IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

PRESENT:
MR. JUSTICE MAQBOOL BAQAR
MR. JUSTICE SAJJAD ALI SHAH
MR. JUSTICE MUNIB AKHTAR

CIVIL PETITION NO.479-K OF 2020
(On appeal from the judgment dated 12.06.2020 passed by the High Court of Sindh, Karachi in Const. Petition No.D-444 of 2018.)

Aam Loeg Itehad & another ... Petitioners

Vs

The Election Commission of Pakistan & others ... Respondents

Petitioner No.2	:	In person
For Respondent No.1	:	Mr. Muhammad Nishat Warsi, DAG a/w Mr. Abdullah Hinjrah, Sr. Law Officer, ECP
For Respondents No.2, 3 and 4	:	Mr. Zia ul Haq Makhdoom, Sr. ASC a/w Ms. Hira Agha, Advocate
For Respondent No.5	:	Mr. Mansoor ul Haq Solangi, ASC
Date of Hearing	:	05.05.2021

ORDER

Munib Akhtar, J.: This leave petition is being disposed off as an appeal; see below. The petitioners challenge the judgment of the learned High Court dated 12.06.2020, which is reported as *Aam Log Ittehad and another v Election Commission of Pakistan and others* PLD 2020 Sindh 616. The first petitioner is a political party and the second petitioner, a retired Judge of this Court of high stature and great distinction, is its member. The matter was argued by the second petitioner.

2. It was submitted that the petitioners filed a petition in the High Court under Article 199, seeking writs in the nature of quo warranto against the Respondent Nos. 2 to 5. These respondents had been appointed as members of the Election Commission of Pakistan (Respondent No. 1; hereinafter "the Commission") after the 22nd Amendment (2016) to the Constitution, in terms of Article 218 of the Constitution. It will be convenient to set out clauses (1) and (2) of the said Article:

> "(1) For the purpose of election to both Houses of Majlis-e-Shoora (Parliament), Provincial Assemblies and for election to such other public offices as may be specified by law, a permanent Election Commission shall be constituted in accordance with this Article.
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> (2) The Election Commission shall consist of-
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> (a) The Commissioner who shall be the Chairman of the Commission; and
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> (b) four members, one from each Province, each of whom shall be a person who has been a judge of a High Court or has been a senior civil servant or is a technocrat and is not more than sixty-five years of age, to be appointed by the President in the manner provided for appointment of the Commissioner in clauses (2A) and (2B) or Article 213.
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> Explanation.- "senior civil servant" and "technocrat" shall have the same meaning as given in clause (2) or Article 213."

The learned petitioner explained that the Respondent Nos. 2 to 4 were retired Judges of respective High Courts whereas the Respondent No. 5 was a retired senior civil servant. It may be noted that the Respondent Nos. 2 and 5 have since retired; the other two respondents continue to hold office. By far the most important thrust of the submissions made was that the retired Judges could not have been appointed as members of the Commission on account of the bar contained in clause (2) of Article 207. An objection was also taken as to the appointment of the Respondent No. 5. Article 207 falls in Chapter IV of Part VII of the

Constitution, which relates to the Judiciary. Chapter IV contains provisions applicable generally to Judges of the Supreme Court and the High Courts. Clause (2) of Article 207 provides as follows (emphasis supplied):

> "A person who has held office as a Judge of the Supreme Court or of a High Court shall not hold any office of profit in the service of Pakistan, not being a judicial or quasi-judicial office or the office of Chief Election Commissioner or of Chairman or member of a law commission or of Chairman or member of the Council of Islamic Ideology, *before the expiration of two years after he has ceased to hold that office*."

3. The case of the learned petitioner, in essence, was that the three retired Judges could not be members of the Commission because, as on the dates of their respective appointments, the two year period had not yet elapsed. We may note that this is the admitted position, and there is no factual dispute as regards any of the matters taken up by the petitioners.

4. Expanding on his basic submission, the learned petitioner submitted that Article 207(2) provides for four exceptions to the bar contained therein. The first relates to a "judicial or quasi-judicial office", one to the Chief Election Commissioner and the last two to members of a law commission or the Chairman or member of the Council of Islamic Ideology (herein after "CII"). If the appointment of a retired Judge was to any of the offices within the exceptions then the appointment could be made even within the initial two year period. However, beyond that the bar was absolute and brooked of no other exceptions. Appointment as a member of the Commission was not within any excepted categories. Hence, it was contended, the appointment of the Respondent Nos. 2 to 4 was

ultra vires the Constitution and the petitioners were entitled to appropriate relief.

5. The learned petitioner submitted that the learned High Court erroneously concluded that the office of a member of the Commission was in the nature of a quasi-judicial office, and thus within the first of the excepted categories. On such basis, the appointments were held to be valid and the petition dismissed. The learned petitioner respectfully submitted that the learned High Court fell in clear error in coming to this conclusion. It was submitted that when considering whether an office was judicial or quasi-judicial, it was the inherent nature of the office that had to be considered. That was what determined whether it was judicial or quasi-judicial, and not any ancillary or collateral powers or functions that were, or could be, attached to the office or conferred upon it. It was submitted that the learned High Court had failed to keep this fundamental distinction in mind. The learned petitioner contended that the nature of the office was determinable by considering the basic constitutional duty that was imposed on the Commission. This is set out in clause (3) of Article 218, which provides as follows:

> "It shall be the duty of the Election Commission to organize and conduct the election and to make such arrangements as are necessary to ensure that the election is conducted honestly, justly, fairly and in accordance with law, and that corrupt practices are guarded against."

