JUDGMENT

Syed Hasan Azhar Rizvi, J. I have carefully perused the majority opinion authored by my esteemed colleagues, Justice Amin-ud-Din Khan as well as additional note of Justice Jamal Khan Mandokhail. Regrettably, I find myself in disagreement with the reasons they adopted to arrive at their conclusions, and I take issue with them on various aspects of the matter. Consequently, I am compelled to record my observations and rationale for adjudicating this matter.

Intra Court Appeal No.1 of 2024

2. The Federation of Pakistan was not a party to the original proceedings, however it has filed this Intra-Court Appeal under Section 5 of the Supreme Court (Practice and Procedure) Act, 2023 ("**SCPPA**"), against the judgment dated 13.06.2023 ("**impugned judgment**"), on the grounds that it is directly affected by the interpretation of Article 209, as rendered by a two-member bench of this Court in the impugned judgment. Thus, the instant appeal has been filed in view of the law laid down by this Court in the case of *H.M. Saya & Co. versus Wazir Ali Industries Ltd.* (**PLD 1969 SC 65**).

Further asserted that the impugned judgment suffers from a grave misinterpretation by limiting the application and ambit of Article 209 of the Constitution to only Judges who have not retired or resigned. The impugned judgment seeks to distinguish between a judge who has retired and a judge who has resigned for the purposes of the applicability of Article 209 of the Constitution. Retirement, resignation, and removal are covered within the language of Article 179 of the Constitution, which defines the retiring age i.e. a judge of this Court retires upon attaining the age of sixty-five years, while that of the High Court retires at the age of sixty-two years.

However, the other two instances where a judge may vacate his office are upon resignation under Article 206 and removal under Article 209(6) of the Constitution. Section 15 of the Supreme Court Judges Leave, Pension, and Privileges Order, 1997 ("**Order of 1997**") provides that a judge who retires or resigns is entitled to a pension, as are those who are removed due to ill health or physical or mental incapacity. Thus, a judge removed under Article 209(6) of the

Constitution is not entitled to pensionary benefits. Moreover, a former judge, other than the one who is removed under Article 209 of the Constitution, may be called upon to perform such function, as is requested to perform or be appointed to a post in connection with the affairs of the Federation or Province in terms of clause 16 of the Order of 1997. By simply resigning from office during the pendency of proceedings before the Supreme Judicial Council ("**Council**"), without any findings rendered by it, a former judge can make himself eligible for post-retirement appointment. This runs contrary to the principles of transparency and fairness, diminishes the faith of the public in the judiciary, and thus, undermines the independence of the judiciary, which is contrary to Articles 9, 25, and 175 of the constitution.

Intra Court Appeal No.2 of 2024

3. This appeal has been preferred by the six private individuals ("**private appellants**") against the impugned judgment of this Court whereby their Constitution Petition filed under Article 184(3) of the Constitution against the order dated 08.03.2019 of the Council was dismissed *in limine*.

The background of the controversy is that the appellants along with other ninety-two persons filed a complaint on 10th October 2018 under Article 209 of the Constitution with the respondent No. 1/the Council, alleging instances of misconduct and violations of the Judges' Code of Conduct by Justice (Retd.) Mian Saqib Nisar, the then Chief Justice of Pakistan. The appellants received no information about any proceedings on their complaint. However, they came to know about the fate of their complaint from the Council's response to a letter dated 22.05.2019 from the Women's Action Forum, indicating that their complaint had been disposed of as infructuous by the Council vide order dated 08.03.2019.

Feeling aggrieved, the private appellants challenged the order dated 08.03.2019 of the SJC before this Court by filing a Constitutional Petition under Article 184(3) of the Constitution and made the following prayers:

> A. *Declare the failure of the Hon'ble Council to duly examine the Reference No.SJC-398 of 2018 and to render an opinion on the allegations of misconduct in*

the reference, to be illegal, and an unlawful omission to exercise jurisdiction, granted under the law.

B. Set aside the imputed order dated 08.03.2019 of the Hon'ble Council as void ab initio and a nullity in the eye of the law.

C. Declare that the Reference No.SJC-398 of 2018 is still pending before the Hon'ble Council.

D. Direct the Hon'ble Council to take up the reference and to render its opinion on the allegations of misconduct contained therein and report its opinion to the President under Article 209(6) of the Constitution.

E. Pass directions to structure the Hon'ble Council's discretion in relation to the priority, listing and hearing of complaints/references and to ensure that the eventual findings of the Hon'ble Council are publicly disclosed and direct the Hon'ble Council to amend the Supreme Judicial Council Procedure of Enquiry 2005, accordingly.

F. Give any other directions or pass any interim orders that are required and are necessary for the effective implementation of Article 209.

However, the Constitution Petition was dismissed by this Court in *limine vide* the impugned judgment; hence, this Intra Court Appeal.

4. In drafting this dissenting opinion, I will refer to the arguments presented by the legal representatives and counsel as outlined in the majority judgment, except for those necessary for my analysis.

