Federation of Pakistan through Secretary,  
Ministry of Law and Justice Islamabad

**...Petitioner**  
(in all C.Ps.)

Muhammad Hamid Mughal

**...Applicant**  
(in all CMAs)

VS

Mr. Fazal-e-Subhan & other	:	C.P. No.2314/22
Mr. Naeem Ahmad Khattak and another	:	C.P. No.2317/22
Dr. Khurshid Iqbal and others	:	C.P. No.2318/22
Fazal Subhan and another	:	C.M.A. No.863-P/22
Naeem Ahmad Khattak and others	:	C.M.A. No.866-P/22
Dr. Khurshid Iqbal and others	:	C.M.A. No.869-P/22

**...Respondents**

For the Petitioner		Ch. Aamir Rehman, Addl. AGP (in all C.Ps.)
For the Applicant	:	Mr. M. Siddique Haider Qureshi, ASC (in C.M.A. Nos. 863-P, 866-P and 869-P/2022)
For Respondents No.1-2	:	Syed Mudassar Ameer, ASC (in C.P. No.2314/2022)
For the Respondent	:	N.R. (in C.P. No.2317/2022)
For Respondent No.1	:	Dr. Adnan Khan, ASC (in C.P. No.2318/2022)
For Respondent No.1	:	Syed Mudassar Ameer, ASC (in C.M.A. No.863-P/2022)
Other Respondents	:	N.R. (all C.Ps. and C.M.As.)
Date of Hearing	:	30.05.2023

## JUDGMENT

**MUHAMMAD ALI MAZHAR, J-** These Civil Petitions for leave to appeal are directed against the judgment dated 10.05.2022, passed by the Peshawar High Court in W.P. Nos.712-P/2022, 370-P/2022 and 377-P/2022, whereby the writ petitions were allowed and the decision of the Parliamentary Committee (the "**Committee**") dated 19.01.2022 was set aside with the directions to the Federal Government to implement the recommendations of the Judicial Commission of Pakistan (the "**Commission**") dated 05.01.2022 and issue the Notification for the appointment of Additional Judges of the Peshawar High Court.

2. The compendious facts of the case are as follows:

On 05.01.2022, the Commission convened a meeting at Islamabad to consider the nominations of the following learned persons for elevation as Additional Judges of the Peshawar High Court:

- |    |                              |                                  |
|----|------------------------------|----------------------------------|
| 1) | Mr. Fazal Subhan             | District & Sessions Judge        |
| 2) | Mr. Shahid Khan              | District and Sessions Judge      |
| 3) | Dr. Khushid Iqbal            | District and Sessions Judge      |
| 4) | Mr. Kamran Hayat<br>Miankhel | Additional Advocate General, KPK |
| 5) | Mr. Muhammad<br>Ijaz Khan    | Advocate Supreme Court           |
| 6) | Mr. Muhammad<br>Faheem Wali  | Advocate Supreme Court           |

### Decision of the Commission

After in-depth discussion, the hon'ble Members of the Commission recommended the nominees mentioned at Serial No. 1 to 3 for appointment as Additional Judges of the Peshawar High Court for a period of one year by the majority of ten members, with two members dissenting and one-member abstaining. While nominees at Serial No. 4 to 6 were also recommended for appointment as Additional Judges of the Peshawar High Court for a period of one year, by the majority of twelve members with one-member abstaining. The recommendations were forwarded by the Commission to the Committee for confirmation of the aforesaid names for appointment as additional judges of Peshawar High Court.

The meeting of the Committee was convened on 19th January, 2022 and decided as under:

### Decision of the Committee

The Committee is therefore of the unanimous opinion that three positions for which three District and Session Judges have been nominated for appointment as Additional Judges of the Peshawar High Court be kept vacant and the names of all the five District and Session Judges namely (i) Mr. Fazal Subhan, (ii) Mr. Shahid Khan, (iii) Dr. Khurshid Iqbal, (iv) Mr. Kaleem Arshad and (v) Mr.

Asim Imam may be re-considered keeping into view their seniority and competence. Accordingly the names of three District and Session Judges namely (i) Mr. Fazal Subhan, D&S, (ii) Mr. Shahid Khan, D&SJ and (iii) Dr. Khurshid Iqbal, D&SJ are not confirmed and the matter is referred back for re-consideration as stated herein above.

Being aggrieved and dissatisfied with the decision of the Committee, the recommendees at Serial No.1 to 3 and one Naeem Ahmad Khattak (Advocate) filed three writ petitions in the Peshawar High Court for setting aside the decision of the Committee. The learned High Court set aside the decision of the Committee and directed the Federation of Pakistan to implement the recommendations of the Commission and issue Notification of appointment.

3. The learned Additional Attorney General for Pakistan ("**Addl. AGP**") argued that the impugned judgment is not sustainable for the reason that the principles laid down in the case of Munir Hussain Bhatti (infra) were followed by the Committee in letter and spirit and they did not discuss the professional caliber, competency and/or judicial skills of the nominees, but only referred the matter back to the Commission to consider the seniority, suitability and merit. The seven members of the Committee unanimously decided not to confirm the nominations in question and the matter was sent back for reconsideration of seniority which in fact was in true adherence to the principles laid down in the case of Munir Hussain Bhatti (infra). It was further averred that the District and Session Judges senior to the nominees were ignored and superseded without any opportunity of being heard. He further argued that while interpreting a constitutional provision, the approach taken must be dynamic, progressive, and oriented with the desire to meet the situation, and since the Constitution is a living document, therefore it must be liberally interpreted with proper checks and balances. In support of this contention, he referred to the case of Al-Jehad Trust and others v. Federation of Pakistan and others (**PLD 1996 SC 324**). He next argued that the role of the Committee on judges has been diluted on in the case of District Bar Association, Rawalpindi and others v. Federation of Pakistan and others (**PLD 2015 SC 401**) in which it was held that Article 175A of the Constitution of the Islamic Republic of Pakistan, 1973 ("**Constitution**") marginalized the roles of the President, the Prime Minister and the ruling party in the appointment of judges of the superior courts to avoid any undue influence in appointments. Involvement of the Parliament through a Committee in the process of appointment of Judges of the superior courts was thus not likely to impinge upon the independence of the

judiciary and it also did not offend the concept of separation of powers between the Judiciary and Executive. It was further avowed that this Court in the aforesaid case also held that where the Committee provided a valid objection against a nominee of the Commission, the Committee had to give its reasons and the Commission, upon receipt thereof, had to reconsider the nominee's suitability to hold judicial office. It was further contended that the purpose of the Committee is to make the process of appointment of Judges in the Superior Courts more transparent and fair, and if its role is reduced then it might defeat the very purpose of making of such Committee. It was further averred that the learned High Court while rendering the impugned judgment failed to appreciate the true spirit of Article 175A of the Constitution in which it is the collective power of the Commission to nominate the candidates for appointment and not the Chief Justice's alone.