It was submitted that in its essence, this constitutional obligation was of an administrative or executive nature. It was certainly not judicial, and could not be regarded as quasi-judicial. The learned petitioner then referred to Article 219, which expands upon the duties of the Commission and lists the same in five

clauses. The first four are of a specific nature, and the learned petitioner submitted that even a bare perusal of the same showed that they were administrative/executive (and that included the appointment of Election Tribunals (clause (d)). The last clause is of a general nature and requires the Commission to perform "such other functions as may be specified by an Act of Majlis-e-Shoora (Parliament)". It was submitted that even if such functions were of a judicial or quasi-judicial nature that could not alter the nature of the office of a member of the Commission. That was determinable on the plane of constitutional principle and could not be altered or affected by exercise of sub-constitutional authority, i.e., the power to legislate conferred on Parliament in terms of clause (e). Referring to the legislation in question, i.e., the Elections Act 2017 ("2017 Act") and its predecessor legislation the Representation of the People Act, 1976 ("1976 Act"), the learned petitioner submitted that s. 9 of the former (which corresponds to s. 103AA of the latter) did confer a quasi-judicial jurisdiction on the Commission in terms of the said provisions. However, it was pointed out, both sections specifically deemed the Commission to be an Election Tribunal for purposes thereof. Thus, this was not a conferment of quasi-judicial functions on the Commission per se but rather in terms of a legal fiction that required the Commission to be treated (for strictly limited purposes) to be a forum (i.e., an Election Tribunal) that was a judicial body. The learned petitioner also referred to certain observations in the case law which according to him showed that the Commission did not have or exercise judicial functions. In any case, it was submitted, these functions were ancillary or collateral to the Commission's main functions and could not alter the inherent nature of the office of a member. The learned petitioner

also submitted that the position, and functions, of the Chief Election Commissioner ("CEC") could not possibly be any less than a member of the Commission. If the reasoning of the learned High Court were correct, then that would mean that the office of the CEC was also of a quasi-judicial nature. But that would then make redundant the specific mention of the CEC in Article 207(2); the express exclusion of this office would be otiose. Redundancy could not of course be lightly read into even a statute, let alone the Constitution. Thus, the learned High Court had erred in concluding that the office of a member of the Commission was quasi-judicial in nature.

6. As regards the Respondent No. 5 it was submitted that at the time of appointment his name was on the Exit Control List as being involved in a multi-billion rupee scam. Although he was subsequently acquitted his appointment was wholly inappropriate and could not have been made. Even if he (and the Respondent No. 2) since stood retired, the learned petitioner submitted that an appropriate declaration could still be made against them and they would be accountable for the salary and emoluments of office that had been obtained. It was prayed that the reasoning and conclusions of the learned High Court were erroneous in law and the impugned judgment merited being set aside.

7. Learned counsel who appeared for the Respondent Nos. 2 to and 4 took certain preliminary objections as to the maintainability of the petition before the High Court. It was submitted that the learned High Court had correctly concluded that the office of a member of the Commission was of a quasi-judicial nature.

Reference was made to Articles 213, 215 and 218 in particular. Turning to the 2017 Act, learned counsel relied strongly on s. 9 but submitted that there were a number of other provisions also in that statute that clearly established that the nature of the office was quasi-judicial. Reference was made to ss. 8, 15, 126 and 236. It was also submitted that the High Court had in an earlier decision, reported as *Major (Rtd) Abdur Rauf Khan v Justice (Rtd) Salah ud Din Mirza, Provincial Ombudsman and another* 1998 CLC 1225, held the office of the Ombudsman to be of a quasi-judicial nature. In this case the same objection, i.e., that the two year period under Article 207(2) had not elapsed as on the date of appointment had been taken, but was repelled. Relying on this decision it was submitted that the position of a member of the Commission was no different or at least comparable. It was submitted that both the reasoning and conclusions of the learned High Court were correct and ought to be sustained. Learned counsel for the Respondent No. 5 emphasized that the said respondent stood retired but in any case had been acquitted of the criminal charges against him and at the time of appointment the presumption of innocence applied in his case and prevailed. It was submitted that he had no case to answer. The learned DAG adopted the submissions of both learned counsel and prayed that the leave petition be dismissed.

8. We have heard the learned petitioner and learned counsel and considered the relevant provisions and the record. We begin by setting out the conclusions arrived at by the learned High Court, which are conveniently summarized in para 22 of the judgment:

> "22. We would, therefore, sum up our findings on various constitutional and legal grounds agitated by the petitioners and the objections as to maintainability of instant petition raised by the respondents, in the following terms:
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> (i) Petitioners have the locus standi to file instant constitutional petition in the nature of quo-warranto under Article 199(i)(b)(ii) of the Constitution of Islamic Republic of Pakistan, 1973 for the reason that any person, who may not be an aggrieved party, can invoke the constitutional jurisdiction of a High Court for issuance of a writ of quo-warranto so that a High Court may examine the validity of an appointment to a public office, on constitutional and legal grounds. In view of our detailed finding as recorded in Paras. 9 to 12 hereinabove, the objections raised by the respondents with regard to maintainability of instant petition on various grounds, including: (i) locus standi of petitioners to file instant petition; (ii) mala fide on the part of the petitioners; (iii) laches; and (iv) lack of territorial jurisdiction of this Court, are hereby declared to be without any substance, hence over-ruled.
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> (ii) Office of Election Commission of Pakistan is a "quasi-judicial office", therefore, bar of expiration of two years in terms of Article 207(2) of the Constitution of Islamic Republic of Pakistan, 1973, would not be attracted in the case of appointment of retired judges of Supreme Court and High Court(s). Therefore, a writ of quo-warranto cannot be issued against respondents Nos. 2 to 4 being the retired Judges of different High Courts on the grounds that their appointments have been made before expiration of two years from the date when they ceased to hold office as Judges of High Courts. Accordingly, writ against respondents Nos.2 to 4 is misconceived and not maintainable.
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> (iii) As regards issuance of writ of quo-warranto against respondent No.5, a retired bureaucrat, no substantial constitutional or legal ground has been agitated, nor any sufficient material or evidence has been produced in support of the allegations of corruption, therefore, we are not inclined to conduct any inquiry or to make a probe into the allegations levelled against respondent No.5 while exercising constitutional jurisdiction under Article 199(i)(b)(ii) of the Constitution in the instant case. Accordingly, writ against respondent No.5 is not maintainable."

We may note that the learned High Court has, in sub-para (ii), inadvertently referred to the "Office of Election Commission of Pakistan" being quasi-judicial. There is of course no such office (the Commission being a body), but the true meaning and intent is clear and we proceed accordingly. It will be seen that the preliminary objections taken before us were also raised before the

learned High Court but were repelled. We are satisfied with the treatment of the same; therefore no further notice need be taken of them here. Furthermore, we are, with respect, also not inclined to take up the matter of the Respondent No. 5, both for the reasons that found favor with the learned High Court and that admittedly he stands retired. We turn therefore to the central question raised before us, and decided by the impugned judgment: is the office of a member of the Commission of a quasi-judicial nature?

