

IN THE SUPREME COURT OF PAKISTAN
(Advisory Jurisdiction)

PRESENT:

**MR. JUSTICE KHILJI ARIF HUSSAIN.
MR. JUSTICE TARIQ PARVEZ.
MR. JUSTICE EJAZ AFZAL KHAN.
MR. JUSTICE GULZAR AHMED.
MR. JUSTICE SH. AZMAT SAEED.**

REFERENCE NO.01 OF 2012.

[Reference by the President of Pakistan
under Article 186 of the Constitution of
Islamic Republic of Pakistan, 1973]

For the President:	Mr. Wasim Sajjad, Sr. ASC. Mr. Abdul Latif Yousafzai, Sr. ASC. Mr. Idrees Ashraf, Advocate Mr. Mehr Khan Malik, AOR.
For Federation:	Mr. Irfan Qadir, A. G. for Pakistan Mr. Dil Muhammad Alizai, DAG Barrister Shehryar Riaz Sh. Advocate Mrs. Shafaq Mohsin, Advocate Ch. Faisal Hussain, Advocate
Amicus Curie:	Mr. Makhdoom Ali Khan, Sr. ASC. Mr. Khurram M. Hashmi, Advocate. Mr. Umair Majeed Malik, Advocate. Mr. Hyder Ali Khan, Advocate. Mr. Saad M. Hashmi, Advocate. Mrs. Asma Hamid, Advocate.
	Khawaja Haris Ahmed, Sr. ASC, Assisted by: i. Kh. Zaheer Ahmed, Advocate ii. Syed Ali Shah Gilani, Advocate.
Date of Hearing:	14.12.2012. (Reserved)

OPINION

Khilji Arif Hussain, J-. Briefly stating the facts, relevant
to give opinion on the questions referred to by the President of
Pakistan, through Reference No.1 of 2012, under Article 186 of the
Constitution of Islamic Republic of Pakistan, 1973 *[hereinafter referred*

to as '**the Constitution**'], are that in a meeting of the Judicial Commission of Pakistan [hereinafter referred to as '**the Commission**'], held on 27.09.2012 to fill a vacancy, the Chief Justice of Pakistan initiated the names of Mr. Justice Iqbal Hameed-ur-Rahman, the Chief Justice of Islamabad High Court, Islamabad, as a Judge of this Court. After deliberations, the Commission nominated Mr. Justice Iqbal Hameed-ur-Rahman as a Judge of this Court.

2. In another meeting of the Commission, on the same day, which was attended by Mr. Justice Iqbal Hameed-ur-Rahman, the Chief Justice of Islamabad High Court, Islamabad, the Chief Justice of Pakistan initiated the name of Mr. Justice Muhammad Anwar Khan Kasi, as Chief Justice of Islamabad High Court, Islamabad, who after deliberations and with majority of 7 to 2, was nominated.

3. When the tenure of Mr. Shaukat Aziz Siddiqui; Mr. Noor-ul-Haq N. Qureshi; and Mr. Muhammad Azeem Khan Afridi, who were initially appointed as Additional Judges of Islamabad High Court, Islamabad, for a period of one year with effect from the date they took oath of their offices was nearing expiry, their cases were referred to the Commission and after deliberations it nominated the names of Mr. Shaukat Aziz Siddiqui, as a Judge of Islamabad High Court, Islamabad with a vote of 8 to 2 and unanimously nominated Mr. Noor-ul-Haq N. Qureshi, as an Additional Judge of Islamabad High Court, Islamabad, for further

period of six months from the date of expiry of his present term, whereas the name of Mr. Muhammad Azeem Khan Afridi was dropped he was not nominated.

4. The meeting of the Commission was attended by Mr. Justice Muhammad Anwar Khan Kasi, as most senior Judge of Islamabad High Court, Islamabad.

5. On receipt of nominations, in respect of Mr. Justice Iqbal Hameed-ur-Rahman, as a Judge of this Court; Mr. Justice Muhammad Anwar Khan Kasi, as Chief Justice of Islamabad High Court, Islamabad; Mr. Shaukat Aziz Siddiqui, as a Judge of Islamabad High Court, Islamabad; and Mr. Noor-ul-Haq N. Qureshi, as an Additional Judge of Islamabad High Court, Islamabad, for a period of six months from the date of expiry of his tenure, the Parliamentary Committee [*hereinafter referred to as ‘the Committee’*], after due consideration unanimously endorsed the nominations made by the Commission and sent the same to the Prime Minister of Pakistan to forward them to the President of Pakistan for issuance of requisite notifications. The President of Pakistan, after receipt of the aforesaid nominations, instead of issuing the notifications, by way of filing a Reference (Reference No.1 of 2012) under Article 186 of the Constitution, sought opinion of this Court on the following questions of law, considering them to be of public importance:-

“(i). *Whether in view of the decision by the Chief Justice of the IHC that Mr. Justice Riaz was the senior most judge of the IHC, which decision of the Chief Justice was also confirmed by the*

President of Pakistan, Mr. Justice Kasi could be treated as most senior Judge of the IHC?

- (ii) *Whether Mr. Justice Riaz had a legitimate expectancy to be appointed as Chief Justice of the IHC on the ground that he was the most senior Judge of that Court in the light of the judgment of the Supreme Court in the Al-Jehad case referred to above?*
- (iii) *Whether the JCP acted in accordance with the Constitution and conventions thereof in recommending a junior Judge as Chief Justice of the IHC?*
- (iv) *Whether JCP was properly constituted as per provision of Article 175-A of the Constitution as Mr. Justice Kasi who participated in the meeting was not a Member thereof and was a stranger to the proceedings?*
- (v) *Whether the President who is bound by oath of office to preserve, protect and defend the Constitution is obliged to make the appointments which are not in accordance with the provisions of the Constitution?*
- (vi) *What should be the manner, mode and criteria before the Judicial Commission with respect to the nomination of a person as a Judge of High Court, Supreme Court and Federal Shariat Court in terms of Clause (8) of Article 175-A of the Constitution of Islamic Republic of Pakistan, 1973?*
- (vii) *What is the proper role of the Judicial Commission and Parliamentary Committee under the Constitution of Pakistan with respect to appointment of Judges of Supreme Court, High Court and Federal Shariat Court?*
- (viii) *What should be the parameters before the Parliamentary Committee for the confirmation of the nominee of the Judicial Commission in terms of Clause (12) of Article 175-A of the Constitution of Islamic Republic of Pakistan, 1973?*
- (ix) *Whether the Constitution prohibits reconsideration of the nominations by JCP and confirmed by the Parliamentary Committee in the light of the observations made by the President?*
- (x) *What should be the criteria for elevating a Judge/Chief Justice of the High Court to the Supreme Court? Is it, their seniority inter-se as Judge of the High Court or their seniority inter-se as Chief Justice of respective High Court be the consideration for elevation to the Supreme Court?*
- (xi) *Whether the Constitution of Pakistan prohibits individual Members of the JCP to initiate names for appointments of Judges to the Supreme Court, the High Courts and the Federal Shariat Court?*
- (xii) *The Parliamentary Committee under Article 175-A of the Constitution may confirm or may not confirm a nomination in accordance with the provisions stated therein. What is the true import and meaning of the word "confirm" and what is the effect of the proviso to Clause 12 of Article 175-A which reads as follows:*

"Provided further that if nomination is not confirmed, the Commission shall send another nomination"

(xiii) *Whether by not providing in camera proceeding for JCP in Article 175-A of Constitution of Pakistan, the intention of the legislature is to ensure complete transparency and open scrutiny?"*

6. As the subject matter of the Reference is of utmost importance with regard to the independence of the Judiciary and the principle of trichotomy of powers, this Court decided to seek the assistance of some senior Lawyers and thus appointed Mr. Makhdoom Ali Khan, learned Sr.ASC and Khawaja Haris Ahmed, learned ASC, as *amicus*.

7. Mr. Waseem Sajjad, learned Sr. ASC while appearing on behalf of the Referring Authority contended that the principle underlying the determination of seniority of Judges, elevated on the same day is seniority in age, Mr. Justice Riaz Ahmed Khan, being senior in age is the most Senior Judge and thus is to be nominated as Chief Justice, Islamabad High Court. This practice, the learned counsel added, being more than a century old has been consistently followed in the Indian sub-continent and even after its partition. The learned counsel, to substantiate his argument, referred to the letter No.F.12(5)/86-AII, dated 30.04.1987, Government of Pakistan, Ministry of Justice and Parliamentary Affairs (Justice Division). The learned counsel by elaborating his argument contended that when according to the dictum laid down in the case of Al-Jehad Trust v. Federation of Pakistan (PLD 1996 Supreme Court 324), the most senior Judge of a High Court has a legitimate expectancy to be appointed as Chief Justice, in the absence of any concrete reason, Mr.

Justice Riaz Ahmed Khan being the most senior Judge was entitled to be nominated for appointment as Chief Justice and that the nomination of Mr. Justice Muhammad Anwar Khan Kasi was not only an out right departure from the century old practice but also against the law of the land, therefore, the President is not bound to appoint such person as Chief Justice. The learned counsel next contended that even the Judicial Commission, nominating Mr. Justice Shaukat Aziz Siddique for appointment and Mr. Justice Noor-ul-Haq Qureshi for extension as Judges of the High Court, cannot be said to have been properly constituted in the absence of the most senior Judge, therefore, their nominations will not have any legal or constitutional sanctity, notwithstanding it having been confirmed by the Parliamentary Committee, sent to the Prime Minister and then forwarded to the President. It would be all the more without any legal and Constitutional sanctity, argued the learned counsel, when it does not conform to the manner prescribed by the Constitution. The learned counsel to support his contention referred to the cases of Human Rights Cases Nos. 4668 of 2006, 1111 of 2007 and 15283-G of 2010 (PLD 2010 Supreme Court 759), and Federation of Pakistan v. Aftab Ahmad Khan Sherpao (PLD 1992 Supreme Court 723). The fact, maintained the learned counsel, that a non-entity, sat, voted and took part in the proceedings would also call for its annulment on this score alone. The learned counsel to support his contention placed reliance on the case of "Regina. Vs. Bow Street Metropolitan Stipendiary Magistrate and others, Ex-

parte Pinochet Ugarte (No.2). Even otherwise, the learned counsel submitted, that the President being appointing authority is duty bound to ensure obedience to the Constitution and the law cannot appoint a person who has not been nominated in accordance with the provisions of the Constitution.

8. The learned counsel further contended that if the principle of seniority and that of legitimate expectancy linked therewith, are ignored without reasons to record, it would give rise to the whim and caprice of the person sitting at the peak which is not conducive for independence of judiciary. The learned counsel also waxed eloquent by asking this Court to redefine the mode and manner of appointing Judges but when we observed that all these questions have been elaborately dealt with in the case of Munir Hussain Bhatti v. Federation of Pakistan (**PLD 2011 Supreme Court 407**), the learned counsel submitted that since they have been dealt with collaterally the judgment so rendered being *obiter dicta* will not have binding force. We would have agreed with the learned counsel for the President but he could not point out anything striking or significant in the judgment which went un-noticed or unattended. It is, therefore, not *obiter dicta* by any attribute. This judgment could have been treated as sub-silentio a precedent not fully argued, but again the learned counsel could not advert to any legal or Constitutional aspect of the case which escaped the notice of the Bench, rendering the judgment, so as to relegate it, to the status of sub-silentio. The learned counsel after taking us through various

parts of the judgment rendered in the case of Federation of Pakistan v. Sindh High Court Bar Association (PLD 2012 Supreme Court 1067), contended that its reference in the minutes of the meeting of the Judicial Commission, to justify the inference that Mr. Justice Muhammad Anwar Khan Kansi is the most Senior Judge of the High Court, is absolutely uncalled for, as it, when read carefully, does not support any such inference. How could the proceeding in the Judicial Commission be held in camera, asked the learned counsel, when the legislature in its wisdom purposely provided otherwise so as to ensure complete transparency and open scrutiny. What would be the criterion asked the learned counsel, for elevating Judges or a Chief Justice of a High Court to the Supreme Court and whether it is inter se seniority of the Judges or the Chief Justices of the High Courts which constitutes a determining factor?

9. Learned Attorney General appearing on the notice of the Court contended that the Judicial Commission was not properly constituted, as *persona designata* did not attend the meeting and the person who attended the meeting was just a non-entity, therefore, the whole process shall stand vitiated. The President, the learned Attorney General submitted, is not bound to appoint a nominee of such Judicial Commission notwithstanding nomination so made was confirmed by the Parliamentary Committee and forwarded to the President by the Prime Minister on its receipt. The learned Attorney General next contended that where in the judgment rendered in the case of Sindh High Court Bar Association v. Federation of Pakistan

(PLD 2009 Supreme Court 879), this Court annulled the appointment of many Judges for want of recommendation by the consultee, a nomination originating from the Judicial Commission which was not properly constituted has to be given alike treatment. The learned Attorney General by referring to the commentary on the Constitution of India by Durga Das Basu argued that the President is not a robot placed in the President House nor a Computer controlled automation, nor a figure head nor ornamental piece placed in the show window of the nation called the President's House. Instead, the learned Attorney General submitted, he is a living human who on being selected by the nation is endowed with all dignity, honour and prestige as head of the republic for upholding the Constitution and the laws, therefore, his role as such cannot be doubted in any situation. Seen from such an angle, the learned Attorney General concluded, the President cannot be kept out of the affairs regulating the appointment of Judges.

10. Mr. Makhdoom Ali Khan, learned Sr. ASC appeared as Amicus Curie on notice of the Court. The learned counsel in the first instance addressed the Court as to the binding nature of an advice rendered by this Court in the exercise of its advisory jurisdiction. The learned counsel by referring to the relevant paragraph of the judgment rendered in Reference No. 02 of 2005 by the President of Pakistan **(PLD 2005 Supreme Court 873)**, submitted that though an opinion given by the Court on a reference filed by the President is not a decision between the parties but since it is handed down after

undertaking an extensive judicial exercise and hearing of Advocates it has a binding force. Such advice, the learned counsel submitted has to be esteemed and accepted with utmost respect. The learned counsel then by referring to various Articles of the Constitution in general and Article 175-A in particular contended that the mode and manner of appointing Judges of the superior Courts has undergone a change and that the whole process from the inception to the end is now regulated by the latter. The learned counsel submitted that after a person has been nominated by the Judicial Commission, his name has been confirmed by the Parliamentary Committee, sent to the Prime Minister and then forwarded by the latter to the President for appointment, the President will have no choice but to appoint him. While commenting on the mode and manner of appointment of Judges and things ancillary thereto, the learned counsel submitted that an exhaustive exercise has been taken in the cases of Al-Jehad Trust (*supra*) and Munir Hussain Bhatti (*supra*), therefore, yet another exercise is hardly called for. The learned counsel, however, submitted that the principle and practice of appointing the most Senior Judge as Chief Justice is not open to any dispute and thus cannot be departed from without reasons to be recorded as held in the case of Al-Jehad Trust (*supra*). The President or for that matter any other person performing the affairs of Federation, the learned counsel submitted, is duty bound to protect the Constitution and that the instant reference appears to be an effort in this behalf.

11. Khawaja Haris Ahmed, Sr. ASC who was also asked to assist the Court as Amicus Curie, highlighted the salient features of his written submissions. He by referring to Article 175-A of the Constitution of Pakistan submitted that the role of the President in the appointment of Judges is more-or-less ministerial, once a nomination originating from the Judicial Commission and confirmed by the Parliamentary Committee has been sent to the Prime Minister and then forwarded to the President. He by referring to the judgment rendered in the case of Munir Hussain Bhatti (*supra*), submitted that where almost all of the questions raised in the reference have been answered in the judgment it would be futile to reiterate the same.

12. With regard to the question relating to seniority, the learned counsel submitted that the same being person specific is not one of law, therefore, this Court cannot afford to decide such question in its advisory jurisdiction. The learned counsel next contended that the omission to mention the expression most senior Judge in the provision relating to appointment of the Chief Justice of a High Court is significant and that in the absence of any express provision even the most senior Judge cannot have legitimate expectancy, as the Constitution on this score has remained the same even after the dictum laid down in the case of Al-Jehad Trust (*supra*).

13. In order to give an opinion on the questions referred to by the President of Pakistan and reproduced hereinabove, we would

like to discuss the legislative history of various Articles of the Constitution.

14. The first document that served as the Constitution of Pakistan was the Government of India Act, 1935. The constituent assembly, elected in the year 1946, after nine years adopted the first Constitution of 1956, which was abrogated in October, 1958 by Gen.(R) Ayub Khan. The 1962 Constitution was abrogated on 25.03.1969 by second Martial Law Administrator Gen.(R) Muhammad Yahya Khan. In December, 1970, elections were held, however, due to various reasons, which we would not like to comment upon, the National Assembly did not meet due to widespread disturbance in East Pakistan and Mr. Zulfikar Ali Bhutto was sworn in on 20.12.1971 as President of Pakistan. After gaining power, Mr. Zulfikar Ali Bhutto invited the leaders of political parties to meet on 19.07.1972, which after intensive discussions resulted in an agreement. A Committee of 25 Members was appointed to prepare a draft for a permanent Constitution of Pakistan and after deliberations; the Assembly passed a bill unanimously on 19.04.1973. The Constitution of Pakistan, 1973 came into effect on 14.08.1973, providing Parliamentary Form of Government, based on the trichotomy of power.

15. Prior to Constitution (Eighteenth) Amendment, the procedures for appointment of a Judge of the superior Courts mentioned in the Constitutions of Islamic Republic of Pakistan, 1962

and 1973 were identical to some extent. Before Constitution (Eighteenth) Amendment, the Articles 177 and 193 of the Constitution empowered the President of Pakistan to appoint the Chief Justice of Pakistan; the Chief Justices of the High Courts; and the Judges of the superior Courts. From perusal of the said Articles, it appears that though appointment of a Judge of the superior Courts was to be made by the President, but after consultation with the Chief Justice of Pakistan, the Governor concerned and the Chief Justice of the concerned High Court (except where the appointment is that of a Chief Justice). The appointment of a Judge of the superior Courts is a constitutional appointment and mode thereof is provided by the Constitution itself. The "consultation", as envisaged prior to the Constitution (Eighteenth and Nineteenth) Amendments, required by the President of Pakistan from the consultees was not a formality, but was mandatory and no appointment or confirmation of a Judge of the superior Courts could be made without resorting to the consultative process.

16. In the case of Al-Jehad Trust v. Federation of Pakistan (PLD 1996 Supreme Court 324), it was held that if the Chief Justice of the High Court and the Chief Justice of Pakistan give a positive opinion about the suitability of a candidate, but the Governor on the basis of information received about his antecedents gives a negative opinion, the President is empowered to decline the appointment of the candidate. On the other hand, if the Chief Justice of the High Court and the Chief Justice of Pakistan give a negative opinion

about a candidate on the basis of their expert opinion that the candidate cannot be appointed, then the opinion of the Chief Justice cannot be ignored and due weight is to be given to his opinion. It was further held that the President/Executive does not have a final say in the matter of appointment of the Judges of the superior Courts and if the opinion of the Chief Justice is ignored, the President/Executive should give reasons which could be juxtaposed with the reasons of the Chief Justice to find out as to what reasons are in the public interest.

17. Immediately, after the pronouncement of judgment in the case of **Al-Jehad Trust** (*supra*), the President of Pakistan filed a Reference (Reference No.2 of 1996) under Article 186 of the Constitution seeking opinion of this Court whether the President's powers to make the appointment of Judges of the superior Courts, such appointment is subject to the provisions of Article 48(1), which prescribed that in the exercise of his functions, the President shall act in accordance with the advice of the Prime Minister. This Court, vide judgment reported as **Al-Jehad Trust v. Federation of Pakistan (PLD 1997 Supreme Court 84)**, after discussing all aspects of the matter, in detail, came to the conclusion that in respect of appointment of the Judges as contemplated under Articles 177 and 193 of the Constitution, the advice of the Cabinet/Prime Minister under Article 48 (1) is attracted. In the said case at page 141, it was held as under:-

"74. After considering the arguments advanced for and against the proposition on the point whether for making

appointments of Judges under Articles 177 and 193, which are special provisions, advice of the Prime Minister to the President under general provision of Article 48 is attracted or not, we are of the considered opinion that there is no apparent conflict in Articles 48 on one side and 177 and 193 on the other side because Articles 177 and 193 are to be read in conjunction with Article 48 (1) which is omni potent provision being special characteristic of Constitution of 1973 which envisages Parliamentary Form of Government. If the Constitution-makers intended even after promulgation of Eighth Amendment to exclude Article 48(1) from application to Articles 177 and 193, then they could have expressly mentioned in Articles 177 and 193 that the President while performing his functions under these Articles is allowed to act in his discretion excluding advice of the Prime Minister and would be deemed to be acting under Article 48(2). For such reasons we are of the view that there is no conflict as appointments under Articles 177 and 193 of the Constitution are made in conjunction with Article 48(1) of the Constitution always attracting and applying advice of the Prime Minister to the President."

18. After the pronouncement of the authoritative decision by this Court in the case of Al-Jehad Trust (*ibid*) by Constitution (Eighteenth) Amendment Act, 2010 (Act 10 of 2010), the appointment procedures of the Judges of the superior Courts were radically changed.

"175A. *Appointment of Judges to the Supreme Court, High Courts and the Federal Shariat Court.*- (1) There shall be a Judicial Commission of Pakistan, hereinafter in this Article referred to as the Commission, for appointment of Judges of the Supreme Court, High Courts and the Federal Shariat Court, as herein after provided.

- (2) For appointment of Judges of the Supreme Court, the Commission shall consist of--
- | | | |
|-------|--|-----------------|
| (i) | Chief Justice of Pakistan; | <i>Chairman</i> |
| (ii) | two most senior Judges of the Supreme Court; | <i>Members</i> |
| (iii) | a former Chief Justice or a former Judge of the Supreme Court of Pakistan to be nominated by the Chief Justice of Pakistan, in consultation with the two member Judges, for a term of two years; | <i>Member</i> |
| (iv) | Federal Minister for Law and Justice; | <i>Member</i> |
| (v) | Attorney-General for Pakistan; and | <i>Member</i> |
| (vi) | a Senior Advocate of the Supreme Court of Pakistan | <i>Member</i> |

to be nominated by the Pakistan Bar Council for a term of two years.

- (3) Notwithstanding anything contained in clause (1) or clause (2), the President shall appoint the most senior Judge of the Supreme Court as the Chief Justice of Pakistan.
- (4) The Commission may make rules regulating its procedure.
- (5) For appointment of Judges of a High Court, the Commission in clause (2) shall also include the following, namely: ---
 - (i) Chief Justice of the High Court *Member* to which the appointment is being made;
 - (ii) the most senior Judge of that *Member* High Court;
 - (iii) Provincial Minister for Law; *Member* and
 - (iv) a senior advocate to be *Member* nominated by the Provincial Bar Council for a term of two years:

Provided that for appointment of the Chief Justice of a High Court, the most senior Judge of the Court shall be substituted by a former Chief Justice or former Judge of that Court, to be nominated by the Chief Justice of Pakistan in consultation with the two member Judges of the Commission mentioned in clause (2):

Provided further that if for any reason the Chief Justice of High Court is not available, he shall also be substituted in the manner as provided in the foregoing proviso.

- (6) For appointment of Judges of the Islamabad High Court, the Commission in clause (2) shall also include the following, namely:---
 - (i) Chief Justice of the Islamabad *Member* High Court; and
 - (ii) the most senior Judge of that *Member* High Court:

Provided that for initial appointment of the Judges of the Islamabad High Court, the Chief Justices of the four Provincial High Courts shall also be members of the Commission:

Provided further that subject to the foregoing proviso, in case of appointment of Chief Justice of Islamabad High Court, the provisos to clause (5) shall, *mutatis mutandis*, apply.

- (7) For appointment of Judges of the Federal Shariat Court, the Commission in clause (2) shall also include the Chief Justice of the Federal Shariat Court and the most senior Judge of that Court as its members:

Provided that for appointment of Chief Justice of Federal Shariat Court, the provisos to clause (5) shall, *mutatis mutandis*, apply.