5. I have heard the learned counsel for the parties and, with their able assistance, examined the record. The above appeals have been filed under section 5 of the newly introduced law i.e. the Supreme Court (Practice and Procedure) Act, 2023. The provision of section 5 of SCPPA clearly mandates that, "***an appeal shall lie within thirty days*** *from an order of a Bench exercising jurisdiction under clause (3) of Article 184 of the Constitution…*".

The record shows that the appeals were not filed within the above-prescribed period of limitation. The ICA 1 of 2024 was filed belatedly, with a delay of 180 days, while ICA 2 of 2024 was filed with a delay of 186 days. To seek condonation of delay, both appellants filed separate applications under Order XIII Rule 1 read with Order XXXIII Rule 6 of the Supreme Court Rules, 1980 ("**the Rule**"). The bare

reading of Rule 1 of Order VIII reveals that it relates to the filing of a petition for leave under Article 185 of the Constitution and provides a specific limitation period for the said purpose. Undoubtedly, the proviso to Rule 1 *supra* empowers this Court to extend such a limitation period for sufficient cause. In my understanding, the aforementioned provision of Rule 1 does not allow for the extension of the limitation period for an appeal or an Intra Court Appeal to be filed under Section 5 of the SCPPA, and thus it does not support the stance of the appellants, by any stretch of imagination, which is deemed irrelevant and misconceived.

As far as the provision of Order XXXIII Rule 6 of the Rules is concerned, it has been found that this provision relates to the inherent power of this Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court. I have not doubt in my mind that this Court is fully competent to make all such orders which may be necessary to do real and substantial justice and prevent abuse of the process, subject only to the limitation that it cannot override an express provision of any law.

It is a well-established principle of law that where an express provision is made in a law for a particular purpose, resorting to inherent powers to achieve the same purpose is not permissible. Thus, the inherent power cannot be applied to defeat the express provisions of the statute. Reference in this regard may made to the cases of *Shahkot Bus Service, Shahkot versus the State and Another* (**1969 SCMR 325**) and *University of Malakand through Registrar and others versus Dr. Alam Zeb and others* (**2021 SCMR 678**). Moreover, the above Rule can be pressed into service only in a matter which is competently filed before this Court but it does not give an independent right to initiate proceedings of the nature in question even after the expiry of the provided period of limitation as observed by this Court in the case of *Mehr Zulfiqar Ali Babu and others versus Government of the Punjab and others* (**PLD 1997 SC 11**). This provision too not support the case of the appellants.

6. The ground mentioned in the application by the Federation of Pakistan that impugned judgment was not within the notice of the Federation of Pakistan and the same came to the

knowledge of the learned Attorney General for Pakistan after the meeting of the Council dated 09.01.2024 does not appeal to reasons.

In the modern digital age, transparency and accessibility in the judicial system are paramount. One manifestation of this principle is the practice of uploading every judgment of this Court to its official website[1], effectively making it a public notice. By providing easy access to all the latest judgments online, this Court promotes accountability, facilitates legal research, and fosters public understanding of the law. In essence, the act of uploading the latest judgments of this Court on its official website not only upholds the principles of transparency and accountability but also empowers and facilitates litigant parties, their advocates, and the general public engaged with the legal process, as well as enables governments to exercise their rights with informed knowledge. Following this practice, the impugned judgment was uploaded on the official website of this Court on 27.06.2023. The screenshot[2] from the official website of this Court is provided below for ease of reference:

Sr. No.	Case Subject	Case No	Case Title	Author Judge	Upload Date	Judgment Date	Citation(s)	SCCitation(s)	Download
18	U/A 184(3)	C.P.19/2020	Afiya Shehrbano Zia & others v. The Hon'ble Supreme Judicial Council & others	Mr. Justice Munib Akhtar	27-06-2023	27-06-2023	PLD 2023 SC 510	2023 SCP 186	PDF 21 KB

7. The Attorney General for Pakistan is the Principal Law Officer of the Federation, with the office located within the premises of this Court. The Office of the Attorney General comprises a team of law officers, including Additional Attorneys General, Deputy Attorneys General, and Assistant Attorneys General. The Office represents, defends, and protects the interests of the Federal Government before this Court and provides invaluable legal guidance to the Federal Government in matters of policy formulation and execution of its decisions. As a highly responsible and sensitive office, it is its duty to be and keep the government aware of all the important decisions made by this Court. Any statement claiming a lack of knowledge about a particular decision, especially when it has been uploaded on the