9. The first point to make is that the inquiry to be undertaken must be focussed on determining the essence of the office. And, in determining its true nature (its very pith and substance, as it were), it must be remembered that the office is created by the Constitution itself. As the office sounds on the constitutional plane, an inquiry into its nature must examine the matter through constitutional lens. To focus exclusively, or even primarily, on the plane of (sub-constitutional) legislation may well becloud the issue. And, more fundamentally, such an approach would be premised (if only implicitly) on the assumption that Parliament can affect or even alter the nature of the office. That, in our view, cannot be correct. Unless the Constitution itself so provides or permits, or necessarily require, the nature of the constitutional office here involved cannot be subject to, or affected by, the objectives and goals (howsoever desirable or laudable) of the legislature. It must be kept in mind that the constitutional duty of the Commission is expressly shielded from legislative action. That duty, as correctly submitted by the learned petitioner, is categorically set out in clause (3) of Article 218. Thus, while Article 222 lists in some detail the sort of electoral laws Parliament is competent to enact, it

concludes, very significantly, with the following words: “no such law shall have the effect of taking away or abridging any of the powers of the Commissioner or the Election Commission under this Part”. These words establish an array of powers and an area of activity that is constitutionally irreducible. (Of course, in the exercise of those powers and in conducting itself while performing its constitutional duties the Commission must act in accordance with the law as enacted. It is only when, and if, there is a clash or inconsistency between the two that the latter will give way to the former.) For present purposes, these words, when read with Article 218(3), indicate that the nature of the office of a member of the Commission (or the CEC for that matter) must be determined by looking at the constitutional position. While legislation may expand upon that by, e.g., conferring additional powers and/or functions on the Commission, that is not of the essence of the office. To hold otherwise may well make the office captive and beholden to whatever is set out in the law for the time being in force. For, what the legislature gives it can also take away. Thus, to regard the nature of the office as determinable by, or subject to, the legislative whim (again, howsoever laudably exercised) would make it rather like what was once said of equity and the Chancellor’s foot. That, in our view and with respect to the learned High Court, cannot be the correct. The nature of the office is to be determined autonomously, by a consideration of the constitutional position. The position under any laws for the time being in force can play only (and at best) a subordinate or ancillary role.

10. With these preliminary points in mind we take a first look at Article 207(2). As submitted by the learned petitioner, if the

question posed above was rightly answered in the affirmative, then the separate listing of the office of the CEC would become otiose and redundant. The reason is that anything that is true of, or for, the office of a member of the Commission must (unless there is some provision to the contrary) be necessarily true of, and for, the office of the CEC (although the reverse may not apply). If the constitutional intent had been to regard the former as a quasi-judicial office, then the same would be true for the latter. The specific mention of the office of CEC would not have been required. Why then list this office separately? With respect, the learned High Court failed to appreciate this basic question. Redundancy cannot lightly be read into a statute, let alone the Constitution. A reading of Article 207(2) that leads even to the possibility of such a conclusion is, in our view, constitutionally suspect and ought to be avoided.

11. So much for what emerges from even a bare reading of Article 207(2). We now proceed to consider the reasoning and conclusions of the learned High Court on the basis of the various provisions of the 2017 Act referred to, which were also relied upon before us by learned counsel for the respondents. Of these by far the most important is s. 9 which, as noted above, corresponds to the earlier s. 103AA of the 1976 Act. The first point to note is that the jurisdiction conferred on the Commission by these provisions is actually of a complex, hybrid nature and an attempt to “slot” it into the well known categories of “judicial”, “quasi-judicial” and “administrative” may not be appropriate (and may actually be misleading). However, any such discussion will take us too far from what is necessary for present purposes, and we proceed with this

matter on the basis that the jurisdiction conferred was, and is, of a quasi-judicial nature. Now, as the numbering of the earlier section suggests, it was not part of the 1976 Act when originally enacted. It was in fact added much later, in 1991. This in itself demonstrates that it could not be of the essence of the office of a member. Had that been the case, the failure to confer such a jurisdiction on the Commission from inception would have resulted in a material inability that could well have fatally hampered it in discharging its constitutional duties in terms of Article 218(3). That however was patently not so. Thus, the conferment of the jurisdiction on the Commission cannot be part, or even indicative, of the true nature of the office of a member. It was, and is, simply an additional power, latterly conferred and ancillary to the essence of the office. Thirdly, the jurisdiction has been conferred by statute and, as noted above, what the legislature gives it can take away. The jurisdiction could easily have been omitted when the 1976 Act was replaced by the 2017 Act. Section 9 can at any time be omitted or reshaped or even whittled down to insignificance. If therefore the jurisdiction so conferred were part, or even indicative, of the true nature of the office of a member, that nature would be subject to the will and whims of the legislature. That surely cannot be true for the constitutional office. Here, it must also be pointed out that both the learned petitioner and learned counsel for the respondents have proceeded on the basis that the jurisdiction was conferred in terms of clause (e) of Article 219, already referred to above. With respect, this cannot be correct. Clauses (d) and (e) were added to Article 219 only by the 18th Amendment (2010). On this view, the earlier insertion of the predecessor s. 103AA in 1991 would be *ultra vires*. The insertion is more properly referable to

Article 222, clause (d) of which empowers Parliament to make laws for the “conduct of elections” and “decision of doubts and disputes arising in connection with elections” (read of course, with Entry No. 41 of the Federal Legislative List). In other words, the jurisdiction was conferred in terms of the general lawmaking competences of Parliament and not in terms of a power relatable expressly to the duties of the Commission, as provided for in Article 219.