- (8) The Commission by majority of its total membership shall nominate to the Parliamentary Committee one person, for each vacancy of a Judge in the Supreme Court, a High Court or the Federal Shariat Court, as the case may be;
- (9) The Parliamentary Committee, hereinafter in this Article referred to as the Committee, shall consist of the following eight members, namely: ---
- (i) four members from the Senate, and
 - (ii) four members from the National Assembly.
- (10) Out of the eight members of the Committee, four shall be from the Treasury Benches, two from each House and four from the Opposition Benches, two from each House. The nomination of members from the Treasury Benches shall be made by the Leader of the House and from the Opposition Benches by the Leader of the Opposition.
- (11) Secretary, Senate shall act as the Secretary of the Committee.
- (12) The Committee on receipt of a nomination from the Commission may confirm the nominee by majority of its total membership within fourteen days, failing which the nomination shall be deemed to have been confirmed:
- Provided that the committee may not confirm that nomination by three-fourth majority of its total membership within the said period, in which case the Commission shall send another nomination.
- (13) The Committee shall forward the name of the nominee confirmed by it or deemed to have been confirmed to the President for appointment.
- (14) No action or decision taken by the Commission or a Committee shall be invalid or called in question only on the ground of the existence of a vacancy therein or of the absence of any member from any meeting thereof.
- (15) The Committee shall make rules for regulating its procedure."

The Constitution (Eighteenth) Amendment was called in question through various petitions in this Court and after hearing, an interim

short order was passed; for convenience sake relevant portion therefrom, reads as under:-

“While doing so we take note of the fair stand taken by Mian Raza Rabbani, Chairman of the Special Committee of the Parliament for Constitutional Reforms and the Attorney General for Pakistan to which reference has been made in Para-12 above and hold that Article 175A shall be given effect to in the manner as under:-

- (i) In all cases of an anticipated or actual vacancy a meeting of the Judicial Commission shall be convened by the Chief Justice of Pakistan in his capacity as its Chairman and the names of candidates for appointment to the Supreme Court shall be initiated by him, of the Federal Shariat Court by the Chief Justice of the said Court and of the High Courts by the respective Chief Justices.
- (ii) The Chief Justice of Pakistan as head of the Judicial Commission shall regulate its meetings and affairs as he may deem proper.
- (iii) The proceedings of the Parliamentary Committee shall be held *in camera* but a detailed record of its proceedings and deliberations shall be maintained. The Parliamentary Committee shall send its approval of recommendations of the Judicial Commission to the Prime Minister for onward transmission to the President for necessary orders. If the Parliamentary Committee disagrees or rejects any recommendations of Judicial Commission, it shall give specific reasons and the Prime Minister shall send copy of the said opinion of the Committee to the Chief Justice of Pakistan and the same shall be justiciable by the Supreme Court.

19. In the light of the interim order, the Constitution (Nineteenth) Amendment Act of 2011 was passed and to some extent, the observations made by this Court were accepted and Article 175A was amended, which reads as under:-

175A. Appointment of Judges to the Supreme Court, High Courts and the Federal Shariat Court.-

- (1) There shall be a Judicial Commission of Pakistan, hereinafter in this Article referred to as the Commission, for appointment of Judges of the Supreme Court, High Courts and the Federal Shariat Court, as hereinafter provided.
- (2) For appointment of Judges of the Supreme Court, the Commission shall consist of--
 - (i) Chairman Chief Justice of Pakistan;
 - (ii) Members four most senior Judges of the Supreme Court;
 - (iii) Member a former Chief Justice or a former Judge of the Supreme Court of Pakistan to be

nominated by the Chief Justice of Pakistan, in consultation with the four member Judges, for a term of two years;

- (iv) Member Federal Minister for Law and Justice;
- (v) Member Attorney-General for Pakistan; and
- (vi) Member a Senior Advocate of the Supreme Court of Pakistan nominated by the Pakistan Bar Council for a term of two years.

(3) Notwithstanding anything contained in clause (1) or clause (2), the President shall appoint the most senior Judge of the Supreme Court as the Chief Justice of Pakistan.

(4) The Commission may make rules regulating its procedure.

(5) For appointment of Judges of a High Court, the Commission in clause (2) shall also include the following, namely:-

- (i) Member Chief Justice of the High Court to which the appointment is being made;
- (ii) Member the most senior Judge of that High Court;
- (iii) Member Provincial Minister for Law; and
- (iv) Member An advocate having not less than fifteen years practice in the High Court to be nominated by the concerned Bar Council for a term of two years:

Provided that for appointment of Chief Justice of a High Court, the most senior Judge mentioned in paragraph (ii) shall not be Member of the Commission:

Provided further that if for any reason the Chief Justice of High Court is not available, he shall be substituted by a former Chief Justice or former Judge of that Court, to be nominated by the Chief Justice of Pakistan in consultation with the four member Judges of the Commission in paragraph (ii) of clause (2):

(6) For appointment of Judges of the Islamabad High Court, the Commission in clause (2) shall also include the following, namely:-

- (i) Member Chief Justice of the Islamabad High Court; and
- (ii) Member the most senior Judge of that High Court

Provided that for initial appointment of the Chief Justice and the Judges of the Islamabad High Court, the Chief Justices of the four Provincial High Courts shall also be members of the Commission:

Provided further that subject to the foregoing proviso, in case of appointment of Chief Justice of Islamabad High Court, the provisos to clause (5) shall, *mutatis mutandis*, apply.

(7) For appointment of Judges of the Federal Shariat Court, the Commission in clause (2) shall also include the Chief Justice of the Federal Shariat Court and the most senior Judge of that Court as its members:

Provided that for appointment of Chief Justice of Federal Shariat Court, the provisos to clause (5)

shall, *mutatis mutandis*, apply.

(8) The Commission by majority of its total membership shall nominate to the Parliamentary Committee one person, for each vacancy of a Judge in the Supreme Court, a High Court or the Federal Shariat Court, as the case may be.

(9) The Parliamentary Committee, hereinafter in this Article referred to as the Committee, shall consist of the following eight members, namely:-

(i) Four members from the Senate; and

(ii) Four members from the National Assembly.

Provided that when the National Assembly is dissolved, the total membership of the Parliamentary Committee shall consist of the members from the Senate only mentioned in paragraph (i) and the provisions of this article, shall, *mutatis mutandis*, apply.

(10) Out of the eight members of the Committee, four shall be from the Treasury Benches, two from each House and four from the Opposition Benches, two from each House. The nomination of members from the Treasury Benches shall be made by the Leader of the House and from the Opposition Benches by the Leader of the Opposition.

(11) Secretary, Senate shall act as the Secretary of the Committee.

(12) The Committee on receipt of a nomination from the Commission may confirm the nominee by majority of its total membership within fourteen days, failing which the nomination shall be deemed to have been confirmed:

Provided that the Committee, for reasons to be recorded, may not confirm the nomination by three-fourth majority of its total membership within the said period.

Provided further that if a nomination is not confirmed by the Committee it shall forward its decision with reasons so recorded to the Commission through the Prime Minister.

Provided further that if a nomination is not confirmed, the Commission shall send another nomination.

(13) The Committee shall send the name of the nominee confirmed by it or deemed to have been confirmed to the Prime Minister who shall forward the same to the President for appointment.

(14) No action or decision taken by the Commission or a Committee shall be invalid or called in question only on the ground of the existence of a vacancy therein or of the absence of any member from any meeting thereof.

(15) The meetings of the Committee shall be held in camera and the record of its proceedings shall be maintained.

(16) The provisions of Article 68 shall not apply to the proceedings of the Committee.

(17) The Committee may make rules for regulating its procedure.

It is in this background that thirteen questions have been framed and are placed before this Court seeking opinion under Article 186 of the Constitution.

20. We are recording this opinion without touching the vires of Article 175A which is subject matter of various petitions pending before this Court.

21. First of all, we would like to give our opinion on questions No.(v) & (ix) although framed separately but are interconnected. These are as under:-

- (v) *Whether the President who is bound by oath of office to preserve, protect and defend the Constitution is obliged to make the appointments which are not in accordance with the provisions of the Constitution? and*
- (ix) *Whether the Constitution prohibits reconsideration of the nominations by JCP and confirmed by the Parliamentary Committee in the light of the observations made by the President?*

22. The suitability of a candidate about his ability, legal competency and integrity, which was to be determined by the Chief Justice of Pakistan and the Chief Justice of the concerned High Court prior to the Constitution (Eighteenth and Nineteenth) Amendments now is to be determined by the Commission, a body consisting of experts from all stakeholders i.e. the Judiciary, the Executive and Bars, created by Article 175A of the Constitution. Although each Member of the Commission is equal, including the Chief Justice of Pakistan/Chief Justice of the concerned High Court having one vote each, yet the Constitution Framers in their wisdom gave decisive vote to the Judiciary, as out of 11 Members of the Commission 08

Members are from the Judiciary alongwith one retired Judge of the Supreme Court, nominated by the Chief Justice of the Pakistan.

23. To discharge the duty put on their shoulders by the Constitution Makers, to select the best person as a Judge of the superior Courts, the most senior Judges of the Supreme Court and the High Courts, being Members of the Commission, having one vote each, are supposed to form their opinions independently about the ability, legal competency, integrity and administrative skill of the person, whose name is initiated by the Chief Justice of Pakistan or the Chief Justice of the High Court, without which, the fundamental rights of the Citizens cannot be secured.

24. The President of Pakistan makes appointment to various (non-elective) constitutional offices besides appointing the High Court and Supreme Court Judges like the Auditor General of Pakistan; the Chief Election Commissioner and its Members; the Chairman, Federal Public Service Commission; Care Taker Prime Minister, Members of Islamic Council and the Chiefs of Armed Forces. We would like to reproduce hereinbelow the relevant Articles of the Constitution to appreciate the questions involved:-

"Audit and Accounts

168. (1) There shall be an Auditor-General of Pakistan, who shall be appointed by the President.

(2) Before entering upon office, the Auditor-General shall make before the Chief Justice of Pakistan oath in the form set out in the Third Schedule.

(3) The Auditor-General shall, unless he sooner resigns or is removed from office in accordance with clause (5), hold office for a term of four years from the date on which he assumes such office or attains the age of sixty-five years, whichever is earlier.

(3A) The other terms and conditions of service of the Auditor-General shall be determined by Act of Majlis-e-

Shoora (Parliament); and, until so determined, by Order of the President.]

(4) A person who has held office as Auditor-General shall not be eligible for further appointment in the service of Pakistan before the expiration of two years after he has ceased to hold that office.

(5) The Auditor-General shall not be removed from office except in the like manner and on the like grounds as a Judge of the Supreme Court.

(6) At any time when the office of the Auditor-General is vacant or the Auditor-General is absent or is unable to perform the functions of his office due to any cause, [the President may appoint the most senior officer in the Office of the Auditor-General to] act as Auditor-General and perform the functions of that office.

Appointment of Supreme Court Judges.

177. (1) The Chief Justice of Pakistan and each of the other Judges of the Supreme Court shall be appointed by the President in accordance with Article 175A.

(2) A person shall not be appointed a Judge of the Supreme Court unless he is a citizen of Pakistan and—

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

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

Appointment of High Court Judges.

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

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

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

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

(c) he has, for a period of not less than ten years, held a judicial office in Pakistan.

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

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

Chief Election Commissioner and Election Commissions

213. (1) There shall be a Chief Election Commissioner (in this Part referred to as the Commissioner), who shall be appointed by the President.

(2) No person shall be appointed to be 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.

(2A) The Prime Minister shall in consultation with the Leader of the Opposition in the National Assembly, forward three names for appointment of the Commissioner to a Parliamentary Committee for hearing and confirmation of any one person.

(2B) The Parliamentary Committee to be constituted by the Speaker shall comprise fifty percent members from the Treasury Benches and fifty percent from the Opposition Parties, based on their strength in Majlis-e-Shoora (Parliament), to be nominated by the respective Parliamentary Leaders:

Provided that in case there is no consensus between the Prime Minister and the Leader of the Opposition, each shall forward separate lists to the Parliamentary Committee for consideration which may confirm any one name:

[Provided further that the total strength of the Parliamentary Committee shall be twelve members out of which one-third shall be from the Senate:

Provided also that when the National Assembly is dissolved and a vacancy occurs in the office of the Chief Election Commissioner, the [total membership of the Parliamentary Committee shall consist of] the members from the Senate only and the foregoing provisions of this clause shall, *mutatis mutandis*, apply.]

(3) The Commissioner shall have such powers and functions as are conferred on him by the Constitution and law.

Time of Election and bye-election

224(1)(1A) On dissolution of the Assembly on completion of its term, or in case it is dissolved under Article 58 or Article 112, the President, or the Governor, as the case may be, shall appoint a care-taker Cabinet:

Provided that the care-taker Prime Minister shall be appointed by the President in consultation with the Prime Minister and the Leader of the Opposition in the outgoing National Assembly, and a care-taker Chief Minister shall be appointed by the Governor in consultation with the Chief Minister and the Leader of the Opposition in the outgoing Provincial Assembly:

“224A. Resolution by Committee or Election Commission.-

(1) In case the Prime Minister and the “Leader of the Opposition in the outgoing National Assembly do not agree on any person to be appointed as the care-taker Prime Minister, within three days of the dissolution of the National Assembly, they shall forward two nominees each to a Committee to be immediately constituted by the Speaker of the National Assembly, comprising eight members of the outgoing National Assembly or the Senate, or both, having equal representation from the Treasury and the Opposition, to be nominated by the Prime Minister and the Leader of the Opposition respectively.

(2) In case a Chief Minister and the Leader of the Opposition in the outgoing Provincial Assembly do not agree on any person to be appointed as the care-taker Chief Minister, within three days of the dissolution of that Assembly, they shall forward two nominees each to a Committee to be immediately constituted by the Speaker of the Provincial Assembly, comprising six members of the outgoing Provincial Assembly having equal representation from the Treasury and the Opposition, to be nominated by the Chief Minister and the Leader of the Opposition respectively.

(3) The Committee constituted under clause (1) or (2) shall finalize the name of the care-taker Prime Minister or care-

taker Chief Minister, as the case may be, within three days of the referral of the matter to it:

Provided that in case of inability of the Committee to decide the matter in the aforesaid period, the names of the nominees shall be referred to the Election Commission of Pakistan for final decision within two days.

Composition, etc., of Islamic Council.

228. (1) There shall be, constituted within a period of ninety days from the commencing day a Council of Islamic Ideology, in this part referred to as the Islamic Council.

(2) The Islamic Council shall consist of such members, being not less than eight and not more than 3[twenty] as the President may appoint from amongst persons having knowledge of the principles and philosophy of Islam as enunciated in the Holy Quran and Sunnah, or understanding of the economic, political, legal or administrative problems of Pakistan.

(3) While appointing members of the Islamic Council, the President shall ensure that—

(a) so far as practicable various schools of thought are represented in the Council;

(b) not less than two of the members are persons each of whom is, or has been a Judge of the Supreme Court or of a High Court;

(c) not less than 1[one third] of the members are persons each of whom has been engaged, for a period of not less than fifteen years, in Islamic research or instruction; and

(d) at least one member is a woman.

2[(4) The President shall appoint one of the members of the Islamic Council to be the Chairman thereof.]

(5) Subject to clause (6), a member of the Islamic Council shall hold office for a period of three years.

(6) A member may, by writing under his hand addressed to the President, resign his office or may be removed by the President upon the passing of a resolution for his removal by a majority of the total membership of the Islamic Council.

Public Service Commission

242. (1) Majlis-e-Shoora (Parliament) in relation to the affairs of the Federation, and the Provincial Assembly of a Province in relation to the affairs of the Province may, by law provide for the establishment and constitution of a Public Service Commission.

(1A) The Chairman of the Public Service Commission constituted in relation to the affairs of the Federation shall be appointed by the President on the advice of the Prime Minister.

(1B) The Chairman of the Public Service Commission constituted in relation to affairs of a Province shall be appointed by the Governor on advice of the Chief Minister.]

(2) A Public Service Commission shall perform such functions as may be prescribed by law.

Armed Forces

243. (1) The Federal Government shall have control and command of the Armed Forces.

(2) Without prejudice to the generality of the foregoing provision, the Supreme Command of the Armed Forces shall vest in the President.

(3) The President shall subject to law, have power—

(a) to raise and maintain the Military, Naval and Air Forces of Pakistan; and the Reserves of such Forces; and

(b) to grant Commissions in such Forces.

(4) The President shall, on advice of the Prime Minister, appoint—

(a) the Chairman, Joint Chiefs of Staff Committee ;
(b) the Chief of the Army Staff;
(c) the Chief of the Naval Staff; and
(d) the Chief of the Air Staff,
and shall also determine their salaries and allowances]”

25. A bare reading of the Article 168 prior to Constitution (Eighteenth and Nineteenth) Amendments, reveals that Clause 3 of Article 168 was substituted by Sub Clause 3 of Article 168 (1) of the Constitution, as adopted in 1973 Constitution by providing a term of office of the Auditor General of Pakistan.

26. Articles 177(1) and 193(1) were amended by Constitution (Eighteenth and Nineteenth) Amendments by providing that the Chief Justice of Pakistan and Chief Justices of the Provincial High Courts and Judges of superior Courts will be appointed by the President of Pakistan, in accordance with Article 175A of the Constitution, which Article gives a complete process and mechanism for the appointment of Judges of the superior Courts.

27. Article 213 for appointment of Chief Election Commissioner and its Members was amended by inserting new Clauses 2A & 2B by Constitution (Eighteenth) Amendment and proviso to clause 2B by Constitution (Nineteenth) Amendment. By Clause 2B of Article 213 of the Constitution, a Parliamentary Committee (to some extent identical to Parliamentary Committee in the matter relating to appointment of Judges of the superior Courts) has been constituted to confirm one person out of three names each proposed by the Prime Minister and the Leader of the Opposition, if there is no consensus between them on three names. The ‘discretion’

of the President to appoint the Chief Election Commissioner, as provided in the 1973 Constitution was omitted from sub clause 1 of Article 213 of the Constitution, which means that though the President of Pakistan has to appoint the Chief Election Commissioner and its Members, he now has no discretion except to appoint the "person" whose name is confirmed by the Parliamentary Committee, as provided by Article 175A(13) of the Constitution for appointment of Judges of the superior Courts. He is completely ousted from the process of nomination of name and the only role left for him is to "appoint" the nominee of the Committee and or of Prime Minister & Leader of Opposition as the case may be.

28. Article 224(1A) is inserted by Constitution (Eighteenth) Amendment, whereas Article 224A is inserted by Constitution (Twentieth) Amendment providing for appointment of care-taker Cabinet/Prime Minister. On dissolution of the Assembly on completion of its term or in case it is dissolved under Article 58 or Article 112, the President or the Governor, as the case may be, shall appoint a care-taker Prime Minister in consultation with the Prime Minister and the Leader of Opposition in the outgoing National Assembly. The proviso of Article 224(1A) inserted by Constitution (Eighteenth) Amendment made it mandatory to appoint the person as care-taker Prime Minister, nominated by the Prime Minister and the Leader of the Opposition. In case, the Prime Minister and the Leader of the Opposition in the outgoing National Assembly do not agree on any person, they shall forward two nominees each to a

committee comprising 8 members of the outgoing National Assembly or the Senate or both, having equal representation from the Treasury and the Opposition, to be nominated by the Prime Minister and the Leader of the Opposition, respectively. The Committee shall finalize the name of the care-taker Prime Minister within 3 days of the referral of the matter to it. If committee is unable to finalize the name of care-taker Prime Minister within 3 days of the referral, the name of the nominee shall be referred to the Election Commission for final decision within two days.

29. Although, the President of Pakistan has to appoint the care-taker Prime Minister but by Constitution (Eighteenth & Twentieth) Amendments, now he is only a symbolic appointing authority with no discretion, but to appoint the person nominated by the outgoing Prime Minister and the Leader of the Opposition as care-taker Prime Minister within 3 days of the dissolution of National Assembly and if they do not agree then by the Committee comprising 8 Members of the outgoing National Assembly or the Senate or by the Election Commission, as the case may be, as in the matter of appointment of Judges of the Superior Courts.

30. The Chairman of Public Service Commission and Chiefs of Armed Forces now by Constitution (Seventeenth) Amendment are to be appointed by the President on the advice of the Prime Minister instead of "in his discretion".

31. From the perusal of different Articles referred to above for appointments of various constitutional offices, by the President in the matter of appointment of Chairman, Public Service Commission, Chiefs of Armed Forces, it appears that the President has to act on the advice of Prime Minister and he may require the Prime Minister to re-consider such advice whereas, in the matter of appointment of Judges in the Superior Courts; Chief Election Commissioner and Members of the Commission; and care-taker Prime Minister, the advice of Prime Minister is not required and after the nomination of name for appointment, by the Committee, the President has no discretion except to appoint the nominee.

32. We would like to mention here that the Azam Jammu & Kashmir Interim Constitution Act, 1974 provides that a Judge of the Supreme Court or High Court shall be appointed by the President on the advice of a Council after consultation with the Chief Justice of the Azad Jammu & Kashmir. The Prime Minister or the person nominated by him is one of the members of the council alongwith six members to be elected by the Assembly, including five members nominated by the Prime Minister of Pakistan and others. In the case of **Muhammad Younas Tahir and another vs. Shaukat Aziz, Advocate, Muzaffarabad and others** (PLD 2010 SC AJK 42) while dealing with question whether advice of Prime Minister is required while appointing Judges of superior courts it was held that since a Judge in the Supreme Court is appointed by the President on the advice of the "Council" and after consultation with the Chief Justice

of Azad Jammu & Kashmir and the Chief Justice of the High Court the advice of Prime Minister is not relevant for the purpose of appointment of judges.

33. The Constitution, being a living organ for all times is to be interpreted dynamically, as a whole, to give harmonious meaning to every Article of the Constitution.

34. The function of the Court, while interpreting the statute, is to discover the true legislative intent. Having ascertained the intention, the Court must strive to interpret the statute as to promote/advance the object and purpose of the enactment. For this purpose, where necessary, the Court may even depart from the rules that plain words should be interpreted according to their plain meaning. The Constitution was framed by its Framers, keeping in view the situations and conditions prevailing at the time of its making, but being an organic document it has been conceived in a manner so as to apply to the situations and conditions which might arise in the future. The words and expressions used in the Constitution, in that sense, have no fixed meaning and must receive interpretation based on the experience of the people in the course of working of the Constitution.

35. The general principle of interpretation of statutes is equally applicable while interpreting any provision of the Constitution. However, while interpreting a provision of the Constitution, great caution has to be taken by the Court, as the

Constitution is supreme law, which creates the Legislature itself which makes ordinary law and statutes with respect to which canons of statutory interpretation have been formulated by the Courts. The task of expounding a Constitution is crucially different from that of construing a statute. An ordinary statute can easily be enacted or repealed by a simple majority of the Members of the Parliament, whereas any provision of the Constitution can be amended only by 2/3rd majority of both the Houses.

36. In the case of Munir Hussain Bhatti v. Federation of Pakistan (PLD 2011 Supreme Court 407), this Court held that the Parliamentary Committee under Article 175A of the Constitution cannot be equated with the Parliament nor can it be treated as a subset of the Parliament in the manner in which a Parliamentary Committee elected and answerable to the Parliament can be considered to be part of the Parliament. The role of the Parliamentary Committee has been dealt with in detail in the said judgment and the Review Petition filed there-against by the Federation of Pakistan. We would like to reproduce hereinbelow paras 15 and 16 of the judgment, under review, dated 24.04.2011:-

"15. Let me say at once that the Committee has and can exercise the powers which under the earlier dispensation were exercisable by the Prime Minister. We have specifically held that "[t]he role which they [the Prime Minister and President] were performing in the previous legal set up ... is now logically to be performed by the Committee". Therefore, if the Prime Minister's role in the previous appointment mechanism was not considered to be meaningless, we fail to see how the Committee, charged with performing the same role, can be considered redundant. That the Committee is only an "institutionalized forum" for performing the functions which were previously the domain and province of the Prime Minister is made clear in our judgment more than once. This can be further buttressed if one considers the speeches of Mr. Raza Rabbani, Chairman of the Parliamentary Committee on

Constitutional Reform (PCCR), on the floor of Parliament at the time the 18th Amendment bill was being debated. On 6.4.2010, for instance, with the object of convincing the members of the National Assembly to approve Article 175A, Mr. Rabbani said, *"in actual fact what is happening is that the functions that were being performed by the Prime Minister in terms of the present [pre amendment] system of appointment of Judges would be taken over by this Parliamentary Committee"*. The very same intention was repeated six days later on the floor of the Senate on 12.4.2010 when Mr. Rabbani, with the same clarity of expression and intent stated that *"what in actual fact has been done here [in Article 175A] is, that the role that was assigned to the Prime Minister in terms of appointment of Judges ... has now been assigned to this Parliamentary Committee"*.