[1] https://www.supremecourt.gov.pk/
[2] https://www.supremecourt.gov.pk/judgement-search/

official website of this Court and published in August 2023 as **PLD 2023 SC 510** in the monthly edition of the All Pakistan Legal Decisions (PLD), undermines its position and reputation not only among the citizens of Pakistan but also in the eyes of people outside the country. It has also been observed that on numerous occasions, cases involving the Federal or Provincial Government, departments or autonomous bodies were filed before this Court beyond the limitation prescribed by law without providing any justifiable reasons acceptable under the law for not approaching the Court within the specified time. In the applications seeking condonation of delay, if filed, general pleas for condonation of delay were invariably made. The concerned governments, departments or autonomous bodies must understand that the delay in the limitation for filing proceedings can only be condoned if sufficient grounds are provided. Otherwise, in the absence of such grounds, no preferential treatment can be offered to the governments, departments or autonomous bodies. Their cases must be dealt with in the same manner as those of an ordinary litigant or citizen. Reference in this behalf may be made to the case of the *Pakistan through Secretary, Ministry of Defence versus Messrs Azhar Brothers Ltd.* (**1990 SCMR 1059**); *Government of the Punjab through Secretary (Services), Services General Administration and Information Department, Lahore and another versus Muhammad Saleem* (**PLD 1995 SC 396**); *Federation of Pakistan through Secretary, Ministry of Foreign Affairs, Government of Pakistan, Islamabad and 5 others versus Jamaluddin and others* (**1996 SCMR 727**); *Central Board of Revenue, Islamabad through Collector of Customs, Sialkot versus Messrs Raja Industries (Pvt.) Ltd. through General Manager and 3 others* (**1998 SCMR 307**), *Lahore High Court, Lahore through Registrar versus Nazar Muhammad Fatiana and others* (**1998 SCMR 2376**); *Chairman, District Evacuee Trust, Jhelum versus Abdul Khaliq through Legal Heirs and others* (**PLD 2002 SC 436**) and *Principal Public School Sangota, Government of Khyber Pakhtunkhwa through Chief Secretary and others versus Sarbiland and others* (**2022 SCMR 189**)

8. The private appellants, in their application for condonation of delay, have raised somewhat similar grounds regarding their knowledge of the impugned judgment. They asserted that they came to know about the impugned judgment on 09.01.2024 when it

was widely reported through electronic and social media that the Federal Government announced its intention to file an appeal against the decision in the *Afiya Shehrbano Zia* case. The private appellant in their main petition themselves pleaded that they actively pursued their complaint before the Council and feeling aggrieved by the order of the Council, immediately filed the Constitution Petition before this Court under Article 184(3) of the Constitution.

In this view of the matter, it would not be believable that the private respondents were ignorant of the passing of the impugned judgment, especially when it was uploaded on the official website of this Court and published in the above-mentioned Law Journal. Moreover, a litigant party is required to pursue its case vigilantly until the pronouncement of the judgment; therefore, it cannot claim benefits from its own faults or ignorance.

9. Even otherwise, the public interest requires that there should be an end to litigation. The law of limitation provides an element of certainty in the conduct of human affairs. The law of limitation is a law that is designed to impose *quietus* on legal dissensions and conflicts. It requires that persons must come to Court and take recourse to legal remedies with due diligence. Therefore, the limitation cannot be regarded as a mere technicality. With the expiration of the limitation period, valuable rights accrue to the other party, as observed in numerous judgments by this Court. However, reference may be made to the cases of *Ghulam Rasool and others* versus *Ahmad Yar and others* (**2006 SCMR 1458**); *Collector Sales Tax (East), Karachi* versus *Customs, Excise and Sales Tax Appellate Tribunal, Karachi and another* (**2008 SCMR 435**)and *Messrs SKB-KNK Joint Venture Contractors through Regional Director* versus *Water and Power Development Authority and others* (**2022 SCMR 1615**). In view of the afore-noted facts and legal position, the applications for condonation of delay filed by the appellants are devoid of any merits and as such are dismissed, accordingly.

10. As the matter involves an important issue regarding the true intent and interpretation of Article 209 of the Constitution, I deem it imperative to give my observations despite the matter being squarely time-barred. Undoubtedly, judicial accountability is a cardinal principle of the system of administration of justice and is essential to

its successful working. In the modern democratic system of government, unlike other public functionaries, Judges of the Superior Courts are not immune from the process of accountability. However, to prevent Judges from being subject to ordinary courts or tribunals and to uphold the concept of 'judicial independence,' a highest constitutional body i.e. the Council is established for the removal of judges, comprised of their fellow judges. I believe that if a person loses or abandons the necessary attributes of a Judge integrity, impartiality, legal expertise, and mental balance then he is not entitled to any security of tenure and must be promptly removed through due process as outlined in Article 209 of the Constitution. Such removal is necessary to preserve the independence of the judiciary. For better understanding, the provision of Article 209 is reproduced below in tabular form, highlighting historical changes since its inception:

Sr. No	**Original Text at the time of promulgation of Constitution, 1973**	**The Constitution (First Amendment) Act, 1974 08 May, 1974**	**The Constitution (Eighteenth Amendment) Act, 2010 20 April, 2010**	**Article 209 (At Present)**
1.	**209. Supreme Judicial Council**. (1) There shall be a Supreme Judicial Council of Pakistan, in this Chapter referred to as the Council.			**209. Supreme Judicial Council**. (1) There shall be a Supreme Judicial Council of Pakistan, in this Chapter referred to as the Council.
2.	(2) The Council shall consist of, (a) the Chief Justice of Pakistan; (b) the two next most senior Judges of the Supreme Court; and (c) the two most senior Chief Justices of High Courts. **Explanation:-** For the purpose of this clause, the inter se seniority of theChief Justices of the High Court's shall be determined with reference to their dates of appointment as Chief Justice and	In the Explanation, after words "Chief Justice", the words "**otherwise than as acting Chief Justice**" was		(2) The Council shall consist of, (a) the Chief Justice of Pakistan; (b) the two next most senior Judges of the Supreme Court; and (c) the two most senior Chief Justices of High Courts. **Explanation:-** For the purpose of this clause, the inter se seniority of theChief Justices of the High Court's shall be determined with reference to their dates of appointment as Chief Justice

