

IN THE SUPREME COURT OF PAKISTAN
(APPELLATE JURISDICTION)

PRESENT:

MR. JUSTICE TASSADUQ HUSSAIN JILLANI
MR. JUSTICE MAHMOOD AKHTAR SHAHID SIDDIQUI
MR. JUSTICE ASIF SAEED KHAN KHOSA

Civil Petition No. 1017-L of 2011

(Against the judgment dated 11.5.2011 passed by the Lahore High Court,
Multan Bench in W.P. No. 8930 of 2010)

Rana Aamer Raza Ashfaq and another

... Petitioners

VERSUS

Dr. Minhaj Ahmad Khan & another

... Respondents

For the Petitioners:

Mr. Ahmad Raza, ASC along with Sajid Iqbal in person.

For Respondent No.1:

In person

For Respondent No.2:

Mr. Nazir Ahmad Chishti, Deputy Registrar,
BZU.

On Court's Call:

Maulvi Anwarul Haq, Attorney General for
Pakistan a/w Salman Faisal, Advocate,
Syed Ali Mustafa Gillani, Advocate and
Mrs. Shafaq Mohsin, Advocate.
Khawaja Haris Ahmed, Advocate General
Punjab
Mr. Khadim Hussain Qaiser, Addl. A.G.
Punjab
Mr. Jawad Hasan, Addl. A.G. Pb.
Mr. K. K. Agha, Addl. Attorney General for Pakistan.

Date of Hearing:

19.8.2011,
14, 19 & 22.9.2011

JUDGMENT

TASSADUQ HUSSAIN JILLANI, J.- “*Good or bad*

*fortune of a nation depends on three factors; its Constitution, the
way the Constitution is made to work and the respect it inspires* .”*

The Constitution of a country is a sacrosanct document which

* George Bidault, a French intellectual and former Prime Minister.

establishes various institutions, apparatus of the government, defines the relationship between the individuals and the State, between the Federation and its Federating Units/Provinces and various organizations of the State. The judiciary is under oath to preserve and defend the Constitution under the rule of law. It does so by its power of judicial review and in the case in hand, we have been called upon to exercise it in the following set of circumstances.

2. Petitioner and respondent No.1 Dr. Minhaj Ahmad Khan applied for three posts of Assistant Professors in Computer Sciences in Bahauddin Zakariya University (hereinafter referred to as “the University”] pursuant to advertisement made by it on 11.3.2010 through newspapers and its website. They were among the nine candidates shortlisted and called for the interview on 4.8.2010. Respondent No.1 appeared before the Selection Committee but was neither interviewed nor considered. However, the petitioners were selected after the interview. He challenged this selection through a Constitution petition. In the written statement filed by the respondent-University before the High Court, the fact that respondent was the only Ph.D among the nine shortlisted candidates and more experienced was not disputed but the reason given for not considering him for the posts was that he went to France on ex-Pakistan leave for post doctoral studies though with NOC but without the permission of the competent authority therefore, the Syndicate in its meeting dated 17.2.2010 had directed an enquiry against him under the Punjab Employees Efficiency,

Discipline and Accountability Act, 2006 (PEEDA Act 2006) which was still pending. The Constitution petition was allowed by the Lahore High Court vide the impugned judgment dated 11.5.2011 on the ground that the pendency of an enquiry was no ground not to consider him. The recommendations of the Selection Board dated 8.8.2010 were declared illegal by the High Court and the respondent was directed to convene a meeting of the Selection Board and conduct interviews of the petitioner along with the shortlisted candidates afresh.

3. Seeking leave to appeal against the impugned judgment, learned counsel for the petitioners submitted that the High Court had no jurisdiction to interfere in the selection process as the employees of the University are not governed by statutory rules; that even otherwise relief could have been granted to respondent No.1 without interfering with the selection of the petitioners as there was still one post vacant; that petitioners had assumed the charge after having been selected and worked for eleven months and that their appointment has been set aside for reasons not sustainable in law. He further submitted that on account of the non-appointment of the Vice Chancellor of the University, the meeting of the Selection Board has not been convened for a denovo exercise for selection in terms of the impugned judgment and not only the petitioners are suffering but the University is partially dysfunctional on account of this inaction on the part of the Provincial Government.

4. The University has not challenged the impugned judgment. On 19.8.2011 during the course of hearing of this petition and on Court query, the Deputy Registrar of the University apprised the Court that meeting of the Selection Board to initiate the process of interviewing the shortlisted candidates afresh in terms of the impugned judgment has not been held because no Vice Chancellor has been appointed as yet; that the appointment is being delayed as the Chancellor of the University/Governor Punjab has not passed any order in this regard despite the advice having been tendered by the Chief Minister Punjab in terms of section 11(8) of the Bahauddin Zakariya University Act, 1975 [hereinafter referred to as 'the Act'].

5. Notice was issued to the learned Attorney General for Pakistan to address this Court, *inter alia*, on the following issues arising out of the petition:-

- (i) *Whether the Chancellor of the University/Governor of Punjab is bound by the advice tendered by the Chief Minister on reconsideration in view of section 11(8) of the Act read with proviso to Article 105 of the Constitution and the law declared by this Court [in the case of **Muhammad Nawaz Sharif vs. President of Pakistan and others** (PLD 1993 SC 473) and **Sindh High Court Bar Association and another v. Federation of Pakistan and others** (PLD 2009 SC 879)] and in Intra Court Appeal No. 243 and 245 of 2010, decided by the Lahore High Court, Lahore, in which the Chancellor was a party? (Emphasis is supplied)*
- (ii) *Whether the delay in appointment of the Vice Chancellor and the Pro Vice Chancellor in the University has the effect of making the Institution dysfunctional to achieve its objectives under the law?*

- (iii) *Considering the Right to Education to be a Fundamental Right, whether the same is being violated on account of delay in appointment of the institutional head of the said University?*
- (iv) *Whether the delay in appointment of the Institutional Head has the effect of impinging on the Fundamental Rights enshrined in Articles 9, 14, 18 of the Constitution?*

6. The learned Attorney General for Pakistan submitted as follows:-

- (i) that the Governor of Punjab while acting in his capacity as Chancellor under the Act as opposed to his Constitutional capacity as Governor is not bound by the advice of the Chief Minister. According to him the Governor is bound to act on the advice of the Chief Minister under Article 105 of the Constitution only if he is acting as Governor and not when he is seized of a matter as Chancellor of the University;
- (ii) that if Article 105 of the Constitution was made applicable to acts done and orders passed by the Governor under a Statute acting in a different capacity, it would deprive him of any discretionary and independent decision making power under the Act and make the relevant Statute redundant qua his role;
- (iii) that a distinction has to be made in the functions of the Governor when he acts under the Constitution in

terms of its Article 105 and in cases when he acts under the Statute in different capacities i.e. Chancellor;