12. Fourthly, and most importantly, as pointed out by the learned petitioner, both s. 103AA and s. 9 specifically had, and have, a legal fiction in identical terms, to the following effect: “While exercising the powers conferred on it by sub-section (1), the Commission shall be deemed to be an Election Tribunal to which an election petition has been presented....” Now, an Election Tribunal is constituted to (exclusively) determine election disputes, and this is itself a constitutional requirement: see Article 225. This Tribunal is a forum that undoubtedly exercises judicial power. Section 9 deems the Commission to be such a Tribunal for its purposes and, as noted above, we proceed here on the basis that the jurisdiction conferred is quasi-judicial. As is apparent there is a tension and even, seemingly, a contradiction involved in what has just been said. (This is one of the many reasons why, as noted above, the jurisdiction conferred by s. 9 is actually quite complex in nature, not easily resolvable by resort to the “normal” division into the three well known categories, which ordinarily work well enough.) We need not resolve the tension here, nor iron out the apparent contradiction. It suffices to note that clearly the legislature itself was, and remained, acutely aware that the

jurisdiction could not be directly conferred on the Commission *per se*, i.e., acting as such. It could only be given under cover of a legal fiction requiring, for purposes of the jurisdiction, for the Commission to be regarded as that which it patently is not, i.e., an Election Tribunal. But if this is so (and the very constitutionality of a provision such as s. 9 can be regarded as being open to question) then one point is clear: it is not of the essence of the office of a member and does not, and cannot, touch upon the core or inherent nature of that office. We therefore conclude that the support found by the learned High Court in s. 9 (and the predecessor s. 103AA) for its conclusions was, with respect, an error that cannot be sustained.

13. The other provisions of the 2017 Act considered may now be taken up (though not in sequential order). Reference was made to s. 126, which provides that for purposes of disposal of an appeal the Commission has the same powers as vest in a court under the Code of Civil Procedure ("CPC") for certain matters as listed therein. Now, s. 126 and the conferment of the sort of powers there listed is a common legislative device that has been adopted in many statutes in respect of diverse offices, bodies, authorities and forums. To take but one example, s. 176 of the Income Tax Ordinance, 2001 ("2001 Ordinance") empowers the Commissioner of Inland Revenue to issue notices to persons to attend to tax (and/or other) authorities, and provide information and produce record etc. Subsection (4) of this section corresponds to s. 126. It lists very much the same sort of matters in respect of which the Commissioner can exercise the powers of a court under the CPC. No one has ever suggested that the Commissioner, by virtue of s.

176(4), is to be regarded as being an office or post of a quasi-judicial nature. Remaining with fiscal laws for the moment, we may also note that such laws routinely provide that for purposes of recovery of tax, the relevant authorities shall have the same powers as does a court under the CPC "for the purposes of the recovery of any amount due under a decree". See, e.g., s. 138 of the 2001 Ordinance, s. 202 of the Customs Act, 1969 and s. 48 of the Sales Tax Act, 1990. Again, no one has ever suggested that by reason of such a provision the tax authorities are to be regarded as quasi-judicial. Section 126 is just another example of a well known, and widely used, legislative device and nothing more should be read into it. Furthermore, the powers of the Commission are, as noted, limited to the disposal of an appeal. Section 125 is an example of such an appellate power. It is in relation to the count of the vote, which is clearly an administrative exercise.

14. Reliance was also placed on s. 236, which is an ouster clause of a sort well known to the law, and to be found in innumerable statutes. Again, with respect, for the reasons already given nothing can be concluded from this provision as to the nature of the office of a member. The next provision to consider is s. 15 which relates to complaints. Sub-section (1) provides as follows (emphasis supplied):

> "Any person aggrieved by any decision or action taken or direction issued by an authority subordinate to the Commission or any action of a political party or a candidate in violation of the Code of Conduct may, within fifteen days of such decision or action, submit a complaint to the Commission pertaining to matters *other than relating to election disputes falling under Article 225*."

The portion emphasized is significant. It excludes those matters which would (or could) require a judicial determination by an Election Tribunal under Article 225. That would clearly affect the reach of s. 9 where, as noted, the Commission exercises its (quasi-judicial) jurisdiction as such a Tribunal by reason of the deeming clause. Thus, what are left in s. 15 are matters that can be regarded as being essentially executive or administrative in nature and requiring determination on such basis. Certainly, this section does not in our view suggest that the office of a member of the Commission is quasi-judicial in nature. Section 4 (which corresponds to s. 6 of the 1976 Act) was also relied upon. This provision, in subsection (1), empowers the Commission, generally, to "issue such directions or orders as may be necessary for the performance of its functions and duties, including an order for doing complete justice in any matter pending before it...." It is further provided in subsection (2) as follows: "Any such direction or order shall be enforceable throughout Pakistan and shall be executed as if it had been issued by the High Court". The phrase "complete justice" used in subsection (1) is protean and cannot, in our view, be regarded as indicative of the exercise of only judicial or quasi-judicial jurisdiction. It can easily be related also to administrative and executive decisions and is so intended to apply here. As regards subsection (2), that is an enforcement mechanism. Given that Article 220 of the Constitution expressly binds all executive authorities in the Federation and the Provinces to assist the Commission in the discharge of its functions it is not surprising that subsection (2) gives an elevated status to an order or direction issued by it. It is however simply a procedural device, in the nature of a deeming clause ("as if it had been"). It would be

incorrect to confuse and conflate the nature of what it is that is to be enforced with how it is to be enforced, and read back from the latter something into the former that alters its very nature. (The enforcement mechanism created in fiscal statutes, which proceeds in comparable terms, has already been alluded to.) Section 4 therefore also does not advance the case sought to be made by the respondents and accepted, with respect erroneously, by the learned High Court.

15. The learned High Court also referred to s. 234. This falls in Chapter XV of the statute, titled “Miscellaneous”. It relates to a statutory duty of monitoring cast on the Commission, and, inter alia, confers an appellate power on the latter for purposes of the section. This is hardly, with respect, indicative of the nature of the office of a member being quasi-judicial. The learned High Court also relied on *Major (Rtd) Abdur Rauf Khan v Justice (Rtd) Salah ud Din Mirza, Provincial Ombudsman and another* 1998 CLC 1225. It was held on the basis of this decision that the office of a member was comparable to the office of the Provincial Ombudsman that had been considered there (in the context of Article 207(2)), and the latter had been found to be of a quasi-judicial nature. With respect, we are unable to agree that the offices are comparable. The learned Division Bench that decided the cited case considered in great detail the nature and structure of the statute under which the office of the Ombudsman was created and operated. It is clearly of a qualitatively different nature. The cited case does not provide any assistance for the issues raised here. We therefore conclude, with respect, that there is nothing in the 2017 Act as

would establish that the nature of the office of a member is quasi-judicial.