	in case the dates of such appointment are the same, with reference to their dates of appointment as Judges of any of the High Courts.	inserted.		otherwise than as acting Chief Justice, and in case the dates of such appointment are the same, with reference to their dates of appointment as Judges of any of the High Courts.
3.	(3) If at any time the Council is inquiring into the capacity or conduct of a Judge who is a member of the Council or a member of the Council is absent or is unable to act due to illness or any other cause, then (a) if such member is a Judge of the Supreme Court, the Judge of the Supreme Court who is next in seniority below the Judges referred to in paragraph (b) of clause (2), and (b) if such member is the Chief Justice of a High Court; the Chief Justice of another High Court who is next in seniority amongst the Chief Justices of the remaining High Courts, shall act as a member of the Council in his place.			(3) If at any time the Council is inquiring into the capacity or conduct of a Judge who is a member of the Council or a member of the Council is absent or is unable to act due to illness or any other cause, then (a) if such member is a Judge of the Supreme Court, the Judge of the Supreme Court who is next in seniority below the Judges referred to in paragraph (b) of clause (2), and (b) if such member is the Chief Justice of a High Court; the Chief Justice of another High Court who is next in seniority amongst the Chief Justices of the remaining High Courts, shall act as a member of the Council in his place.
4.	(4) If, upon any matter inquired into by the Council, there is a difference of opinion amongst its members, the opinion of the majority shall prevail, and the report of the Council			(4) If, upon any matter inquired into by the Council, there is a difference of opinion amongst its members, the opinion of the majority shall prevail, and the report of the Council

	to the President shall be expressed in terms of the view of the majority.			to the President shall be expressed in terms of the view of the majority.
5.	(5) If, on information received from the Council or from any other source, the President is of the opinion that a Judge of the Supreme Court or of a High Court- (a) may be incapable of properly performing the duties of his office by reason of physical or mental incapacity; or (b) may have been guilty of misconduct, the President shall direct the Council to inquire into the matter.		In clause (5)- (i) for the words and comma "**received from the Council or from any other source,**" the words and **comma** "**from any source, the Council or**" shall be substituted: and (ii) after the words "**Council to**", the commas and words "**,or the Council may, on its own motion,**" shall be inserted.	(5) If, on information from any source, the Council or the President is of the opinion that a Judge of the Supreme Court or of a High Court- (a) may be incapable of properly performing the duties of his office by reason of physical or mental incapacity; or (b) may have been guilty of misconduct, the President shall direct the Council to, or the Council may, on its own motion, inquire into the matter.
6.	(6) If, after inquiring into the matter, the Council reports to the President that it is of the opinion- (a) that the Judge is incapable of performing the duties of his office or has been guilty of misconduct, and (b) that he should be removed from office, the President may remove the Judge from office.			(6) If, after inquiring into the matter, the Council reports to the President that it is of the opinion- (a) that the Judge is incapable of performing the duties of his office or has been guilty of misconduct, and (b) that he should be removed from office, the President may remove the Judge from office.
7.	(7) A Judge of the Supreme Court or of a High Court shall not			(7) A Judge of the Supreme Court or of a High Court shall not

	be removed from office except as provided by this Article.			be removed from office except as provided by this Article.
8.	(8) The Council shall issue a code of conduct to be observed by Judges of the Supreme Court and of the High Courts.			(8) The Council shall issue a code of conduct to be observed by Judges of the Supreme Court and of the High Courts.

A perusal of the above-quoted provisions of Article 209 would reveal that clauses (1) to (4) thereof envisage the existence and the constitution of the Council while the provisions of clauses (5) and (6) provide various steps of the exercise leading to the removal of a Judge of the Superior Courts. The notable change since its inception is that initially, proceedings under Article 209 could only be initiated by the President, but now they can also be invoked by both the President and the Council itself.

11. It transpires from the record that the grievance of the appellants arises from the refusal of the SJC to initiate proceedings on a complaint filed by them against Justice (Retd.) Mian Saqib Nisar, the then Chief Justice of Pakistan, after his retirement. This is followed by the interpretation of Article 209 as presented by a two-member Bench of this Court in the impugned judgment, which states that Article 209 does not apply to a person who has retired or resigned from the office of a Judge of this Court or a High Court. The task of interpreting a dynamic instrument like the Constitution holds great importance in a democracy. The Courts are entrusted with the critical role of explaining its provisions while ensuring and preserving the rights and liberties of citizens, all without undermining the fundamental principles upon which the Constitution is built. Although, primarily, it is the literal rule that is considered to be the norm that governs the courts of law while interpreting statutory and constitutional provisions, mere allegiance to the dictionary or literal meaning of words contained in the provision may, sometimes, annihilate the quality of poignant flexibility and requisite societal progressive adjustability. Such an approach may not eventually serve the purpose of a living document. The principles of constitutional interpretation, thus, occupy a prime place in the method of adjudication. In bringing