- (iv) that the powers of the President under Article 48(1) and (2) are comparable with that of the Governor in a Province in terms of latter's powers under Article 105(1). This Court in Al-Jehad Trust v. Federation of Pakistan (PLD 1997 SC 84 at 93 to 95) has dilated upon matters/Articles of the Constitution where the President is bound by the advice and where he can act in his discretion. This distinction has to be kept in view in the case of Governor as well;
- (v) that the advice of the Prime Minister is binding on President in some cases under the Constitution, whereas when the latter is acting under a Statute, he has discretionary powers to act. The afore-referred judgment does not lay down that President/Governor while performing functions in different capacities under a Statute, will be bound by the mandate of Article 48(1) and Article 105 of the Constitution respectively;
- (vi) that section 11(8) of the Act inserted through an amendment has incorporated Article 105 of the Constitution into the Act and this inserted provision applies to the functions of the Chancellor in respect

of those matters set out in section 11 only and not those set out in section 14 of the said Act;

- (vii) that while interpreting section 11(8) of the Act, this Court has to keep in view the decision taken by the Chancellors' Committee in its meeting held on 11th of May, 2006 under the chairmanship of President of Pakistan, para-7 of which unequivocally vests the power for appointment of Vice Chancellor in the Chancellor. The said para reads as follows:-

“7. Vice Chancellors of all Provincial Public Universities should be appointed after advertisement through a search committee process. The search Committee will be required to put up a panel of 3 names for approval of the Chancellor from whom the Vice Chancellor may be selected.”

- (viii) that in the present case the above mentioned decision was followed. An advertisement was placed and the Search Committee recommended three names from which the Governor in his capacity as Chancellor, not Governor, selected one, in his discretion and gave credible reasons for his selection. This is fully in line with the scheme envisaged by the Act under section 14 and the law on the exercise of discretion;
- (ix) that in any event section 11(8) is wholly out of place in the Act and is contrary to the scheme of the Act. It

is entirely inappropriate to incorporate a Constitutional provision into an ordinary piece of legislation which is relatable to the functions of the Governor under the Constitution rather than a Statute. Its incorporation can therefore be regarded as redundant vis-à-vis the working of the Act; and

- (x) that it is notable that when the Chief Minister ignored the summary by not recommending the first of the three in order of merit on the Search Committee's list and interviewed only two of the three candidates, he gave no reasons as to why he preferred candidate No. 2 over candidate No. 1 or 3. On the other hand, the Chancellor/Governor interviewed all the three candidates selected by the Search Committee. After careful examination of their comparative merit, he considered Dr. Muhammad Zafar Ullah as the best of the lot which is not open to exception.

7. Learned Advocate General Punjab, on the other hand, submitted as follows:-

- (i) that refusal of Governor of Punjab to appoint Professor Dr. Syed Khawaja Alqama and instead appointing Prof. Dr. Muhammad Zafar Ullah is not tenable in law: first because in terms of section 11(8) of the Act read with Article 105 of the Constitution, the Chancellor can only refer the matter back to the

Chief Minister once for re-consideration, but when the said advice is re-tendered by the Chief Minister, the Governor has no option but to act in accordance therewith within ten days;

- (ii) that neither the Constitution nor the law permits him to sit in judgment over the advice of the Chief Minister and the law does not empower him to override the said advice;
- (iii) that the provisions of section 11(8) of the Act are based on the principle embodied in Article 105 of the Constitution and cannot be termed to be violative of Article 9, 14, 18 and 25 as contended in the written statement filed by the Attorney General;
- (iv) that the decision of the Second Chancellors' Committee meeting dated 11.5.2006 cannot in any manner override a statutory provision contained in section 11(8) of the Act;
- (v) that the argument that Governor in his capacity as Chancellor is not performing the Constitutional functions and therefore is not bound by the advice completely ignores that Article 105 of the Constitution was inserted in the Act by legislative reference to which no exception can be taken and the advice of the Chief Minister with reference to section 11(8) of the Act is binding in the same

manner on the Chancellor as the advice of the Chief Minister on the Governor because Article 105 of the Constitution is in *pari materia* to section 11(8) of the Act;

- (vi) that the Chief Minister was not bound to interview Dr. Muhammad Zafar Ullah though he was amongst the three recommended by the Search Committee for the slot of Vice Chancellor because first Dr. Muhammad Zafar Ullah was placed at No.3 in the list of candidates recommended by the Search Committee and, as such, it was the prerogative of the Chief Minister whether to call him for interview or not; and, second there was sufficient information available with the Chief Minister that the conduct of Dr. Muhammad Zafarullah had not been above board, and that he had been undergoing a number of inquiries during his previous tenure as the Vice Chancellor of the University; and
- (vii) that the Vice Chancellor is the academic head of the university and enjoys a pivotal position in various domains of the functioning of the University under the Statute. The delay in the appointment of Vice Chancellor is adversely affecting the functioning of the university and may have a negative effect on the fundamental right of Right to Education of the

students. According to him, the Vice Chancellor of the University is head of the Senate which passes the annual statement of accounts and revised budgets; that he appoints members of the Syndicate; he convenes meeting of the Syndicate being its Chairman; he is head of the Academic Council; he in his capacity as Head of Board of Studies has to coordinate publication, research work, assigning subject to each faculty and convenes the meeting of the Selection Board which fills various posts in the University.

8. We have considered the submissions made and have gone through the precedent case law to which reference has been made above.

9. The issues mentioned in Para-5 above have nexus and are being dilated upon together.

10. The role and functions of the Chancellor under the Act have been delineated in various provisions of the Act. In terms of its section 11(1), the Governor Punjab is the *ex officio* Chancellor of the University; Under section 11(2), he or his nominee presides over the Convocation of the University and the meeting of Senate; he has the power to issue show cause to an Authority functioning under the Act for annulling any proceedings which are violative of the Act, the Statute, the Regulations or the Rules framed under the Act [Section

11(3)]; he confirms conferral of an honorary degree on any one [Section 11(4)]; he issues assent to Statutes which are to be submitted to him by the Senate [Section 11(5)]; and he has the power to remove any one from membership of any Authority under the Act for reasons given in sub-section (6) of Section 11. Sub-section (8) of section 11 mandates that “in performance of his functions under the Act the Chancellor shall act and be bound in the same manner as the Governor of the Province acts and is bound under Article 105 of the Constitution of the Islamic Republic of Pakistan.” (Emphasis is supplied). He has the revisional powers (Section 11-A), powers of visitation and inspection (Section 12), power to appoint Vice Chancellor on such terms and conditions as he may determine, and he has the power to appoint Pro Vice Chancellor (section 15).