4. The learned counsel for the private respondents argued that the Committee is not an appellate forum for the Commission. They had no right to reject the recommendations of the Commission and remand the matter back to reconsider the nominations. He further argued that the issue of seniority was properly dealt with prior to the Commission sending the recommendations to the Committee. It was further contended that the Committee had exceeded its authority and travelled beyond its jurisdiction, and made an attempt to re-examine and review the recommendations of the Commission with regard to the three recommendees and unnecessarily raised the issue of seniority instead of evaluating the antecedents of the candidates. The learned counsel further argued that the issue of seniority with other District & Sessions Judges was discussed by the Commission and, being a highest constitutional body, it made an objective evaluation regarding the suitability of the nominees which could not be revised by the Committee in any manner.

5. Heard the arguments. To begin with, we would like to accentuate that the Federation of Pakistan in both the Civil Petitions has taken a common ground of challenge "A" which is reproduced as under:

"That the impugned judgment of the Peshawar High Court could not be sustained since the principle of this August Court as laid down in the case of **Munir Hussain Bhatti (PLD 2011 SC 407)** were followed by the Committee in letter and spirit, for the Committee did not discuss the professional caliber, competency and judicial skills rather

than it by following constitutional criteria referred the matter back to the Commission to further deliberate upon the seniority, suitability and merit."

6. The impugned decision of the learned High Court is predominantly rooted in the dictum laid down in the case of Munir Hussain Bhatti (infra). The exactitudes of Article 189 of the Constitution command that any decision of the Supreme Court shall, to the extent that it decides a question of law or is based upon or enunciates a principle of law, be binding on all other courts in Pakistan. Reference to the case of Justice Khurshid Anwar Bhinder and others v. Federation of Pakistan and another (**PLD 2010 SC 483**) is somewhat pertinent in which it was concluded by this Court that where the Supreme Court deliberately, and with the intention of settling the law, pronounces upon a question of law, such pronouncement is the law declared by the Supreme Court within the meaning of Article 189 and is binding on all the Courts of Pakistan. It cannot be treated as mere *obiter dictum*. It was further held that even *obiter dictum* enjoys a highly respected position as if "it contains a definite expression of the court's view on a legal principle or the meaning of law". Being sanguine and mindful of the binding effect, the learned Addl. AGP himself asserted that the Committee's action of non-confirming the name of nominees and remanding the nominations for reconsideration is not against the dictum laid down in the Munir Hussain Bhatti case (infra); in fact, it was in consonance with the said decision in letter and spirit which needs to be explored and resolved by dint of this judgment.

7. The procedure for appointment of Judges is provided under Article 175A of the Constitution by means of the Commission. In pith and substance, the aforesaid Article articulates a collegium for the appointment of Judges of the Supreme Court, appointment of the Chief Justice and Judges of a High Court, and the Chief Justice and judges of Federal Shariat Court. According to the niceties of sub-article (8), the Commission by majority of its total membership nominates to the Committee the person for each vacancy of a judge. Whereas sub-article (9) establishes the collegium referred to as the Committee and, in view of sub-article (12), the Committee on receipt of a nomination from the Commission may confirm the nominee by majority of its total membership within fourteen days, failing which the nomination shall be deemed to have been confirmed. It is further enumerated that the Committee, for reasons to be recorded, may not confirm the

nomination by a three-fourth majority of its total membership, and, if a nomination is not confirmed by the Committee, it shall forward its decision with reasons so recorded to the Commission through the Prime Minister and, thereafter, the Commission shall send another nomination.

8. In exercise of the powers conferred by sub-article (4) of Article 175A of the Constitution, the Commission *vide* S.R.O.122(KE)/2010, framed the Judicial Commission of Pakistan Rules, 2010 ("**JCP Rules**"). According to Rule 3, for each anticipated or actual vacancy of a Judge in the Supreme Court, or the Chief Justice of the Federal Shariat Court, or the Chief Justice of a High Court, the Chief Justice of Pakistan shall initiate nominations in the Commission for appointment against such vacancy and, according to sub-rule (2), for each anticipated or actual vacancy of a Judge in the Federal Shariat Court or Judge in the High Court, the Chief Justice of the respective Court shall initiate and send the nomination for appointment against such vacancy to the Chairman for convening a meeting of the Commission. Compliant with Rule 4, the proceedings of the Commission are to be regulated by the Chairman and the proceedings of the Commission shall be conducted under Rule 5 and whenever a nomination is received under Rule 3, the Chairman shall call a meeting of the Commission on the date, time and place determined by him and notified by the Secretary to each member. While in sub-rule 2 of Rule 5, the Commission may call for any information or record required by it from any person or authority for the purposes of carrying out its functions and, under Sub-rule 3, the nominations made by the Commission are forwarded to the Committee. Under Rule 6, the Chairman may constitute one or more committees of members for such purpose as may be deemed necessary.

9. Pursuant to the powers conferred by sub-article (17) of Article 175A of the Constitution, the Committee *vide* S.R.O.11(1)/2011, dated 06.01.2011, also framed the Parliamentary Committee on Judges Appointment in the Superior Courts Rules 2010 ("**PC Rules**"). Consistent with Rule 3, the Committee has the powers to summon or invite any person or call for any information or record required by it from any person or authority for the purpose of carrying out its functions and may also call the person nominated for a judicial vacancy for an interview. According to the functions of

the Committee enumerated under Rule 4, the nomination received by the Secretary from the Commission shall be placed before the Chairman for calling a meeting of the Committee and, as per sub-rule (2) of Rule 4, the Committee, after considering the nomination, may confirm the nominee by a majority of its total membership within fourteen days of the receipt of the nomination, failing which the nomination shall be deemed to have been confirmed. However, under sub-rule (3) of Rule 4, it is further explicated that the Committee, for reasons to be recorded, may not confirm the nomination by a three-fourth majority of its total membership within the said period and, according to sub-rule (4), the Committee in case of non-confirmation shall forward its decision with reasons to the Commission through the Prime Minister for sending another nomination.

10. The learned Addl. AGP raised an argument that the hon'ble Chief Justice of Pakistan ("**HCJP**"), acting as the Chairman of the Commission, cannot initiate the nomination, rather it is the power of the Commission as a whole; and initiating the process of appointment at the sole discretion of the HCJP is violative of the principles of natural justice. The Rules framed by the Commission and the Committee pursuant to Article 175A of the Constitution (the "**Rules**") are both very much in field and have never been challenged before any forum. In exercise of the powers delegated under the aforesaid Rules, the HCJP has the authority to initiate nominations in the Commission for the appointment for each anticipated or actual vacancy of a Judge in the Supreme Court, or the Chief Justice of the Federal Shariat Court, or the Chief Justice of a High Court; and for each anticipated or actual vacancy of a Judge in the Federal Shariat Court or Judge in the High Court, the Chief Justice of the respective Court shall initiate and send nominations for appointment against such vacancy to the Chairman of the Commission, the HCJP, for convening a meeting of the Commission. The argument is misconceived in view of the existing Rules framed under Article 175A of the Constitution. Though under the Rules the nomination is to be made by the Chief Justice of the respective High Court for the appointment of judges but the minutes of meeting reflect that the hon'ble Chief Justice of the Peshawar High Court ("**Chief Justice (PHC)**") avowed that the names proposed for elevation as additional judges were also supported by all the judges of the Peshawar High Court. A similar statement of the senior puisne Judge (PHC), Mr.