about constitutional order through interpretation, this Court is often confronted with two propositions - whether the provisions of the Constitution should be interpreted as it was understood at the time of framing of the Constitution unmindful of the circumstances at the time when it was subsequently interpreted or whether the constitutional provisions should be interpreted in the light of contemporaneous needs, experiences and knowledge. In other words, should it be historical interpretation or contemporaneous interpretation? In this regard, I think it appropriate to have a bird's eye view as to how the jurists and Superior Courts of different jurisdictions have contextually perceived the science of constitutional interpretation.

12. Chief Justice Marshall in *Mc Culloch versus Maryland* ***17 US (4Wheat) 316 (1819)*** has observed that the American Constitution is intended to serve for ages to come and it should be adapted to various crises of human affairs. Justice Hughes in *State versus Superior Court* ***(1944) at 547*** observed that the constitutional provisions should be interpreted to meet and cover the changing conditions of social life and economic life. Justice Holmes in *Gompers versus U.S.* ***233 (1914)*** observed that the meaning of the constitutional terms is to be gleaned from their origin and the line of their growth. Justice Cardozo once stated in *Benjamin N. Cardozo, The Nature of the Judicial Process, Yale University Press, 1921* that a Constitution states or ought to state not Rules for the passing hour but principles for an expanding future.

13. The Supreme Court of India in numerous cases has articulated the principles of constitutional interpretation, emphasizing that courts are obligated to adopt an interpretation that upholds the democratic spirit of the Constitution. Passages from some of the leading judgments are quoted below for ease of reference:

I) In *Kalpana Mehta and Ors. versus Union of India (UOI) and Ors*. (**AIR 2018 SC2493**), the Supreme Court of India held as follows:

> *"38. The Constitution being an organic document, its ongoing interpretation is permissible. The supremacy of the Constitution is essential to bring social changes in the national polity evolved with the passage of time. The interpretation of the Constitution is a difficult task. While doing so, the Constitutional*

> *Courts are not only required to take into consideration their own experience over time, the international treaties and covenants but also keep the doctrine of flexibility in mind."*
>
> **Underlining is for emphasis.**

II) In *Government of NCT of Delhi versus Union of India (UOI) and Ors*. (**2018)8 SCC 501**), a five-member Bench of the Supreme Court of India articulated the principles of constitutional interpretation in the following words:

> *"277.(i) While interpreting the provisions of the Constitution, the safe and most sound approach for the Constitutional Courts to adopt is to read the words of the Constitution in the light of the spirit of the Constitution so that the quintessential democratic nature of our Constitution and the paradigm of representative participation by way of citizenry engagement are not annihilated. The Courts must adopt such an interpretation which glorifies the democratic spirit of the Constitution."*
>
> **Underlining is for emphasis.**

III) In *Justice K.S. Puttaswamy and Ors. versus Union of India (UOI) and Ors*. (**AIR2017SC4161**), the Supreme Court of India observed as under:

> "*149....These constitutional developments have taken place as the words of the Constitution have been interpreted to deal with new exigencies requiring an expansive reading of liberties and freedoms to preserve human rights under the Rule of law. India's brush with a regime of the suspension of life and personal liberty in the not too distant past is a grim reminder of how tenuous liberty can be, if the judiciary is not vigilant. The interpretation of the Constitution cannot be frozen by its original understanding. The Constitution has evolved and must continuously evolve to meet the aspirations and challenges of the present and the future. Nor can judges foresee every challenge and contingency which may arise in the future. This is particularly of relevance in an age where technology reshapes our fundamental understanding of information, knowledge and human relationships that was unknown even in the recent past. Hence as Judges interpreting the Constitution today, the Court must leave open the path for succeeding generations to meet the challenges to privacy that may be unknown today*."
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> **Underlining is for emphasis.**

14. This Court has had an almost similar approach regarding the interpretation of a Constitutional provision. As in *Al-Jehad Trust*

versus *Federation of Pakistan* (**PLD 1996 Supreme Court 324**), it was held *that:*

> *"…a written Constitution, is an organic document designed and intended to cater the need for all times to come. It is like a living tree, it grows and blossoms with the passage of time in order to keep pace with the growth of the country and its people; Thus, the approach, while interpreting a Constitutional provision should be dynamic, progressive and oriented with the desire to meet the situation, which has arisen, effectively. The interpretation cannot be a narrow and pedantic. But the Court's efforts should be to construe the same broadly, so that 'it may be able to meet the requirement of ever changing society. The general words cannot be construed in isolation but the same are to be construed in the context in which, they are employed. In other words, their colour and contents are derived from their context."*

15. More importantly, this Court in *Begum Nusrat Ali Gonda versus Federation of Pakistan and others* (**PLD 2013 Supreme Court 829**) culled out the following basic principles for the interpretation of the Constitution:

> *a. That the entire Constitution has to be read as an integrated whole;*
> *b. No one particular provision should be so construed as to destroying the other, but each sustaining the other*
> *c. provision. This is the rule of harmony, rule of completeness and exhaustiveness;*
> *d. Interpretation to be consistent with the Injunctions of Islam;*
> *e. It must always be borne in mind that it is only where the words are not clear, or the provision in question is ambiguous, that is, it is fairly and equally open to diverse meanings, that the duty of interpretation arises;*
> *f. Intention to be gathered from the language of the enactment, otherwise known as the 'plain meaning rule;*
> *g. It is elementary rule of construction that it is to be assumed that the words and phrases of technical legislation are used in their technical meaning, if they have acquired one, and otherwise in their ordinary meaning. Critical and subtle distinctions are to be avoided and the obvious and popular meaning of the language should, as a general rule, be followed;*
> *h. It is a cardinal rule of construction of statutes that no words are to be added or omitted or treated as surplusage or redundant;*
> *i. That the words of written Constitution prevail over all unwritten conventions, precedents and practices to the contrary; and*
> *j. Legislative history is relevant for interpreting constitutional provisions.*
>
> **Underlining is for Emphasis.**

16. This Court in *Aam Log Itehad and another* versus *The Election Commission of Pakistan and others* (**PLD 2022 SC 39**) held that:

> *"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..."*
>
> **Underlining is for Emphasis.**

17. Recently, this Court in *Hamza Rasheed Khan* versus *Election Appellate Tribunal, Lahore High Court, Lahore and others* (**Civil Appeal No. 982 of 2018**) *(delivered on 19.02.2024 and is yet to be reported)* distinguished between progressive interpretation and amending the Constitution. In this case, my learned brother, Justice Syed Mansoor Ali Shah, in his additional note, made the following important observations regarding the interpretation of the Constitution:

> *"9....With their progressive approach, the courts look to the purpose or intent behind a constitutional provision to guide its application in modern contexts. It is a necessary tool for ensuring the Constitution remains relevant and capable of protecting the rights of citizens and the governmental structure in changing societal contexts, ensuring the Constitution remains a living document that evolves alongside societal changes. It is, however, important to underline that there is a marked difference between progressive interpretation and amendment of the Constitution. By way of progressive interpretation, as observed in M.Q.M, "a particular provision, a term or word" of the Constitution is "interpreted dynamically and purposively with a view to achieve the constitutional intent". Courts cannot, under the disguise of progressive interpretation, amend the Constitution and read that into it which is not enshrined in any provision of the Constitution. Progressive interpretation is rooted in constitutional text viewed through a lens of contemporary social, economic and political values but any interpretation that does not have any textual mooring or is not entrenched in or flows from any constitutional provision passes for a*

> *constitutional amendment by unwarranted reading into the Constitution and is beyond the permissible scope of the judicial act of interpreting the Constitution."* (**Internal Citations are omitted**)
>
> **Underlining is for Emphasis.**

18. In short, the Constitution should be read as a whole giving every part thereof meaning consistent with the other provisions of the Constitution. As far as possible each provision of the Constitution should be construed to harmonize with all the others. But, in applying these rules we however have to remember that to harmonies is not to destroy. In the interpretation of the Constitutional provision, the Courts always presume that the legislature inserted every part thereof for a purpose and the legislative intention is that every part of the Constitution should have effect. An argument based on what is claimed to be the spirit of the Constitution is always attractive, as it has a powerful appeal to sentiment and emotion. However, a Court of law must derive the spirit of the Constitution from its language. What one may believe or think to be the spirit of the Constitution cannot prevail if the language of the Constitution does not support that view.

19. By applying the principles of interpretation of a constitutional provision as quoted and discussed above, I will now proceed to determine the questions involved in this case. The sole question before the Court in the Constitution Petition under Article 184(3) of the Constitution was whether the Council could proceed against a Judge on a pending complaint after his retirement or resignation. The learned two-member bench of this Court unanimously dismissed that Constitution Petition in *limine* even without issuing notice to any party while holding that Article 209 does not apply to a person who has retired or resigned from the office of a Judge of this Court or a High Court. The reasons prevailing with the said learned bench were that the Constitution draws a distinction between a person who, at the relevant time, holds office as a Judge and one who, having held that office in the past, does not. Article 209 applies only to the former and not the latter. For example, clauses (2) and (3) of Article 202 respectively refer to a "person who has held office" "as a Judge of the Supreme Court or of a High Court" or "as a permanent Judge." Similarly, Article 182 allows, among other things, for "a person who has held the office of a Judge of [the Supreme]

Court" to attend sittings of the Court as an *ad hoc* Judge, and then states that "while so attending an *ad hoc* Judge shall have the same power and jurisdiction as a Judge of the Supreme Court". Without any hesitation, I am in complete agreement with the above reasons advanced by the said learned bench in the impugned judgment.