16. It may be noted here that Mr. Raza Rabbani was not just any member of Parliament making any odd speech on the floor of the Houses of Parliament to put forward his own point of view. He was the Chairman of the PCCR. It was he who was steering the Constitutional amendments through Parliament. We can presume that within the PCCR, comprised of 27 members, there would have been discussion and divergent points of view on Article 175A before it was given the shape it finally took in the 18th Amendment. These divergent views were sorted out which resulted in the view expressed by Mr. Rabbani while explaining the function of the Committee. It has not been suggested and, in any event, there would be no warrant for the premise that the intent of Parliament was anything different from what was stated by Mr. Rabbani in Parliament, in the solemn proceedings effecting important provisions of the Constitution. It would, therefore, be reasonable to rely on Mr. Raza Rabbani, as providing evidence of Parliamentary intent. It is such intent after all, which we are engaged in ascertaining and in this effort we are immeasurably benefited by what Mr. Rabbani said. We have already commented on the relevance of Parliamentary proceedings as an aid to interpretation of statutory text. While considering the domain and functions of the Committee we should also note that Mr. Rabbani was unambiguous in informing Parliament that the members of the PCCR *"were also mindful of the fact that the manner in which the trichotomy of power has been defined in that [Sindh High Court Bar Association] judgment, the balance of that should not be upset"*. Our judgment under review has ensured that this balance is maintained."

37. The President of India under Article 143 of Constitution of India, sought the opinion of the Indian Supreme Court as to whether the expression "consultation with the Chief Justice of India" in Articles 217(1) and 222(1) requires consultation with a plurality of Judges in the formation of opinion of the Chief Justice of India or does the sole individual opinion of the Chief Justice of India constitute consultation within the meaning of the said Articles. It gave its opinion as under:-

"19. It is, we think, reasonable to expect that the collegiums would make its recommendations based on a consensus. Should that not happen, it must be remembered that no one can be appointed to the Supreme Court unless his appointment is in conformity with the opinion of the Chief Justice of India. The question that remains is: what is the position when the Chief Justice of India is in a minority and the majority of the collegiums disfavor the appointment of a particular person? The majority judgment in the second Judges case has said that if "the final opinion of the Chief Justice of India is contrary to the opinion of the senior Judges consulted by the Chief Justice of India and the senior Judges are of the view that the recommendee is unsuitable for stated reason, which are accepted by the President, then the non-appointment of the candidate recommended by the Chief Justice of India would be permissible". This if the majority of the collegiums is against the appointment of a particular person, that person shall not be appointed, and we think that this is what must invariably happen. We hasten to add that we cannot easily visualize a contingency of this nature; we have little doubt that if even two of the Judges forming the collegiums express strong views, for good reasons, that are adverse to the appointment of a particular person the Chief Justice of India would not press for such appointment.

20. The majority judgment in the second Judges case contemplates the non-appointment of a person recommended on the ground of unsuitability. It says that such non-appointment "must be for good reasons, disclosed to the Chief Justice of India to enable him to reconsider and withdraw his recommendation on those considerations. If the Chief Justice of India does not find it necessary to withdraw his recommendation even thereafter, but the other Judges of the Supreme Court who have been consulted in the matter are of the view that it ought to be withdrawn, the non-appointment of that person for reasons to be recorded, may be permissible in the public interest..... However, if after due consideration of the reasons disclosed to the Chief Justice of India, that recommendation is reiterated by the Chief Justice of India with the unanimous agreement of the Judges of the Supreme Court consulted in the matter, with reasons for not withdrawing the recommendation, then that appointment as a matter of healthy convention ought to be made". It may be that one or more members of the collegium that made a particular recommendation have retired or are otherwise unavailable when reasons are disclosed to the Chief Justice of India for the non-appointment of that person. In such a situation the reasons must be placed before the remaining members of the original collegium plus another Judge or Judges who have reached the required seniority and become one of the first four puisne Judges. It is for this collegium, so re-constituted, to consider whether the recommendation should be withdrawn or reiterated. It is only if it is unanimously reiterated that the appointment must be made. Having regard to the objective of securing the best available men for the Supreme Court, it is imperative that the number of Judges of the Supreme Court who consider the reasons for non-appointment should be as large as the number that had made the particular recommendation (**AIR 1999 Supreme Court 1**).

38. The Parliament, keeping in view the principle laid down by this Court in **Al-Jehad Trust** case (i.e. the opinion of the

Chief Justice of Pakistan, being pater-familias about suitability of a candidate's ability, legal competency and integrity deserves due deference and that the President/Executive should give justicable reasons, which could be juxtaposed with the reasons of the Chief Justice, if the opinion of the Chief Justice of Pakistan is ignored) and the principle laid down by Supreme Court of India that instead of nomination by Chief Justice of India, the nomination will be made by the collegiums of Judges with majority, amended the process of appointment, by constituting a Commission having members from the Judiciary, Bars and the Executive to nominate one person each for each vacancy of a Judge in the Supreme Court, High Courts or the Federal Shariat Court, as the case may be, by majority of its members. Now instead of the President/Executive, under the old dispensation, the Parliamentary Committee either confirm the nomination by a majority of its total membership within fourteen days on receipt of a nomination from the Commission, failing which the nomination shall be deemed to have been confirmed or for justifiable reasons, to be recorded, may not confirm the nomination by a three-fourth majority of its total membership within fourteen days.

39. In the case of Al-Jehad Trust v. Federation of Pakistan (PLD 1997 Supreme Court 84) [Reference No.2 of 1996, filed by the President of Pakistan], it was held that if the Prime Minister within the time-frame fixed in the judgment of this Court fails to tender his advice, he or she, shall be deemed to have agreed to the

recommendations of the Chief Justice of Pakistan and the Chief Justice of Provincial High Court, as the case may be, and the President may proceed to make the final appointment on that basis. Keeping in view the authoritative decision given by this Court in the said case, the Constitution Framers by Clause 12 of Article 175A of the Constitution provided that if the Parliamentary Committee on receipt of a nomination from the Commission fails to confirm the nominee or to record reasons for not confirming the same by three-fourth majority of its total membership within said period, the nomination shall be deemed to have been confirmed. Clause 12 of Article 175A of the Constitution read with the law laid down in the cases of Munir Hussain Bhatti and Al-Jehad Trust leaves no room of doubt that the advice of the Prime Minister for the appointment of Judges of the superior Courts, which was binding upon the President under Article 48(1) of the Constitution, is now conferred upon the Committee and it is for this reason that Clause 13 of Article 175A of the Constitution provided that the Prime Minister shall forward the nominee confirmed by the Committee to the President of Pakistan for appointment. It does not require that the Prime Minister shall then advice the President for appointment.

40. To appreciate the proposition, it would be advantageous to reproduce hereinbelow the definition of the word "*forward*" as defined in 'The Concise Oxford Dictionary (Ninth Edition), which is the foremost authority on current English Language:-

Onward so as to make progress (not getting any further forward); send (letter etc.) on to a further destination.

41. From a bare reading of Clause 13 of Article 175A of the Constitution, it appears that the Committee, if confirms the name of a nominee of the Commission or the same is deemed to have been confirmed by it, the Prime Minister is left with no discretion but to forward the same to the President of Pakistan for appointment. The Prime Minister after confirmation of the name of the nominee by the Committee is not required to advise the President, under Article 48 of the Constitution or vice versa since no advice is given by the Prime Minister to return the same for reconsideration.

42. The role of the Prime Minister and the President of Pakistan in the appointment of Judges of the superior Courts is nothing but ministerial, and after receiving the nominations from the Committee the Prime Minister and the President have no discretion but to forward/appoint the nominees.

43. If Article 175A alongwith the Scheme of the Constitution, keeping in view its Preamble, which refers to an independent judiciary as well as Article 175(3) of the Constitution, which aims to separate the Judiciary from the Executive, is examined, it will lead to an irresistible conclusion that the role of the Executive in the appointment process of the Judges of the Superior Courts has become more-or-less ministerial and the entire process of appointment revolves around two bodies, created by/under the Constitution i.e. the Judicial Commission and the Parliamentary Committee.

44. Neither the learned Sr.ASC for the Referring Authority nor the learned Attorney General for Pakistan pointed out that the method of selecting Judges by the Commission in its meetings dated 27.09.2012 & 22.10.2012 and by the Committee thereafter was violative of Articles 177(2) or 193(2) of the Constitution or any provision of the Constitution. The questions are answered in above terms.

45. Now we would revert to question No.(i), to give my opinion on the same, which for convenience sake is reproduced hereinbelow:-

- (i). *Whether in view of the decision by the Chief Justice of the IHC that Mr. Justice Riaz was the senior most judge of the IHC, which decision of the Chief Justice was also confirmed by the President of Pakistan, Mr. Justice Kasi could be treated as most senior Judge of the IHC?*

46. Mr. Justice Riaz Ahmad Khan was born on 15.05.1952. He qualified C.S.S. Examination in the year 1977 and joined Civil Services Academy Lahore. At the time, when he was posted at Peshawar, the PCS (Judiciary) Exam was announced in Khyber Pakhtunkhwa (the then NWFP) and he participated in the said examination and qualified the same. On his request, his services were transferred from Federal Government to the Provincial Government of Khyber Pakhtunkhwa and was posted as Civil Judge at Kohat, Haripur, and Peshawar and lastly as Senior Civil Judge at D.I. Khan. He resigned from the said post and started practicing law. He was elevated to the Bench on 04.1.2011 as an Additional Judge of

Islamabad High Court, Islamabad and was confirmed on 21.11.2011 as a Judge of the said High Court.

47. Conversely, Mr. Justice Muhammad Anwar Khan Kasi was born on 28.11.1956. He was enrolled as an Advocate in 1982 and joined the Judicial Service of Balochistan as a Civil Judge in May, 1986. He was appointed as an Additional District and Sessions Judge in 1991 and as a District and Sessions Judge in 1997. He was elevated as an Additional Judge of Islamabad High Court, Islamabad on 04.01.2011 and was confirmed as a Judge of the said High Court on 21.11.2011.

48. Both the learned Judges were appointed through the same Notification, issued by the Ministry of Law, Justice & Parliamentary Affairs, Government of Pakistan, Islamabad, wherein the name of Mr. Justice Muhammad Anwar Khan Kasi appeared at Sr.No.1, whereas the name of Mr. Justice Riaz Ahmed Khan appeared at Sr.No.2. The Hon'ble Chief Justice of Islamabad High Court, Islamabad, while fixing their seniority, vide his order dated 22.12.2011 treated Mr. Justice Riaz Ahmad Khan, being elder in age, as senior to Mr. Justice Muhammad Anwar Khan Kasi. Mr. Justice Muhammad Anwar Khan Kasi made a representation to the Chief Justice of Islamabad High Court, Islamabad, against the determination of his seniority, which was forwarded to the Secretary Ministry of Law, because the appointment notification issued by the said Ministry had placed the name of Mr. Justice Muhammad

Anwar Khan Kasi at a senior serial number of the notification, to resolve the dispute of *inter se* seniority at the earliest. The President of Pakistan decided the representation and declared Mr. Justice Riaz Ahmad Khan senior to Mr. Justice Muhammad Anwar Khan Kasi in the seniority of the Judges of Islamabad High Court, Islamabad.

49. The letter No.F.12(5)/86-Add, dated 30.04.1987, issued by the Ministry of Law for the purpose of laying down the principle for *inter se* seniority of the Judges appointed on the same day, is nothing more than an equitable principle consistently adopted but is not backed by any provision of the Constitution or law. However, the convention of *inter se* seniority of a Judge is on the basis of 'senior in age', which by passage of time has become convention and ought to have been respected. We would like to reproduce hereinbelow the letter dated 30.04.1987:-

"No.F.12(5)/87-AII

Dated 30.04.1987.

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

Subject:- SENIORITY LIST OF HIGH COURT JUDGES

My dear Chief Justice,

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

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

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

With kind regards.

Yours sincerely,
Sd/-
(Irshad Hussain Khan)"

50. We have gone through various seniority lists of the Judges of the superior Courts and notifications of their appointments which leave no room for doubt that the recognized principle for determining seniority amongst the Judges of High Courts appointed on the same day irrespective of their appointments from Subordinate Judiciary or Bars, is the seniority in age, and the Law Secretary who issues the notifications of appointment has no lawful authority to determine the same nor does the serial-wise appearance of names in the notification have any nexus with the determination of seniority. We would like to reproduce hereinbelow, as illustration, some of the notifications, issued by Ministry of Law, Justice & Parliamentary Affairs, Government of Pakistan, Islamabad and seniorities as determined by the High Courts:-

"As shown in the Notification, dated 14.09.2009, issued by Ministry of Law, Justice & Parliamentary Affairs, Government of Pakistan, Islamabad:-		As placed in the seniority list, prepared by the Lahore High Court, according to their dates of birth:-	
1.	Syed Mansoor Ali Shah.	Mr. Justice Sagheer Ahmed	
2.	Sh. Najam ul Hassan.	Qadri.	02.12.1951
3.	Mr. Manzoor Ahmad Malik.	Mr. Justice Nasir Saeed Sheikh.	12.12.1951
4.	Mr. Asad Munir.	Mr. Justice Sh. Najam ul Hassan	15.03.1952
5.	Mr. Ijaz ul Ahsan.	Mr. Justice Kh. Imtiaz Ahmed.	30.03.1953
6.	Hafiz Abdul Rehman Ansari.	Mr. Justice Manzoor Ahmed	01.05.1956
7.	Sardar Tariq Masood.	Malik	
8.	Mr. Tariq Javaid.	Mr. Justice Sardar Tariq Masood	11.03.1959
9.	Mr. Nasir Saeed Sheikh.	Mr. Justice Ijaz ul Ahsan	05.08.1960
10.	Mr. Mansoor Akbar Kokab.	Mr. Justice Syed Mansoor Ali	28.11.1962
11.	Khawaja Imtiaz Ahmad.	Shah	
12.	Mr. Sagheer Ahmad Qadri.		

As shown in the Notification, dated 11.05.2011, issued by Ministry of Law, Justice & Parliamentary Affairs, Government of Pakistan, Islamabad:-		As placed in the seniority list, prepared by the Lahore High Court, according to their dates of birth:-	
		Mr. Justice Altaf Ibrahim Qureshi	06.03.1953
1.	Syed Kazim Raza Shamsi.	Mr. Justice Abdus Sattar Asghar	20.03.1953
2.	Mr. Abdul Waheed Khan.	Mr. Justice Mehmood Maqbool	27.09.1954
3.	Syed Iftikhar Hussain Shah.	Bajwa	
4.	Mr. Abdus Sattar Asghar.	Mr. Justice Amin-ud-Din Khan	01.12.1960

5. Ch. Muhammad Younas.	Mr. Justice Muhammad Ameer	08.03.1962
6. Mr. Mehmood Maqbool Bajwa.	Bhatti	
7. Syed Ijaz Hussain Shah.	Mr. Justice Ch. Muhammad	16.09.1951
8. Mr. Ameen-ud-Din Khan.	Younas	
9. Mr. Muhammad Ameer Bhatti.	Mr. Justice Iftikhar Hussain Shah	01.04.1953
10. Mr. Altaf Ibrahim Qureshi.	Mr. Justice Syed Muhammad	06.09.1956
11. Malik Shahzad Ahmad Khan.	Kazim Raza Shamsi	
	Mr. Justice Malik Shahzad	15.03.1963
	Ahmed Khan	

As shown in the Notification, dated 24.10.2005, issued by Ministry of Law, Justice & Parliamentary Affairs, Government of Pakistan, Islamabad:-	As placed in the seniority list, prepared by the High Court of Sindh, according to their dates of birth:-
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	Mr. Justice Shamsuddin	01.12.1946
	Hisbani	
1. Mr. Justice Munib Ahmed Khan	Mr. Justice Munib Ahmed	08.05.1949
2. Mr. Justice Muhammad Athar Saeed	Khan	
	Mr. Justice Muhammad	29.09.1949
3. Mr. Justice Faisal Arab	Athar Saeed	
4. Mr. Justice Sajjad Ali Shah	Justice Mrs. Yasmeen	05.01.1950
5. Mr. Justice Nadeem Azhar Siddiqui	Abbasey	
6. Mr. Justice Shamsuddin Hisbani	Justice Mrs. Qaiser Iqbal	13.12.1949
7. Justice Mrs. Yasmeen Abbasey	Mr. Justice Ali Sain Dino	01.03.1950
8. Justice Mrs. Qaiser Iqbal	Metlo	
9. Mr. Justice Ali Sain Dino Metlo	Mr. Justice Faisal Arab	05.11.1955
	Mr. Justice Sajjad Ali Shah	14.08.1957
	Mr. Justice Nadeem Azhar	22.01.1959
	Siddiqui	

As shown in the Notification, dated 24.09.2009, issued by Ministry of Law, Justice & Parliamentary Affairs, Government of Pakistan, Islamabad:-	As placed in the seniority list, prepared by the High Court of Sindh, according to their dates of birth:-
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	Mr. Justice Bhajandas	01.01.1950
	Tejwani	
	Mr. Justice Shahid Anwar	05.10.1950
	Bajwa	
1. Mr. Justice Shahid Anwar Bajwa	Mr. Justice Ali Bin Adam	14.01.1952
2. Justice Ms. Rukhsana Ahmed Malik	Jaffery	
3. Mr. Justice Ghulam Sarwar Kurai	Mr. Justice Ghulam Sarwar	05.04.1952
4. Mr. Justice Ahmed Ali Sheikh	Kurai	
5. Mr. Justice Ali Bin Adam Jaffery	Justice Ms. Rukhsana Ahmed	15.04.1957
6. Mr. Justice Bhajandas Tejwani	Malik	
7. Mr. Justice Irfan Saadat Khan	Mr. Justice Tufail H. Ibraim	10.05.1958
8. Mr. Justice Aqeel Ahmed Abbasi	Mr. Justice Ahmed Ali	03.10.1961
9. Mr. Justice Muneeb Akhtar	Sheikh	
10. Mr. Justice Tufail H. Ibrahim	Mr. Justice Irfan Saadat Khan	07.02.1963
	Mr. Justice Aqeel Ahmed	16.06.1963
	Abbasi	
	Mr. Justice Muneeb Akhtar	14.12.1963"

51. Likewise neither the Constitution nor any law authorizes the President of Pakistan, who is a symbolic appointing authority, to decide the *inter se* seniority of Judges, which even otherwise is not only against the principles of Independence of Judiciary but also violative of Article 175(3) of the Constitution, which provides for separation of the Judiciary from the Executive.

52. Like the Supreme Judicial Council, a forum created by the Constitution, as held “not a Court” in case of Chief Justice of Pakistan Iftikhar Muhammad Chaudhry v. President of Pakistan (PLD 2010 Supreme Court 61), the Judicial Commission is also created by the Constitution and cannot be given the status of a Court to decide the issue of *inter se* seniority between two persons. The Commission, which is assigned the function of nominating the names of the candidates for appointment of Chief Justices of High Courts and the Judges of superior Courts by taking in consideration their legal competency etc, who meet the minimum qualification provided by Articles 177(2) and 193(2) of the Constitution has no mandate to decide the *inter se* seniority of Judges. Anyone, if aggrieved, by the determination of his seniority by the Chief Justice of the High Court and or by the Chief Justice of Pakistan being paterfamilias in the absence of rules, can seek remedy from the Court of competent jurisdiction. However, in the absence of specific guideline it is expected from the constitutional functionaries to regulate the exercise of their discretionary power in the matter as per norms emerging from the actual practice and convention, and legitimate expectancies.

53. Since no rules have been framed for determining the *inter se* seniority of Judges in superior Courts appointed on same day, we endeavor to draw out a criterion of *inter se* seniority from the example of a neighboring country.

54. According to the seniority norm in India, a judge (X) is considered to be senior to another judge (Y) if X was appointed to the court prior in time to Y. The presumption here is that both X and Y are appointed to the same court. If, say, X is appointed to the Bombay High Court, and then Y is appointed to the Calcutta High Court, it's not entirely clear if X is senior to Y. So let's assume that X and Y are both appointed to the Bombay High Court. What if they are appointed on the same date? If one of them is a lawyer being appointed to the court, and another is a subordinate court judge, the lawyer is considered senior to the subordinate judge, though they're appointed on the same date. This is entirely based on convention, however, at one point it was not - the Indian High Courts Act, 1861, said that "Judges of each High Court shall have Rank and Precedence according to the Seniority of their appointments". This provision was also seen in the Government of India Act, 1915, and in the Government of India Act, 1935.

55. Interestingly, in the U.S. Supreme Court as well as in Pakistan, associate justices have "precedence according to the seniority of their commissions", and then according to age if they're appointed on the same date; the same rule applies to US federal circuit court Judges.

56. Though it is not relevant for the purposes of giving opinion on the questions referred to, but time has come to avoid such an unpleasant situation in the future, instead of relying upon

the opinion of Law Secretary given in the year 1987 rules should be framed by the superior Courts as to what should be the criteria for *inter se* seniority between (a) Judges appointed on the same day?; (b) A lawyer and a Judge from the District Service? Should it be date of appointment, age or date of registration as an advocate.

57. To record our opinion on question Nos.(ii); (iii); and (x), the same are reproduced hereinbelow:-

- (ii) *Whether Mr. Justice Riaz had a legitimate expectancy to be appointed as Chief Justice of the IHC on the ground that he was the most senior Judge of that Court in the light of the judgment of the Supreme Court in the Al-Jehad case referred to above;*
- (iii) *Whether the JCP acted in accordance with the Constitution and conventions thereof in recommending a junior Judge as Chief Justice of the IHC; and*
- (x) *What should be the criteria for elevating a Judge/Chief Justice of the High Court to the Supreme Court? Is it, their seniority inter-se as Judge of the High Court or their seniority inter-se as Chief Justice of respective High Court be the consideration for elevation to the Supreme Court?*

58. The Hon'ble Chief Justice of Pakistan initiated the name of Mr. Justice Iqbal Hameed-ur-Rahman, the Chief Justice of Islamabad High Court, Islamabad, for appointment as a Judge of this Court, in terms of Rule 3(1) of the Judicial Commission of Pakistan Rules, 2010 framed in exercise of powers conferred on the Commission by Clause 4 of Article 175A of the Constitution. After deliberation and taking into consideration various aspects of the matter including the criteria for elevation of a Judge in Supreme Court, he was nominated as a Judge of this Court. In another meeting, held on the same day, which was attended by Chief Justice of Islamabad High Court, Islamabad, the name of Mr. Justice

Muhammad Anwar Khan Kasi was initiated for appointment as Chief Justice of the Islamabad High Court, Islamabad and after deliberation he was nominated for Chief Justice of Islamabad High Court, Islamabad and send the same to the Parliamentary Committee.

59. The names of Mr. Justice Iqbal Hameed-ur-Rahman, as a Judge of this Court and Mr. Justice Muhammad Anwar Khan Kasi, as Chief Justice of Islamabad High Court, Islamabad, were confirmed by the Committee.

60. As regards the legitimate expectancy of the most senior Judge to be appointed as Chief Justice of the High Court, in the case of **Al-Jehad Trust** (*supra*) it was held as under:-

“Article 193 of the Constitution empowers the President of Pakistan to appoint the Chief Justice of the High Court. Apparently there is no constitutional requirement to appoint senior most Judge as Chief Justice of the High Court whenever permanent vacancy occurs in the High Court, but to secure the independence of Judiciary from the Executive, it is necessary to advert to the Constitutional convention which has developed by the continuous usage and practice over a long period of time. The Constitutional convention to appoint most Senior Judge of the High Court as a Chief Justice, had been consistently followed in the High Courts since before partition of the sub-continent. The senior most Judge has an edge over rest of the Judges of the High Court on the basis of his seniority and entertains a legitimate expectancy to be considered for appointment as Chief Justice against permanent vacancy of the office of the Chief Justice. Apparently there is wisdom in following the Constitutional convention of appointing most senior Judge of the High Court as permanent Chief Justice, otherwise a junior most Judge in the High Court may aspire to become Chief Justice of the High Court by bypassing his seniors and to achieve this object resort to undesirable conduct by going out of his way to oblige the Government in power. If he succeeds in securing his appointment as Chief Justice by superseding his seniors, by resorting to such measures he will endanger the independence of Judiciary and destroy the public confidence in the Judiciary. If a departure to follow the established convention of appointing the senior most Judge is to be made, the appointing authority should record reasons for not appointing most senior Judge as Chief Justice of the High Court. The complexion of the Institution is likely to be impaired by so doing.”