Justice Rooh-ul-Amin Khan, is recorded in the minutes that the nominations have been initiated after consultation with each hon'ble Judge of the High Court.

11. The nitty-gritties of the judgment rendered by a four member bench of this Court in the case of Munir Hussain Bhatti, Advocate and others v. Federation of Pakistan and another (PLD 2011 SC 407), divulge that two Constitutional Petitions under Article 184(3) of the Constitution were filed to challenge the decisions of the Committee whereby it refused to confirm the nominations made by the Commission for extension in the tenure of four additional judges of the Lahore High Court and two additional judges of the Sindh High Court. The petitioners entreated to quash the recommendations of the Committee with the direction to implement the recommendations of the Commission and issue a Notification. For the ease of convenience, some of the most important and relevant excerpts from the aforesaid judgment are replicated as under:

24. Given this discussion, we do not understand how the Committee could consider that its function was to redo the entire exercise conducted by the Commission while determining the professional caliber, judicial skill, legal acumen and personal conduct, required as a judge, of the nominees. More so, how could they arrive at a conclusion, that the entire exercise of the Commission was flawed, based on the piecemeal views of one member of the Commission? And it might be added here that even these views did not last the Commission passed the nominations unanimously. Let us assume, however, that the unanimity present in these decisions of the Commission was not there. Let us further assume, for the sake of argument, that the Attorney-General of Pakistan objected to a particular nomination and the Judicial Commission still, by a majority of its total membership, as mandated by clause (8) of Article 175A, decided to nominate that person to the Parliamentary Committee. Could the Parliamentary Committee reject this nomination simply on the reason that they trust the evaluation of the Attorney General of Pakistan and not of the other judges? We strongly believe that such is neither the function of the Parliamentary Committee, nor its mandate under Article 175A, and would amount to an incorrect and unconstitutional decision.

25. The technical evaluation of a person's caliber as judge has to be made by the Commission, and once evaluated the recommendations of the Commission are to be looked as one. The views of the individual members of the Commission thus no more exist before the Committee. What the Commission has already assessed and held cannot be overturned on the basis of a dissenting view, note or discussion of any individual member. If this was allowed, it would render the whole working of the Judicial Commission as futile and make it nugatory under the Constitution. Doing so would be akin to refusing to recognize a resolution of the Parliament, or any law passed by it, on the basis of the minority view in the House. Such reasoning will lead to a deliberate breakdown of our Constitutional mechanisms and procedures.

26. Therefore, the Parliamentary Committee, on receipt of a nomination from the Commission, can either confirm the nominee by a majority of its total membership within fourteen days, failing which the nomination shall be deemed to have been confirmed, or reject the nomination on grounds falling within its domain for very strong reasons which shall be justiciable. This is the clear direction of clause (12) of Article 175A.

27. Since in the present case, as already discussed above, the Committee has tried to assume the jurisdiction of the Commission, there is no option but to



come to the conclusion that the Committee failed to perform its functions in terms of clause (12) of Article 175A. The consequence of this failure has been prescribed by the Constitution itself. The Committee must act within a period of fourteen days of receiving the nominations, "failing which the nomination shall be deemed to have been confirmed". So, while in any other case of failure to exercise jurisdiction, we might have been required to send the issue back to the authority for consideration in accordance with law, here the Constitution leaves us with no such option because of a deeming provision.

32. The recommendations of the Judicial Commission are now on greater footing than the recommendations of the Chief Justice alone in the earlier system. These cannot be superseded for any extraneous considerations as already discussed above. Therefore, the Parliamentary Committee cannot simply brush aside the recommendations of the Commission without its own sound reasons. The Committee is to confine itself to the purpose for which it has been constituted, which is evidently the thrashing out of issues not related to the domain of the Commission. The Committee can, based on factual data and reasons, for instance, declare that a nominee is corrupt or is affiliated/partial making him a controversial choice, but judging the caliber of a nominee as a judge rests with the Commission.

52. In brief, it was held that the judicial consultees are best suited to determine the caliber, competence, legal acumen and over-all suitability of a person for appointment to a tenured judicial office under the Constitution. The executive functionaries on the other hand were considered more suitable, for ascertaining the antecedents of judicial appointees. A reasonably clear demarcation between the different roles, respectively, of the judicial consultees and the executive functionaries of the State was thus drawn. And with the passage of time this demarcation was further refined. In the latest pre-amendment judicial pronouncement on the question of appointment of Judges, made in the case of Sindh High Court Bar Association and another v. Federation of Pakistan and others (PLD 2009 SC 879), for instance, it was held that the opinion of the Chief Justice of Pakistan in respect of the suitability of a person to be appointed to constitutional judicial office had primacy and that this opinion was subjective and not open to challenge through judicial review.

12. To revisit the judgment rendered by this Court in the Munir Bhatti case (supra), a Review Petition was also filed by the Federation of Pakistan which was dismissed *vide* judgment titled Federation of Pakistan through Secretary Ministry of Law Vs Munir Hussain Bhatti and others (PLD 2011 SC 752). The operative portion is reproduced as under:

18. Regardless of the above discussion, it must be stressed here that though the Commission and the Committee perform essentially the same functions as the Chief Justice and the Prime Minister in the previous dispensation, it would be a mistake to imagine these constitutional bodies as simply substitutes for the Chief Justice of Pakistan and the Prime Minister respectively. The base of decision-making has been substantially broadened. Thus we now have in the Commission, members of the Bar and the governing Executive involved in the decision-making process along with seven members of the Judiciary who did not have a Constitutional role in the previous dispensation. This provides capacity to the Commission which enables it to have information about, and consider what in our jurisprudence are referred to as 'antecedents', of a potential nominee for judicial office. This should not be taken to mean that the Committee's role in considering the antecedents of such nominee stands eliminated. The Committee may also examine the antecedents of a nominee and form an opinion as to his suitability for judicial office. Such opinion, however, must conform to standards which pass judicial scrutiny because the decisions of the Committee are subject to judicial review.