11. Sub-section (8) of Section 11 of the Act referred to above was inserted along with certain other amendments by the Multan University (Amendment) Act, 1975 (Punjab Act No. XIX of 1975, Section 2). The declared object and reasons for this amendment were as follows:-

“it is also imperative that in order to preserve the academic atmosphere of the Universities, there should be effective machinery to regulate the conduct and behaviour of all people engaged in the instruction of the youth of the country.”

12. A perusal of the Statutes relating to some other Universities in Punjab indicate that similar amendments were brought about in following Universities:-

S.No.	Description	Amendment	Reasons and Objects
1.	The University of the Punjab (Second Amendment) Bill, 1975	In Section 11 after sub-section (7), sub-section (8) was added. (8) In the performance of his functions under the Act the Chancellor shall act and be bound in the same manner as the Governor of a Province acts and is bound under Article 105 of the Constitution of the Islamic Republic of Pakistan. (Emphasis is supplied)	It is necessary that principles of good Government as enunciated in the Constitution should be made applicable as widely as possible. It is, therefore, necessary to amend the law on the subject.
2.	The University of Agriculture Lyallpur (Second Amendment) Bill, 1975.	In Section 11 after sub-section (7), sub-section (8) was added. (8) In the performance of his functions under the Act the Chancellor shall act and be bound in the same manner as the Governor of a Province acts and is bound under Article 105 of the Constitution of the Islamic Republic of Pakistan. (Emphasis is supplied)	It is necessary that principles of good Government as enunciated in the Constitution should be made applicable as widely as possible. It is, therefore, necessary to amend the law on the subject.
3.	The Islamia University of Bahawalpur (Amendment) Bill, 1975	In Section 11 after sub-section (7), sub-section (8) was added. (8) In the performance of his functions under the Act the Chancellor shall act and be	It is necessary that principles of good Government as enunciated in the Constitution should be made applicable as widely as possible. It is, therefore,

		<u>bound in the same manner as the Governor of a Province acts and is bound under Article 105 of the Constitution of the Islamic Republic of Pakistan. (Emphasis is supplied)</u>	necessary to amend the law on the subject.
4.	The Government College University, Lahore (Amendment) Bill, 2003	<p>In Section 9 after sub-section (6), sub-section (7) was added.</p> <p>(7) <u>In the performance of his functions under the Act the Chancellor shall act and be bound in the same manner as the Governor of a Province acts and is bound under Article 105 of the Constitution of the Islamic Republic of Pakistan. (Emphasis is supplied)</u></p>	As the Chief Minister is the executive head of the Province, the Governor in his capacity as Chancellor of the University shall act on his advice. The Minister for Education, Punjab should act as Pro-Chancellor of the University and in order to create academic freedom for the University and to help it function smoothly representation of the Members of the Provincial Assembly in the Syndicate should be made. Therefore, the Government of Punjab has decided to amend the Government College University Lahore Ordinance, 2002 (XLVIII of 2002).
5.	The University of Education, Lahore (Amendment) Bill 2003	<p>In section 10, after sub-section 6, sub-section 7 was added.</p> <p>(7) <u>In the</u></p>	As the Chief Minister is the executive head of the Province, the Governor in his

		<u>performance of his functions under the Act the Chancellor shall act and be bound in the same manner as the Governor of a Province acts and is bound under Article 105 of the Constitution of the Islamic Republic of Pakistan. (Emphasis is supplied)</u>	capacity as Chancellor of the University shall act on his advice. The Minister for Education, Punjab should act as Pro-Chancellor of the University and in order to create academic freedom for the University and to help it function smoothly representation of the Members of the Provincial Assembly in the Syndicate should be made. Therefore, the Government of Punjab has decided to amend the University of Education, Lahore Ordinance, 2002 (L of 2002).
6.	The University of Sargodha (Amendment) Bill, 2003	<p>In section 9, after sub-section (6), sub-section (7) was added.</p> <p>(7) <u>In the performance of his functions under the Act the Chancellor shall act and be bound in the same manner as the Governor of a Province acts and is bound under Article 105 of the Constitution of the Islamic Republic of Pakistan. (Emphasis is supplied)</u></p>	As the Chief Minister is the executive head of the Province, the Governor in his capacity as Chancellor of the University shall act on his advice. The Minister for Education, Punjab should act as Pro-Chancellor of the University and in order to create academic freedom for the University and to help it function smoothly representation of the Members of

			the Provincial Assembly in the Syndicate should be made. Therefore, the Government of Punjab has decided to amend the University of Sargodha Ordinance, 2002 (LXXX of 2002).
7.	The University of Engineering & Technology Taxila (Amendment) Bill 2003	In Section 9, after sub-section (5), sub-section (6) was added. (6) <u>In the performance of his functions under the Act the Chancellor shall act and be bound in the same manner as the Governor of a Province acts and is bound under Article 105 of the Constitution of the Islamic Republic of Pakistan. (Emphasis is supplied)</u>	As the Chief Minister is the executive head of the Province, the Governor in his capacity as Chancellor of the University should act on his advice. Government of the Punjab has therefore, decided to amend the University of Engineering and Technology, Taxila Act, 1994 (XII of 1994).
8.	The Fatima Jinnah Women University, Rawalpindi (Amendment) Bill 2003	In Section 8, after sub-section 6, sub-section 7 was added. (7) <u>In the performance of his functions under the Act the Chancellor shall act and be bound in the same manner as the Governor of a Province acts and is bound under Article 105 of the Constitution of the Islamic Republic of Pakistan. (Emphasis</u>	As the Chief Minister is the executive head of the Province, the Governor in his capacity as Chancellor of the University should act on his advice. Government of the Punjab has therefore, decided to amend the Fatima Jinnah Women University, Rawalpindi Ordinance, 1999 (XLIII of 1999).

		is supplied)	
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13. There is no cavil to the proposition as canvassed by the learned Attorney General for Pakistan, Moulvi Anwarul Haq that there are matters/Articles where the President or the Governor, subject to Constitution, may act in their discretion. But those matters are not an issue before this Court and the attempt to extend the discretionary domain to the issue in hand has not been found by us to be backed by law. Here we are seized of giving effect to a Statute which incorporates a Constitutional provision by reference. In construing such a piece of legislation, the Court has to examine and keep in mind three things: (i) the Statement of Reasons and Objects given therein; (ii) the statement of objects given in other laws in *pari materia* to the one under consideration; and (iii) the mandate of the Constitutional provision which stands adopted by way of reference.