61. Having notice of the principles laid down by this Court in the case of Al-Jehad Trust (*ibid*) that the most senior Judge has the legitimate expectancy to be appointed as Chief Justice of the High Court, the Parliament in its wisdom, while making it mandatory that the most senior Judge of the Supreme Court will be appointed as the Chief Justice of Pakistan under Article 175A(3) of the Constitution, left the question of suitability for appointment of the Chief Justice of the High Court to be decided by the Judicial Commission, a forum created by the Constitution, having four most senior Judges of this Court alongwith the Chief Justice of Pakistan and Chief Justice of the concerned High Court with one vote each. The contention of the learned counsel that if the principles of seniority and legitimate expectancy linked therewith are ignored, it would give rise to the whim and caprice of the person initiating the name, which will affect the independence of the judiciary and its working. At first sight, it seems to have force, but on a careful perusal of Clause 5 of Article 175A of the Constitution, it appears that the process of nomination by one person, prior to Constitution (Nineteenth) Amendment now vests in a body consisting of all stakeholders i.e. the Judiciary, the Representatives of Bars and the Executive. The four most senior Judges of this Court, the Chief Justice of the High Court, a retired Judge of Supreme Court, persons of integrity, who have first hand information about the administrative skill and other related matters, decide who is the most suitable person to be appointed as Chief Justice of the High Court. Knowing well the principles laid down by

this Court in ***Al-Jehad Trust*** case, if the Commission decides to nominate someone other than the most senior Judge as Chief Justice, it may give cause to question before an adjudicatory forum, and the issue may be decided there, but not in this (Reference) jurisdiction.

62. In the Budget Reference (PLD 1989 Supreme Court 85), this Court said “it cannot in this (reference) jurisdiction decide the matter as a *lis* between the parties, wherein exercise of other powers is available to the Court including discretionary and taking other consequential actions”. But on this count nomination cannot be termed as violative of the Constitution.

63. We may mention here that after ***Al-Jehad Trust*** case and even after Constitution (Nineteenth) Amendment, the President of Pakistan appointed the Chief Justices of Lahore and Peshawar High Court, who were not the most senior Judges of that Courts.

64. The Constitution is an organic law which creates the very Legislature which makes ordinary statutes.

65. Prior to the Constitution (Nineteenth) Amendment, the Chief Justice of Pakistan being the head of the judiciary nominates a candidate for the post of Chief Justice of the High Court or Judges of the Superior Courts. The “ability, competency, knowledge and suitability” of the nominee were held to be determined by the Chief Justice of Pakistan being *pater familias*, his view deserved due deference, which power now is exercised by the Judicial

Commission consisting of Senior Judges, including Chief Justice of the High Court, Representative of Bar, Attorney General for Pakistan and the Law Minister. The power to appoint a Judge of the superior Courts was initially vested in the Chief Justice of Pakistan prior to Constitution (Nineteenth) Amendment, which then devolved upon the Judicial Commission. As held in the case of Munir Hussain Bhatti, (*supra*) that the principle laid down in the authoritative decision of Al-Jehad Trust case is still applicable. In the said case, it was held that in the matter of Judges the “satisfaction” of the Chief Justice of Pakistan (now Judicial Commission of Pakistan) is “subjective” and that such satisfaction is not subject to judicial review. In the case of Ghulam Hyder Lakho v. Federation of Pakistan (PLD 2000 Supreme Court 179), it was held that satisfaction of the Chief Justice of Pakistan is “subjective” and was not justifiable. This view was again reaffirmed in the case of Supreme Court Bar Association v. Federation of Pakistan (PLD 2002 Supreme Court 939).

66. Although minutes of meeting of Judicial Commission have been placed on record by referring authority. We are not taking note of it nor making any comments on it for the reason that satisfaction of the Chief Justice of Pakistan prior to 19th Constitutional Amendment and of Judicial Commission now is “subjective” as held in the cases of Al-Jehad Trust, Ghulam Hyder Lakho and Munir Ahmed Bhatti and not open to judicial review.

67. In this view of the matter, when this Court, time and again, by authoritative decisions held that the “satisfaction” in the appointment of Judges of the superior Courts including the Chief Justice of the High Court is “subjective” and not open to Judicial Review, the question of nomination by the Commission and confirmation by the Committee of a Judge who is not the most senior Judge of that Court as Chief Justice of High Court, cannot be answered in advisory jurisdiction and may be adjudicated upon in other jurisdiction. Although the practice of appointment of a Judge other than most senior Judge is against the convention and may not be in the interest of the judiciary, however, the appointment of a Judge not most senior as Chief Justice of the High Court cannot be termed as violative of the Constitution.

68. Proviso to Sub clause 5 (iv) of Article 175A provided that for the appointment of a Chief Justice of the High Court the most senior Judge mentioned in paragraph (ii) shall not be a member of the Commission have wisdom in it. If it is supposed that the Judicial Commission decided to nominate most senior Judge of the High Court as a Chief Justice, it is not desirable that he should be a part of such nomination process being one of the interested parties and in case the Judicial Commission decided not to nominate the most senior Judge as the Chief Justice to avoid embarrassment to him because of his presence in the Commission, as various issues may be related to him come under discussion.

69. In this view of the matter, the Advisory Jurisdiction of the Court is not suitable for such a determination, as the person whose rights are likely to be affected is not before us.

70. When we analyze Clauses 3 and 5 of Article 175A alongwith Article 180 and 96 of the Constitution, it appears that the Constitution Framers made it mandatory under Clause 3 of Article 175A that the most senior Judge of the Supreme Court shall be appointed as Chief Justice of Pakistan and during the absence of the Chief Justice of Pakistan, the most senior Judge of the Supreme Court shall be appointed as Acting Chief Justice of Pakistan, whereas in the case of Chief Justice of the High Court neither Clause 5 of Article 175A nor Article 196 of the Constitution make it mandatory that in the case of a vacancy, the most senior Judge of the High Court will be appointed as Chief Justice of the High Court and in case of absence of the Chief Justice of the High Court, the most senior Judge of the High Court shall be appointed as Acting Chief Justice.

71. It is a principle of legal policy that law should be altered deliberately rather than causally. When the Legislature provided two different modes of appointment of the Chief Justice of Supreme Court and the Chief Justice of the High Court, then so long as the Article of the Constitution is not amended or in adjudicatory jurisdiction, the Court has to follow the same criteria as in the case of the Chief Justice of Pakistan, the appointment of a Judge other than

most senior Judge cannot be held, in Advisory Jurisdiction, against the Constitution.

72. As regards the criteria for the appointment of a Judge of the Supreme Court, the Chief Justice of Pakistan, pater familias of the Judiciary, in terms of Rule 3 of the Judicial Commission of Pakistan Rules, 2010, initiates nomination of a Judge in the Supreme Court, keeping in view the number of sitting Judges from different High Courts and in this Court, work load of High Courts, their administrative difficulties and other related issues. The Supreme Court is the highest Court of Pakistan and its Judges should reflect the geographic diversity of Pakistan i.e. Judges are appointed to the Supreme Court by taking into account all the Provincial High Courts and Islamabad High Court. Justice Ahmadi while disagreeing with the majority view in second Judge case (**AIR 1994 Supreme Court 268**) held that the seniority norm ought to be deviated from while appointing Judges to the Supreme Court of India in order to achieve a more representative course.

73. The Judicial Commission consisting of four most senior Judges of this Court; a retired Judge of Supreme Court; a senior Advocate nominated by the Pakistan Bar Council; the Law Minister; and the Attorney General for Pakistan, after deliberations, in terms of Clause 8 of Article 175A, by majority decides whether to nominate or not to nominate the candidate whose name was initiated by the Chief Justice of Pakistan.

74. Generally, in interpreting statutes, it is presumed that the Legislature chooses its words carefully. Therefore, if a word or phrase has been added somewhere, such addition is not to be deemed redundant; conversely, if a word or phrase has been left out somewhere, such omission is not to be deemed inconsequential. Instead, a change in language implies a change in intent. Maxwell, an authority on statutory interpretation remarks: *"When precision is required, no safer rule can be followed than always to call the same thing by the same name."* (P.311, Maxwell on the Interpretation of Statutes, Eleventh Edition, 1962)

75 In any case, we work on the understanding that the Parliament and its draftsmen are not so careless that they would, within the space of a single article, make such a fatal error. We owe the Legislature more deference than the Legislature is presumed to have chosen its words even more carefully in this case, since we are not talking of some obscure procedural statute over here; we are dealing with a document no less sacred than the Constitution itself.

76 Although due consideration of every legitimate expectation in the decision making process is a requirement of the rule of non-arbitrariness therefore, it is expected that this norm to be observed, while initiating the name in term of Rule 3 of Judicial Commission Rules, 2010 and then by the Judicial Commission. A three Member Bench of this Court in the case of Tariq Aziz-ud-Din: in re (2010 SCMR 1301) held as under:-

“Suffice to observe as is pointed out hereinabove, as well, that posting a junior officer to hold the charge of a senior post, ignoring seniors who are eligible for promotion, does not advance the object of achieving good governance because the rules framed on the subject, noted hereinabove, are not redundant in any manner, therefore, same need to be respected and followed accordingly. It is a settled principle of law that object of good governance cannot be achieved by exercising discretionary powers unreasonably or arbitrarily and without application of mind but objective can be achieved by following the rules of justness, fairness and openness in consonance with the command of the Constitution enshrined in different articles including Articles 4 and 25. Once it is accepted that the Constitution is the supreme law of the country, no room is left to allow any authority to make departure from any of its provisions or the law and the rules made thereunder. By virtue of Articles 4 and 5 (2) of the Constitution, even the Chief Executive of the country is bound to obey the command of the Constitution and to act in accordance with law and decide the issues after application of mind with reasons as per law laid down by this Court in various pronouncements [Federation of Pakistan through Secretary, Establishment Division v. Tariq Pirzada (1999 SCMR 2744)]. It is also a settled law that even Chief Executive of the country is not above the Constitution [Ch. Zahur Ilahi v. Mr. Zulfikar Ali Bhutto (PLD 1975 SC 383)]. It is the duty and obligation of the competent authority to consider the merit of all the eligible candidates while putting them in juxtaposition to find out the meritorious amongst them otherwise one of the organs of the State i.e. Executive could not survive as an independent organ which is the command of the Constitution. Expression ‘merit’ includes limitations prescribed under the law. Discretion is to be exercised according to rational reasons which means that; (a) there be finding of primary facts based on good evidence; and (b) decisions about facts be made for reasons which serve the purposes of statute in an intelligible and reasonable manner. Actions which do not meet these threshold requirements are considered arbitrary and misuse of power [Director Food, NWFP v. M/s Madina Flour and General Mills (Pvt) Ltd. (PLD 2001 SC 1)]. Equally, discretionary power conferred on Government should be exercised reasonably subject to existence of essential conditions, required for exercise of such power within the scope of law. All judicial, quasi judicial and administrative authorities must exercise power in reasonable manner and also must ensure justice as per spirit of law and seven instruments which have already been referred to above regarding exercise of discretion. The obligation to act fairly on H.R.C. No. 8340-G/2009 35 the part of the administrative authority has been evolved to ensure the rule of law and to prevent failure of justice Mansukhlal Vithaldas Chauhan v. State of Gujrat [1997 (7) SCC 622].”

However, a perusal of Clause 3 of the Article 175A read in juxtaposition with Clause 5 of Article 175A alongwith its proviso indicates that instead of making it mandatory to appoint the most senior Judge as Chief Justice of the High Court, as provided in Clause 3 of Article 175A read with Rule 3 of the Judicial Commission

of Pakistan Rules, 2010, the matter is left to the discretion of the Chief Justice of Pakistan to initiate the name for Chief Justice of the High Court and the Commission by majority of its total membership to nominate one person for said post. When the Constitution Framers in the case of the appointment of the Chief Justice of Pakistan made it mandatory that only the most senior Judge of Supreme Court shall be appointed as Chief Justice of Pakistan, it left room to appoint a person, who may not be the senior most Judge as Chief Justice of the High Court. Appointment of a Judge other than most senior Judge though may be violative of the convention and is not desirable, but cannot be termed as violative of the Constitution. However, it may give cause to the aggrieved person to seek remedy before the adjudicatory forum, and question can be answered in said jurisdiction.

77. As regards question No.(iv) "*Whether JCP was properly constituted as per provision of Article 175-A of the Constitution as Mr. Justice Kasi who participated in the meeting was not a Member thereof and was a stranger to the proceedings*". Mr. Justice Muhammad Anwar Khan Kasi attended the meeting of the Commission, dated 22.10.2012. The Chief Justice of Islamabad High Court, Islamabad, initiated the names of Mr. Shaukat Aziz Siddiqui, as a Judge and Mr. Noor-ul-Haq N. Qureshi, as an Additional Judge *[for a period of six months]* of Islamabad High Court, Islamabad. For this reason, the notifications in respect of these learned Judges were not issued. The Commission after deliberations nominated the above named learned

Judges by majority of 7 to 2. Even if it is accepted that Mr. Justice Muhammad Anwar Khan Kasi was not the most senior Judge of Islamabad High Court, Islamabad, and attended the meeting of the Commission, it is established from the record that on the date when the meeting of the Commission was called for the purpose of considering the appointment of three Additional Judges of the High Court, Mr. Justice Riaz Ahmad Khan was on ex-Pakistan Leave and the former (Mr. Justice Muhammad Anwar Khan Kasi) was the most senior Judge available of the said High Court. The terms "Chief Justice" and "Acting Chief Justice" have been defined by the Constitution, whereas the term "most senior Judge" has not been defined. However, even if it is accepted that Mr. Justice Muhammad Anwar Khan Kasi, was not eligible to sit in the meeting of the Commission, Clause 8 of Article 175A stipulates that the decision of the nomination of a person for any vacancy of a Judge of the superior Court is to be taken by the Commission, by majority of its total members and as such, his attending the said meeting does not vitiate the entire proceedings or makes the nomination invalid.

78 In the case of Managing Director, SSGC Ltd. v. Ghulam Abbas (PLD 2003 Supreme Court 724), it was held that:-

"Perusal of subsection (1) of section 3-A of the Act, 1973 reveals that "minimum strength of a Bench to exercise or perform functions of the Tribunal is two Members, including the Chairman," meaning thereby that while conducting hearing, the status of a Chairman is also of a Member. Whereas under clause (a) of section 3-A(2), decisions are to be pronounced by the majority of the Members. Clause (b) of section 3-A (2) further provides that in case of division between Members of the Bench or in case of equal division of the Members, the case shall be referred to the Chairman and whatever opinion is expressed by him, would have supremacy and constitute the decision of the Tribunal. In

this case impugned judgment has been authored by the Chairman and all the Members have concurred with him, therefore, presuming that Mr. Aftab Ahmed joined proceedings without lawful authority but nevertheless impugned judgment can sustain, as it has been rendered by the Bench comprising of more than two Members of the Service Tribunal and apprehension of influencing the judgment by Mr. Aftab Ahmed (Retired Member) stands excluded as it was authored by a former Judge of High Court being the Chairman of the Service Tribunal.

In addition to above legal position, the impugned judgment can be treated to have been delivered validly under de facto doctrine.

.....
Thus endorsing the principles discussed in above paras, the impugned judgment is declared to have been passed validly because Mr. Aftab Ahmed immediately before his retirement had been performing same functions, therefore, it would be deemed that in exercise of same powers in good faith he associated himself in the proceedings.

Besides above conclusion, the inclusion of Mr. Aftab Ahmed as a Member of the Bench, had also not caused prejudice to any of the parties because he has not authored the judgment nor there is any likelihood of his having influenced the judgment in any manner as it was authored by the Chairman and remaining two Members of the Bench had concurred with him. No useful purpose as such would be served by remanding the case to the Service Tribunal for fresh decision because dispute is lingering on between the parties for the last so many years, therefore, justice demands that now cases should be decided finally unless remand of the cases is inevitable under the circumstances of each case."

79. In the case of Muhammad Saleem and 12 others v. Secretary Prosecution, Government of Punjab, Lahore and another (2010 PLC (CS) 1), a three member Bench of the Lahore High Court, while dealing with the question that the committee which conducted the interviews of the petitioners did not comprise all the four members, appointed by the Chief Minister of Punjab vis-à-vis the persons (strangers), who have participated in the interview process, applied the rule of severance, excluded the marks given by the stranger and held that whatever result emerges on account of the exclusion of the stranger's marks, shall be taken to be the result of the committee, as quorum of the selection committee was complete.

80. In the case of Anderson v. City of Persons (496, P.2d 1333-Kan: Supreme Court 1972), the Supreme Court of Kansas while dealing with a question, *"The appellants' first point involves an alleged conflict of interest arising from the fact that City Commissioners Myer S. Freshman and Barton Dean and all of the five urban renewal commissioners owned property within the general urban renewal area at the time they voted on various resolutions during the progress of the urban renewal program. The legislature provided in the urban renewal law for a special conflict of interest section to disqualify any officer or employee of the city or of the urban renewal board who owned property included or planned to be included in an urban renewal project."* noted as under:-

"It is undisputed in the evidence that on May 16, 1966, at the time the resolutions were passed by the city commission declaring certain areas of Parsons to be "slum and blight areas" and creating and appointing the urban renewal agency, two of the three Parsons city commissioners owned real estate in the slum or blight areas. The same two commissioners continued to own their properties at the time the urban renewal plan was adopted. The two commissioners mentioned were Myer S. Freshman and Barton Dean. On January 22, 1969, the city commission by resolution approved the urban renewal project. At that time commissioners Freshman and Dean owned property within the urban renewal area but did not own any land within the area covered by the urban renewal project. As pointed out heretofore, at all stages in the development of the urban renewal program, all of the five urban renewal commissioners had an interest in property located within the general urban renewal area. The first issue to be determined is whether or not the various actions of the urban renewal board in establishing and developing the urban renewal program and the various actions of the Parsons city commissioners in approving the urban renewal plan and in approving the urban renewal project were so tainted with conflict of interest within the meaning of K.S.A. 17-4758 as to completely invalidate ab initio all of the actions and steps taken by the urban renewal board and by the city commissioners in developing the Parsons urban renewal program. It should be emphasized that each of the commissioners made a full disclosure of his property interest in the urban renewal area before participating in any action of his board.

We, of course, recognize the common law principle that a public officer owes an undivided duty to the public whom he serves and is not permitted to place himself in a position that will subject him to conflicting duties or cause him to act other than for the best interests of the public. If he acquires any interest adverse to those of the public, without a full disclosure it is a betrayal of his trust and a breach of confidence. (United States v. Carter, 217 U.S. 286, 54 L.Ed. 769, 30 S.Ct. 515.)

The law, however, does not forbid the holding of an office and exercising powers thereunder because of a possibility of a future conflict of interest. (Reilly v. Ozzard, 33 N.J. 529, 166 A.2d 360, 89 A.L.R.2d 612.) It has generally been held that the vote of a council or board member who is disqualified because of interest or bias in regard to the subject matter being considered may not be counted in determining the necessary majority for valid action. There are many cases cited in the annotation in 42 A.L.R. 698 in support of this principle. It is also the rule that where the required majority exists without the vote of the disqualified member, his presence and vote will not invalidate the result and further that a majority vote need not be invalidated where the interest of a member is general or of a minor character. (Beale v. City of Santa Barbara, 32 Cal.App. 235, 162 P. 657; Corliss v. Village of Highland Park, 132 Mich. 152, 93 N.W. 254, adhered to on rehearing 132 Mich. 159, 95 N.W. 416; 56 Am.Jur.2d, Municipal Corporations, Etc. Section 172.)

81. As regards Pinochet case (***R v Bow Street Metropolitan Stipendiary Magistrate (1999) UK (H.L.52)***), the House of Lords on allegation that one of the Law Lords member of majority decision had links with Amnesty International complaining of the extradition of Gen. Pinochet, set aside his earlier majority decision by 3 to 2.

82. Consequently, in our opinion, in view of the principle laid down in the cases of Ghulam Abbas and Muhammad Saleem (*supra*), the proceedings of the Judicial Commission, thereby nominating the names of two, mentioned above, as Judges of Islamabad High Court, Islamabad, are not vitiated because of the attendance of Mr. Justice Muhammad Anwar Khan Kasi in the meeting.

83. Attending to questions No.(vi), (vii), (viii) & (xii) reproduced hereinbelow, which are interconnected and require to be answered together:-

- (vi) *What should be the manner, mode and criteria before the Judicial Commission with respect to the nomination of a person as a Judge of High Court, Supreme Court and Federal Shariat Court in terms of Clause (8) of Article 175-A of the Constitution of Islamic Republic of Pakistan, 1973;*

- (vii) *What is the proper role of the Judicial Commission and Parliamentary Committee under the Constitution of Pakistan with respect to appointment of Judges of Supreme Court, High Court and Federal Shariat Court;*
- (viii) *What should be the parameters before the Parliamentary Committee for the confirmation of the nominee of the Judicial Commission in terms of Clause (12) of Article 175-A of the Constitution of Islamic Republic of Pakistan, 1973; and*
- (xii) *The Parliamentary Committee under Article 175-A of the Constitution may confirm or may not confirm a nomination in accordance with the provisions stated therein. What is the true import and meaning of the word "confirm" and what is the effect of the proviso to Clause 12 of Article 175-A which reads as follows:*

"Provided further that if nomination is not confirmed, the Commission shall send another nomination;

Clause 9 of Article 175A of the Constitution provides for the constitution of a Parliamentary Committee and Clause 10 thereof provides for quorum of the Committee, whereas Clause 12 of the said Article provides that the Committee on receipt of a nomination from the Commission may confirm the nominee by majority of its total membership within fourteen days, failing which the nomination shall be deemed to have been confirmed. Proviso to Clause 12 of Article 175A of the Constitution provides that the Committee, for reasons to be recorded, may not confirm the nomination by three-fourth majority of its total membership within the said period and shall forward its decision with reasons so recorded to the Commission through the Prime Minister. The role of the Committee after receipt of nominations from the Commission has been discussed in depth by a four Member Bench of this Court in the case of Munir Hussain Bhatti (*supra*) and it was held as under:-

"The nominations made by the Judicial Commission and the refusal of the Parliamentary Committee to confirm the same appear to have generated considerable public interest, providing a great deal of material for debate in the public, the media and the legal fraternity. The Bar Associations of the High Courts in the country have also debated the impugned decisions of the Committee. The Sindh High Court Bar Association, which is itself a petitioner in Constitution Petition No.18 of 2011, has placed on record its resolution dated 23.2.2011 "condemning" the action of the Committee. The proceedings in these petitions and the short order of 4.3.2011 have also made headlines in the print and the electronic media. More so, critical comments on our order dated 4.3.2011 have been carried prominently in the media. We, therefore, find little substance in the factual assertion advanced by Mr. K. K. Agha.

"26. The repeatedly emphasized imperative of maintaining a record both of the proceedings of the Committee and of the "reasons" behind its decisions, very strongly suggests that the Committee's decisions were intended to be subject to judicial review. Otherwise, if the Committee's decisions were meant to be non-justiciable, and beyond judicial scrutiny, the insistence on recording reasons would not make much sense. It is an established rule of interpretation that Parliament does not waste words and redundancy should not be imputed to it. This principle would apply with even greater force to the Constitution - the supreme law of the land. On this point Mr. K. K. Agha was hard pressed to respond. It will be seen that even an insular reading of this Article, leaves the impression that the decisions of the Committee are subject to review. He, however, argued that even though the 19th amendment had required the Committee to give reasons for its decisions, it did not make any provision for these decisions to be challenged in a court of law.

27. The above submission was augmented by Mr. K. K. Agha, by adverting to the Order of the seventeen-member Bench dated 21.10.2010 wherein it had, inter alia, been said that "in case of rejection of nomination by the Parliamentary Committee ... [it] shall have to state reasons which shall be justiciable". The gist of this argument appears to be that in view of the order of the larger Bench, this Court should infer that through the 19th amendment, it was intended by Parliament that decisions taken by the Parliamentary Committee should not be subject to judicial review. Such inference was sought on the basis that the suggestion in the aforesaid Order as to justiciability was not incorporated in the amended Article. The argument of the learned Additional Attorney General, based on implication and not on the wording of Article 175A as amended, is contrary to the jurisprudence that has evolved in our jurisdiction. Furthermore, the argument ignores the legal precept explained above that the Constitution has to be construed as an organic whole."