16. We now turn to consider two constitutional provisions which confer a jurisdiction on the Commission, one of which was (lightly) touched upon in the impugned judgment. The first of these is clauses (2) and (3) of Article 63 (read with Article 113, as appropriate). It will be recalled that the said Article, in clause (1), sets out the disqualifications from being a member of Parliament or a Provincial Assembly. The combined effect of clauses (2) and (3) is that (subject to the conditions therein contained) if a question arises that a lawmaker has become disqualified then the matter is to be decided by the Commission "and if it is of the opinion that the member has become disqualified, he shall cease to be a member and his seat shall become vacant". For our purposes the question is whether this jurisdiction is of a quasi-judicial nature, and if so is that determinative for the office of a member of the Commission. Since the jurisdiction is granted on the constitutional plane it is of course on a level higher than what is contained in the 2017 Act. We proceed on the basis that the jurisdiction is quasi-judicial in nature. Is this determinative of the nature of the office? In our view, the answer ought to be in the negative. That the jurisdiction conferred is important can hardly be doubted. But it is, in the end, ancillary to the core jurisdiction and powers of the Commission which are, as already noted, set out in Article 218(3). The reason is that even if clauses (2) and (3) of Article 63 were not there, some alternative mechanism could have been created, either on the constitutional plane or by Parliament by way of legislation, to deal with the question of whether a lawmaker had become

disqualified. But if Article 218(3) were to be done away with that would radically and fundamentally alter a crucial aspect of the Constitution, i.e., the conduct of elections, which underpin the functioning of the system of parliamentary democracy that has been held to be a basic or salient feature of the Constitution. It is noteworthy that although Part VIII of the Constitution, which consists of two chapters containing Articles 213 to 226, has been amended many times, clause (3) of Article 218 has never been touched (save for one change, which was only of a consequential nature). That core is what guides and informs us as to the true and inherent nature of the office of a member. Clauses (2) and (3) of Article 63, howsoever important, are for present purposes only ancillary.

17. This brings us to Article 63A, which was mentioned in passing by the learned High Court. For present purposes, it suffices to note that this Article (introduced by the 14th Amendment (1997) and much amended (and indeed substituted) thereafter) lists certain specific instances or acts which can lead to the disqualification of a lawmaker. It provides for an elaborate mechanism which can in the end result in the Presiding Officer of a House receiving a declaration of disqualification of a lawmaker from a Party Head (all these terms being defined in the Article). That declaration is to be placed before the Commission and if it confirms the same, the lawmaker ceases to a member of the House and his seat falls vacant. Clause (5) provides that any party aggrieved by the decision may appeal to the Supreme Court. For very much the same reasons as set out in relation to Article 63, we are of the view that this Article also does not guide and inform as

to the true or inherent nature of the office of a member of the Commission. As before, it is only ancillary for present purposes. In particular, the right of appeal to this Court does not alter anything.

18. In view of the above discussion and analysis, we conclude that the question posed in para 8 must be answered in the negative. The contrary view taken by the learned High Court is, with respect, erroneous, and cannot be sustained.

19. This does not however conclude the matter. For, the answer just given leads to another question: if the answer to the first question be in the negative, does that necessarily and ineluctably lead to the conclusion that the office of a member of the Commission is hit by the two-year bar contained in Article 207(2)? We turn to consider this question. The answer can be regarded as having four aspects.

20. Firstly, it must be examined is as to why was an exception created in Article 207(2) in favour of the office of the CEC only and not for a member of the Commission. After all, the provision specifically provides exceptions for, e.g., both the Chairman and a member of the CII. Why were members of the Commission not listed? To answer this fundamental question one needs to look at the Constitution as it stood on its commencing day (which, according to Article 265(2), was 14.08.1973). On that day, clause (2) of Article 213 provided as follows (emphasis supplied):

> "No person shall be appointed to be [Chief Election] Commissioner unless he is, *or has been*, a Judge of the Supreme Court or is, *or has been*, a Judge of a High Court and is qualified under paragraph (a) of clause (2) of Article 177 to be appointed a Judge of the Supreme Court."

Clauses (1) and (2) of Article 218 had been in the following terms:

> "(1) For the purpose of each general election to the National Assembly and to a Provincial Assembly, an Election Commission shall be constituted in accordance with this Article.
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> (2) The Election Commission shall consist of,
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> (a) the Commissioner who shall be Chairman of the Commission; and
>
> (b) two members each of whom shall be a Judge of a High Court appointed by the President after consultation with the Chief Justice of the High Court concerned and with the Commissioner."

It will be seen from the foregoing that the CEC could be either a sitting or a retired Judge. *However, the two members of the Commission in addition to the CEC could only be sitting High Court Judges*. The reason for the "failure" to mention members of the Commission in Article 207(2) becomes clear at once. They were not mentioned *because there was no need to do so*. Article 207(2) applied only to retired Judges. That situation could not, and did not, arise in respect of the members of the Commission on the commencing day. This position may be contrasted with that in relation to the CII. Clause (3) of Article 228 deals with its composition. On the commencing day, para (b) thereof required that "not less than two of the members [be] persons each of whom is, *or has been*, a Judge of the Supreme Court or of a High Court" (emphasis supplied). This provision has remained unaltered to this day. Clause (4) of the said Article relates to the Chairman. Although it was subsequently substituted, on the commencing day it had provided as follows: "The President shall appoint one of the members referred to in paragraph (b) of clause (3) to be the

Chairman of the Islamic Council". Thus, as originally conceived not less than two members of the CII had to be Judges (either sitting or retired), and one of them had to be the Chairman. The reason behind the express reference to both the Chairman and the members of the CII in Article 207(2) is obvious, as is the contrast with the position of the Commission.