14. A bare perusal of the statement of objects of the similar amending provisions in various Universities of Punjab, a detail of which has been given in the table above, reflects that the legislative intent was that “*the principles of good government as enunciated in the Constitution should be made applicable*” (The University of the Punjab Second Amendment Bill, 1975) or “*as the Chief Minister is the executive head of the Province, the Governor in his capacity as Chancellor of the University shall act on his advice*” [The Government College University, Lahore (Amendment) Bill 2003]. These amendments insert in the Statutes an important principle of

Parliamentary Democracy enshrined in Article 105 of the Constitution which *inter alia* mandates that (at the Provincial level) “*subject to Constitution, in the performance of his functions, Governor shall act [on and] in accordance with the advice of the Cabinet [or the Chief Minister].*”

15. The Constitutional intent and mandate of Article 48 and Article 105 are one of the foundational values of our Constitutional scheme. The Constitution of Islamic Republic of Pakistan underpins a system of Federal Parliamentary Democracy. The Governor of a Province under the Constitution enjoys an exalted position—he is a nominee of the President and a symbol of Federation in the Province, whereas the Chief Minister is the Chief Executive of the Province and is elected by the Provincial Assembly. Except otherwise so provided under the Constitution, the President and Governor are bound by the advice tendered by the Prime Minister and the Chief Minister respectively and in the manner as provided in the afore-referred provisions of the Constitution. The Governor while acting as Chancellor is a statutory functionary. By specific mention of Article 105 of the Constitution in section 11(8) of the Act and in laying down that, “*in the performance of his functions under the Act, the Chancellor shall act and be bound in the same manner as the Governor of a Province acts and is bound under Article 105 of the Constitution of Islamic Republic of Pakistan*”, the Legislature has blended the same value of supremacy of the Parliament/Provincial Assembly which underlie the adopted Constitutional provision.

16. The insertion of sub-section (8) in section 11 of the Act and similar provisions in Statutes of other Universities are instances of referential legislation which is a common device to incorporate earlier statutory provisions by reference rather than setting out similar provisions in totality. Such a legislation is as old as the Latin maxim *Verba relata hoc maxime operantur per referentiam ut in eis inesse videntur* i.e. words to which reference is made in an instrument have the same effect and operation as if they were inserted in the clause referring to them.

17. Referential legislation broadly is of two kinds i.e. either a specific provision of a certain Act is incorporated into another Statute or the provision of a certain Statute is incorporated by a general reference. Laws including the adopted provisions do not remain static and issues crop up when the adopted provisions are amended in the earlier Statute. The question whether subsequent amendments in such adopted provisions either by specific incorporation or by a general reference would be *ipso facto* read into the latter has been a subject of judicial comment. In Bajaya vs Gopikabai And Anr. (AIR 1978 SC 793), the Court was of the view as follows:-

Broadly speaking, legislation by referential incorporation falls in two categories : First, where a statute by specific reference incorporates the provisions of another statute as of the time of adoption. Second, where a statute incorporates by general reference the law concerning a particular subject, as a genus. In the case of the

former, the subsequent amendments made in the referred statute cannot automatically be read into the adopting statute. In the case of latter category, it may be presumed that the legislative intent was to include all the subsequent amendments also, made from time to time in the generic law on the subject adopted by general reference. This principle of construction of a reference statute has been neatly summed up by Sutherland, thus :

A statute which refers to the law of a subject generally adopts the law on the subject as of the time the law is invoked. This will include all the amendments and modifications of the law subsequent to the time the reference statute was enacted.

(Vide, Sutherland's Statutory Construction, Third Edition, Article 5208, page 5208).

Corpus Juris Secundum also enunciates the same principle in these terms :

...Where the reference in an adopting statute is to the law generally which governs the particular subject, and not to any specific statute or part thereof,...the reference will be held to include the law as it stands at the time it is sought to be applied, with all the changes made from time to time, at least as far as the changes are consistent with the purpose of the adopting statute."

18. In a rather instructive judgment of the Lahore High Court in Pakistan International Airlines Corporation v. Chairman,

Punjab Labour Appellate Tribunal, Lahore (PLD 1979 Lahore 415),

the rule of interpretation in this context was summed up as follows:-

“37. The rule of interpretation to be inferred from all the references quoted above is:

(a) When a statute adopts a part or all of another statute by specific or descriptive reference the, adoption takes the statute as it exists at that time and the adopted , provisions with necessary adaptations if any became a part of the adopting statute as if it was written down in it;

(b) any subsequent addition to or modification of the adopted statute, can be included in the - adopting statute only if so expressly or impliedly provided in the adopting statute;

(c) When particular sections of an earlier statute are expressly incorporated into a later statute the other sections of the earlier statute may be referred to in order to resolve any ambiguity or obscurity that may arise in its interpretation of that section;

(d) When the adopting statute refers to law generally which governs a particular subject, the reference in such a case includes not only the law in force at the date of adopting act but all subsequent laws on the particular subject referred to, in so far as they are consistent with the adopting law;

(e) When Legislature in adopting the procedural provisions of another Act, made substitutions in certain instances, it will be inferred that in matters not specified no substitutions were intended.”

19. In a recent judgment of the Supreme Court of India dated 11.1.2011 passed in M/s Girnar Traders v. State of Maharashtra & Ors (Civil Appeal No. 3703 of 2003 & Civil Appeal

No. 292 of 2011), a similar view was taken and it was held as follows:-

“Reference to an earlier law in the latter law could be a simple reference of provisions of earlier statute or a specific reference where the earlier law is made an integral part of the new law, i.e., by incorporation. In the case of legislation by reference, it is fictionally made a part of the latter law. We have already noticed that all amendments to the former law, though made subsequent to the enactment of the latter law, would ipso facto apply and one finds mention of this particular aspect in Section 8 of the General Clauses Act, 1897. In contrast to such simple reference, legal incidents of legislation by incorporation is that it becomes part of the existing law which implies bodily lifting provisions of one enactment and making them part of another and in such cases subsequent amendments in the incorporated Act could not be treated as part of the incorporating Act. Ultimately, it is the expression and/or the language used in the new law with reference to the existing law that would determine as to under what class of referential legislation it falls.”