34. On the other hand, Article 175A has set up an independent constitutional body having a specific role assigned to it relating to the appointment of Judges of this Court and of the High Courts. This constitutional body, as adverted to above, has been referred to as a Parliamentary Committee but it is neither part of Parliament when acting under Article 175A nor is it elected by or answerable to Parliament. An examination of the Constitution and established Parliamentary practice will further demonstrate this distinction between the Committee set up under Article

175A and a parliamentary committee. By virtue of Article 67 of the Constitution, each House of Parliament may "make rules for regulating its procedure and the conduct of its business". This authority has been exercised by both Houses of Parliament and as a result, rules have been framed. The upper House has framed the "Rules of Procedure and Conduct of Business in the Senate 1988" (the 'Senate Rules') while the National Assembly has adopted its own rules known as the "Rules of Procedure and Conduct of Business in the National Assembly, 2007" (the 'Assembly Rules'). From the Senate Rules and the Assembly Rules, it is very clear that a parliamentary committee is a body elected by the respective houses of Parliament and answerable to such houses. For instance, the Assembly Rules in Rule 200, state that "[e]xcept as otherwise provided in these rules, each Committee shall consist of not more than seventeen members to be elected by the Assembly within thirty days after the ascertainment of the Leader of the House." Likewise, the Senate Rules in Rule 145(1) provide that "[e]ach Committee shall consist of not less than six members and not more than twelve members to be elected by the Senate...

38. It would be obvious from a plain reading of the above provisions that the limited ouster of jurisdiction stipulated therein is in respect of, inter alia, the proceedings and conduct of business of the Parliament. The decisions of the Committee (even if comprised of persons who are honorable members of Parliament) cannot be considered immune from judicial scrutiny by virtue of Article 69. This conclusion necessarily follows from the fact that the Committee is a creation of the Constitution and not of the Parliament. Furthermore, it is independent of and separate from Parliament notwithstanding its composition. It performs, as noted above, an executive function relating to the Judiciary and, therefore, has been placed in the Chapter relating to the Judicature rather than in Chapter 2 [The Majlis-e-Shoora (Parliament)] dealing with Parliament.

39. The justiciability of the decisions of the Parliamentary Committee can also be approached from another angle, which would be manifest from a holistic examination of the Constitution. The governance of state organs in Pakistan is based on checks and balances where the powers of each organ are counter-balanced by some other organ of the State. Thus, executive action taken by the various administrative and executive functionaries of the State can be called in question, inter alia, under Articles 199 and 184(3) of the Constitution. Such executive action may additionally be subject to Parliamentary review and over-sight in our parliamentary system of governance. Legislative action can also be called in question in Court, inter alia, on the touchstone that it is violative of the Constitution. Likewise, decisions rendered by this Court can be modified or reversed by legislation (in recognized circumstances) and such legislation may also be retrospective. Thus we see that each organ of the State, be it the Judiciary, the Executive or the Legislature, operates under constitutional constraints which effectively make these organs of State limited in their actions.

84. The principles laid down in the said case were reiterated by another four Members Bench of this Court in the case

of Federation of Pakistan v. Sindh High Court Bar Association (**PLD 2012 Supreme Court 1067**).

85. The roles of the Committee and the Commission as well as the parameters before the Committee for confirmation of a nomination by the Commission in terms of Clause 12 of Article 175A of the Constitution are well settled by the reading of the Constitution itself and also by the principles laid down by this Court in the afore-referred two judgments and in Advisory Jurisdiction the same cannot be reviewed.

86. In the matter of Cauvery Water Disputes Tribunal (**AIR 1992 Supreme Court 522**), the Supreme Court of India declined to answer the question of law under Article 148 of the Indian Constitution, which is parallel to Article 186 of the Constitution and held that:-

“when the Supreme Court in its adjudicatory jurisdiction pronounces its authoritative opinion on a question of law, it cannot be said that there is any doubt about the question of law or the same is *res integra* so as to require the President to know what the true position of law on the question is. The decision of the Supreme Court on a question of law is binding on all Courts and authorities and under the said clause the President can refer a question of law only when this Court has not decided it. Secondly, a decision given by the Supreme Court can be reviewed only under Article 137 read with Rule 1 of Order XL of the Supreme Court Rules, 1966 and on the conditions mentioned therein. When, further, the Supreme Court overrules the view of the law expressed by it in an earlier case, it does not do so sitting in appeal and exercising an appellate jurisdiction over the earlier decision. It does so in exercise of its inherent power and only in exceptional circumstances such as when the earlier decision is per incuriam or is delivered in the absence of relevant or material facts or if it is manifestly wrong and productive of public mischief. Under the Constitution such appellate jurisdiction does not vest in the Supreme Court, nor can it be vested in it by the President under Article 148 of the Indian Constitution”.

87. For the foregoing reasons, it is not necessary to answer questions No.(vi), (vii) & (viii) & (xii), as the same have already been answered in the above referred cases.

88. Now coming to questions No.(xi) & (xiii), which read as under:-

(xi) *Whether the Constitution of Pakistan prohibits individual Members of the JCP to initiate names for appointments of Judges to the Supreme Court, the High Courts and the Federal Shariat Court; and*

(xiii) *Whether by not providing in camera proceeding for JCP in Article 175-A of Constitution of Pakistan, the intention of the legislature is to ensure complete transparency and open scrutiny?*

Clause 1 of Article 175A of the Constitution provides that there shall be a Judicial Commission of Pakistan for the appointment of the Judges of the Supreme Court, High Courts and the Federal Shariat Court. The composition of the Commission is provided in Clauses 2 and 5 of Article 175A of the Constitution for appointment of Judges of the Supreme Court and of the High Courts, respectively, and Clause 6 thereof relates to the composition of the Commission for appointment of Judges of the Islamabad High Court, whereas Clause 7 of the Article deals with the appointments of Judges of the Federal Shariat Court. The Constitution itself has not provided a mechanism by which the name of the proposed Judge for appointment in the Supreme Court, High Courts or Federal Shariat Court can be placed before the Commission except providing qualification in terms of Articles 177(2) and 193(2). However, Clause 4 of Article 175A of the Constitution confers

powers upon the Commission to make rules regulating its procedure and Clause 15 thereof empowers the Committee to make rules to regulate its proceeding.

89. The Commission, in exercise of the powers conferred on it by Clause 4 of Article 175A (1), framed the Judicial Commission of Pakistan Rules, 2010, which were duly published in the Gazette of Pakistan, dated 08.11.201. Rule 3 of the said Rules reads as under:-

“3. Nominations for Appointments.(1) For each anticipated or actual vacancy of a Judge in the Supreme Court or the Chief Justice of Federal Shariat Court or the Chief Justice of a High Court, the Chief Justice of Pakistan shall initiate nominations in the Commission for appointment against such vacancy.

(2). For each anticipated or actual vacancy of a Judge in the Federal Shariat Court or Judge in the High Court, the Chief Justice of the respective Court shall initiate and send nomination for appointment against such vacancy to the Chairman for convening meeting of the Commission.

5(4). The proceedings of the Commission shall be held in camera. A record of the proceedings shall be prepared and maintained by the Secretary duly certified by the Chairman under his hand.”

Till date, the said Rules are not amended. No Member of the Commission, in terms of the Rules duly framed and not in conflict with any provision of Article 175A, except the Chief Justice of Pakistan or the Chief Justice of the Federal Shariat Court or of a High Court, can initiate the nomination for appointment against anticipated or actual vacancy therein.

90. In terms of the said Rules, the Commission itself in its wisdom decided and rightly so that for each anticipated or actual

vacancy of a Judge in the Supreme Court, High Courts and Federal Shariat Court, the Chief Justices of the said Courts shall initiate nomination in the Commission for appointment against such vacancy of a person duly qualified in terms of Articles 177(2) and 193(2) of the Constitution and sent to the Chairman of the Commission. The Chairman of the Commission shall then call a meeting of the Commission where such nomination shall be discussed and deliberated upon and then either it will be approved or rejected. The wisdom behind the Rules framed by the Commission is that the Chief Justice of Pakistan or the Chief Justice of the concerned High Court is the best person to practically/technically evaluate a person's caliber to be nominated as a Judge, including his legal competence and integrity. The Chief Justice of the High Court holding the highest office in the judicial hierarchy of the Province is the best person to know about all the Judicial Officers working in the Province and Advocates appearing before the High Court and on the basis of such personal knowledge, information and material before him, he recommends a person to be appointed as a Judge of the superior Courts.

91. Except initiating the nomination of a person, the Chief Justice of Pakistan or the Chief Justice of the High Court has no other special role in the appointment process and is just like any other member of the Commission and merely because he initiates the nomination, the same itself cannot be recommended, but to be considered as an act of mere procedure. The name initiated by the

Chief Justice of Pakistan or the Chief Justice of the Provincial High Court is discussed in the Commission comprising all members from different spheres including the Executive, Representatives of Bars and Senior Judges of the Supreme Court and the High Courts. After deliberations and technical/professional evaluation of person's caliber as a Judge, the Commission nominates the name of such person to be appointed as a Judge of the superior Courts by majority of its total membership of the Commission.

92. In the case of Sindh High Court Bar Association, Sukkur through President versus Pakistan through Secretary, Ministry of Law, Parliamentary Affairs & Justice, Islamabad and another (PLD 2012 Sindh 531), the learned High Court of Sindh while dealing with the question of nominating a person as a Judge or an Additional Judge, in the meeting of the Commission held as under:-

"We had the benefit of going through the judgment proposed to be delivered by our learned brother Maqbool Baqar J. We are in agreement with the conclusion drawn by him. However we intend to append our own reasoning in order to clarify that initial nomination for appointment as Additional Judge or a Judge in the High Court is to be made exclusively by the Chief Justice of the concerned High Court and after receiving the initial nomination, the Chairman, convenes meeting of the Judicial Commission of Pakistan where the nomination is considered. Judicial Commission then either recommends or rejects such nomination but on its own does not initiate the process of nomination. The reasons for stating so are as follows.

Appointment of Judges of the superior courts are made under the provisions of Article 175-A of the Constitution. The said Article provides the procedure that is to be followed by the Parliamentary Committee but it does not provide the procedure that is to be followed by the Judicial Commission. Under sub-Article (4) of Article 175-A of the Constitution it was left to the Judicial Commission to devise its procedure by framing its own rules. Such rules were framed by the Judicial Commission described as Judicial Commission of Pakistan Rules, 2010. Rule 3 (2) of the said Rules provide that for each vacancy of a Judge in a High Court, nomination for appointment is to be initiated by the Chief Justice of the concerned High Court. Hence under the new dispensation also it is the Chief Justice of the concerned High Court who initially proposes a name against an anticipated or actual vacancy in his Court and sends it to the Chairman of the Judicial Commission. The Chairman then convenes meeting of

the Judicial Commission. The nomination is discussed and deliberated and then either it is approved or rejected.

We may add here that in case it is interpreted in a way that initial nomination of the person as a Judge or Additional Judge can also be made by other members of the Judicial Commission then it might lead to a bizarre situation. The Judicial Commission for appointment in the High Courts comprises of thirteen members. Apart from five sitting judges of the Supreme Court and two of the concerned High Court, the other six members of the Judicial Commission comprise of a retired judge, Federal Law Minister, Provincial Law Minister, Attorney General and one representative each from Pakistan Bar Council and Provincial Bar council. If they as members of Judicial Commission also become entitle to nominate persons for the consideration of the Judicial Commission in addition to the nominations sent by the Chief Justice of the concerned High Court then each of such members would be coming up with his own list of nominees whom he might consider suitable for appointment. There is strong possibility that at a time scores of nominations would be before the Judicial Commission for consideration. Pressure groups might also emerge lobbying with certain members of Judicial Commission to initiate nomination of persons of their choice. The entire process of appointment might get confused and become unworkable. It is to avoid all this that Rule 3(2) of Judicial Commission of Pakistan Rules, 2010 provides that initial nomination for appointment, be it for a Judge or Additional Judge of a High Court, is to be sent to the Judicial Commission by the chief Justice of the concerned High Court. This has always been the procedure in the previous dispensation and has also been recognized under the present dispensation under Rule 3(2) of Judicial Commission of Pakistan, Rules, 2010. The only change that has been brought about after the 18th amendment to the Constitution is that determination of capability of a nominee of the Chief Justice of the High Court is not left to be decided by the Chief Justice of the concerned High Court and the Chief Justice of Pakistan only but to a thirteen member body called Judicial Commission of Pakistan."

93. Rules being delegated Legislation are subject to certain fundamental factors. Underlying the concept of delegated legislation is the basic principle that the Legislature delegates because it cannot directly exert its will in every detail.

94. The Judicial Commission of Pakistan Rules, 2010 are not in contravention with or inconsistent or repugnant to any provision of the Constitution, and have been made and promulgated in exercise of the authority conferred on it by the Constitution.

95. On having dilated upon the questions referred to by the President of Pakistan and opinion recorded hereinabove, we are of the opinion that Mr. Justice Riaz Ahmad Khan is senior most Judge of the Islamabad High Court.

96. Though it is desirable that the most senior Judge of the High Court should be appointed as Chief Justice of that Court, however, in view of Clauses 2 and 3 of Article 175A read with Clause 5, appointment of a Judge not most senior Judge as a Chief Justice of the High Court is not violative of any provision of Constitution.

97. The recommendations made by the Judicial Commission in its meeting dated 22.10.2012 are not vitiated merely because Mr. Justice Muhammad Anwar Khan Kasi attended the said meeting.

98. In terms of Article 175A of the Constitution, the President of Pakistan has no discretion to send the name of nominee of the Judicial Commission and confirmed by the Parliamentary Committee for reconsideration.

99. The Judicial Commission in exercise of powers conferred by Clause 4 of Article 175A framed rules who can initiate the name of a person as a Judge of the High Court, Federal Shariat Court and the Supreme Court and the Chief Justice of the High Courts and Federal Shariat Court, as the case may be.

100. The roles of the Parliamentary Committee and the Judicial Commission and parameters for the confirmation of the nominee of the Judicial Commission, have been dealt with, in detail, by this Court in the case of Munir Hussain Bhatti (supra).

Judge

Judge

Judge

Judge

Judge

EJAZ AFZAL KHAN, J. – I have gone through the judgment authored by my brother Mr. Justice Khilji Arif Hussain. I have also gone through the answers to the questions and the reasons recorded therefor. I am not inclined to agree with some of them and thus answer the questions in my note recorded as under.

2. Brief facts leading to the institution of the reference and the Constitution Petition are that a vacancy occurred in this Court on the retirement of Mr. Justice Mian Shakirullah Jan. In order to fill the said vacancy, the Judicial Commission of Pakistan in its meeting held on 27.09.2012 nominated Mr. Justice Iqbal Hameed-ur-Rehman as a Judge of this Court. His nomination as such necessitated the nomination of a Judge of the said High Court for appointment as Chief Justice. Mr. Justice Muhammad Anwar Khan Kansi was nominated for appointment as Chief Justice of the High Court on the ground that he was the most Senior Judge of the said Court. His nomination was confirmed by the Parliamentary Committee and sent to the Prime Minister, who forwarded it to the President for appointment. The President having serious reservations to the status of Mr. Justice Muhammad Anwar Khan Kansi as the most Senior

Judge declined to appoint him and thus filed the reference raising the questions recounted above. Constitution Petition mentioned above is also a corollary of the same episode.

3. Mr. Waseem Sajjad, learned Sr. ASC while appearing on behalf of the President contended that when the principle underlying determination of seniority of the Judges elevated on the same day is seniority in age, Mr. Justice Riaz Ahmed Khan, being senior in age is the most Senior Judge to be nominated as Chief Justice, Islamabad High Court. This practice, the learned counsel added, being more than a century old has been consistently followed in the Indian sub-continent and even after its partition. The learned counsel to substantiate his argument referred to the letter No.F.12(5)/86-All, dated 30.04.1987, Government of Pakistan, Ministry of Justice and Parliamentary Affairs (Justice Division). The learned counsel by elaborating his argument contended that when according to the dictum laid down by this Court in the case of **"Al-Jehad Trust through Raeesul Mujahideen Habib-ul-Wahabb-ul-Khairi and others. Vs. Federation of Pakistan and others"** (PLD 1996 S.C. 324), the most senior Judge of a High Court has a legitimate expectancy to be appointed as Chief Justice, Mr. Justice Riaz

Ahmed Khan being the most senior Judge of the High Court, would be entitled to be nominated for appointment as Chief Justice in the absence of any valid reason and that the nomination of Mr. Justice Muhammad Anwar Khan Kasi is not only an out right departure from the century's old practice but also against the law of the land, therefore, the President is not bound to appoint such person as Chief Justice. The learned counsel next contended that the Judicial Commission, nominating Mr. Justice Shaukat Aziz Siddique for appointment and Mr. Justice Noor-ul-Haq Qureshi for extension as Judges of the High Court, cannot be said to have been properly constituted in the absence of most senior Judge, therefore, their nomination will not have any legal or constitutional sanctity notwithstanding it having been confirmed by the Parliamentary Committee was sent to the Prime Minister and then forwarded to the President. This nomination would be all the more without any legal and Constitutional sanctity, argued the learned counsel, when the proceedings before the Commission have not been conducted in the manner prescribed by the Constitution. The learned counsel to support his contention referred to the cases of **"Human Rights Cases No. 4668 of 2006, 1111 of 2007 and 15283-G of 2010, (Action taken**

on news clippings regarding Fast Food Outlet in F-9 Park, Islamabad). (PLD 2010 Supreme Court 759), and "Federation of Pakistan through Secretary, Ministry of Law, Justice and Parliamentary Affairs, Islamabad and others. Vs. Aftab Ahmad Khan Sherpao and others" (PLD 1992 S.C. 757(K). The fact, maintained the learned counsel, that a non-entity, sat, voted and took part in the proceedings of the Judicial Commission would alone call for their annulment. The learned counsel to support his contention placed reliance on the case of "Regina. Vs. Bow Street Metropolitan Stipendiary Magistrate and others, Ex-parte Pinochet Ugarte (No.2).

Even otherwise, the learned counsel submitted, the President being appointing authority is duty bound to ensure obedience to the Constitution and the law cannot appoint a person who has not been nominated in accordance with the provisions of the Constitution.

4. During the course of arguments I asked the learned counsel for the President that when the proceedings in the house in view of the provision contained in Article 67 of the Constitution do not become invalid on the ground that some persons who were not entitled to sit, vote or otherwise take part in the proceedings, sat,

voted and took part therein, how a proceedings of the Commission can become invalid on this score, the reply of the learned counsel was that the proceedings in the former case do not become invalid because it has been so provided in the aforesaid article but there is nothing of that sort in Article 175-A of the Constitution. The learned counsel by referring to Article 48 of the Constitution contended that despite insertion of Article 175-A in the Constitution, the President still has the power to send back a nomination to the Judicial Commission for reconsideration. But when asked whether a nomination originating from the Judicial Commission, confirmed by the Parliamentary Committee, and forwarded by the Prime Minister to the President could be treated as an advice and returned as such for reconsideration in terms of Article 48 of the Constitution when it does not provide for any such eventuality, the learned counsel did not give any satisfactory answer. The fact is that his own reply to our query with reference to Article 67 of the Constitution barricaded his way to take a U-turn. Though he swung to yet another argument by submitting that the Constitutional provisions have to be interpreted as a whole and not in isolation but that would not be of any help to him. The learned counsel further

contended that if the principle of seniority and that of legitimate expectancy linked therewith, are ignored without reasons to be recorded, it would give rise to the whim and caprice of the person sitting at the peak which is not conducive for independence of judiciary. The learned counsel also waxed eloquent by asking this Court to redefine the mode and manner of appointing judges but when I observed that all these questions have been elaborately dealt with in the case of **"Munir Hussain Bhatti, Advocate and others. Vs. Federation of Pakistan and another"** (PLD 2011 S.C. 407), the learned counsel submitted that they have been, but since they have been dealt with collaterally, the judgment so rendered being *obiter dicta* will not have a binding force. I would have agreed with the learned counsel for the President but he could not point out anything striking or significant in the judgment which went unnoticed and unattended. It is, therefore, not *obiter dicta* by any attribute. This judgment could have been treated as sub-silentio: a precedent not fully argued, but again the learned counsel could not advert to any legal or Constitutional aspect of the case which escaped the notice of the Bench rendering the judgment, so as to relegate it to the status of sub-silentio. The learned counsel next

contended that Mr. Justice Muhammad Anwar Khan Kasi could not be held as most senior Judge on the strength of the judgment rendered in the case of "**Federation of Pakistan through Secretary, Ministry of Law and Parliamentary Affairs and Justice, Islamabad. Vs. Sindh High Court Bar Association through President and another**". (PLD 2012 Supreme Court 1067), as it does not provide any premises for such conclusion. How the proceedings in the Judicial Commission could be held in camera, asked the learned counsel, when the legislature in its wisdom purposely provided otherwise, so as to ensure complete transparency and open scrutiny. What would be the criterion, asked the learned counsel, for elevating a Judge or a Chief Justice of a High Court to the Supreme Court and how far the inter se seniority of the Judges or the Chief Justices of the High Courts would be relevant in this behalf?.

5. Mr. Muhammad Akram Sheikh, learned Sr. ASC appearing on behalf of the petitioner contended that once the Judicial Commission nominated Mr. Justice Shaukat Aziz Siddique for appointment and Mr. Justice Noor-ul-Haq Qureshi for extension for a period six months as Judges of the Islamabad High Court, the Parliamentary Committee after having confirmed their nomination

sent it to the Prime Minister and the Prime Minister forwarded it to the President for appointment, the President has no other option but to do the needful. The learned counsel next contended that Mr. Justice Muhammad Anwar Khan Kasi being the most Senior Judge rightly participated in the meeting of the Judicial Commission nominating the Judges mentioned above, therefore, the President has no power whatsoever to delay or decline the appointment on any pretext if it is seen in the light of Eighteenth and Nineteenth Amendment. Even if it is assumed, added the learned counsel, that the Judge participating in the meeting was a non-entity, it would not materially affect the result if the doctrine of severance is applied. The learned counsel to support his contention placed reliance on the case **"Managing Director, Sui Southern Gas Company Ltd., Karachi. Vs. Ghulam Abbas and others"** (PLD 2003 S.C. 724). The learned counsel next contended that had the decision been made by a margin of one, the argument of the learned counsel for the President and the judgment rendered in the case of **"Regina. Vs. Bow Street Metropolitan Stipendiary Magistrate and others, Ex-parte Pinochet Ugarte (No.2)"** would have had some relevance but where the decision is by the majority of 7 against 2,

absence of the *persona designata* or participation of a non-entity would be of little consequence. When I asked what course of action would be open before the President if a person nominated for appointment of a Judge of the Supreme Court does not fulfill the requirements laid down by Article 177(2) or a person nominated for appointment of a Judge of the High Court does not fulfill the requirements laid down by Article 193 (2) of the Constitution, the learned counsel except referring to the stance taken by the Government in C.M.A. No. 1602 of 2010 in Constitution Petition No. 11 of 2010 could not state anything more.

6. Learned Attorney General appearing on the Court's notice contended that the Judicial Commission was not properly constituted, as the *persona designata* did not attend the meeting and the person who attended the meeting was just a non-entity therefore, the whole process shall stand vitiated. The President, the learned Attorney General submitted, is not bound to appoint a nominee of such Judicial Commission notwithstanding his nomination was confirmed by the Parliamentary Committee and forwarded to the President by the Prime Minister on its receipt. The learned Attorney General next contended that when in the

judgment rendered in the case of **“Sindh High Court Bar Association through its Secretary and another. Vs. Federation of Pakistan through Secretary, Ministry of Law and Justice, Islamabad and others”** (PLD 2009 S.C. 379), this Court annulled the appointment of many Judges for want of recommendation by the consultee, a nomination originating from the Judicial Commission which was not properly constituted has to be given alike treatment. The learned Attorney General by referring to the commentary on the Constitution of India by Durga Das Basu argued that the President is not a robot placed in the President House nor a Computer controlled automation, nor a figure head nor ornamental piece placed in the show window of the nation called the President’s House. Instead, the learned Attorney General submitted, he is a living human who on being selected by the nation is endowed with all dignity, honour and prestige as head of the republic for upholding the Constitution and the laws, therefore, his role as such cannot be doubted in any situation. Seen from such angle, the learned Attorney General concluded, the President cannot be kept off the affairs regulating the appointment of Judges.