19. There may, therefore, be an overlap of functions of the Commission and the Committee in, for instance, assessing and evaluating the antecedents of

a nominee for judicial office. But this overlap does not eliminate the role of the Committee or make it redundant. It simply requires the Committee to engage in a conscious and rigorous exercise of its own which will ensure that a person who has dubious antecedents is filtered out in the selection and appointment process. It is precisely this function which has been emphasized on behalf of the Federation in the synopsis of arguments referred to above, wherein it has been said, inter alia, that the Committee may "be concerned in calling for intelligence reports which was the function of the Governor under the old system...".

21. It is clear that the observations which form the sole basis of the Committee's decision represent at best the pre-deliberation views of the Chief Justices of the two High Courts. These views may or may not have an empirical basis. It would be for the Commission, assembled as a collegium to examine the same and to decide whether or not these views adhere to the objective standards considered appropriate or relevant by the collegium. This is the essential function of a collegium responsible for making a collective decision. Our jurisprudence is familiar with instances of collective decision making, be these in University Syndicates, Boards of Trustees/directors or statutory authorities etc. The hallmark of such decision-making is that each member of the collegium brings his own views - informed or uninformed, subjective or reasoned - to the collegiate body. It is there that all views are either synthesized into an objective decision, or a member of the collegiate body, who disagrees with the collective view, records his dissent.

22. In the facts of this case, the relevant collegiate body, the Commission, unanimously agreed to recommend the contentious names after discussion. The Committee, therefore, could not rely on the pre-discussion views of the one member of the Commission respectively in each case, without providing any independent reasoning. The Committee did not have any information before it for treating the tentative views of the two Hon'ble Chief Justices as empirical fact nor did it consider the objective standards which informed the unanimous opinion of the Commission. It is this aspect of the petitions which has been of concern to us and has justifiably been given importance. The Committee could still have disagreed with the Commission within the ambit previously reserved for the Prime Minister, if it had any reasons of its own to justify a different opinion. This process, if adhered to, would have been consistent with the role which was earlier envisaged for the Prime Minister...

23. Therefore, if in future the Committee decides to subordinate itself to the opinion of one member of the Commission, it must, under accepted norms of judicial scrutiny, give its own reasons for making this choice. Without such reasons which are capable of withstanding judicial scrutiny, the opinion of the Committee can only be termed as unreasoned and arbitrary. Our jurisprudence as a rule strikes down arbitrary and unreasoned exercise of discretionary power, particularly when the law requires that reasons be given by the decision maker for such exercise of power. Reference can be made to the case titled Chief Justice of Pakistan Iftikhar Muhammad Chaudhry v. President of Pakistan through Secretary and others (PLD 2010 SC 61) if authority is required for this established principle of law. Thus, if at all, a legal principle is to be deduced from our judgment in the light of Article 189, it would be that the Committee does not have untrammelled powers to choose, without sound reasons, the unconsidered views of one member of the Commission out of thirteen, while discarding the considered views of all thirteen members together or of the remaining twelve members. The decisions of the Committee must meet the usual and well recognized standards of objectivity and application of mind, amongst other standards.

13. A similar controversy arose in the case of Sindh High Court Bar Association, Sukkur v. Pakistan through Secretary Ministry of Law Parliamentary Affairs and Justice, Islamabad and another (PLD 2012 Sindh 531), where two constitution petitions were filed by the Sindh High Court Bar Association, Sukkur and the Sindh High Court Bar Association, Karachi, in the Sindh High Court against the decision

of the Committee whereby it refused to confirm the nominations made by the Commission for two learned Sindh High Court judges. The constitution petitions were heard by a full bench (three-members) of the Sindh High Court whereby it was held that the decision of the Committee not only suffers from illegality, irrationality and procedural impropriety, but in a large part has purportedly been made for considerations which are clearly beyond the well prescribed domain of the Committee and, as a consequence thereof, the impugned decision of the Committee was set aside. The judgment was authored by Justice Magbool Baqar (as he then was). His lordship, while relying on the dictums rendered in the case of Munir Hussain Bhatti, Advocate and others v. Federation of Pakistan and another (PLD 2011 SC 407), Al-Jehad Trust and others v. Federation of Pakistan and others (PLD 1996 SC 324), Sharaf Faridi and others v. Federation of the Islamic Republic of Pakistan and another (PLD 1989 Karachi 404), Syed Zafar Ali Shah and others v. General Pervez Musharraf, Chief Executive of Pakistan and others (PLD 2000 SC 869), Chief Justice of Pakistan Iftikhar Muhammad Chaudhary v. President of Pakistan and others (PLD 2010 SC 61), Mehram Ali and others v. Federation of Pakistan and others (PLD 1998 SC 1445) and Sindh High Court Bar Association and another v. Federation of Pakistan and others (PLD 2009 SC 879), held in paragraph 10 of the judgment that in our jurisprudence, it is now well settled (i) that the independence of the judiciary and the concept of separation of powers are the cardinal principles of our Constitutional scheme; (ii) that the independence of the judiciary is inextricably linked and connected with the process of appointments of the Judges of the Constitutional Courts; (iii) that the evaluation of the calibre, competence, legal acumen, and the overall suitability of a nominee for appointment as a Judge of a Constitutional Court falls exclusively within the domain of the judicial consultees; (iv) that the decision of the Commission is not justiciable; (v) that the scope of the Committee's function and competence is limited to consider the antecedents, to be examined on the basis of material obtained by the Committee/executive; (vi) that the Committee can refuse to accept the nomination of the Commission only on the basis of antecedents, such as character, moral and/or financial integrity; (vii) the Committee's refusal to accept the nomination by the Commission should be based on very strong reasons pertaining to

the criteria falling within the former's domain; and (viii) that the reasons, as above, are justifiable and are amenable to judicial scrutiny/review.

14. The aforesaid judgment rendered by the Sindh High Court was also challenged in this Court which was decided by a four-member bench in the case of Federation of Pakistan through Secretary, Ministry of Law and Parliamentary Affairs and Justice, Islamabad v. Sindh High Court Bar Association through President and another (PLD 2012 SC 1067). The Court while relying on the dictum laid down in the case of Munir Hussain Bhatti (supra), dismissed the petition and held that the essential function of a collegium is its responsibility to make a collective decision by examining any observations made and deciding whether or not those views adhere to the objective standards considered appropriate or relevant by the collegium. Our jurisprudence is familiar with instances of collective decision making, be they in University Syndicates, Boards of Trustees/directors or statutory authorities etc. The hallmark of such decision-making is that each member of the collegium brings his own views, informed or uninformed, subjective or reasoned, to the collegiate body. It is there that all views are either synthesized into an objective decision, or a member of the collegiate body, who disagrees with the collective view, records his dissent. This Court reiterated that the ratio of the Munir Hussain Bhatti case (supra) is fully applicable and was rightly relied upon by the three-member bench of the Sindh High Court.