20. The effect of this referential legislation [Section 11(8) of the Act] would be that any Constitutional amendment made in the said Article would be read into the amended provision of the Act. Consequently the amendments brought about in Article 105 of the Constitution by virtue of the 18th Amendment (Act X of 2010) would be fully applicable. Article 105 as amended reads as follows:-

“105. Governor to act on advice, etc.—(1)
Subject to Constitution, in the performance of his

functions, Governor shall act [on and] in accordance with the advice of the Cabinet [or the Chief Minister]:

[Provided that [within fifteen days] the Governor may require the Cabinet or, as the case may be, the Chief Minister to reconsider such advice, whether generally or otherwise, and the Governor shall [,within ten days,] act in accordance with the advice tendered after such reconsideration.]
(Emphasis is supplied).

(2) The question whether any, and if so what, advice was tendered to the Governor by the Chief Minister [or Cabinet] shall not be inquired into in, or by, any court, tribunal or other authority.

[(3)

(a)

(b)

(5) The provisions of clause [(2)] of Article 48 shall have effect in relation to a Governor as if reference therein to "President" were reference to "Governor".]

21. The principle of Parliamentary Democracy or supremacy of the Parliament which underlie the afore-mentioned provision is also reflected at the Federal Level in Article 48(1) of the Constitution qua the binding nature of the advice tendered by the Prime Minister to the President and has time and again been highlighted by this Court. In a seminal judgment titled as Mian Muhammad Nawaz Sharif v. President of Pakistan (PLD 1993 SC 473 at 567), it was held as follows:-

"Our Constitution, in fact, is designed to create a parliamentary democracy. The President in this set-up is bound to act, in the exercise of his functions, in accordance with the advice of the Cabinet or the Prime Minister [Article 48(1)] and the Cabinet in its turn is collectively responsible to

the National Assembly [Article 91(4)] though the Prime Minister holds office at the pleasure of the President. However, the President cannot remove him from his office as long as he commands the confidence of the majority of the members of the National Assembly [Article 91(5)]. In view of these provisions, the system of Government envisaged by the Constitution of 1973 is of the Parliamentary type wherein the Prime Minister as Head of the Cabinet is responsible to the Parliament, which consists of the representatives of the nation.

It is manifest, therefore, that in the scheme of our Constitution the Prime Minister in administering the affairs of the Government is neither answerable to the President nor in any way subordinate to him. In formulation of the policies of his Government and in the running of its affairs, the Prime Minister is answerable only to the National Assembly and not to the President. Indeed, it is the President who is bound by the advice of the Prime Minister or the Cabinet in all matters concerning formulation of policies and administration of the affairs of the Government and not the other way about, as appears to have been mistakenly understood. Undoubtedly, the President may require the Cabinet or the Prime Minister, as the case may be, to reconsider any advice tendered to him but the President is bound to act on the advice tendered, even if it be the same, after consideration. Undoubtedly, both are expected to work in harmony and in close collaboration for the efficient running of the affairs of the State but as their roles in the Constitution are defined, which do not overlap, both can exercise their respective functions unhindered and without bringing the machinery of the Government to a standstill. Despite personal likes or dislikes, the two can co-exist Constitutionally. Their personal likes or dislikes are irrelevant so far as the discharge of their Constitutional obligations are concerned. Despite personal rancour, ill-will and incompatibility of temperament, no deadlock, no stalemate, no breakdown can arise if both act in accordance with the terms or the Oath taken -by them, while accepting their high office. They have sworn:

.not to allow their personal interest to influence their official conduct or their official decisions."

And taken Oath:

"to do right in all circumstances, to all manner of people, according to law, without fear or favour, affection or ill-will."

22. In yet another Full Court judgment of this Court in Sindh High Court Bar Association v. Federation of Pakistan (PLD 2009 SC 879), the Hon'ble Chief Justice of Pakistan, Mr. Justice Iftikhar Muhammad Chaudhry, speaking for the Court, reiterating the ratio laid down in Al-Jehad Trust v. Federation of Pakistan (PLD 1997 SC 84), observed as follows:-

"198. In Al-Jehad Trust v. Federation of Pakistan (PLD 1997 SC 84), it was held that in respect of appointments of Judges as contemplated under Articles 177 and 193 of the Constitution, advice of the Cabinet or Prime Minister under Article 48(1) would be attracted, but the same would be further qualified by, and subject to the ratio decidendi of the judgment passed in Al-Jehad Trust v. Federation of Pakistan (PLD 1996 SC 324). Following the principles enunciated in the aforesaid two judgments, it is declared that in the matter of appointment of Judges of the High Courts, the Governor could act only on the advice of the Chief Minister in terms of Article 105 of the Constitution. In this view of the matter, the fact that the recommendations of the Governor in the case of the respondents Nos. 3 and 4 acting otherwise than on the advice or in absence of the advice of the Chief Minister were invalid even though the same coincided with the recommendation of Abdul Hameed Dogar, J."

23. In a recent case pertaining to appointment of Vice Chancellor of Government College University, Faisalabad, a learned Division Bench of the Lahore High Court in Intra Court Appeal Nos.

243 and 245 of 2010 has already held that the Chancellor of the University/Governor of Punjab is bound by the advice tendered by the Chief Minister qua appointment of Vice Chancellor. In this judgment, the Chancellor/Governor of the Punjab was a party and the judgment has attained finality and it was not interfered with by this Court.

24. In the instant case, the Chief Minister of Punjab having received a panel of three candidates recommended by the Search Committee advised the Governor of Punjab vide Summary dated 25.6.2011 to appoint Dr. Syed Khawaja Alqama as Vice Chancellor of the University. The summary reads as follows:-

“Chief Minister, after interviewing the first two candidates on the panel recommended by the Search Committee, is of the view that Dr. Syed Khawaja Alqama s/o Khawaja Khair-ud-Din is more suitable for appointment as Vice Chancellor, Bahauddin Zakariya University, Multan and has been pleased to advise the Governor/Chancellor in terms of section 14 and section 11(8) of the Bahauddin Zakariya University, Multan Act, 1975 read with Article 105 of the Constitution of the Islamic Republic of Pakistan to appoint Dr. Syed Khawaja Alqama as Vice Chancellor of the said University for a term not exceeding four years.”