7. Mr. Makhdoom Ali Khan, learned Sr. ASC appeared as Amicus Curie on Court's notice. The learned counsel in the first instance addressed the Court as to the binding nature of an advice rendered by this Court in the exercise of its advisory jurisdiction. The learned counsel by referring to the relevant paragraph of the judgment rendered in **"Reference No. 02 of 2005 by the President of Pakistan"** (PLD 2005 Supreme Court 873) submitted that though an opinion given by the Court on a reference filed by the President is not a decision between the parties but since it is handed down after undertaking an extensive judicial exercise and hearing of Advocates it has a binding force. Such advice, the learned counsel submitted has to be accepted and acted upon with utmost respect. The learned counsel then by referring to various Articles of the Constitution in general and Article 175-A in particular contended that mode and manner of appointing Judges of the superior Courts has undergone a change and that the whole process from the inception to the last is now regulated by the latter. The learned counsel argued that once Judicial Commission has nominated a person, the Parliamentary Committee after having confirmed his name has sent it to the Prime Minister and the Prime Minister has

forwarded it to the President for appointment, the President will have no choice but to appoint him. While commenting on the mode and manner of appointment of Judges and things ancillary thereto, the learned counsel submitted that an exhaustive exercise has been taken in the cases of **"Al-Jehad Trust through Raeesul Mujahideen Habib-ul-Wahabb-ul-Khairi and others. Vs. Federation of Pakistan and others"** (supra), and **"Munir Hussain Bhatti, Advocate and others. Vs. Federation of Pakistan and another"** (supra), therefore, yet another exercise is hardly called for. The learned counsel, however, submitted that the principle and practice of appointing most Senior Judge as Chief Justice is not open to any dispute and thus cannot be departed from without reasons to be recorded as held in the case **"Al-Jehad Trust through Raeesul Mujahideen Habib-ul-Wahabb-ul-Khairi and others. Vs. Federation of Pakistan and others"** (supra). The President or for that matter any other person performing in the affairs of Federation, the learned counsel submitted, is duty bound to protect the Constitution and that the instant reference appears to be an effort in this behalf. When asked, whether the President shall appoint a person a Judge of the Supreme Court, if he does not fulfill the requirements laid down

by Article 177(2) or a Judge of a High Court if he does not fulfill the requirements laid down by Article 193 of the Constitution, notwithstanding Clause 13 of Article 175-A of the Constitution, the learned counsel readily replied in no. But when asked, how a deadlock occasioning due to refusal of the President to appoint a person nominated, who does not fulfill the requirements laid down by the Articles mentioned above, would be brought to an end especially when the President in view of the provision contained in Article 175-A cannot send the nomination back to the Commission for reconsideration, the learned counsel could not give any satisfactory reply.

8. Khawaja Haris Ahmed, Sr. ASC who was also asked to assist the Court as Amicus Curie, highlighted the salient features of his written submissions. He by referring to Article 175-A of the Constitution submitted that the role of the President in appointment of Judges, is more or less ministerial when the Judicial Commission has nominated a person, the Parliamentary Committee after having confirmed his name has sent it to the Prime Minister and the Prime Minister has forwarded it to the President for appointment. He by referring to the judgment rendered in the case of **"Munir Hussain**

Bhatti, Advocate and others. Vs. Federation of Pakistan and another”

(supra), submitted that where almost all of the questions raised in the reference have been answered in the judgment, it would be just futile to rehearse the same.

9. With regard to the question relating to seniority, the learned counsel submitted that the same being person specific is not one of law, therefore, this Court cannot afford to decide such question in its advisory jurisdiction. The learned counsel next contended that omission to mention the expression most senior Judge in the provision relating to appointment of Chief Justice of a High Court is significant and that in the absence of any express provision even the most senior Judge cannot have legitimate expectancy, as the Constitution on this score has remained the same even after the dictum laid down in the case of **“Al-Jehad Trust through Raeesul Mujahideen Habib-ul-Wahabb-ul-Khairi and others. Vs. Federation of Pakistan and others”** (supra).

10. I have gone through the relevant record carefully and considered the submissions made by the learned counsel for the parties as well as amicus curie.

11. Before I discuss the arguments addressed at the bar by the learned counsel and answer the questions raised in the reference and the petition, it is worthwhile to mention that the mode and manner of appointing Judges underwent a radical change after Eighteenth and Nineteenth Amendments of the Constitution. Almost all the process of appointing Judges, Chief Justices of the High Courts, the Federal Shariat Court and Judges of the Supreme Court has been capsuled in Article 175-A of the Constitution. A reference to the said Article would, therefore, be relevant which reads as under :-

“175-A, (1). There shall be a Judicial Commission of Pakistan, hereinafter in this Article referred to as the Commission, for appointment of Judges of the Supreme Court, High Courts and the Federal Shariat Court, as hereinafter provided.

(2) For appointment of Judges of the Supreme Court, the Commission shall consist of ---

- i) Chief Justice of Pakistan.
- ii) (four) most senior Judges of the Supreme Court;
- iii) a former Chief Justice or a former Judge of the Supreme Court of Pakistan to be nominated by the Chief Justice of Pakistan, in consultation with the (four) member Judges, for a term of two years;
- iv) Federal Minister for Law and Justice;
- v) Attorney-General for Pakistan; and
- vi) a Senior Advocate of the Supreme Court of Pakistan nominated by the Pakistan Bar Council for a term of two years.

3) Notwithstanding anything contained in clause (1) or clause (2), the President shall appoint the most senior Judge of the Supreme Court as the Chief Justice of Pakistan.

4) The Commission may make rules regulating its procedure.

5) For appointment of Judges of a High Court, the Commission in clause (2) shall also include the following, namely :----

i) Chief Justice of the High Court to which the appointment is being made;

ii) the most senior Judge of that High Court;

iii) Provincial Minister for Law; and

iv) an advocate having not less than fifteen years practice in the High Court to be nominated by the concerned Bar Council for a term of two years;

[Provided that for appointment of the Chief Justice of a High Court the most Senior Judge mentioned in paragraph (ii) shall not be member of the Commission:

Provided further that if for any reason the Chief Justice of High Court is not available, he shall be substituted by a former Chief Justice or former Judge of that Court, to be nominated by the Chief Justice of Pakistan in consultation with the four member Judges of the Commission mentioned in paragraph (ii) of clause (2)].

6) For appointment of Judges of the Islamabad High Court, the Commission in clause (2) shall also include the following, namely :-----

i) Chief Justice of the Islamabad High Court; Member and

ii) the most senior Judge of that High Court;

Provided that for initial appointment of the [Chief Justice and the] Judges of the Islamabad High Court, the Chief Justices of the four Provincial High Courts shall also be members of the Commission:

Provided further that subject to the foregoing proviso, in case of appointment of Chief Justice of Islamabad High Court, the provisos to clause (5) shall, mutatis mutandis, apply.

7) For appointment of Judges of the Federal Shariat Court, the Commission in clause (2) shall also include the Chief Justice of the

Federal Shariat Court and the most senior Judge of that Court as its member:

Provided that for appointment of Chief Justice of Federal Shariat Court, the provisos, to clause (5) shall, mutatis mutandis, apply.

8) The Commission by majority of its total membership shall nominate to the Parliamentary Committee one person, for each vacancy of a Judge in the Supreme Court, a High Court or the Federal Shariat Court, as the case may be.

9) The Parliamentary Committee, hereinafter in this Article referred to as the Committee, shall consist of the following eight members, namely :-----

i) four members from the Senate; and

ii) four members from the National Assembly [:]

[Provided that when the National Assembly is dissolved, the total membership of the Parliamentary Committee shall consist of the members from the Senate only mentioned in paragraph (i) and the provisions of this article shall, mutatis mutandis, apply.].

10) Out of the eight members of the Committee, four shall be from the Treasury Benches, two from each House and four from the Opposition Benches, two from each House. The nomination of members from the Treasury Benches shall be made by the Leader of the House and from the Opposition Benches by the Leader of the Opposition.

11) Secretary, Senate shall act as the Secretary of the Committee.

12) The Committee on receipt of a nomination from the Commission may confirm the nominee by majority of its total membership within fourteen days, failing which the nomination shall be deemed to have been confirmed:

[Provided that the Committee, for reasons to be recorded, may not confirm the nomination by three-fourth majority of its total membership within the said period:]

[Provided further that if a nomination is not confirmed by the Committee it shall forward its decision with reasons so recorded to the Commission through the Prime Minister:

[Provided further that if a nomination is not confirmed, the Commission shall send another nomination.]

[13) The Committee shall send the name of the nominee confirmed by it or deemed to have been confirmed to the Prime Minister who shall forward the same to the President for appointment]

14) No action or decision taken by the Commission or a Committee shall be invalid or called in question only on the ground of the existence of a vacancy therein or of the absence of any member from any meeting thereof.

[15) The meetings of the Committee shall be held in camera and the record of its proceedings shall be maintained.

16) The provisions of Article 68 shall not apply to the proceedings of the Committee.]

[(17)] The Committee may make rules for regulating its procedure.]”

12. A look at the above quoted provision would reveal that it prescribed the mode and manner as to how the judicial Commission shall proceed to nominate a person for appointment as a Judge or Chief Justice of a High Court, the Federal Shariat Court or a Judge of the Supreme Court and how the Parliamentary Committee would look at such nomination while confirming or refusing to confirm it. Who is eligible to be appointed as a Judge or Chief Justice of a High Court, the Federal Shariat Court or a Judge of the Supreme Court and whether the person sought to be nominated possesses the caliber, capacity and conduct befitting the slot, are the questions to be considered by the tiers listed in the

provision mentioned above. Once a person is nominated by the Judicial Commission his name will go to the Parliamentary Committee. The Parliamentary Committee may confirm such nomination by majority of its total membership within fourteen days. If it fails to confirm a nomination within fourteen days it shall be deemed to have been confirmed. It may refuse to confirm a nomination by 3/4th and send it back to the Commission through the Prime Minister for reconsideration but after recording reasons therefor. The Commission shall, then, send another nomination. The Committee shall send the name of the nominee confirmed by it or deemed to have been confirmed to the Prime Minister who shall forward the same to the President for appointment.

13. Now the questions arise what is nomination in its pith and substance; whether it can be treated as an advice to the President and if so whether it can be returned for reconsideration to the source it has originated from or processed through. Before I answer these questions, a careful look at Article 48 of the Constitution would be quite advantageous. It, thus, reads as under :-

“President to act on advice, etc.

[48. (1) In the exercise of his functions, the President shall act [on and] in accordance with the advice of the Cabinet [or the Prime Minister]:

[Provided that [within fifteen days] the President may require the Cabinet or, as the case may be, the Prime Minister to reconsider such advice, either generally or otherwise, and the President shall [, within ten days,] act in accordance with the advice tendered after such reconsideration.]

(2) Notwithstanding anything contained in clause (1), the President shall act in his discretion in respect of any matter in respect of which he is empowered by the Constitution to do so [and the validity of anything done by the President in his discretion shall not be called in question on any ground whatsoever].

(3) Clause (3) omitted.

(4) The question whether any, and if so what, advice was tendered to the President by the Cabinet, the Prime Minister, a Minister or Minister of State shall not be inquired into in, or by, any court, tribunal or other authority.

(5) Where the President dissolves the National Assembly, notwithstanding anything contained in clause (1), he shall,---

(a) appoint a date, not later than ninety days from the date of the dissolution, for the holding of a general election to a Assembly; and

(b) appoint a care-taker Cabinet [in accordance with the provisions of Article 224 or, as the case may be, Article 224A]]

[(6) If at any time the Prime Minister considers it necessary to hold a referendum on any matter of national importance, he may

refer the matter to a joint sitting of the Majlis-e-Shoora (Parliament) and if it is approved in a joint sitting, the Prime Minister may cause such matter to be referred to a referendum in the form of a question that is capable of being answered by either --- Yes" or --- Not".]

(7) An Act of Majlis-e-Shoora (Parliament) may lay down the procedure for the holding of a referendum and the compiling and consolidation of the result of a referendum.]

14. A bare reading of this Article would reveal that the President in the exercise of his functions shall act in accordance with the advice of the Cabinet or the Prime Minister. The President in view of the proviso to Article 48(1) has the power to require the Cabinet or the Prime Minister as the case may be, to reconsider such advice generally or otherwise. Similarly, the President, in view of the provision contained in Article 75 of the Constitution, has the power to return a bill, other than a money bill, presented to him for his assent, for reconsideration. A nomination originating from the Commission, confirmed by the Committee is also an advice in its pith and substance inasmuch as it is forwarded by the Prime Minister to the President for being acted upon. But since it originates from the Commission in terms of Article 175-A of the Constitution, it is not an advice in terms of Article 48 of the Constitution. Nor is it open to

the incidence of return for reconsideration because Article 175-A of the Constitution does envision any such thing. This omission appears to be deliberate and purposeful. For whatever power the President had before Eighteenth and Nineteenth Amendments, including the power to return a nomination for reconsideration to the source it has originated from, has now been conferred on the Parliamentary Committee. If a power requiring the Prime Minister or the Cabinet to reconsider an advice, under Article 48, or a power requiring the Parliament to reconsider a bill, under Article 75 of the Constitution, has been conferred on the President, a power requiring the Commission or the Parliamentary Committee, to reconsider a nomination, too, could have been conferred on him, but it has not been conferred. When it has not been conferred, I am bound to take the Constitutional provisions as they are. A Causus Omissus can, in no case, be supplied by the Court of law as that would amount to altering the provision. "It is not our function, as was held by Mr. Justice Walsh, in the case of "Attorney General. Vs. Bihari, re Australia Factors Limited (1966) 67 S.R. (N. S. W) 150; to repair the blunders that are to be found in the legislation". They must be corrected by the legislator". A Court of law is not entitled to read

words into the Constitution or an Act of Parliament unless clear reason is found within the four corners of either of them. Yes, the President can act in the exercise of his discretionary powers under Article 48 (2) of the Constitution but the areas of such powers are well defined and well marked. He cannot return a nomination for reconsideration even under the garb of his discretionary power when it in its origin and specie is not an advice in terms of Article 48(1) of the Constitution. I, therefore, hold that the President has no power to return a nomination to any of the tiers it has passed from, even if it is violative of the Constitution or the law. But at any rate the President shall not appoint a person a Judge of the Supreme Court or a Judge or Chief Justice of a High Court as the case may be, whose nomination, in his opinion, is against the Constitution and the law. For the Constitution which makes obedience to the Constitution and the law the inviolable obligation of every citizen would never ever require a person no less than the President to do something against the Constitution and the law. Nor would his oath of office, which requires him to discharge his duties and perform his functions in accordance with the Constitution and the law, permit him to do any such thing. Reference may well be made to Article

177 and 193 of the Constitution and Oath of the President which read as under :-

“Article 177: Appointment of Supreme Court Judges.

[(1) The Chief Justice of Pakistan and each of the other Judges of the Supreme Court shall be appointed by the President in accordance with Article 175A.]

(2) A person shall not be appointed a Judge of the Supreme Court unless he is a citizen of Pakistan and-

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

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

“Article: 193: Appointment of High Court Judges

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

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

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

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

(c) he has, for a period of not less than ten years, held a judicial office in Pakistan.

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

And

“OATHS OF OFFICE

President

[Article 42]

(In the name of Allah, the most Beneficent, the most Merciful.)

I, _____, do solemnly swear that I am a Muslim and believe in the Unity and Oneness of Almighty Allah, the Books of Allah, the Holy Quran being the last of them, the Prophethood of Muhammad (peace be upon him) as the last of the Prophets and that there can be no Prophet after him, the Day of Judgment, and all the requirements and teachings of the Holy Quran and Sunnah:

That I will bear true faith and allegiance to Pakistan:

That, as President of Pakistan, I will discharge my duties, and perform my functions, honestly, to the best of my ability, faithfully in accordance with the Constitution of the Islamic Republic of Pakistan and the law, and always in the interest of the sovereignty, integrity, solidarity, well- being and prosperity of Pakistan:

That I will not allow my personal interest to influence my official conduct or my official decisions:

That I will preserve, protect and defend the Constitution of the Islamic Republic of Pakistan:

That, in all circumstances, I will do right to all manner of people, according to law, without fear or favor, affection or ill- will:

And that I will not directly or indirectly communicate or reveal to any person any matter which shall be brought under my consideration or shall become known to me as President of Pakistan, except as may be required for the due discharge of my duties as President.

[ay Allah Almighty help and guide me (A'meen)]”

15. The above quoted provisions of the Constitution as well as the oath of his office would show that the President before appointing a person, a Judge or a Chief Justice of a High Court or a Judge of the Supreme Court shall ensure that his nomination is in accordance with the Constitution and the law. He shall not appoint a person, a Judge or a Chief Justice of a High Court or a Judge of Supreme Court, if his nomination does not conform to the Constitution and the law. Especially when there is no provision in Article 175-A of the Constitution, in paramateria with that of Article 48 requiring the President to do the needful within ten days, or a deeming provision in paramateria with that of Article 75 of the Constitution requiring the President to do the needful within ten days failing which the needful shall be deemed to have been done. A deadlock, would inevitably be the consequence as the President can neither return the nomination to the source it has originated from or processed through nor can he appoint the person, thus

nominated. As the deadlock revolves around the constitutionality, legality or otherwise of the nomination recourse to an advisory or adjudicatory jurisdiction of this Court would be the only way out. If the Court upholds the opinion of the President, the Commission shall initiate proceedings denovo in accordance with the opinion of the Court. If it does not, the President shall appoint the person nominated accordingly.

16. Who is senior, what is the criterion for determining seniority amongst the Judges elevated on the same day and what is the way of deciding about the most senior Judge for appointment as Chief Justice? Answers to these questions have been provided in the letter of Law Department dated 30.04.1987 which reads as under :-

"No.F.12(5)/86-All.

Dated . 30.04.1987.

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

SUBJECT: SENIORITY LIST OF HIGH COURT JUDGES.

My dear Chief Justice,

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

2. An equitable principle consistently adopted in this regard is that Judges whose appointments are made by a single order, take seniority according to age. If the appointment of two or more service candidates is also simultaneously made with that of candidate from

the Bar, the service Judges will retain their existing seniority in the department regardless of their age which of course would be the determining factor in respect of their seniority viz-a-viz candidates from the Bar. This principle has the approval of the President.

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

With kind regards.

Yours sincerely,

Sd/-

(Irshad Hassan Khan)"

17. A perusal of the letter reproduced above leaves no doubt that the established practice and the time honoured yardstick for determining seniority amongst the Judges of a High Court, elevated on the same day, is seniority in age except in the case of Judges from service whose inter se seniority remains intact even on their elevation irrespective of their age. This principle has been consistently followed hitherto without exception ever since the establishment of the High Courts in the Indian Subcontinent and also after its partition. This principle even otherwise merits respect and reverence because it not only rules out personal whim and caprice of the person at one peak or another and shuts doors and windows for manipulation at ministerial level but also creates an environment which is conducive for the rule of law, supremacy of the Constitution and independence of Judiciary. This principle being too clear and conspicuous cannot be disputed. At times it has been departed

from but that was only when there was something concrete against the Judge. This is what was laid down in the case of "**Al-Jehad Trust through Raeesul Mujahideen Habib-ul-Wahabb-ul-Khairi and others. Vs. Federation of Pakistan and others**" (supra). The relevant paragraph would be germane to the case in hand which reads as under:-

"It is true that in Article 193 of the Constitution which relates to inter alia to the appointment of a Chief Justice in a High Court, it has not been provided that most of the senior of Judges shall be made as the Chief Justice. The reason seems to be obvious, namely, it is possible that the senior most Judge, at the relevant time, may not be physically capable to take over the burden of the office or that he may not be willing to take upon himself the above responsibility. The Chief Justice of Pakistan, who is one of the consultees under Article 193 will be having expertise knowledge about the senior most Judges of a High Court. If the senior most Judge is bypassed for any of the above reasons, he cannot have any grievance but if he is superseded for extraneous considerations, the exercise of power under Article 193 of the Constitution will not be in accordance therewith and will be questionable.

I am, therefore, of the view that keeping in view the provisions of the Constitution as a whole and the well-established convention as to the appointment of the senior most Judges in the High Court as the Chief Justice followed consistently in conjunction with the Islamic concept of 'Urf'. The most senior Judge of a High Court has a legitimate expectancy to be considered for appointment as the Chief Justice and in the absence of any concrete and valid reasons to be recorded by the President/Executive, he is entitled to be appointed as such in the Court concerned.

Before parting with the discussion on the above question, I may observe that there seems to be wisdom in following the convention of seniority. If every Judge in a High Court aspires to become Chief Justice for the reason that he knows that seniority rule is not to be followed, it will adversely affect the independence of judiciary. The junior most Judges may feel that by having good terms with the Government in power he can become the Chief Justice. This will

destroy the institution and public confidence in it. The Chief Justices of the High -Courts have the power to fix the roster i.e. to decide when a case is to be fixed and before whom it is to be fixed. In other words, they regulate the working of the forum It is, therefore, very important that the Chief Justices should not be pliable and they should act independently".

The word "Urf" used in the above quoted paragraph is of tremendous significance which means commonly known, commonly received and commonly approved of. This principle was reiterated in the case of "**Malik Asad Ali and others vs. Federation of Pakistan and others**"(PLD 1998 SC 33), the relevant paragraph for the facility of reference is reproduced as under:-

"6. This Court in case of Al-Jehad Trust v. Federation of Pakistan PLD 1996 SC 324 while interpreting the provisions of Article 193 of the Constitution, relating to the appointment of Chief Justice of a Provincial High Court, on the basis of convention followed in this behalf held, that the senior most Judge of the High Court, in the absence of any concrete and valid reason has to be appointed as the Chief Justice of the High Court. We are of the view that the above rationale laid down by this Court for appointment of the Chief Justice of High Court applied with greater force in the case of appointment of Chief Justice of Pakistan under Article 177 of the Constitution, in view of the more consistent practice and convention followed in this regard for appointment of Chief Justice of Pakistan in the past and especially in view of the provisions contained in Article 180 of the Constitution which recognizes the principle of seniority as the sole criteria for appointment of Acting Chief Justice of Pakistan."

This Court in the case of "**Munir Hussain Bhatti, Advocate and others. Vs. Federation of Pakistan and another**" (supra) while reaffirming the dicta laid down in the cases of "**Al-Jehad Trust through Raeesul**

Mujahideen Habib-ul-Wahabb-ul-Khairi and others. Vs. Federation of Pakistan and others”(supra) and “Malik Asad Ali and others vs. Federation of Pakistan and others” (supra) held as under:-

“31. At this stage, it would also be appropriate for us to note that the contention of the AAG that earlier judgments on the issue of appointment of Judges are irrelevant is a bit misconceived. The change in the appointment process has merely diversified decision making amongst the many members of the two new collegiate bodies, but essentially the roles of these bodies, looked at collectively, remains the same. So as such the principles of law enunciated in earlier judgments such as Al-Jehad Trust case, Malik Asad Ali and several others would continue to apply to the new mechanism with full force. In face, these principles can be said to be applicable even more strongly after the introduction of the newly constituted bodies under Article 175-A.”

It, irresistibly, follows that this principle, practice or convention, whatever one may like to call it, besides being esteemed, honoured and upheld throughout has also been blessed with the approval of this Court in the judgments cited above. It is now a declared law of the land to all intents and purposes. I, therefore, do not see any reason much less tenable warranting any deviation therefrom.

18. Yet another provision contained in the first proviso to Clause 5(iv) of Article 175-A of the Constitution, which provides that for appointment of the Chief Justice of a High Court the most senior Judge mentioned in Clause 5(ii) of the Article shall not be member

of the Commission, unmistakably indicates that it has all along been taken for granted that it is the most senior Judge of the High Court who shall be nominated as Chief Justice in the absence of any valid reason. Otherwise, it would have been provided in the aforesaid clause that the Judge whose nomination for appointment as Chief Justice is in the offing shall not be member of the Commission. Therefore, the argument advanced by Kh. Haris Ahmed, learned Sr. ASC that the Constitutional provisions on this score have remained the same even after the dictum laid down in the case of **"Al-Jehad Trust through Raeesul Mujahideen Habib-ul-Wahabb-ul-Khairi and others. Vs. Federation of Pakistan and others"** (supra) is without force. I am, therefore of the opinion, that Mr. Justice Riaz Ahmed Khan, being the most senior Judge of the High Court has a legitimate expectancy to be appointed as Chief Justice and that subject to any valid reason which is yet to be recorded by the Commission, he would be entitled to be appointed as such.

19. Next question in the sequence is as to who determines seniority amongst the Judges appointed on the same day? Again the answer can be found in the long standing practice. It is the Chief Justice of the respective High Court who determines inter se

seniority of the Judges in the light of the principle mentioned above. It is, then, the Judicial Commission nominating the most Senior Judge for appointment as Chief Justice, which determines inter se seniority of the Judges so elevated. The President in this scheme does not figure anywhere. It is, however, a fact well worth remarking that seniority in this case has been determined by the Chief Justice of the Islamabad High Court and that Mr. Justice Riaz Ahmed Khan being senior in age has already been declared the most senior Judge of the High Court. Needless to say that settling the principle underlying the determination of a question can never become person specific.