21. Now, clause (2) of Article 218, and the requirement that the members of the Commission could only be sitting High Court Judges, continued up to the 18th Amendment (2010). The only change in between was that the number was increased to four, one from each High Court. But they had to be sitting Judges and therefore, for present purposes, the change did not alter anything. The 18th Amendment provided that clauses (1) and (2) become as follows (emphasis supplied):

> "(1) For the purpose of election to both Houses of Majlis-e-Shoora (Parliament), Provincial Assemblies and for election to such other public offices as may be specified by law, a permanent Election Commission shall be constituted in accordance with this Article.
>
> (2) The Election Commission shall consist of,
>
> (a) the Commissioner who shall be Chairman of the Commission; and
>
> (b) four members, each of whom *has been* a Judge of a High Court from each Province, appointed by the President in the manner provided for appointment of the Commissioner in clauses (2A) and (2B) of Article 213."

The Commission became a permanent body rather than one constituted for each general election. More importantly for present purposes, para (b) of clause (2) now provided that the members of the Commission could only be retired High Court Judges. It will thus be seen that between 1973 and 2010, any inclusion of

members of the Commission in Article 207(2) was not only unnecessary; it would have contradicted what was provided in Article 218. The effect of the change brought about by the 18th Amendment is further taken up below.

22. The second aspect of the answer to the question posed in para 19 requires us to consider one important consequence that would follow if the submission made by the learned petitioner is accepted. By the 22nd Amendment (2016) para (b) of clause (2) of Article 218 was substituted again, to take the shape that it holds today. (The provision as it now stands has been set out in para 2.) For completeness, it may be noted that by the said Amendment, clause (2) of Article 213 was also substituted. It now reads as follows (as presently relevant; emphasis supplied):

> "No person shall be appointed [Chief Election] Commissioner unless he *has been* a judge of the Supreme Court or *has been* a senior civil servant or is a technocrat and is not more than sixty-eight years of age."

It will be seen that it is now only retired persons (or technocrats) who can be appointed the CEC or members of the Commission. In addition, an (upper) age limit requirement has also been imposed: 68 for the CEC and 65 for the members. Insofar as the CEC is concerned, there is no change in the context of Article 207(2). However, in relation to the members of the Commission being retired Judges, if that provision were to apply a rather startling result would obtain. By virtue of the said provision, no retired Judge would be eligible for appointment for a period of two years, i.e., until he reaches the age of 64. But, by virtue of the upper age limit, a retired Judge over 65 would be ineligible. Therefore, if the learned petitioner is correct, then there would only

be a very narrow band within which retired Judges would be eligible: the one year period between the ages of 64 and 65. On the other hand, retired senior civil servants would be eligible from a five year band, the ages of 60 (when civil servants retire) till 65. And for technocrats there would be only the upper age limit of 65. The practical result could well be that on most occasions that a vacancy arises for appointment as a member, retired Judges would simply be ineligible since it could well be that there are no Judges within the one year band at the relevant time. This could hardly have been the intent behind the constitutional amendment. On the other hand, if Article 207(2) were inapplicable, the pool of eligible Judges would be considerably greater, being those aged between 62 and 65. This would almost certainly ensure that for any vacancy at any given time a suitable pool of retired Judges would be available for consideration for appointment. That would accord with the constitutional intent.

23. Thirdly, it must also be kept in mind that the "exemption" from the bar under Article 207(2) for the retired Judge being appointed as the CEC was conditional and not absolute. This was so because of clause (2) of Article 216, which provided on the commencing day as follows (as presently relevant):

> "A person who has held office as Commissioner shall not hold any office of profit in the service of Pakistan before the expiration of two years after he has ceased to hold that office:...."

It will be seen that even if a Judge were to be appointed as the CEC either immediately upon retirement or within the two year period the bar was only "deferred". Upon the completion of the term of office there was a bar under the aforesaid provision. And, it

will be noted, this bar was absolute: it did not make any exception for a judicial or quasi-judicial office. Now, by the 20th Amendment (2012), the words “or a member” were inserted after the word “Commissioner”. Thus, the bar under Article 216(2) also applies, as here relevant, to retired Judges who have served as members of the Commission. But, if the learned petitioner is correct, such members would face what might be called a double jeopardy. They would first be excluded from the service of Pakistan for two years under Article 207(2) and then face a further two year bar under Article 216(2). Again, this would seem not to accord with the constitutional intent.

24. The combined effect of the first three aspects of the answer may now be set out. Starting with the 18th Amendment, constitutional amendments have successively affected and altered the structure and composition of the Election Commission. (We leave aside the office of the CEC and focus on the members.) The Constitution has been so amended that the original position (which lasted up to 2010), i.e., that the members could only be sitting High Court Judges, has been completely abandoned. Now, only retired Judges can be appointed as members. But the amendments did not stop at that. Two new categories of potentially eligible persons, i.e., retired senior civil servants and technocrats have been added. And to top it all an upper age limit has also been imposed. The position of Judges as potential members of the Commission must be read in light of the trajectory of these constitutional amendments. Obviously, the intent and spirit of these amendments must be respected and given effect to. If it had been intended to so amend the Constitution as to eliminate Judges

from the pool of potentially eligible persons, that result could have been achieved easily, in the most obvious and straightforward manner. But that was patently not done. In our view, the three aspects noted above show that the case advanced by the learned petitioner in relation to Article 207(2), with respect, places such a squeeze on the constitutional amendments and puts them in such a straitjacket that they are, in effect, defeated. The result may well be that Judges are, practically speaking, removed altogether from the pool of eligible candidates. Clearly, that result, not being in accord with the constitutional intent, ought to be avoided. But, at the same time, Article 207(2) does textually say what it does. And, the learned petitioner also submitted, even if the failure to make a suitable insertion in Article 207(2) when Articles 218 etc. were being amended over and over again can be regarded as an unintentional (and avoidable) omission, that would result in a casus omissus, which could not be filled by the Court but had to be left to Parliament. In other words, the submission was that if the constitutional amendments were put on one side of the scales and Article 207(2) on the other, the balance would still tilt in favour of the latter.