25. The Chancellor of the University/Governor of Punjab instead of acting on the advice tendered by the Chief Minister, or sending it back to him for reconsideration in terms of Article 105(1) of the Constitution, himself interviewed the panel of three candidates (selected by the Search Committee) and sent a memo to the Chief Minister on 7.7.2011 in purported exercise of appointing Dr.

Muhammad Zafarullah as the Vice Chancellor and gave his own reasons which *inter alia* are as follows:-

- (i) *The amended provision in Sub Section 8 of Section 11 would itself be void under Article 8 of the Constitution impinging upon the Fundamental Rights of Articles 9, 14, 18 and 25 of the Constitution of the Islamic Republic of Pakistan and hence, by virtue of inbuilt mandate of the Constitution, the extent of such inconsistency (Sub Section 8), the amending Act would be void and non-operative, ineffective and liable to be declared accordingly by the Judicial for a causing embarrassment to the Government.*
- (j) *As per prevailing position in the Federally Chartered Public Sector Universities, the Head of the State as Chancellor appoints the Vice Chancellors at his discretion. Similarly in the other Provinces, Constitutional Heads of the Provinces exercise such powers in their capacity as Chancellors without the advice of the Chief Ministers. This is also reflected from the decision of the 2nd Chancellors Committee meeting held on 11.05.2006, as indicated at Para 1 ante. Accordingly, the affairs of the Universities including appointment of Vice Chancellors of the Public Sector Universities in Punjab are also the sole prerogative of the Governor/Chancellor, to maintain parity in line with the Federation as well as other Provinces. As also to sustain educational excellence through integrated expansion of curricula, disciplines, policies in tune with national aspirations and international accreditation, a cohesive uniformity is imperative and consistent with the propounded exposition.*

In view of the above, I, in exercise of the powers vested in me, in my capacity as Chancellor, under Section 14(1) of the Bahauddin Zakariya University Act, 1975, hereby appoint Prof. Dr. Muhammad Zafarullah as Vice Chancellor, Bahauddin Zakariya University, Multan, for a period of four years, with immediate effect.”

26. The procedure adopted by the Chancellor/Governor of Punjab for purported appointment of Prof. Dr. Muhammad Zafarullah is not countenanced in section 11(8) of the Act read with Article 105(1) of the Constitution. The only option which the Chancellor had under the afore-referred provision is given in proviso to Article 105 of the Constitution which mandates, “provided that [within fifteen days] the Governor may require the Cabinet or, as the case may be, the Chief Minister to reconsider such advice, whether generally or otherwise, and the Governor shall [within ten days] act in accordance with the advice tendered after such reconsideration” (emphasis is supplied). The timeline given in Article 105 of the Constitution within which the Governor is to act, is intended to avoid deadlock and friction between the two Constitutional functionaries. The Chancellor’s summary reflects a lack of understanding of both the legal and Constitutional provisions which regulate the powers of the Chancellor of the University. The mandate of law cannot be frustrated. We, therefore, hold that the summary sent by the Chancellor to appoint a person of his choice as Vice Chancellor against the advice tendered by the Chief Minister (recommending Prof. Dr. Syed Khawaja Alqama as Vice Chancellor of the University) be treated as a reference for reconsideration by the Chief Minister and the letter of the Chief Minister holding that the Chancellor’s attempt to appoint a person of his choice was violative of section 11(8) of the Act read with Article 105(1) of the Constitution,

reiterating the earlier advice for appointment of Prof. Dr. Syed Khawaja Alqama as Vice Chancellor, shall be deemed to be the advice of the Chief Minister after reconsideration and shall be given effect to accordingly. The said summary/advice reads as follows:-

“Chief Minister has seen and has observed as under:-

The purported powers claimed by the Governor in his capacity as Chancellor and the consequent “appointment” of Dr. Muhammad Zafarullah, as Vice Chancellor, Bahauddin Zakariya University, Multan, claimed to have made by him, have no legal or constitutional basis. Nor does the Chancellor have the authority to arrogate to himself the power to sit over the judgment of the Chief Minister, inter alia, in the matter of advice given by him in the context of Section 14(1) read with Section 11(8) of Bahauddin Zakariya University Act, 1975.

Accordingly, the purported appointment of Dr. Muhammad Zafarullah, in disregard of the advice of the Chief Minister (para 9/ante), is illegal, void ab initio and of no legal effect in view of Section 14(1) and Section 11(8) of the Bahauddin Zakariya University, Multan Act, 1975, read with Article 105 of the Constitution and the legal opinion at Annex-K (paras 18 and 26). Be that as it may, considering the observations of the Chancellor as a referral for reconsideration, particularly in view of the contents of para 11(a) to (e) supra, the Chief Minister, after thoroughly examining the case from all conceivable angles, is pleased again to advise the Chancellor to appoint Dr. Syed Khawaja Alqama as Vice Chancellor of the said University for a term of four years.

The case may be placed before the Chancellor accordingly.”

Sd/-
(Abdul Qayoum)

*Additional Secretary
Chief Minister's Secretariat*

27. The afore-mentioned summary/advice by the Chief Minister after reconsideration is dated 11.7.2011. More than three months have gone by, although the timeline provided under Article 105 of the Constitution is ten days within which the Chancellor was to act on the advice. The lack of appreciation reflected in the summary of the Chancellor/Governor of Punjab of the mandate of law can neither be permitted to frustrate the legislative intent, nor the university's disarray can be allowed to remain unchecked.

28. In the afore-referred circumstances, we further hold that the summary dated 11.7.2011 sent after reconsideration by the Chief Minister shall be deemed to have been acted upon and the department concerned shall issue the requisite notification accordingly.

29. It is imperative to remind ourselves particularly those who are under Oath, *"to defend and protect"* the Constitution that in terms of Article 5(2), *"obedience to the Constitution and law is the [inviolable] obligation of every citizen wherever he may be and of every other person for the time being within Pakistan."* A Constitutional provision which is time bound is always mandatory unless the context otherwise provides so. The provisions of Article 254 of the Constitution i.e. *"failure to comply with requirement as to time does not render an act invalid"* are not intended to condone non-compliance of a mandatory and time bound provision, rather are

meant to save the action taken belatedly. In the instant case, we are not dealing with a delayed act but a failure to act as mandated by the Constitution.