20. The majority judgment (authored by Justice Amin-ud-Din Khan) in para 17 also affirmed that only the above question was before the learned two-member bench. The majority judgment also did not expressly show its disagreement with the observation of the learned two-member bench on the point that Article 209 does not apply to a person who has retired or resigned from the office of a Judge of this Court or a High Court. However, the majority judgment unnecessarily split the issue into two different categories**:** Judges of this Court or High Courts against whom a complaint under Article 209 is pending, where

(a) no further steps have been taken by the Council, and

(b) the Council has initiated the proceeding by issuing notices, etc.

In the case of the first category, the majority judgment concurred with the conclusion reached in the impugned judgment that the complaint shall abate. However, regarding the latter, the majority judgment held that the complaint should not abate even after the retirement or resignation of the Judge. With all due respect, I disagree with the categories outlined by the majority of the bench, as they are not supported by any law.

21. Para 7 of the Supreme Judicial Council Procedure of Enquiry 2005 provides a procedure for scrutinizing information presented before the Council. It provides that, "*once any information in respect of enquiry into the conduct of a Judge is received by any Member or the Council,* ***it shall be presented to the Chairman*** *of the Council, who; shall* ***(a)*** *refer the same to any Member of the Council to look into the said information; and to express his opinion in relation to sufficiency or otherwise of the information.* ***(b)*** *if the Council is satisfied that the information prima facie discloses sufficient material for an enquiry, it shall proceed to consider the same.*"

While para 8(1) provides that, "*The* ***Chairman may, call the meeting of the Council****, for discussion and enquiry into the information received.*" The combined effect of the above two paragraphs is that any information against a judge, whether received by a member or the Council, must be presented to the Chairman, who is the Chief Justice of Pakistan (as per the definition of the term "Chairman" under para 3(d) of SJC Procedure of Enquiry 2005). It is solely his prerogative to convene a meeting of the Council for discussion and enquiry into the received information. If, for the sake of argument, the interpretation of Article 209 as put forward by the majority of this bench is admitted to be correct, even then it would not serve any purpose, as it would also give unfettered powers to the Chief Justice of Pakistan. He may, at his discretion, initiate the proceeding on a pending complaint or wait until the retirement of a Judge so that the complaint may be abated.

22. Article 209 of the Constitution does not recognize any such classification, despite having been amended twice since 1973.Clause 5 thereof categorically stipulates that "*if, on information from any source, the Council or the President is of the opinion that a Judge of the Supreme Court or a High Court--(a) may be incapable of properly performing the duties of his office by reason of physical or mental incapacity; or (b) may have been guilty of misconduct", the President shall direct the Council to, or the Council may, on its own motion, inquire into the matter.*'

The above clause clearly suggests that the President or the Council is competent to inquire into a matter under Article 209 against '**a judge of the Supreme Court or a High Court**,' which may result in their removal. Articles 179 and 195 of the Constitution provide that a Judge of the Supreme Court and the High Court shall hold office until he attains the age of sixty-five years and sixty-two years respectively, unless he sooner resigns or is removed from office in accordance with the Constitution. The combined effect of the above articles is that a judge, after retirement or resignation, cannot be termed as 'a judge of the Supreme Court or a High Court,' within the purview of Article 209 (5) of the Constitution and as such, the Council lacks authority to conduct an inquiry against them. Being so, any complaint pending against a judge, whether proceedings have been

initiated or not, shall abate after his retirement or resignation, accordingly.

23. To avoid the above eventuality, the Council, being aware of the date of retirement, can inquire into and resolve the complaint before the retirement of the Judge. Unfortunately, Article 209 does not address the scenario in which a Judge, against whom a complaint is pending or under inquiry, resigns before its conclusion. Regarding this gap, my learned brother Justice Jamal Khan Mandokhail in his additional note remarked, "*Since there is no express provision in the Constitution, nor is there any enactment, preventing the Council from continuing its proceedings of inquiry in a situation where a judge is retired or resigns before conclusion of the inquiry, it is the constitutional obligation of the Council to conclude the inquiry initiated against a judge and form an opinion regarding his conduct. If after inquiring into the matter, the Council is of the opinion that the judge has been guilty of misconduct, under such circumstances, he shall not be eligible for post-retirement benefits.*"

To my understanding, the Constitution is not a procedural law where everything that is not prohibited is permissible. Moreover, the above penal action is not provided by or under any Article of the Constitution; therefore, it could not be so introduced merely through the process of interpretation as proposed or expected by the Federal Government. It would amount to re-write or read in "a phrase" in a Constitutional provision and would also affect the other provisions of the Constitution. The Courts cannot, under the disguise of progressive interpretation, amend the Constitution and read that into it which is not enshrined in any provision of the Constitution. It would not be out of context to state that the Courts only interpret the law and cannot legislate it. If a provision of law is misused and subjected to the abuse of the process of law, it is for the legislature to amend, modify or repeal it, if deemed necessary. (See *Padmasundara Rao (dead) and Ors. versus State of Tamil and Ors.* **(2002) 255 ITR 147 (SC)**).