20. Then comes the question as to whether the well established principle underlying the determination of inter se seniority amongst the Judges has been departed from by the Commission on correct premises. Reference has been made to a paragraph from the judgment rendered in the case of **"Federation of Pakistan. Vs. Sindh High Court Bar Association through its President"** (CPLA No. 1390 of 2012) (*supra*) which runs as under :-

"..... It is for this reason that in number of judgments of the Apex Court, out of which two have been referred to above, in service matters, concept of reinstatement into service with original seniority and back benefits has been developed and followed on

case to case basis to give complete relief to an aggrieved party. Following the same equitable principle, while passing our short order, we have specifically mentioned that the issuance of notification for permanent appointment of the two Judges shall have its effect from 17.9.2011 when four other recommendees of the Commission in the same batch were notified after clearance by the Committee, so that they shall have their respective seniority and all other benefits as permanent judges of the High Court”.

But a careful reading of the above quoted paragraph would reveal that it has not judicially laid down any criterion for determining, inter se seniority among the Judges appointed on the same day. Nor has it justified a deviation from the recognized course. It, when read with reference to the context, deals with a situation different altogether. No such question was involved in that case, nor has it been decided as such. It would thus be ominous to draw a parallel between this case and that case or to treat them alike. I, therefore, have no hesitation to hold that the premises recorded by the Commission for departing from the well established principle of determining seniority are not correct.

21. The next question emerging for the consideration of this Court on its advisory as well as adjudicatory side is whether the Judicial Commission in this case was properly constituted in the absence of a persona designata and whether the presence or participation of a person, who was a non-entity in the Commission,

could vitiate the nomination for the appointment of Mr. Justice Shukat Aziz Siddique and extension of Mr. Justice Noor-ul-Haq Qureshi ? Answers to these questions are simple and straightforward. Accepting that Mr. Justice Riaz Ahmed Khan being the most Senior Judge was required to attend the meeting of the Commission but his failure to do so for any reason, would not vitiate the proceedings of the Commission. For clause 14 of Article 175-A of the Constitution clearly provides that no action or decision taken by the Commission or a Committee shall be invalid or called in question only on the ground of the existence of a vacancy therein or of the absence of any member from any meeting thereof. Accepting that Mr. Justice Muhammad Anwar Khan Kasi being a non-entity sat, voted and took part in the proceedings culminating in the nomination of the Judges mentioned above, yet it would not vitiate the proceedings when the Judicial Commission, in view of Clause 8 of Article 175-A of the Constitution, has nominated the Judges by majority of its total membership. It would have vitiated or materially affected the proceedings of the Commission if it had nominated the Judges for appointment and extension with a margin of one. But where the Commission nominated the Judges by majority of 7 against 2, the

presence or participation of Mr. Justice Muhammad Anwar Khan Kasi in the meeting would not be of any consequence. The case of **"Managing Director, Sui Southern Gas Company Ltd., Karachi. Vs. Ghulam Abbas and others"** (supra) may well be referred to in this behalf wherein it was held as under: -

"Perusal of subsection (1) of section 3-A of the Act, 1973 reveals that 'minimum strength of a Bench to exercise or perform functions of the Tribunal is two Members, including the Chairman,' meaning thereby that while conducting hearing the status of a Chairman is also of a Member. Whereas under clause (a) of section 3-A(2), decisions are to be pronounced by the majority of the Members. Clause (b) of section 3-A(2) further provides that in case of division between Members of the Bench or in case of equal division of the Members, the case shall be referred to the Chairman and whatever opinion is expressed by him, would have supremacy and constitute the decision of the Tribunal. In this case impugned judgment has been authored by the Chairman and all the Members have concurred with him, therefore, presuming that Mr. Aftab Ahmed joined proceedings without lawful authority but nevertheless impugned judgment can sustain, as it has been rendered by the Bench comprising of more than two Members of the Service Tribunal and apprehension of influencing the judgment by Mr. Aftab Ahmed (Retired Member) stands excluded as it was authored by a former Judge of High Court being the Chairman of the Service Tribunal."

22. The principle enunciated in the aforesaid judgment is not alien or extraneous, on any account, to our jurisprudence. It has also been recognized by Article 67 of the Constitution, which does not allow a proceedings of the House to become invalid simply because a person who was not entitled to sit, vote or otherwise take part in the proceedings, sat, voted or took part therein. The case of

“Regina. Vs. Bow Street Metropolitan Stipendiary Magistrate and others, Ex-parte Pinochet Ugarte (No.2), therefore, has no relevance to the case in hand.

23. Mr. Muhammad Akram Sheikh, learned Sr. ASC also referred to Establishment Manual but could not cite any clear and definite provision of law, rule or convention as could justify a deviation from the course which has been consistently followed till date. He failed to refer to any precedent much less relevant to support his stance. He also failed to bring anything exceptional, extraordinary or outstanding in our notice as could dilute, diminish or discount the binding force of the said principle. Even otherwise, I would not approve substitution or replacement of a principle which has unquestionably been accepted and acted upon throughout.

24. The argument addressed by the learned Attorney General on the strength of **“Sindh High Court Bar Association through its Secretary and another. Vs. Federation of Pakistan through Secretary, Ministry of Law and Justice, Islamabad and others”** (supra) that if this Court annulled the appointment of many Judges for want of recommendation of the consultee, the nomination originating from the Judicial Commission which was not properly

constituted has to be given alike treatment is wholly misconceived inasmuch as the status of the Chief Justice of Pakistan before the amendments has been brought at par with the status of a member after the amendments without appreciating that the Chief Justice of Pakistan before such amendments was the chief consultee. Even after the amendments he being the Chairman of the Commission is not only the chief consultee but no meeting of the Commission can be held in his absence. Whereas absence of any other member or vacancy in view of clause 14 of Article 175-A of the Constitution is of no consequence whatever.

25. The argument of the learned counsel for the President that such nomination would be all the more without any legal or constitutional sanctity when the proceedings before the Commission were not conducted in the manner prescribed by the Constitution is also devoid of force as this provision for want of envisaging the consequence of failure or neglect to comply therewith cannot be treated as mandatory.

26. The argument that the proceedings in the Judicial Commission could not be held in camera when the legislature purposely provided otherwise so as to ensure complete

transparency and open scrutiny appears to be ornamental as its members not only represent all the essential segments of the Bar and Bench but also those of the Federation and the Province through Attorney General for Pakistan, Minister for Law and Justice of the Federation and Minister for Law of the Province. The scrutiny is open in the truest sense of the word when each member is at liberty to present his point of view one way or the other. Transparency in the proceedings cannot be affected by holding it in camera if every member consciously and conscientiously gives his input in the nomination, keeping in view its overall impact on the Institution on the one hand and society at large on the other. I do not understand what does the learned counsel for the President want to project by using the expressions "complete transparency and open scrutiny". If he by using these expressions wants the inclusion and intrusion of all and sundry, I am afraid, he is far off the lines drawn by the Constitution. It was in view of this backdrop, that the Judicial Commission while framing the rules in exercise of the powers conferred on it under clause 4 of Article 175-A of the Constitution provided for holding the proceedings in camera.

27. Question relating to criterion for elevating a Judge or Chief Justice of a High Court to the Supreme Court has been fully answered by Article 177 of the Constitution reproduced above. I, therefore, would not like to add anything thereto. The more so when the convention followed thus far is also in conformity with the letter and spirit of the Article mentioned above.

28. Having thus considered, I answer the questions raised in the reference accordingly. The detailed reasons for the Short Order dated 21.12.2012 in the Constitution Petition No. 126 of 2012 are also included in the Judgment.

29. While parting of the judgment, we would appreciate the enlightened assistance rendered by Mr. Makhdoom Ali Khan and Khawaja Haris Ahmed, learned Senior Advocates Supreme Court.

(Ejaz Afzal Khan)
Judge

سپریم کورٹ آف پاکستان

ہدایتی دائرہ سماعت

بیچ:

جناب جسٹس خلیجی عارف حسین

جناب جسٹس طارق پرویز

جناب جسٹس اعجاز افضل خان

جناب جسٹس گلزار احمد

جناب جسٹس شیخ عظمت سعید

ریفرنس نمبر 1 آف 2012

آئین کے آرٹیکل 186 کے تحت صدر پاکستان کی طرف سے ریفرنس

صدر کی طرف سے : جناب وسیم سجاد، سینئر ایڈووکیٹ سپریم کورٹ
جناب عبداللطیف یوسف زئی، سینئر ایڈووکیٹ سپریم کورٹ
جناب ادریس اشرف، ایڈووکیٹ
جناب مہر خان ملک، ایڈووکیٹ آن ریکارڈ
وفاق کی طرف سے : جناب عرفان قادر، اٹارنی جنرل آف پاکستان
جناب دل محمد علی زئی، ڈپٹی اٹارنی جنرل
بیرسٹر شہریار ریاض شیخ، ایڈووکیٹ
مسز شفق محسن، ایڈووکیٹ
چوہدری فیصل حسین، ایڈووکیٹ

معاون عدالت : جناب مخدوم علی خان، سینئر ایڈووکیٹ سپریم کورٹ
جناب خرم ایم ہاشمی، ایڈووکیٹ
جناب عمیر مجید ملک، ایڈووکیٹ

جناب حیدر علی خان، ایڈووکیٹ

جناب سعد ایم ہاشمی، ایڈووکیٹ

مسز اسماء حمید، ایڈووکیٹ

خواجہ حارث احمد، سینئر ایڈووکیٹ سپریم کورٹ

بمع معاونین

i. خواجہ ظہیر احمد، ایڈووکیٹ

ii. سید علی شاہ گیلانی، ایڈووکیٹ

14 دسمبر 2012ء

تاریخ سماعت :

اخباری اعلامیہ:

سپریم کورٹ آف پاکستان نے صدرِ پاکستان کی جانب سے اسلام آباد ہائیکورٹ میں ججز کی تقرری سے متعلق صدارتی ریفرنس پر تفصیلی فیصلہ جاری کر دیا۔ مذکورہ ریفرنس کی سماعت سپریم کورٹ آف پاکستان کے پانچ رکنی بینچ نے کی جس کی سربراہی جسٹس خلیفی عارف حسین کر رہے تھے اور معاون ججز میں جسٹس طارق پرویز، جسٹس اعجاز افضل خان، جسٹس گلزار احمد اور جسٹس شیخ عظمت سعید شامل تھے۔

صدارتی ریفرنس جو کہ اسلامی جمہوریہ پاکستان کے آئین کے آرٹیکل 186 کے تحت دائر کیا گیا تھا میں پاکستان کے عدالتی کمیشن کے مورخہ 27-09-2012 کو منعقدہ اجلاس جو ججز کی خالی اسامیوں کو پر کرنے کے متعلق تھا۔ مذکورہ اجلاس میں چیف جسٹس آف پاکستان نے جسٹس اقبال حمید الرحمان، چیف جسٹس اسلام آباد ہائیکورٹ اسلام آباد کو بطور جج سپریم کورٹ آف پاکستان نامزد کیا تھا اور بعد از سفارشات کمیشن جسٹس اقبال حمید الرحمان کے بطور جج سپریم کورٹ آف پاکستان تقرر پر متفق ہو گیا تھا۔ کمیشن کے ایک اور اجلاس میں جسٹس محمد جسٹس اقبال حمید الرحمان چیف جسٹس اسلام آباد ہائیکورٹ بھی شریک تھے چیف جسٹس آف پاکستان نے جسٹس محمد انور خان کاسی کو بطور چیف جسٹس آف اسلام آباد ہائیکورٹ نامزد کیا جو کہ بعد از سفارشات 07:02 کی اکثریت سے منظور کر لیا گیا۔ جب جناب شوکت عزیز صدیقی، جناب نور الحق این قریشی اور جناب محمد عظیم خان آفریدی

جن کا تقرر بطور ایڈیشنل جج اسلام آباد ہائیکورٹ ایک سال کی مدت کیلئے کیا گیا تھا کی مدت منصبی اختتام کے قریب پہنچی تو اُن کے معاملات بھی کمیشن میں لائے گئے اور بعد از سفارشات کمیشن نے جناب شوکت عزیز صدیقی کو بطور جج اسلام آباد ہائیکورٹ 08:02 کی اکثریت سے نامزد کیا اور متفقہ طور پر جناب نور الحق این قریشی کا نام بطور ایڈیشنل جج اسلام آباد ہائیکورٹ مزید چھ ماہ کیلئے منظور کر لیا جبکہ محمد عظیم خان آفریدی کو مستقل نہ کیا گیا۔ کمیشن کے مذکورہ اجلاس میں جناب جسٹس انور خان کاسی نے بطور اسلام آباد ہائیکورٹ کے سینئر ترین جج شرکت کی۔

کمیشن کی جانب سے جناب اقبال حمید الرحمان کی بطور جج سپریم کورٹ تقرری، جناب جسٹس انور خان کاسی بطور چیف جسٹس اسلام آباد ہائیکورٹ تقرری، جناب شوکت عزیز صدیقی کو بطور جج اسلام آباد ہائیکورٹ مستقل کیا جانا اور جناب نور الحق این قریشی کی مدت منصبی میں بطور ایڈیشنل جج اسلام آباد ہائیکورٹ مزید چھ ماہ کے اضافے کی سفارشات پارلیمانی کمیٹی کو موصول ہوئیں جس نے کافی غور و خوض کے بعد متفقہ طور پر کمیشن کی جانب سے بھیجی گئی نامزدگیوں سے اتفاق کیا اور انہیں وزیر اعظم کے پاس بھیج دیا تاکہ مذکورہ سفارشات پر صدر پاکستان کی جانب سے نوٹیفیکیشن جاری کیا جاسکے۔ صدر پاکستان نے مذکورہ نامزدگیوں پر نوٹیفیکیشن جاری کرنے کی بجائے آئین کے آرٹیکل 186 کے تحت ریفرنس دائر کرتے ہوئے چند سوالات کو عوامی اہمیت کا حامل قرار دیتے ہوئے عدالتی رائے کے لئے بھیجا۔ مذکورہ سوالات درج ذیل ہیں:

i- آیا چیف جسٹس آف اسلام آباد ہائیکورٹ کے فیصلے کی روشنی میں کہ جناب جسٹس ریاض اسلام آباد ہائیکورٹ کے سینئر ترین جج تھے جس کی توثیق صدر پاکستان کی جانب سے بھی ہو چکی تھی کیسے جناب جسٹس کاسی کو اسلام آباد ہائیکورٹ کا سینئر ترین جج تصور کیا جاسکتا ہے؟

ii- آیا جناب جسٹس ریاض اسلام آباد ہائیکورٹ کے سینئر ترین جج ہونے کے ناطے سپریم کورٹ آف پاکستان کے مقدمہ ”الجهاد ٹرسٹ“ میں دیئے گئے فیصلے کی رو سے قانونی اور آئینی طور پر چیف جسٹس اسلام آباد ہائیکورٹ کے عہدے پر تقرر کئے جانے کیلئے جائز امیدوار تھے؟

iii- آیا عدالتی کمیشن آف پاکستان نے آئین اور روایات کی پاسداری کرتے ہوئے ایک جونیئر جج کو چیف جسٹس اسلام آباد ہائیکورٹ کیلئے نامزد کر سکتا ہے؟

iv- آیا عدالتی کمیشن کی تشکیل آئین کے آرٹیکل 175(a) کے مطابق کی گئی تھی کیونکہ جناب جسٹس کاسی کو اجلاس میں شامل کیا گیا جو کہ عدالتی کمیشن کے رکن بھی نہ تھے؟

v- آیا صدر جو کہ عہدے کے حلف کی مناسبت سے آئین کے تحفظ اور دفاع کا پابند ہے آئین کی روح کے برخلاف تقرریاں کرنے کا مجاز ہے؟

vi- آئین کے آرٹیکل 175(a)(8) کی رو سے عدالتِ عظمیٰ، عدالتِ عالیہ وفاقی شرعی عدالت کے ججوں کی تقرر کیلئے شخصی نامزدگیاں کرتے ہوئے عدالتی کمیشن کو کیا طریقہ کار یا لائحہ عمل اختیار کرنا چاہئے؟

vii- اعلیٰ عدلیہ میں ججوں کے تقرر سے متعلق اور عدالتی کمیشن کی جانب سے دی گئی نامزدگیوں کی پارلیمانی کمیٹی کی جانب سے توثیق کیلئے آئین کے تحت عدالتی کمیشن اور پارلیمانی کمیٹی کا کیا کردار ہے؟

viii- آئین کے آرٹیکل 175(a) کی شق 12 کی روشنی میں پارلیمانی کمیٹی کو عدالتی کمیشن کی جانب سے بھیجی گئی نامزدگیوں کی توثیق کرتے ہوئے کن اصولوں کو مد نظر رکھنا چاہئے؟

ix- آیا عدالتی کمیشن کی جانب سے نامزد کردہ اور پارلیمانی کمیٹی کی جانب سے توثیق کردہ نامزدگیوں پر صدر کی جانب سے اعتراضات لگائے جانے پر نامزدگیوں پر نظر ثانی آئین کے تحت ممنوع ہے؟

x- ایک جج کی ہائیکورٹ کے چیف جسٹس یا سپریم کورٹ کے جج کے طور پر تعیناتی کا کیا معیار ہونا چاہئے، کیا اُن کے بطور عدالتِ عالیہ کے جج کے سناریٹی مد نظر رکھی جائے گی یا متعلقہ ہائیکورٹ کے چیف جسٹس کے طور پر اُن کی سناریٹی انہیں سپریم کورٹ کے جج کے تقرر کا اہل بنائے گی؟

xi- آیا آئین عدالتی کمیشن کے ارکان کو انفرادی طور پر کسی جج کی بطور جج سپریم کورٹ، ہائیکورٹ یا

وفاقی شرعی عدالت میں نامزدگی تجویز کرنے سے باز رکھتا ہے؟

xii - آیا پارلیمانی کمیٹی آئین کے آرٹیکل 175(a) کے تحت نامزدگیوں کی توثیق یا رد کر سکتی ہے اور اصطلاح ”توثیق“ سے دراصل کیا مراد ہے اور آئین کے آرٹیکل 175(a) کی شق 12 کے شرطیہ فقرہ کا کیا اثر ہوگا؟ جو کہ درج ذیل ہے:

”بشرطیکہ اگر نامزدگیوں کی توثیق نہیں کی جاتی تو کمیشن دوسری نامزدگیاں ارسال کرے گا“

xiii - آیا آئین کے آرٹیکل 175(a) میں قانون سازوں کی جانب سے عدالتی کمیشن کی کارروائی ان کیمرہ کرنے کی اجازت نہ دینے میں مکمل شفافیت اور جائز چناؤ کو یقینی بنانے کی مصلحت کارفرما تھی؟

جناب جسٹس خلجی عارف حسین نے صدارتی ریفرنس میں اٹھائے گئے 13 سوالات کا تفصیلاً جواب دیا جن کا خلاصہ ذیل میں تحریر کردہ ہے:

چونکہ عدالتی خود مختاری اور تقسیمِ ثلاثہ کے اصول کی وجہ سے ریفرنس کا موضوع انتہائی حساس اور اہمیت کا حامل ہے اس لئے عدالت ہذا نے چند معتبر وکلاء کی معاونت حاصل کرنے کا فیصلہ کیا لہذا جناب مخدوم علی خان فاضل سینئر ایڈووکیٹ سپریم کورٹ اور خواجہ حارث احمد فاضل ایڈووکیٹ سپریم کورٹ کی خدمات بطور معاون خصوصی حاصل کی گئیں۔

جناب وسیم سجاد فاضل سینئر ایڈووکیٹ سپریم کورٹ ریفرنسگ اتھارٹی کی جانب سے پیش ہوئے جنہوں نے بحث کی کہ جب دو ججوں کا تقرر ایک ہی تاریخ پر کیا گیا ہو تو سناریو کا فیصلہ اُن کی عمر کے تجزیے سے کیا جاتا ہے۔ جناب جسٹس ریاض احمد خان عمر میں بڑے ہونے کی وجہ سے سینئر ترین جج تھے لہذا انہیں چیف جسٹس اسلام آباد ہائیکورٹ کے لئے نامزد کیا جانا چاہئے تھا۔ یہ روایت صدیوں پرانی ہے اور برصغیر پاک و ہند میں اس کی تقسیم کے بعد تک مستعمل رہی ہے۔

فاضل اٹارنی جنرل عدالتی سمن پر عدالت میں حاضر ہوئے اور انہوں نے اعتراض کیا کہ عدالتی کمیشن کے اجلاس کی تشکیل درست نہیں تھی کیونکہ اُس میں حقیقی عہدے دار شامل نہ تھے اور اُن کی جگہ اُس شخص نے شرکت کی تھی جو کمیشن کا رکن نہ تھا لہذا کمیشن کی تمام کارروائی باطل ہو جاتی ہے۔ اٹارنی جنرل نے مزید بیان کیا کہ صدر عدالتی کمیشن کی جانب سے بھیجی گئی نامزدگیوں کا تقرر کرنے پابند نہیں۔

جناب مخدوم علی خان سینئر ایڈووکیٹ سپریم کورٹ بطور معاونِ عدالت، عدالتِ ہذا میں پیش ہوئے۔ فاضل وکیل نے سب سے پہلے عدالت کے ہدایتی اختیارِ سماعت میں جاری کردہ ہدایات کے لازمِ عمل ہونے پر نظر ڈالی۔ فاضل وکیل نے مقدمہ **PLD 2005 SC 873** کے متعلقہ پیرے کا حوالہ دیتے ہوئے بیان کیا کہ اگرچہ صدر کی جانب سے دائر کردہ ریفرنس پر دی گئی عدالتی رائے فریقین کے مابین فیصلہ شمار نہیں ہوتی لیکن چونکہ یہ عدالتی غور و خوض اور وکلاء کے دلائل کا جائزہ لینے کے بعد جاری کی جاتی ہے لہذا یہ لازمِ عمل ہوتی ہے اور اسے قابلِ احترام اور قابلِ قرار دیا جانا چاہئے۔ انہوں نے مزید بیان کیا کہ جب ایک شخص کو عدالتی کمیشن نامزد کرتا ہے اُس کے نام کی پارلیمانی کمیٹی توثیق کرتی ہے اور وزیرِ اعظم کو بھیجتی ہے جو کہ اُس توثیق کو صدر کے پاس برائے تقرر بھیجتا ہے تو صدر کے پاس تقرر کے علاوہ کوئی دوسرا راستہ نہیں رہ جاتا۔

خواجہ حارث احمد سینئر ایڈووکیٹ سپریم کورٹ جو کہ بطور معاونِ عدالت، عدالت کے روبرو پیش ہوئے نے اپنی تحریری گزارشات کے چند نمایاں نقاط اجاگر کئے۔ انہوں نے پاکستان کے آئین کے آرٹیکل 175(a) کا حوالہ دیتے ہوئے بیان کیا کہ ججوں کی تقرری کرتے ہوئے جب ایک دفعہ جوڈیشل کمیشن کی جانب سے نامزدگیاں جاری ہوں اور پارلیمانی کمیٹی کی جانب سے اُن کی توثیق کر کے انہیں وزیرِ اعظم اور پھر صدر کو بھیج دیا جائے تو صدر کا کردار کم و بیش عاملانہ ہے۔ انہوں نے مقدمہ **منیر حسین بھٹی** کے فیصلے کا حوالہ دیتے ہوئے کہا کہ موجودہ ریفرنس میں اٹھائے گئے تمام سوالات کے جوابات مذکورہ فیصلے میں دیئے جا چکے ہیں لہذا ان سوالات کو دوبارہ اٹھانا بے ثمر ہوگا۔

مذکورہ بالا پس منظر میں صدر کی جانب سے 13 سوالات رکھے گئے جن پر عدالتِ ہذا سے آئین کے آرٹیکل 186 کے تحت رائے مانگی گئی۔ ہم اپنی رائے آئین کے آرٹیکل 175(a) کی روح (vires) کو چھیڑے