15. A reading of Article 175A of the Constitution makes it abundantly clear that two different limbs have been created to examine and scrutinize the nominations of judges for appointment in the superior Courts, but it is apparent that the Committee is neither vested with any role to act as an appellate forum for the Commission, nor does the Committee have any right or authority to remand the nomination for reconsideration to the Commission. The role of the Committee is confined to the confirmation, or non-confirmation, of the name nominated and, in case the nomination is not confirmed, the reasons thereof shall be sent to the Commission for sending another nomination. Here the Committee remanded the matter to the Commission for fresh consideration due to the alleged seniority issue, which exercise of powers by the Committee is alien to Article 175A of the Constitution. The independence of the Judiciary is a basic

principle of constitutional governance in Pakistan. It is a well settled exposition of law that a written constitution is, in essence, a form of statute which needs to be interpreted liberally. It is also a well settled principle of interpretation that the Constitution has to be read holistically as an organic document which contemplates the trichotomy of powers between the three organs of the State, namely, the Legislature, the Executive, and the Judiciary. The doctrine of pith and substance lays much emphasis on comprehending and figuring out the exact characteristics of constitutional provisions. The concept of purposive interpretation places an obligation upon the Courts to interpret the statute or the Constitution keeping in mind the purposefulness for which the provision in question was legislated with a dynamic and result oriented approach rather than construing it in a restrictive or stringent sense. According to Salmond's Jurisprudence, interpretation or construction is the process by which the courts seek to ascertain the meaning or intention of the legislature through the medium of the authoritative forms in which it is expressed. The interpretation of the Constitution becomes more important when there is a need to harmonize it with the democratic principles of the State. The role and powers assigned to the Commission and Committee in the Constitution as two of the most important limbs of the judicial appointment process is also to be vetted under the doctrine of harmonious interpretation which is akin to the notion of an extensive approach within the basic structure and constitutional scheme.

16. Seemingly, the bone of contention was with regard to the breach of seniority due to which the Committee did not confirm the names of the District Judges as recommended by the Commission. We have also scanned the minutes of meeting of the Commission. The gist of the minutes reflects that the Chairman of the Commission invited the Chief Justice (PHC) to brief the Commission about the nominations. He briefed that 586 Judicial officers are working in the judiciary of Khyber Pakhtunkhwa, from whom three have been nominated to be considered; he also cited the reasons for superseding the three senior District Judges. He also brought to the notice of the Commission that after sending the nominations, the Service Tribunal for Subordinate Judiciary, *vide* judgment dated 18.12.2021, allowed the appeal of Mr. Kaleem Arshad, District and Sessions Judge, and the implementation of the judgment will give an edge to Mr. Kaleem Arshad over the three judges whose names have been recommended. It is further highlighted

from the discussion that Mr. Justice Rooh-ul-Amin Khan (senior puisne Judge, PHC) added that the case of Mr. Kaleem Arshad will be placed before the Administrative Committee for re-fixing his seniority in accordance with the said judgment. He further added that the judgment is also subject to challenge before the Supreme Court by the High Court or by those who are affected. The Chief Justice (PHC) observed that, due to this judgment, his order of recommendations from the cadre would change placing Mr. Kaleem Arshad at Serial No. 1. In response, the Chairman of the Commission asked the Chief Justice (PHC) whether he would like to include the name of Mr. Kaleem Arshad in the list of recommendees, or whether he desires to withdraw the nominations. It is also evident from the discussion that the Chief Justice (PHC), though he affirmed that the judgment is in the field, but on the query of the Chairman, the Chief Justice (PHC) stated that he would stand by the nominations. So far as the matter of Mr. Asim Imam is concerned, due deliberation was made on his service record and it is also mentioned in the minutes that he was superseded twice before, in the year 2020, when two lists for appointment came up before the Commission which were initiated by the then Chief Justice Mr. Justice Waqar Ahmed Seth, and there appeared to be a consensus. Similarly, the service record of Mr. Hamid Mughal was also considered but he was not recommended and it is pertinent to point out that even the Committee has not sent his name for reconsideration, whereas the dossier of Mr. Kaleem Arshad was not before the Commission for the reason that his name was not recommended by the Chief Justice (PHC) and the decision in his service appeal was rendered after the nominations had been sent to the Commission. Though no right of appeal is provided to an aggrieved person under the Constitution or the Rules against a decision of the Commission and Committee, nor can the proceedings before the Commission be considered a 'trial' within the meaning of Article 10A of the Constitution, but in all fairness, it is clear that the nominations were finalized by the Chief Justice (PHC) in consultation with his fellow judges at the High Court and then proposed for recommendation to the Commission, and it is reflected from the minutes of meeting of the Commission that, after due diligence of the service record, and deliberation on the issue of seniority, the recommendations were made by a majority of the members with their collective wisdom.

17. In view of the fact that the elevation of District Judges corresponds with and reckons from the service cadre, therefore for all practical purposes, the guiding principle as accentuated and envisioned in the civil servant structure may be contemplated to appreciate the phraseology of seniority-cum-fitness and/or seniority-cum-merit. In fact, the seniority system is fundamentally an arrangement which acknowledges and corroborates the length of service for consideration of the dossier by the Departmental Promotion Committee or Selection Board under Civil Service for promotion or any other progression. However, while considering the eligibility for promotion or progression, the predominant factor is not solely seniority, instead it is always coupled with fitness and/or merit. Seniority or length of service is not considered a solitary benchmark or standard, in fact competence, antecedents and credentials are also predominant components for progression to the particular post. In the normal course of things, fitness comes first and seniority is given weightage when merit and ability are more or less equivalent among the contenders. One view is that meritocracy is a system in which talented and hardworking personnel are chosen for promotions based on achievements and not because of their seniority or length of service. In the case of Muhammad Amjad versus Director General, Quetta Development Authority and another (2022 SCMR 797 = 2022 PLC(CS) 594), it was held that the promotion is not a vested right, but it depends on the eligibility as well as fitness of the candidate. The concept of eligibility implies a qualification to be appointed or promoted, whereas determination of fitness encompasses a person's competence to be chosen or selected for appointment or promotion subject to the availability of post on which the credentials and antecedents of person could be examined for examining his merits and worthiness for promotion. In the case of State of Mysore versus Syed Mahamood and others (AIR 1968 SC 1113), it was held that where the promotion is based on seniority-cum-merit the officer cannot claim promotion as a matter of right by virtue of his seniority alone and if he is found unfit to discharge the duties of the higher post, he may be passed over and an officer junior to him may be promoted. But these are not the only modes for deciding whether promotion is to be granted or not.