30. We may add that prior to Eighteenth Amendment [brought about by Constitution (Eighteenth Amendment) Act, 2010 (Act No. X of 2010)], no timeline was provided within which the President was to act under the advice of the Prime Minister (Article 48) or the Governor was to act on the advice of the Chief Minister (Article 105). The absence of timeline could be problematic. It was vulnerable to misuse, had the potential to cause delay in decision making and to impede the working of two elected office holders enjoying majority in respective Assemblies i.e. the Prime Minister at the Federal Level and the Chief Minister at the Provincial Level. This could have a destabilizing effect on democracy. It goes to the eternal credit of those who amended these provisions by the Eighteenth Amendment that the options available to the two important Constitutional functionaries i.e. the President (under Article 48) and the Governor (under Article 105) were made time bound. Although the consequences of non-compliance with these timelines are not provided in the amended provisions, yet this Court has to give a purposive interpretation to make the Constitution a living document. One may imagine the consequences on the affected institutions, if the legislative intent is not given effect to. Unfortunately one of our national banes has been that we tend to live in history but do not learn from it. Friction between the President and the Prime Minister

[with reference to enforcement of Article 48(1) of the Constitution] or between the Governor and the Chief Minister [with reference to Article 105(1) of the Constitution] has been a recurrent theme of our Constitutional history and one of the causes of political instability. Societies grow and nations progress by strict adherence to the rule of law. Judges have nothing to do with shades of public opinion which the holders of public office may represent or with the passions of the day which sway public opinion. Their task is to tenaciously and fiercely uphold and implement the Constitution and the law. In the words of Lord Justice Lawton:-

“Their function is to decide whether a minister has acted within the powers given to him by statute or the common law. If he is declared by a court, after due process of law, to have acted outside his powers, he must stop doing what he has done until such time as Parliament gives him the powers he wants. In a case such as this I regard myself as a referee. I can blow my judicial whistle when the ball goes out of play; but when the game restarts I must neither take part in it nor tell the players how to play².”

31. Blowing a “judicial whistle” is a Constitutional mandate which a Judge can neither shun when it is time to blow, nor can do so without a just cause.

32. The deadlock between two important holders of public offices evidenced in this case is not merely a political issue. It has wider ramifications which may not be difficult to fathom. It is adversely affecting the working of various institutions and in this

² Laker Airways v. Deptt. Of Trade, 1977 (2) WLR 234 at 267.

particular case an important educational institution i.e. the University and consequently the quality of education.

33. Right to education is a fundamental right as it ultimately affects the quality of life which has nexus with other Fundamental Rights guaranteed by the Constitution under Article 4 and 9 of the Constitution of Islamic Republic of Pakistan. Awareness of rights and duties, growth of civic consciousness in a society, enjoyment of Fundamental Rights guaranteed under the Constitution and legal empowerment of people depend to a great extent on the quality of education. People cannot be free in the real sense unless they are properly educated. In Ahmed Abdullah v. Government of the Punjab (PLD 2003 Lahore 752 at 791), a case decided by a Full Bench of the Lahore High Court and wherein one of us (Tassaduq Hussain Jillani, J.-) authored the judgment, it had been held as under:-

26. The fundamental right of "right to life" recognized in the entire civilized world and enshrined in Article 9 of our Constitution has been given expanded meaning over the years. With the passage of time the role of the State has become more pervasive. Its actions, policies and laws affect the individuals in a variety of ways and the Courts have accordingly given a more comprehensive and dynamic interpretation of the fundamental rights including the right to life. Right to life is no longer considered as merely a right to physical existence or a right not to be deprived of life without due process of law. It means a sum total of rights which an individual in a State may require to enjoy a dignified existence. In modern age a dignified existence may not be possible without a certain level of education and the State has to play a role in ensuring by positive action that the citizens enjoy this right. In Brown v. Board of Education (1953) 98 Law Ed. 873, the

US Supreme Court acknowledged this right and held as under:--

*"Today, education is perhaps the most important function of State and Local Governments
.. it is required in the performance of our most basic responsibilities, even service in the Armed Forces, it is the very foundation of good citizenship. Today, it is the principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment'. In these days, it is doubtful and child may reasonably be expected to succeed in life if he is denied the opportunity of an education.
"*

34. Universities are seats of learning and centres of excellence. They not only enable the future generations to equip themselves with degrees/practical tools to earn livelihood, but also enrich them with learning, with wisdom and with visions for practical lives. To achieve its objects, the University functions besides the Chancellor and Vice Chancellor through its various institutions i.e. the faculty, the Senate, the Syndicate and Board of Studies. The Vice Chancellor is its institutional head and enjoys a pivotal position. Being the executive and academic head of the University, it is for him to ensure that the University's Statute, Regulations and Rules are faithfully observed. He presides over the meetings of various bodies of the University and affiliated colleges. In matters of urgent nature, it is he who takes remedial steps; it is he who creates temporary posts when the urgency requires; he sanctions expenditures provided for in the approved budget, re-appropriates amounts not exceeding a certain amount; he convenes meetings of

the Senate and the Syndicate. He is the bridge between the executive and academic wings of the University. It is this multi-dimensional role of the Vice Chancellor which requires that the person who occupies this office should be imbued with values and character traits of integrity, of academic excellence and administrative ability. It is because of this that the search for Vice Chancellor the world over has been an exercise driven by higher principles. In our own country, the University Grants Commission has laid down a procedure for appointment of Vice Chancellor which *inter alia* requires the constitution of a Search Committee. The said Search Committee comprises of eminent individuals having distinction in various disciplines. The Search Committee is to recommend a panel of three candidates out of which the competent authority has to appoint one as Vice Chancellor.

35. The afore-referred description of the role of the Vice Chancellor under the Act would show how the delay in appointment of such an important functionary would adversely affect the working of the University and would make the institution almost dysfunctional and would thereby adversely affect *inter alia* the quality of education.