25. This brings us to the fourth aspect of the answer, which may be put in the form of a question: what, if any, is the way forward? We have carefully considered the situation. In our view, the answer to the question just posed lies in two points. The first is straightforward and part of settled constitutional jurisprudence. It is that the Constitution is a living document, which must be given a dynamic and progressive meaning and interpretation. It evolves and develops not just by way of textual changes (i.e., constitutional

amendments) but also in a (continually) maturing understanding of the constitutional provisions. And this means not just the very words of the Constitution but also the concepts and aspirations that lie behind and underpin those words. The case law is replete with observations that attest to what has just been said. To take but one example, in *Province of Sindh and others v. MQM and others* PLD 2014 SC 531, it was observed as follows: "The Constitution of a country is a living organism and a particular provision, a term or word has to be interpreted dynamically and purposively with a view to achieve the Constitutional intent" (para 60). A well known (and excellent) example of these established principles is the evolving meaning of "life" in Article 9. As landmark cases such as *Shehla Zia and others v WAPDA* PLD 1999 SC 693 demonstrate, this term is to be applied conceptually and ought therefore to be periodically reconsidered, as it continues to be broadened and deepened. It is in these terms that, in our view, the constitutional amendments here involved and their interaction with Article 207(2) are to be understood, interpreted and applied.

26. The second point may, at first sight, appear to be somewhat roundabout and even a bit obscure. It has to do with the constitutional remedies that are available to the Court to redress the situation when a constitutional defect or violation is shown to exist, especially in a statute or other legal instrument. As is well known, the Court has a whole array of remedies available. One is of course to strike down the provision involved, which may sometimes mean even the entire statute. But other tools, which can be more finely tuned and aimed with greater precision, are also there. Two well known examples are the doctrines of severance and

reading down. In suitable cases it is only the offending part of the provision that need be excised, or the provision as a whole may be given a meaning that accords with the Constitution albeit one that is narrower and more restricted than what the actual language may otherwise indicate. (It may be noted that we here set out only the broad contours of these remedies, since that suffices for present purposes. They must of course be applied subject to, and in terms of, the conditions and nuances established in the case law. The latter not being spelt out here should not mislead.) Another doctrine, which is perhaps less well known (and is certainly less used) is of "reading in", i.e., of adding such words to the statute as would remedy the constitutional defect. Interestingly, the jurisprudence of the Supreme Court of Canada is particularly well developed in this regard including the principle of "reading in". The leading case appears to be *Schacter v Canada* [1992] 2 SCR 679, which repays close study (see, for ready reference, the summary at pg. 718). Reference may also be made to Mr. Peter Hogg's monumental treatise, *Constitutional Law of Canada* (Chapter 40, "Enforcement of Rights") where the case law is fully set out, analyzed and discussed.

27. Before proceeding further, one other point may also be made. The constitutional principle of "reading in" is different from the curing of a casus omissus (and the (in general) reluctance of the Court to undertake such an exercise). When a casus omissus is mooted, it is not a constitutional defect but rather a legislative deficiency that is contended. That is, it is not claimed that the omission in the statutory provision renders it liable to be struck down on the constitutional plane. Rather, the submission is that

there exists an omission within the four corners of the statute that, had the legislature put its mind to it, would have undoubtedly been included by the lawmaker and ought therefore to be inserted by the Court. Not surprisingly, the Court is reluctant to do so (however well founded the submission may appear to be) as that could result in an intrusion in the legislative field. (A word of caution again: there are nuances involved that have not been set out here.) On the other hand, the doctrine of “reading in” becomes available once a constitutional violation or defect is found to exist. It is a constitutional remedy to correct the defect without striking down the offending provision. The focus of attention is the Constitution and not just the statute in and of itself. Even then, there are concerns about intruding into the legislative field. Thus, the Canadian Supreme Court has held, in the cited case, that this particular constitutional remedy should be used in the “clearest of cases” and only when, inter alia, “the legislative intent is obvious” (see at pg. 718). The distinction between the constitutional remedy on the one hand and the supplying of a casus omissus in a statute on the other is clear and principled, and must be kept in mind.

28. We are of course concerned with a provision of the Constitution itself, i.e., Article 207(2). Here, even greater care and caution is called for. Our interest in this case in the principle of “reading in” is narrower and more limited than of it being a constitutional remedy in the normal course. It is this. Can, in suitable cases and while maintaining all due care and caution, the principle be regarded as one aspect of the dynamic, evolving and purposive manner in which the Constitution must be interpreted, so as to give full effect to the constitutional intent behind,

especially, amendments to the Constitution? Or, must the obvious intent and effect of the amendments be stifled, if not defeated, by the Court continuing to pay homage to what has been called the "austerity of tabulated legalism" (a phrase used by the Privy Council in *Minister of Home Affairs v Fisher* [1980] AC 319, and taken from a 1964 treatise of the famed jurist, Prof. Stanley de Smith)? The development of the principles of constitutional interpretation cannot, in our view, be so constricted. Again, and in order to achieve full clarity, it is to be emphasized that we are not here concerned with one (or more) constitutional provisions and dealing with the question of whether there is an omission that ought to be supplied or a deficiency that merits correction. We are, rather, concerned with the situation brought about by a constitutional amendment (and indeed, as here involved, several such amendments). It is a resulting imbalance (that is quite obviously unintentional) which is under consideration. Even more, the imbalance has the potential (and in our view very real practical possibility) of defeating the obvious intent of the said amendments. It is in this narrow and limited sense that the principle of "reading in" can, in our view, be invoked and suitably deployed as an (undoubtedly subsidiary) aspect of the basic approach to the interpretation and application of the Constitution set out above.