18. The minutes of the Commission's meeting further expressed that the hon'ble Chairman of the Commission constituted a four-member committee under Rule-6 of the JCP Rules to verify the antecedents of

the nominees, and a two-member Committee to verify their professional competence and caliber. It is also revealed from the minutes of meeting that the Chairman of the Commission, after receiving the names, consulted two brother judges from Khyber Pakhtunkhwa in the Supreme Court and the nominations were also supported by hon'ble Judges from Khyber Pakhtunkhwa and members of the bar. The minutes of meeting of the Commission reflect that, after effectual and lengthy discussion and deliberation, including on the issue of seniority, and considering the pros and cons of the views expressed by the learned members, the Commission, according to the mandate of Article 175A of the Constitution, recommended the nominees (District Judges) for appointment as Additional Judges of the Peshawar High Court by a majority of ten members and forwarded the recommendations to the Committee

19. It is indisputable that the Committee can neither travel beyond its bounds or limits, nor can it undertake or embark on the role and functions of the Commission. The *raison d'être* of enacting Article 175A in the Constitution for the appointment of judges to the superior Courts through the Commission is to make recommendations by majority without according any primacy or supremacy to any individual member. Absolute discretion is not given to any one, not even to the Chairman of the Commission, rather the decision is to be made by majority without any provision for a casting vote where there is a tie among the members. The collegium of the Commission is not a one man show but consists of, amongst others, the Chief Justice of Pakistan, the four senior most judges of this Court, the Chief Justice of the concerned High Courts, the Federal Minister for Law, Justice and Parliamentary Affairs, the Attorney General for Pakistan and representatives of the Bar. The majority decision or recommendation rendered by this Commission cannot be made subject to review by the Committee whose dominion and province of expertise is entirely different. The Commission and Committee are both obligated and duty-bound to act within the spheres of their dominions and command. The realm of powers and jurisdiction of the Commission within the framework of the collegium is to evaluate the professional caliber, judicial skill, legal acumen, personal conduct and suitability of the nominees, which terminus cannot be trespassed or encroached on by the Committee under the region of its powers. In this case too, while remanding the matter to the Commission, the Committee failed



to render any independent evaluation or reasoning even with regard to the seniority issue, and instead, on the basis of a discussion among some hon'ble members of the Commission on the issue of seniority, jotted down in the minutes of the meeting, decided to remand the matter for reconsideration without proper application of mind. The Committee cannot make their decision on the basis of minority views expressed during discussion but in totality; the majority discussion must be considered and in case of a variance of opinion, the Committee should provide independent reasoning and the decision should not be based on guesswork or picking and choosing the points from the gist of discussion recorded in the minutes of meeting of the Commission. Under the mandate of Article 175A of the Constitution, the Committee may confirm or may not confirm the candidate with reasons, but there is no power vested in the Committee to call upon the Commission to reconsider the nominations.

20. Though in the memo of petitions it is alleged that the decision of the Committee is in compliance with the dictum laid down in the case of Munir Bhatti (supra), but in our considered opinion, not only the decision of the Committee is in excess of jurisdiction and powers but also against the law laid down in the case of Munir Bhatti (supra). The Committee also failed to realize a crucial factor, that whatever issues were articulated during the discussion by the hon'ble members of the Commission evincing diversified views, including the issue of seniority, were at the end of the day culminated and merged into the majority decision of the Commission and transmitted to the Committee in the shape of recommendations. The threshold of professional skills, calibre, competence, legal acumen, antecedents and over-all suitability of the nominees were considered by the Commission through a collegium of experts in the discipline of law which could not be overturned by the Committee in a perfunctory and unreasonable manner which would frustrate the very purpose of the Commission and render it redundant. At the same time, we are sanguine and mindful that the Committee cannot be considered an ineffectual or superfluous corpus, rather it has the capability and competence to complement value added role in bringing forth judicial appointments by taking into consideration material which is different from and may not have been available to the Commission. The Committee may examine and gauge the antecedents, such as character, moral and or financial integrity and can reach an independent decision on the basis

of factual data, if any, collected by them and which was not before the Commission, and communicate its independent reasoning in order to avoid any controversial appointment. A rational demarcation of roles of two constitutional bodies cannot be considered adversarial or on the warpath. Quite the opposite, the object of both bodies is to ensure the appointment of the most suitable and deserving persons as Judges of superior Courts. In the Munir Hussain Bhatti case (*supra*), this Court laid out the basic elements and fundamentals required to be considered for the appointment of judges, namely acumen, antecedents, caliber, competence, conduct, integrity and suitability. The aforesaid connotations are delineated in the various lexicons as under:

1. **Collins Concise Dictionary of the English Language**

- (i) **acumen** (*n.*) keenness and quickness of mind
- (ii) **antecedent** (*n.*) 3. [*pl.*] one's ancestry, past life, etc.
- (iii) **calibre** (*n.*) 4. quality or ability
- (iv) **competence** (*adj.*) 1. well qualified; capable; fit 2. sufficient, adequate
- (v) **conduct** (*n.*) 1. management; handling 2. the way that one acts; behavior
- (vi) **integrity** (*n.*) 3. uprightness, honesty, and sincerity
- (vii) **suitable** (*adj.*) right for the purpose, occasion, etc.; fitting; appropriate

2. **Concise Oxford English Dictionary (Twelfth Edition)**

- (i) **acumen** (*n.*) the ability to make good judgments and take quick decisions.
- (ii) **antecedent** (*n.*) 2. (**antecedents**) a person's ancestors and social background.
- (iii) **calibre** (*n.*) 1. quality of character or level of ability.
- (iv) **competence** (*n.*) 1. the quality or extent of being competent.
- (v) **conduct** (*n.*) 1. the manner in which a person behaves.
- (vi) **integrity** (*n.*) 1. the quality of having strong moral principles.
- (vii) **suitable** (*adj.*) right or appropriate for a particular person, purpose, or situation.

3. **Chambers 21<sup>st</sup> Century Dictionary**

- (i) **acumen** (*n.*) the ability to judge quickly and well; keen insight.
- (ii) **antecedent** (*n.*) 4. (*usually antecedents*) a. someone's past history b. someone's ancestry.
- (iii) **calibre** (*n.*) 3. quality; standard; ability.
- (iv) **competence** (*n.*) 1. capability; efficiency.
- (v) **conduct** (*n.*) 1. behavior.

(vi) **integrity** (*n.*) 1. strict adherence to moral values and principles; uprightness.

(vii) **suitable** (*adj.*) appropriate, fitting, proper, agreeable, etc.