24. The argument of the learned AGP and learned counsel for the appellants in ICA No. 2 of 2024 as well as Mr. Muhammad Akram Sheikh and Abdul Moiz Jaffari that the above vacuum necessitates interference of this Court is untenable as the provision of Article 209 is simple, clear and unambiguous. Strict and faithful adherence to the

words of the Constitution, especially 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. If blunders are found in legislation, they must be corrected by the Legislature, and it is not the function of the Court to repair them (see **Halsbury's Laws of England, 3rd Edition, Volume 36, page 390**). The purpose of construction or interpretation of a provision is, no doubt, to ascertain the true intention of the Legislature, yet that intention has, of necessity, to be gathered from the words used by the Legislature itself. If those words are so clear and unmistakable that they cannot be given any meaning other than what they carry in their ordinary grammatical sense, then the courts are not concerned with the consequences of the interpretation. However drastic or convenient the result, the function of the court is interpretation, not legislation. Reference may be made to the cases of *Supreme Court Bar Association of Pakistan through President and another versus Federation of Pakistan through Ministry of Interior Islamabad and others* (**PLD 2023 SC 42**) and *Muhammad Ismail versus The State* (**PLD 1969 SC 241**). It is only in very exceptional and challenging circumstances that this Court considers reading into a provision of Constitution.

25. It is also to be borne in mind that the Constitution envisages the trichotomy of powers amongst three organs of the State, namely the legislature, executive and the judiciary. The legislature is assigned the task of law-making, the executive executes such laws and the judiciary interprets the laws. None of the organs of the State can encroach upon the field of the others. Reference may be made to the cases of *State versus Ziaur Rahman* (**PLD 1973 SC 49); *Federation of Pakistan versus Saeed Ahrnaci Khan* (**PLD 1974 SC 151**); *Government of Balochistan versus AzizullahMemon* (**PLD 1993 SC 341**); *Mahmood Khan Achakzai versus Federation of Pakistan* (**PLD 1997 SC 426**); *Liaquat Hussain versus Federation of Pakistan* (**PLD 1999 SC 504**); *Syed Zafar Ali Shah versus General Pervez Musharraf* (**PLD 2000 SC 869**); *Nazar Abbas Jaffri versus Secretary Government of the Punjab* (**2006 SCMR 606**); *Sindh High Court Bar Association's case* (**PLD 2009 SC 879**); *Dr. Mobashir Hassan versus Federation of Pakistan* (**PLD 2010 SC 265**); *Executive District Officer (Revenue) versus Ijaz Hussain* (**2011 SCMR**

1864); and *Jurists Foundation versus Federal Government* (**PLD 2020 SC 1**).

26. As far as the prayer of the appellants regarding the issuance of directions to the Council to structure its discretion in relation to the priority, listing and hearing of the complaints or references and to publicly disclose its eventual findings and to amend the Supreme Judicial Council Procedure of Enquiry 2005 is concerned, I have noticed that there are apparent flaws in the workings of the Council, particularly in the process of fixing, listing, and hearing the complaints or references. These issues not only hinder the effective functioning of the Council but also pose a threat to the independence of the judiciary, which results in the erosion of public confidence in this highest judicial institution. In the past, there has been a tendency to pick and choose specific complaints, and many complaints have abated due to the retirement of the judge who was the subject of the complaint. Furthermore, the Supreme Judicial Council Procedure of Enquiry 2005 grants unfettered powers to the Chief Justice of Pakistan/the Chairman to convene a meeting of the SJC for discussion and inquiry into the received information. Given this, the Supreme Judicial Council Procedure of Enquiry 2005 needs to be amended, accordingly. However, I believe that it would be inadvisable and inappropriate to give any specific direction to the Council. It is, however, expected that the Council, to ensure the smooth functioning of its operations and to safeguard the independence of the Judiciary, will implement clear and transparent procedures for fixing, listing, and hearing complaints, thereby preventing any undue delays or manipulation in the process of accountability. In this regard, I feel appropriate to quote a passage from famous letter of Hazrat Ali Ibn-e-Abi Talib (a.s.) to Malik Ashtar, Governor of Egypt, to emphasis on the importance of accountability of Judges of the Superior Courts for administration of Justice:-

> *"Of these select for higher posts men of experience, men firm in faith and belonging to good families. Such men will not fall an easy prey to temptations and will discharge their duties with an eye on the abiding good of others. Increase their salaries to give them a contended life. A contended living is a help to self-purification. They will not feel the urge to tax the earnings of their subordinates for their own upkeep.*

> *They will then have no excuse either to go against your instructions or misappropriate state funds. Keep to watch over them without their knowledge, loyal and upright men. Perchance they may develop true honesty and true concern for the public welfare. But whenever any of them is accused of dishonesty and the guilt is confirmed by the report of your secret service, then regard this as a sufficient to convict him. Let the punishment be corporal and let that be dealt in the public at an appointed place of degradation."*

27. Foregoing in view, both the appeals are dismissed as being time-barred as well as on merits.

28. Above are the reasons for the short order announced on 21.02.2024 as already reproduced in para 18 of the majority judgment.

(Syed Hasan Azhar Rizvi)
Judge

Islamabad
Approved for reporting
*Ghulam Raza/**