بغیر دیں گے کیونکہ مذکورہ معاملہ متعدد درخواستوں کے تحت عدالتِ ہذا کے روبرو زیر التواء ہے۔ سب سے پہلے ہم صدارتی ریفرنس میں دیئے گئے سوالات نمبر 5 اور 10 پر اپنی رائے دینا چاہیں گے۔ کسی امیدوار کی قانونی اہلیت، قابلیت اور سالمیت کی بناء پر موزونیت کا فیصلہ اٹھارویں اور انیسویں ترمیم سے قبل چیف جسٹس آف پاکستان اور متعلقہ ہائیکورٹ کے چیف جسٹس صاحبان کیا کرتے تھے تاہم اب یہ تعین عدالتی کمیشن کرتا ہے جو کہ قانونی ماہرین اور تمام سٹیک ہولڈرز مثلاً عدلیہ، انتظامیہ اور بار کے نمائندوں پر مشتمل ہوتا ہے اور آئین کے آرٹیکل 175(a) کے تحت تشکیل دیا گیا ہے۔ اگرچہ کمیشن کے تمام ارکان یکساں اختیارات کے حامل ہیں مگر آئین سازوں نے عدلیہ کو اکثریتی اختیارات دیئے ہیں جس کی بناء پر کمیشن کے گیارہ اراکین میں سے آٹھ اراکین عدلیہ سے تعلق رکھتے ہیں۔

اعلیٰ عدلیہ کے ججز کی تعیناتی میں صدر کے اختیارات کو مناسب طور پر سمجھنے کیلئے آئین کی مختلف دفعات جہاں صدر مملکت مختلف اداروں میں تعیناتی کرتے ہیں کا تقابلی جائزہ بھی لیا گیا ہے۔ صدر پاکستان ہائیکورٹ اور سپریم کورٹ کے ججوں کے تقرر کے علاوہ دیگر بہت سے آئینی عہدیداروں کا تقرر کرتا ہے جن میں آڈیٹر جنرل پاکستان، چیف الیکشن کمشنر اور اُس کے اراکین، چیئر مین فیڈرل پبلک سروس کمیشن، نگران وزیر اعظم، اسلامی نظریاتی کونسل کے اراکین اور مسلح افواج کے چیف وغیرہ شامل ہیں۔

آئین کے آرٹیکل 213 کے تحت جو کہ چیف الیکشن کمیشن اور اس کے ممبران کے تقرر سے متعلق ہے اٹھارویں اور انیسویں ترمیم کے بعد اگرچہ صدر پاکستان چیف الیکشن کمشنر اور اُس کے اراکین کا تقرر کرتا ہے تاہم اب اُس کے پاس صوابدیدی اختیارات نہیں ہیں اور اُس پر لازم ہے کہ وہ اُسی شخص کا تقرر کرے جس کی توثیق پارلیمانی کمیٹی کی جانب سے کر دی گئی ہے۔ اسی طرح آئین کے آرٹیکل 224(a)(1) جو کہ اٹھارویں آئینی ترمیم کے تحت شامل کیا گیا اور آرٹیکل 224(a) جو کہ بیسویں ترمیم کے نتیجے میں شامل کیا گیا نگران کابینہ اور وزیر اعظم کی تقرری کی بابت ہے۔ مدت پوری ہونے کے بعد آئین کے آرٹیکل 58 کے تحت اسمبلیوں کی تحلیل پر صدر نگران وزیر اعظم کا انتخاب سبکدوش ہونے والی اسمبلی کے وزیر اعظم اور قائد حزب اختلاف کے مشورے سے کرے گا اور اگر وزیر اعظم یا قائد حزب اختلاف نگران وزیر اعظم کی نامزدگی پر متفق نہیں ہوتے تو وہ دو نامزدگیاں ایک کمیٹی کو

بھیجیں گے جو کہ سبکدوش ہونے والی اسمبلی اور سینٹ کے اراکین پر مشتمل ہوگی اور کمیٹی اُن نامزدگیوں میں سے نگران وزیرِ اعظم کا نام تین یوم کے اندر منتخب کرے گی اور اگر کمیٹی تین یوم میں نگران وزیرِ اعظم کے نام کا حتمی تعین کرنے میں ناکام رہتی ہے تو نامزد کردہ افراد کے نام الیکشن کمیشن کو حتمی فیصلے کیلئے بھیج دیئے جائیں گے۔ اگرچہ صدرِ پاکستان کو نگران وزیرِ اعظم کے تقرر کا اختیار ہے تاہم اب اٹھارویں اور بیسویں ترمیم کے بعد وہ صرف ایک علامتی اتھارٹی برائے تقرر ہے۔

مذکورہ بالا آئینی ترامیم کی روشنی میں یہ اخذ کیا جاسکتا ہے کہ متعدد آئینی عہدیداران کے تقرر میں صدر کا کردار محض علامتی ہوتا ہے۔ مقدمہ منیر حسین بھٹی بنام فیڈریشن آف پاکستان 2011 PLD SC 407 میں عدالتِ ہذا نے فیصلہ دیا کہ آئین کے آرٹیکل 175(a) کے تحت پارلیمانی کمیٹی پارلیمان سے متقابل نہیں اور نہ ہی اسے پارلیمان کے زیرِ نگر تصور کیا جانا چاہئے۔ پارلیمانی کمیٹی کے کردار کا مذکورہ مقدمے میں تفصیلی جائزہ لیا گیا ہے۔ مقدمہ الجہاد ٹرسٹ بنام وفاقِ پاکستان میں یہ طے کیا گیا کہ اگر وزیرِ اعظم عدالتِ ہذا کی جانب سے مقرر کردہ مدت کے دوران اپنی رائے دینے میں ناکام رہتا ہے تو یہ تصور کیا جائے گا کہ وہ چیف جسٹس آف پاکستان اور صوبائی ہائیکورٹ کے چیف جسٹس کی جانب سے بھیجی گئی سفارشات سے متفق ہے اور اس بناء پر صدر حتمی تقرر کرے گا۔ مذکورہ بالا فیصلے کے تناظر میں آئین سازوں نے آئین کے آرٹیکلز 175(A) کی شق 12 کے تحت بیان کیا کہ اگر پارلیمانی کمیٹی کمیشن کی جانب سے ملنے والی نامزدگیوں کی توثیق کرنے، یا اُن نامزدگیوں کی تین چوتھائی اکثریت سے توثیق کرنے میں ناکام رہتی ہے تو نامزدگیوں کو توثیق شدہ سمجھا جائے گا۔

اعلیٰ عدالتوں کے ججوں کی تقرری میں وزیرِ اعظم اور صدر کا کردار محض علامتی ہوتا ہے اور کمیٹی کی جانب سے نامزدگیاں موصول ہونے کے بعد وزیرِ اعظم اور صدر پر لازم ہے کہ وہ موصول شدہ نامزدگیوں کا تقرر کریں۔ اگر آرٹیکل 175(a) کا موازنہ بشمول تمام آئینی تراکیب بطورِ خاص دیباچہ آئین جو کہ عدلیہ کی خود مختاری پر زور دیتا ہے اور آئین کے آرٹیکل 175(3) جو عدلیہ کو انتظامیہ سے الگ کرتا ہے کا جائزہ لیا جائے تو یہ حتمی نتائج سامنے آئیں گے کہ اعلیٰ عدالتوں کے ججوں کے تقرر میں انتظامیہ کا کردار کم و بیش علامتی ہے اور تقرری کا تمام طریقہ کار آئین کے تحت تشکیل کردہ دو اداروں کے مابین گھومتا نظر آئے گا جن میں سے ایک عدالتی کمیشن اور

ایک پارلیمانی کمیٹی ہے۔

اب ہم سوال نمبر ۱ کی طرف آتے ہیں جس میں جسٹس ریاض کی سناریٹی کا سوال کیا گیا ہے۔ یہاں یہ بیان کرنا ضروری ہے کہ جسٹس ریاض احمد خان کی تاریخ پیدائش 15-05-1952 ہے اور انہوں نے منورخہ 04-01-2011 کو بطور ایڈیشنل جج اسلام آباد ہائیکورٹ کا حلف لیا اور 21-11-2011 کو مذکورہ ہائیکورٹ کے جج کے طور پر مستقل ہوئے۔ اسی طرح جناب جسٹس محمد انور خان کا سی 28-11-1956 کو پیدا ہوئے، منورخہ 04-01-2011 کو ان کا تقرر بطور پر ایڈیشنل جج اسلام آباد ہائیکورٹ کے کیا گیا اور منورخہ 21-11-2011 کو مذکورہ ہائیکورٹ کے جج کے طور پر ان کو مستقل کیا گیا۔ دونوں ججوں کا تقرر ایک ہی نوٹیفکیشن کے ذریعے کیا گیا۔ چیف جسٹس اسلام آباد ہائیکورٹ نے سناریٹی کا تعین کرتے ہوئے جسٹس ریاض احمد خان کو بلحاظ عمر سینئر قرار دیا جس پر جسٹس محمد انور خان کا سی نے سوال اٹھایا اور معاملہ وزارتِ قانون کو بھیجا گیا، معاملے کا حتمی فیصلہ صدرِ پاکستان نے کیا اور جسٹس ریاض احمد خان کو سینئر قرار دیا۔ ایک ہی تاریخ پر تقرر کئے جانے والے ججوں کی سناریٹی کا تعین کرنے کیلئے شرح قانون میں کوئی تحریری شق موجود نہیں البتہ روایات پر عمل کرتے ہوئے سناریٹی کا تعین بلحاظ عمر کیا جاتا ہے۔ ہم نے ججز کی بہت سی سناریٹی فہرستوں اور ان کے تقرر کے نوٹیفکیشنوں کا جائزہ لیا مگر کوئی مسلمہ اصول و وضاحت جو کہ سناریٹی کا تعین کرنے میں مددگار ہو سانسے نہیں آیا۔ اسی طرح نا آئین اور نا ہی کوئی اور قانون صدرِ پاکستان جو کہ محض ایک علامتی تقرری اتھارٹی ہے کو کوئی اختیار دیتی ہیں کہ وہ ججوں کی سناریٹی کا فیصلہ کرے جو کہ نہ صرف عدالتی خود مختاری کے اصول کے منافی ہے بلکہ آئین کے آرٹیکل (3) 175 جو کہ عدلیہ اور انتظامیہ کے اختیارات کی تقسیم کرتا ہے کی خلاف ورزی بھی ہے۔ اسی طرح سپریم جوڈیشل کونسل جو کہ آئین کے تحت تشکیل کردہ ادارہ ہے اُسے بھی دو افراد کے مابین سناریٹی کے معاملے کا فیصلہ کرنے کیلئے عدالت کا درجہ نہیں دیا جاسکتا۔ کوئی بھی شخص جو کہ چیف جسٹس ہائیکورٹ اور چیف جسٹس آف پاکستان کی جانب سے مسلمہ اصولوں کی غیر موجودگی میں سناریٹی کے تعین سے متاثرہ ہے دادرسی کیلئے کسی بھی باختیار عدالت سے رجوع کر سکتا ہے۔ چونکہ سناریٹی کے تعین کیلئے کوئی مسلمہ اصول موجود نہ ہے کہ آیا تقرری کی تاریخ، عمر یا تاریخ رجسٹریشن بطور وکیل سناریٹی کا تعین کرے گی لہذا مستقبل میں ان پیچیدگیوں سے نمٹنے کیلئے مسلمہ اصول وضع کئے جانے چاہئیں۔ عدالت ہذا نے مقدمہ ”الجهاد ٹرسٹ“ میں یہ طے کیا ہے کہ اگر کمیشن

سینئر ترین جن کے علاوہ کسی اور جج کو چیف جسٹس نامزد کرتا ہے تو معاملے کی دادرسی کسی متعلقہ عدالت میں کی جانی چاہئے نہ کہ ریفرنس کے ذریعے۔ یہ بیان کرنا قابل ذکر ہے کہ مقدمہ ”الجهاد ٹرسٹ“ کے بعد اور آئین میں انیسویں ترمیم کے بعد صدر پاکستان نے لاہور اور پشاور ہائیکورٹ کے چیف جسٹس صاحبان کا تقرر کیا جو کہ اُن عدالتوں کے سینئر جج صاحبان نہ تھے۔

آئین میں انیسویں ترمیم سے پہلے چیف جسٹس آف پاکستان عدلیہ کے سربراہ کے طور پر ہائیکورٹ کے چیف جسٹس اور اعلیٰ عدالتوں کے ججوں کے عہدے کے اہل امیدوار کی نامزدگی اہلیت، صلاحیت، قابلیت اور موزونیت کی بناء پر کرتے تھے۔ مذکورہ اختیار اب عدالتی کمیشن استعمال کرتا ہے۔ جہاں تک کہ سپریم کورٹ کے جج کی تقرری کا تعلق ہے چیف جسٹس پاکستان بطور عدلیہ کا جد امجد عدالتی کمیشن پاکستان کے قواعد مجریہ 2010ء کے قاعدہ نمبر 3 کے تحت سپریم کورٹ کے جج کی نامزدگی کرتا ہے۔ مذکورہ نامزدگی کرتے ہوئے وہ مختلف ہائیکورٹس اور عدالت ہذا میں موجودہ ججوں کی تعداد، ہائیکورٹس پر کام کا بوجھ، اُن کے انتظامی مسائل اور دیگر متعلقہ معاملات کو مد نظر رکھتا ہے۔ سپریم کورٹ ملک کی اعلیٰ ترین عدالت ہے اور اُس کے جج کو پاکستان کے جغرافیائی تنوع کا مظہر ہونا چاہئے۔ عدالتی کمیشن جو کہ عدالت ہذا کے سینئر ججز، سپریم کورٹ کے ریٹائرڈ جج، پاکستان بار کونسل کی جانب سے نامزد کردہ سینئر وکلاء، وزیر قانون اور اٹارنی جنرل آف پاکستان پر مشتمل ہوتا ہے چیف جسٹس آف پاکستان کی جانب دی گئی نامزدگی کو اکثریت سے قبول یا رد کرنے کے اختیارات رکھتا ہے۔

جہاں تک کہ سوال نمبر iv کا تعلق ہے جس میں عدالتی کمیشن کی تشکیل کے متعلق سوال اٹھایا گیا ہے یہ بیان کیا جانا ضروری ہے کہ جناب جسٹس محمد انور خان کاسی نے کمیشن کے مورخہ 22-10-2012 کے اجلاس میں شرکت کی۔ یہ ریکارڈ سے ثابت شدہ ہے کہ کمیشن کا اجلاس اسلام آباد ہائیکورٹ کے تین ایڈیشنل ججوں کو مستقل کرنے کیلئے بلایا گیا تھا اور جناب جسٹس ریاض احمد خان اُس وقت بیرون ملک چھٹی (Ex Pakistan Leave) پر تھے اور جناب جسٹس محمد انور خان کاسی مذکورہ ہائیکورٹ کے سینئر ترین جج تھے۔ تاہم اگر یہ فرض کر لیا جائے کہ جسٹس محمد انور خان کاسی کمیشن کے اجلاس میں شرکت کے اہل نہ تھے تب بھی آرٹیکل 175(a) کی شق نمبر 8 طے کرتی ہے کہ اعلیٰ عدالتی جج کی کسی اسامی کو پُر کرنے کیلئے کسی شخص کی نامزدگی کمیشن کو اس کے تمام

اراکین کی اکثریت سے کرنی چاہئے اور اسی طرح اُن کا اس اجلاس میں شرکت کرنا کمیشن کی تمام کارروائی کو باطل نہیں کرتا اور نہ ہی نامزدگیوں کو کالعدم قرار دیتا ہے۔

نتیجتاً ہماری رائے میں اور مقدمات ”غلام عباس اور محمد سلیم“ میں طے کردہ اصولوں کے مطابق عدالتی کمیشن کی کارروائی جس میں اسلام آباد ہائیکورٹ کے دو ججوں کی نامزدگیاں کی گئیں صرف اس وجہ سے باطل قرار نہیں دی جاسکتیں کہ اُس میں جناب جسٹس محمد انور خان کاسی نے شرکت کی۔

سوالات نمبر vi, vii, viii اور xii جو کہ باہم مماثل ہیں اور اُن کا جواب اکٹھے دیا جانا ضروری ہے آرٹیکل 175(a) کی شق 12 کے شرطیہ فقرے میں بیان کیا گیا ہے کہ پارلیمانی کمیٹی تحریری وجوہات کی بناء پر اگر کسی نامزدگی کو تین چوتھائی اکثریت سے مذکورہ مدت میں توثیق نہیں کرتی تو وہ اپنے فیصلے سے وزیر اعظم کے ذریعے کمیشن کو آگاہ کرے گی۔ کمیشن کی جانب سے نامزدگیاں وصول ہونے کے بعد کمیٹی کے کردار کو مقدمہ ”منیر حسین بھٹی“ میں عدالتِ ہذا کے چار رکنی بینچ نے تفصیل سے بیان کیا ہے اور مذکورہ مقدمے میں وضع کردہ اصولوں کی توثیق مقدمہ ”وفاقِ پاکستان بنام سندھ ہائیکورٹ بار ایسوسی ایشن“ میں بھی کی گئی ہے۔ کمیشن اور کمیٹی کا کردار اور آئین کے آرٹیکل 175(a) کی شق 12 کے تحت بھیجی گئی نامزدگیوں کی توثیق کا طریقہ کار آئین میں اور عدالتِ ہذا کے مذکورہ بالا مقدمات میں وضع کردہ اصولوں کے تحت طے شدہ ہیں لہذا سوالات نمبر vi, vii, viii اور xii کی جوابدہی لازم نہیں کیونکہ اُن کے جوابات مذکورہ مقدمات پہلے ہی دیئے جا چکے ہیں۔

اب ہم سوال نمبر xi اور xiii پر آتے ہیں جو کہ عدالتی کمیشن کے ارکان کی جانب سے انفرادی طور پر نامزدگی تجویز کرنے اور کمیشن کی ان کیمرہ کارروائی کی اجازت نہ دینے سے متعلق ہے۔ کمیشن کی تشکیل آئین کے آرٹیکل 175(a) کی شق نمبر 1 کے تحت کی جاتی ہے۔ آئین میں کوئی ایسا مجوزہ طریقہ کار نہیں دیا گیا جس کے تحت سپریم کورٹ، ہائیکورٹ یا فیڈرل شریعت کورٹ کے ججز کی تقرری کیلئے نامزدگیاں پیش کی جائیں ماسوائے اس کے کہ آرٹیکل 177(2) اور 193(2) میں اُن کی اہلیت کا تعین کر دیا گیا ہے۔ تاہم آئین کے آرٹیکل 175(a) کی شق 4 کمیشن کو یہ اختیار دیتی ہے کہ وہ حسبِ ضابطہ قواعد و ضوابط وضع کرے اور شق نمبر 15 کے تحت یہ کمیشن کو یہ

اختیار حاصل ہے کہ وہ کمیشن کی کارروائی کیلئے اصول وضع کرے۔ کمیشن کا کوئی بھی رکن ماسوائے چیف جسٹس آف پاکستان سپریم کورٹ کے ججز کی تقرری کے معاملے میں اور چیف جسٹس فیڈرل شریعت کورٹ اور ہائیکورٹ قواعد کی روشنی میں جو کہ آئین کے آرٹیکل 175(a) سے متصادم بھی نہ ہو کسی نامزدگی کی تجویز نہیں دے سکتا۔ مذکورہ قواعد کی روشنی میں چیف جسٹس آف پاکستان، سپریم کورٹ کے جج، ہائیکورٹ اور فیڈرل شریعت کورٹ کے چیف جسٹس صاحبان کے نام اور ہائیکورٹ اور فیڈرل شریعت کورٹ کیلئے ان کورٹس کے چیف جسٹس صاحبان کمیشن میں ججوں کی خالی اسامیوں کو پر کرنے کیلئے نامزدگیوں کی تجویز پیش کرتے ہیں اور وہ نامزدگیاں کمیشن کے چیئرمین کو ارسال کر دی جاتی ہیں۔ کمیشن کا چیئرمین کمیشن کا اجلاس بلاتا ہے جہاں پر ان نامزدگیوں پر تبصرہ کیا جاتا ہے اور سفارشات پیش کی جاتی ہیں۔ مذکورہ قاعدے کے پس پشت یہ مصلحت کارفرما ہے کہ چیف جسٹس آف پاکستان اور ہائیکورٹ کے چیف جسٹس صاحبان وہ متعلقہ شخصیات ہیں جو کہ کسی جج کی قانونی اہلیت کو تجرباتی اور تکنیکی بنیادوں پر جانچ پرکھ سکتی ہیں۔ ماسوائے نامزدگیاں تجویز کرنے کے چیف جسٹس آف پاکستان اور ہائیکورٹ کے چیف جسٹس صاحبان کا تفریروں کے عمل میں کوئی خاص کردار نہیں ہوتا۔ عدالتی کمیشن آف پاکستان کے قواعد مجریہ 2010ء آئین کی شقات سے متصادم نہیں اور آئین کی جانب سے دیئے گئے اختیارات کے تحت ہی تشکیل دیئے گئے ہیں۔

آخر میں صدرِ پاکستان کی جانب سے بھیجے گئے سولات کا جائزہ لیتے ہوئے ہماری رائے ہے کہ جسٹس ریاض احمد خان اسلام آباد ہائیکورٹ کے سینئر ترین جج ہیں اگرچہ ہائیکورٹ کے سینئر ترین جج کا تقرر بطور چیف جسٹس کیا جانا پسندیدہ عمل ہے تاہم آئین کے آرٹیکل 175(a) کی شقات 2 اور 3 بشمول شق 5 کی روشنی میں کسی ایسے جج کا جو کہ سینئر ترین جج نہ ہو بطور چیف جسٹس ہائیکورٹ تقرر کیا جانا آئین کی شقات کی خلاف ورزی نہ ہو گی۔

عدالتی کمیشن کی مورخہ 22-10-2012 کے اجلاس میں دی گئی سفارشات صرف اس وجہ سے باطل نہیں ٹھہرتیں کہ جناب جسٹس محمد انور خان کاسی نے مذکورہ اجلاس میں شرکت کی۔

آئین کے آرٹیکل 175(a) کے تحت صدرِ پاکستان کے پاس کوئی ایسی صوابدید نہیں ہے کہ وہ عدالتی کمیشن

کی جانب سے تجویز کردہ اور پارلیمانی کمیٹی کی جانب سے توثیق کردہ ناموں کو نظر ثانی کیلئے بھیجے۔ عدالتی کمیشن نے آئین کے آرٹیکل 175(a) کی شق نمبر 4 کے تحت دیئے گئے اختیارات استعمال کرتے ہوئے قواعد وضع کئے ہیں جن کے تحت کسی شخص کا نام بطور جج ہائیکورٹ، فیڈرل شریعت کورٹ، سپریم کورٹ اور چیف جسٹس آف ہائیکورٹ اور فیڈرل شریعت کورٹ تجویز کیا جاسکتا ہے۔ پارلیمانی کمیٹی اور عدالتی کمیشن کا کردار اور عدالتی کمیشن کی جانب سے نامزد کردہ افراد کی کمیٹی کی جانب سے توثیق کا لائحہ عمل کا احاطہ عدالت ہذا کے مقدمہ ”منیر حسین بھٹی“ میں تفصیل سے کیا گیا ہے۔

مذکورہ فیصلے میں جسٹس اعجاز افضل خان صاحب نے اپنا اضافی نوٹ دیتے ہوئے بیان کیا کہ:

”آئین کے تحت صدر پر آئین کی تابعداری بھی اسی طرح واجب العمل ہے جس طرح سے کسی قانون کی اور یہ کسی بھی شخص چاہے وہ کتنا بھی مقتدر ہو یا صدر کے درجے پر بھی فائز ہو کو آئین و قانون سے روگردانی کی اجازت نہیں دیتا نہ ہی صدر کے عہدہ کا حلف جس کے تحت وہ اپنے افعال آئین و قانون کے تابع سرانجام دینے کا پابند ہے اُسے ایسا کوئی اقدام کرنے کی اجازت دیتا ہے۔ اگر نامزدگیوں کا طریقہ کار قانونی اور آئینی حیثیت کا تعین نہ ہو پانے کے باعث تعطل کا شکار ہو جائے تو عدالت ہذا کا ہدایتی اور احکاماتی دائرہ اختیار واحد راستہ رہ جاتا ہے اور اگر عدالت صدر کی رائے کو برقرار رکھتی ہے تو کمیشن کو تمام کارروائی از سر نو عدالت کی رائے کے مطابق کرنی ہوگی اور اگر صدر کی رائے کو برقرار نہیں رکھا جاتا تو صدر اپنی جانب سے نامزد کردہ شخص کی تقرری کر لے گا۔ لہذا میری رائے میں جناب جسٹس ریاض احمد خان ہائیکورٹ کے سینئر ترین جج ہونے کے ناطے چیف جسٹس تقرر کئے جانے کیلئے جائز امیدوار ہیں اور تقرر کی اہلیت رکھتے ہیں چہ جائیکہ کمیشن کی جانب سے اس کے برخلاف جائز توجیحات پیش کی جائیں۔