21. The Munir Bhatti case was decided by a four-member bench of this Court and the same four-member bench heard and dismissed the review petition. The full bench (three-members) of the Sindh High Court decided the constitution petitions based on the *ratio decidendi* of Munir Hussain Bhatti case (supra) and was challenged again in this Court, but again the four-member bench of this Court reiterated the principles laid down in Munir Hussain Bhatti case which is intact and in field. The doctrine of *Stare Decisis* is a Latin term that connotes "*let the decision stand*" or "*to stand by things decided*". Similarly, the Latin maxim *Stare decisis et non quieta movere* means 'to stand by things decided and not to disturb settled points'. This represents an elementary canon of law that Courts and judges should honor the decisions of prior cases on the subject matter which maintains harmony, uniformity and renders the task of interpretation more practicable and reasonable while adhering to it for resolving a *lis* based on analogous facts. The terminology "*vertical stare decisis*" explicates that the decisions of higher courts should take precedence over the decisions of lower courts which is intensely embedded in the American legal system. Whereas the concept of "*horizontal stare decisis*" provides that prior decisions made by courts at a particular appellate level should provide some precedent for cases heard by courts of the same appellate level, however horizontal *stare decisis* is generally seen to be less forceful as compared to vertical *stare decisis*. The doctrine of binding precedent has the excellence of fostering and disseminating firmness and uniformity and also supports the development of law. The doctrine of *stare decisis* is to be adhered to as long as an authoritative pronouncement holds the field, until and unless the dictates of compelling circumstances fortified by rationale justify the exigency of a fresh look for judicial review which has not been done so far for revisiting the dicta laid down in the case of Munir Hussain Bhatti case (supra) which has binding effect under the doctrine of binding precedent. No doubt according to the hierarchical façade and veneer of our judicial system, the dominant consideration is that the law declared by this Court should be certain, translucent and rational, as most of the decisions not only constitute a determination of rights of the parties, but also set down a declaration

of law in service being a binding principle in future cases as a valuable tool of development in the jurisprudence of law. At this point, it would be appropriate to refer to the relevant excerpts appearing at page 47 and 50 of the *Treatise on the Constitutional Limitation* authored by Thomas M. Cooley who expounded as under:-

And as to the first, we understand the rule to be, that a decision once made in a case, by the highest Court empowered to pass upon it, is conclusive upon the parties to the controversy and their privies, who are not allowed afterwards to revive it in a new proceeding for the purpose of raising the same or any other questions. The matter in controversy has become *res judicata*, a thing definitely settled by judicial decision; and the judgment of the Court imports absolute verity. Whatever the question involved, whether the interpretation of a private contract, the legality of an individual act, or the validity of a legislative enactment, the rule of finality is the same. The controversy has been adjudged, and once finally passed upon is never to be renewed.

The rule of conclusiveness to this extent is one of the most inflexible principles of the law; in so much that even if it were subsequently held by the Courts that the decision in the particular case was erroneous, such holding would not authorize the reopening of the old controversy in order that the final conclusion might be applied thereto.

A solemn decision upon a point of law arising in any given case becomes an authority in a like case, because it is the highest evidence which we can have of the law applicable to the subject, and the Judges are bound to follow that decision so long as it stands unreversed, unless it can be shown that the law was misunderstood or misapplied in that particular case. If a decision has been made upon solemn argument and mature deliberation, the presumption in favour of its correctness, and the community have a right to regard it as a just declaration or exposition of the law, and to regulate their actions and contracts by it. It would, therefore, be extremely inconvenient to the public if precedents were not duly regarded, and implicitly followed. It is by the notoriety and stability of such rules that professional men can give safe advice to those who consult them, and people in general can venture to buy and trust, and to deal with each other. If judicial decisions were to be lightly disregarded, we should disturb and unsettle the great landmarks of property. When a rule has once been deliberately adopted and declared, it ought not to be disturbed unless by a Court of appeal or review, and never by the same Court, except for very urgent reasons, and upon a clear manifestation of error; and if the practice were otherwise, it would be leaving us in a perplexing uncertainty as to the law.

22. At this juncture, we cannot ignore the doctrine of precedents *vis-à-vis stare decisis*, since both have fundamental values engrained in our judicial system to ensure an objective of certitude and firmness. Judicial consistency advocates and encourages the confidence in the judicial system and to achieve this consistency, the Courts have evolved the aforesaid rules and principles which are grounded in public policy. The aforesaid doctrine has been expressed in various law lexicons as under:

**1. Black's Law Dictionary (Tenth Edition)** (at pages 1626 to 1627)

The rule of adherence to judicial precedents finds its expression in the doctrine of *stare decisis*. This doctrine is simply that, when a point or principle of law has been once officially decided or settled by the ruling of a competent court in a case in which it is directly and necessarily involved, it will no longer be considered as open to examination or to a new ruling by the same tribunal, or by those which are bound to follow its adjudications, unless it be for urgent reasons and in exceptional cases." William M. Lile et al., *Brief Making and the Use of Law Books* 321 (Roger W. Cooley & Charles Lesley Ames eds., 3d ed. 1914). The general orthodox interpretation of *stare decisis* ... is *stare rationibus decidendis* ('keep to the *rationes decidendi* of past cases'), but a narrower and more literal interpretation is sometimes employed. To appreciate this narrower interpretation, it is necessary to refer ... to Lord Halsbury's assertion that a case is only authority for what it actually decides. We saw that situations can arise in which all that is binding is the decision. According to Lord Reid, such a situation arises when the *ratio decidendi* of a previous case is obscure, out of accord with authority or established principle, or too broadly expressed." Rupert Cross & J.W. Harris, *Precedent in English Law* 100-01 (4<sup>th</sup> ed. 1991).

**2. Words and Phrases (Permanent Edition), Volume 39A** (at page 602)

The doctrine of "stare decisis" requires that rules of law when clearly announced and established by a court of last resort should not be lightly disregarded and set aside but should be adhered to and followed. *Walker v. Bumiller*, Ohio, 27 O.C.D. 366, 25 Cir.Ct.R., N.S., 385. The doctrine of "stare decisis", meaning to stand by decided cases, rests upon the principle that law by which men are governed should be fixed, definite, and known, and that, when the law is declared by court of competent jurisdiction authorized to construe it, such declaration, in absence of palpable mistake or error, is itself evidence of the law until changed by competent authority. *In re Proposal to Incorporate Town of Chesapeake, Kanawha County*, 45 S.E.2d 113, 118, 130 W.Va. 527.

**3. American Jurisprudence (Second Edition), Volume 20** (at page 521)

"While *res judicata* applies only when the same parties, or their privies, are involved in the subsequent case as were involved in the prior case, the applicability of *stare decisis* is not affected by the fact that different parties are involved in the case where the precedent was established. *Res judicata* applies to decisions of both law and fact. *Stare decisis*, on the other hand, is applicable only on questions of law. *Res judicata* is a rule of law that must be applied even where the decision binding as *res judicata* was erroneous, whereas *stare decisis* is a judicial policy in which a certain flexibility is inherent, and which, therefore, does not prevent a Court from overruling its prior decision if, upon re-examination thereof, it is convinced that the decision was erroneous. It has also been pointed out, as a difference between *res judicata* and *stare decisis*, that *stare decisis* is based upon the legal principle or rule involved in a prior case and not upon the adjudication which resulted therefrom, whereas *res judicata* is based upon the adjudication." [Ref: Pir Bakhsh v. Chairman, Allotment Committee (PLD 1987 SC 145)]

**4. Understanding Statutes: Canons of Construction (Fourth Edition), S. M. Zafar, External Aids to Interpretation** (at pages 752 to 756)

The principle of *stare decisis* relates to decisions followed for a long time if a statutory provision of some ambiguity or doubtful meaning is interpreted by higher courts and same has been followed by long period of time and has been acted upon by persons in formation of contracts or in disposition of property or in legal procedures shall not be ordinarily overruled thus the court adopts a policy to stand with the previous judgment...