29. It is necessary to pause here to consider a recent decision of a five member Bench of this Court reported as *Gul Taiz Khan Marwat v The Registrar, Peshawar High Court and others* PLD 2021 SC 391. A number of issues were involved but the one relevant for present purposes was the question whether a petition, either under Article 199 or Article 184(3), was maintainable against an

administrative order of the High Court (as opposed to a judicial order or judgment, where the answer was clearly in the negative)? This Court had earlier, in *Ch. Muhammad Akram v Registrar Islamabad High Court and others* PLD 2016 SC 961 ("the *Muhammad Akram* case"), created such a distinction (on a petition under Article 184(3)) and the larger Bench had been constituted to, inter alia, consider whether this view was correct. In the event, the case just mentioned was overruled (para 21). We are here concerned with what was said in para 19 (emphasis supplied):

> "19. We differ with the view taken in the said judgment in the meaning, interpretation, scope, extent and interplay of Articles 199 and 208 of the Constitution. Keeping in view Articles 176, 192, 199 and 208 of the Constitution, and upon a harmonious interpretation thereof, in our humble opinion, no distinction whatsoever has been made between the various functions of the Supreme Court and High Courts in the Constitution and the wording is clear, straightforward and unambiguous in this regard. There is no sound basis on which Judges acting in their judicial capacity fall within the definition of 'person' and Judges acting in their administrative, executive or consultative capacity do not fall within such definition. *In essence, the definitions of a High Court and Supreme Court provided in Articles 192 and 176 supra respectively are being split into two when the Constitution itself does not disclose such intention. It is expressly or by implication a settled rule of interpretation of constitutional provisions that the doctrine of casus omissus does not apply to the same and nothing can be "read into" the Constitution. If the framers of the Constitution had intended there to be such a distinction, the language of the Constitution, particularly Article 199 supra, would have been very different. Therefore to bifurcate the functions on the basis of something which is manifestly absent is tantamount to reading something into the Constitution which we are not willing to do*. In our opinion, strict and faithful adherence to the words of the Constitution, specially so where the words are simple, clear and unambiguous is the rule. Any effort to supply perceived omissions in the Constitution being subjective can have disastrous consequences. Furthermore, the powers exercisable under the rules framed pursuant to Article 208 supra form a part and parcel of the functioning of the superior Courts. In other words, the power under Article 208 supra would not be there but for the existence of the superior Courts. This 'but for' test, as mentioned by the learned Attorney General, is pivotal in determining whether or not a particular act or function carried out by a Judge is immune to challenge under the writ jurisdiction under Article 199 supra. This test is employed by Courts in various

> jurisdictions to establish causation particularly in criminal and tort law - but for the defendant's actions, would the harm have occurred? If the answer to this question is yes, then causation is not established. Similarly in the instant matter, but for the person's appointment as a Judge (thereby constituting a part of a High Court or the Supreme Court under Articles 192 and 176 supra respectively), would the function in issue be exercised? If the answer to this question is yes, then such function would not be immune to challenge under Article 199 supra. In this case with respect to the administrative, executive or consultative acts or orders in question, the answer to the "but for" test is an unqualified no, therefore such acts or orders would in our opinion be protected by Article 199(5) of the Constitution and thereby be immune to challenge under the writ jurisdiction of the High Court."

At first sight what is said in the last preceding para may appear to be at odds with what has been held in the extracted passage. However, in our respectful view, on a closer and more careful examination this is not so. It is to be noted that the principal constitutional provisions under consideration by the learned larger Bench (Articles 199 and 208) remained unaltered throughout (to the extent as relevant). The same was true of even the other provisions (Articles 176 and 192) mentioned in the extracted passage. Thus, the case did not involve, as here, the question of the effect of constitutional amendments, and their interaction and interplay with another provision left unaltered, in what can only be described as an unintentional omission to act. And, the undoubted consequence of the omission effectively nullifying the intent behind the amendments was also not involved in the cited case. Thus, the context in which those observations were made was quite different from the one with which we are confronted here.

30. Secondly, it should be noted that the terms "reading in" and casus omissus appear to be used in the extracted passage in a

general and descriptive sense (and even interchangeably), and not in the technical, differentiated and much more limited manner that we have in mind here. Indeed, the issue before the Court in the cited decision was not, in a formal sense, one of "reading in" or supplying a casus omissus at all. The reason is that no words were, as such, added to or inserted into any constitutional provision by the *Muhammad Akram* case. Rather, a distinction was there created in the applicability of the provisions involved, between judicial orders and judgments of the High Court on the one hand and administrative/executive actions on the other—a distinction that the learned larger Bench found to be incorrect and unsustainable. This is not the situation with which we are faced here. The question before us of an altogether different nature. In our view therefore, and with respect, what has been said in, and done by, this judgment does not in any way conflict with the decision of the learned larger Bench.

31. Having carefully considered the matter, we are of the view that the present case is an example of the clearest of cases where the intent behind the constitutional amendments is so obvious, and so patently requires appropriate action so as not to defeat the manifest objective thereof, that the constitutional rule of "reading in" can and ought to be invoked in the narrow and limited sense identified in para 28 above. Accordingly, we hold that from the 22nd Amendment (2016) onwards, the words "or member of the Election Commission" are to be read in into clause (2) of Article 207 after the term "Chief Election Commissioner". The second question, posed in para 19 above, therefore stands answered in the negative.

32. In view of the foregoing discussion and analysis, this leave petition is converted into an appeal to consider the two questions posed in paras 8 and 19 above. As the first question has been answered in the negative the judgment of the learned High Court is hereby set aside. Furthermore, since the second question also stands answered in the negative the appeal ultimately fails, and is hereby dismissed.

My note of dissent is appended hereto

Sd/-
(Maqbool Baqar J.)

Sd/-
(Sajjad Ali Shah, J.)

I may note that notice was infact directed to be issued to the learned Attorney General vide order dated 11/3/2021)

Sd/-
(Munib Akhtar, J.)

Announced in Court on 16.12.2021 at Islamabad

Sd/-
Judge

Approved for reporting

MAQBOOL BAQAR, J.-I have carefully perused the proposed judgment authored by my learned brother Munib Akhter, J. Since the same seeks to “read in” a phrase in aconstitutional provision (Clause (2) of Article 207), which approach/device will have far reaching implications for our jurisprudence,itwould be appropriate to first hear the parties as well as the learned Attorney General for Pakistan, before deciding to adopt such approach, more so when neither was it suggested, nor argued by anyone at the time of hearing. The case may therefore be listed for rehearing according to the roster.

Sd/-
Judge

Order of the Bench

By majority of two to one (Justice Maqbool Baqar, dissenting) this leave petition is converted into an appeal, the judgment of the learned High Court is set aside but the appeal stands dismissed.

Judge

Judge

Judge

Announced in open Court on 16.12.2021 at Islamabad

Judge