The principle of *stare decisis* is a greatly valuable doctrine of common law and court should stand by precedents and should not disturb them

but this rule is not so inflexible which precludes a departure therefrom in any case...

However, a rider has been added that previous decisions should not be followed to the extent that grievous wrong may result and accordingly the courts ordinarily will not adhere to a rule of principle established by previous decision which they are convinced is erroneous...

Lord Eldon said 'it is better the law should be certain' that every judge should speculate upon and 'than that every judge improvement in it'. Lord Ellenborough observed 'it is extremely dangerous to shake the authority of decided cases'.

In 1919 Lord Buckmaster, enunciated the principle on which the rule of *stare decisis* is based. "Firstly, the construction of a statute of doubtful meaning once laid down and accepted for a long period of time ought not to be altered.... Secondly, that the decision upon which title to property depends or which by establishing principles of construction otherwise form the basis of contracts ought to receive the same protection. Thirdly, decisions affecting the general conduct of affairs, so that their alteration would mean that taxes had been unlawfully imposed or exemption unlawfully obtained, payments needlessly made or the position of the public materially affected, ought in the same way to continue."

**5. Pir Bakhsh thr. L.R.s and others v. The Chairman, Allotment Committee and others (PLD 1987 SC 145).** "Elaborating further, it is the policy of the Courts to stand by the *ratio decidendi*, that is, the rule of law and not to disturb a settled point. This policy of the Courts is conveniently termed as the doctrine of rule of *stare decisis*. This rationale behind this policy is the need to promote certainty, stability, and predictability of the law. This, however, does not mean that this rule is inflexible. 17. This Court's jurisprudence has shown that usually the courts do not overrule the established precedents unless there is a social, constitutional or economic change mandating such a development. The numbers themselves speak of restraint and the value this Court attaches to the doctrine of precedent. This Court regards the use of precedent as indispensable bedrock upon which this Court renders justice. The use of such precedents, to some extent, creates certainty upon which individuals can rely and conduct their affairs. It also creates a basis for the development of the Rule of law. As the Chief Justice of the Supreme Court of the United States, John Roberts observed during his Senate confirmation hearing, "It is a jolt to the legal system when you overrule a precedent. Precedent plays an important role in promoting stability and even-handedness". [Congressional Record--Senate, Vol. 156, Pt. 7, 10018 (7-6-2010).]

23. To conclude, we have no hesitation in our mind while holding that the judgment in the case of Munir Bhatti (supra) is very much in field which was also reiterated and reaffirmed by a bench of equal strength in the case of Federation of Pakistan through Secretary, Ministry of Law and Parliamentary Affairs and Justice, Islamabad versus Sindh High Court Bar Association through President and another (PLD 2012 SC 1067). The foregoing situation also resonated that the judgment of a bench of larger strength is binding on a bench of smaller strength. We have also noted in the case in hand, the entire decision of the Committee of remanding the nominations of District and Sessions Judges for reconsideration is based solely on the views expressed by two hon'ble members of the Commission on the issue of seniority but in the end, the nominations were made by majority. There is no

indication in the decision of Committee that any independent vetting was done by the Committee with regard to the antecedents, character, and integrity, instead the Committee has relied entirely on the pre-discussion and deliberation of the members of the Commission made prior finalizing the recommendations. The Committee's act of remanding the matter to the Commission for reconsideration was not only against the command and mandate of Article 175A of the Constitution, but also transgression of the enabling Rules and the hierarchy identified and demarcated for the functioning of the Commission and Committee, hence, in our view, the learned High Court rightly set aside the decision of the Committee.

24. So far as aforementioned C.M.As. filed by Mr. Muhammad Hamid Mughal are concerned, he has sought permission of this Court for filing his C.P.L.As. and also allowing him to proceed and argue the accompanying petitions in his personal capacity on the ground that he was not impleaded in writ petitions filed in the High Court due to which his constitutional, legal and vested rights have been adversely affected and he was condemned unheard and deprived from his nomination, consideration, and recommendation as an Additional Judge of the Peshawar High Court. The minutes of meeting of the Commission divulge that, though the name of Mr. Hamid Mughal was not nominated by the Chief Justice (PHC), the Committee constituted by the Chairman of the Commission considered the reasons for his supersession and also examined his service record. In the majority decision of the Commission, his name was not recommended for confirmation by the Committee. Even the minutes of the Committee meeting exhibit that the candidature of Mr. Hamid Mughal was never discussed, and according to the decision of the Committee they only remanded the names of (i) Mr. Fazal Subhan, (ii) Mr. Shahid Khan, (iii) Dr. Khurshid Iqbal, (iv) Mr. Kaleem Arshad, and (v) Mr. Asim Imam for reconsideration based on seniority and competence. If the applicant of the C.M.As. was aggrieved, he should have filed an independent writ petition in the High Court and should not have waited to be impleaded by the writ petitioners. Even keeping aside the recommendations of the Commission for a short while; the moot question is that the name of the applicant was also not considered by the Committee. Neither he was recommended by the Commission after due deliberation and consideration by majority, nor his credentials or antecedents were discussed by the Committee for sending back his name for

reconsideration with the other contenders, therefore, he is neither a proper nor necessary party and the challenge to the impugned judgment will also not help out the applicant who is neither part of recommendations of the Commission, nor the Committee and both the decisions, at least to the applicant's extent, cannot be upset under the doctrine of past and closed transactions with the regard to the consideration and recommendation by the Commission and Committee at least for the present batch of nominees. Consequently, the aforesaid C.M.As. are not maintainable, however the rejection of the C.M.As. will not constitute any stigma against the applicant.

25. The aforesaid Civil Petitions along with the C.M.As. were decided *vide* short order of the Court on 30.5.2023 as under:

1) CPs No.2314, 2317 and 2318/2022 by majority of two to one (Mr. Justice Athar Minallah dissenting) are dismissed. Leave to appeal is refused.

2) CMAS. No.863-P, 866-P and 869-P/2022 are unanimously held not to be maintainable and dismissed.

26. Above are the reasons assigned to the judgment in majority in support of paragraph No.1 of the short order dated 30.5.2023 together with the unanimous order for dismissing the CMAs mentioned in paragraph No.2 of the short order.

Judge

Judge

My reasons for allowing the petitions pursuant to granting leave are appended separately. (Athar Minallah-j)

Judge

Islamabad:  
Dated: 30.5.2023  
Approved for reporting