36. Adverting to the validity of the judgment under challenge, the submissions of petitioners' learned counsel qua the maintainability of petition before the High Court have been considered by us. However, we find that the impugned judgment even if having some element of jurisdictional defect has been passed in aid of justice and any interference would not be in accord

with the canons of equity. Because respondent No.1's grievance was that the principles of natural justice and due process had been violated when he was called for the interview but not considered. It is not denied that in terms of the qualifications prescribed as reflected in advertisement, respondent No.1 was qualified to compete for the post in question and the only Ph.D. in the subject among the shortlisted candidates. He was sent a letter to appear for interview, was called in on the day of interview by the Selection Committee but was not put any question and practically was not interviewed. In the minutes of the Selection Committee, no reason was recorded as to why he was not interviewed nor any reason was conveyed to him. The plea taken by the respondent-University before the Court that the Committee did not deem it proper to interview him because an enquiry was pending appears to be an afterthought and even otherwise in absence of any penalty, he could not have been condemned. In refusing to interview respondent No.1 without assigning any reason, the Selection Committee acted arbitrarily in the exercise of the discretion vested in it. Dilating on the principles which weigh with the courts while exercising the power of judicial review, S.A. de Smith in his book 'Judicial Review of Administrative Action' (3rd Edition) at page 452 adverts to this aspect as follows:-

"The relevant principles formulated by the Courts may be broadly summarised as follows. The authority in which a discretion is vested can be compelled to exercise that discretion, but not to exercise it in any particular manner. In general, a discretion must be exercised only by the authority to which it is committed. That authority must

genuinely address itself to the matter before it: it must not act under the dictation of another body or disable itself from exercising a discretion in each individual case. In the purported exercise of its discretion it must not do what it has been forbidden to do, nor must it do what it has not been authorised to do. It must act in good faith, must have regard to all relevant considerations (emphasis supplied) and must not be swayed by irrelevant considerations, must not seek to promote purposes alien to the letter or to the spirit of the legislation that gives it power to act, and must not act arbitrarily or capriciously (underlining is ours). These several principles can conveniently be grouped in two main categories: failure to exercise a discretion, and excess or abuse of discretionary power. The two classes are not, however mutually exclusive. Thus, discretion may be improperly fettered because irrelevant considerations have been taken into account; and where an authority hands over its discretion to another body it acts ultra vires. Nor, as will be shown, is it possible to differentiate with precision the grounds of invalidity contained within each category."

37. In Federation of Pakistan v. Charsadda Sugar Mills Limited (1978 SCMR 428), this Court was called upon to consider a judgment of the High Court whereby relief was granted against an order passed by the Central Board of Revenue which reflected arbitrariness, absence of conscious application of mind and for considerations other than law. The Court observed as follows:-

"It is self-evident that the Central Board of Revenue in allowing the partial abatement was satisfied that the shortfall in the production capacity was substantial and beyond the control of the respondent but to the extent of 855.53 tons only. In disallowing the shortfall for the remaining 2,643.16 tons of sugar claimed by the respondent the Board merely relied on its own formula by applying the 10% cut on the total production capacity of 26,000 tons per annum. It has failed to

even consider the case set up by the respondent in its application made under Rule 4 of the Rules. In doing so the Board acted almost mechanically and failed to exercise the discretion vested in it under the law. It was the duty of the Board to have acted justly, fairly and reasonably having full regard to the facts and circumstances of the case before it. The Board did not even weigh and examine the merits of the claim pleaded by the respondent. This indeed, tantamount to the refusal on the part of the Board to exercise quasi-judicial discretion vested in it under the law. We, therefore, find that the judgment delivered by the High Court is unexceptionable and hereby dismiss this petition."

38. Lord Denning expressed similar views on exercise of discretionary authority (in his book 'The Closing Chapter') when relying on a judgment of Court of Appeals of England & Wales (1948 1 KB 223, 234) authored by Lord Greene (Master of the Rolls) he said:-

"Again, if a public authority is entrusted, as part of its public law function, with the exercise of a discretion, it must take into account all relevant considerations. It must not be influenced by any irrelevant consideration. And its discretion must be exercised reasonable—in this sense, that it must not be so unreasonable that no reasonable authority could have reached it."

39. This Court would not interfere in the judgment of the High Court on yet another salutary principle of equity i.e. if in the exercise of Constitutional jurisdiction it has passed an order to remedy a manifest wrong. In Messrs Norwich Union Fire Insurance Society Limited v. Muhammad Javed Iqbal (1986 SCMR 1071), it was observed as follows:-

“In this view of the matter, as laid down in Raunaq Ali v. Chief Settlement Commissioner PLD 1973 SC 236, the High Court was within its power to refuse relief in writ jurisdiction, where the impugned order before it had the effect of fostering justice and righting a wrong, even though the authority concerned had acted clearly without jurisdiction. The High Court having acted in consonance with this higher principle of justice laid down by this Court, there is no justification for taking exception to the impugned judgment. The other question of law need not, therefore, be examined.”

40. The respondent-University though did not challenge the impugned judgment, yet its Registrar has submitted a report/written statement dated 17.09.2011 to the effect that the Enquiry Committee entrusted with the task of inquiring into the charge of misconduct against respondent No.1 has submitted its finding and the same would be placed before the Syndicate whenever its meeting is convened, for consideration. The findings of the Enquiry Officer dated 17.3.2011 are to the following effect:-

1. *Dr. Minhaj Ahmad Khan remained absent from his duty without approval of leave from the competent authority.*
2. *The unauthorized absence from duty is considered misconduct in view of the provision of PEEDA Act 2006 and hence Dr. Minhaj Ahmad Khan is found to be guilty in this context.*
3. *The absence from duty period is less than one (1) year, hence, in view of the provision of PEEDA Act 2006 penalty should be of minor degree. It should be not more than withholding one annual increment without any cumulative effect.”*

41. We would not like to comment on the afore-referred findings as it is for the Syndicate, at appropriate stage, to consider and decide about the matter in accordance with law. However, the fact remains that on the date when he was shortlisted and called for interview on 8.8.2010, there was neither any finding against him nor penalty. Even otherwise, it was not a case of promotion but a case of fresh appointment.

42. It was also brought to our notice that another seat of Assistant Professor Computer Sciences for which the parties had competed is available and without disturbing the petitioners, respondent No.1 could be accommodated. This factual position was not specifically controverted by the respondent-University. If that be so, the direction for fresh interview would be confined to respondent No.1 and if he gets selected, the *inter se* seniority shall be re-determined as if respondent was interviewed along with the petitioners. If no fresh seat is available, the entire exercise would be carried out afresh strictly in terms of the impugned judgment.

43. So far as withholding of salary of respondent No.1 is concerned, there is nothing on record and even in the report submitted by the Registrar before this Court to indicate that there is any order passed by the competent authority to withhold his salary. In these circumstances, the same is without any lawful authority and respondent-University is directed to release his salary and arrears, if any, forthwith.

44. For what has been discussed above, we hold, declare and direct as under:-

- (i) that notwithstanding the powers under the Constitution where the Governor may act in his discretion, the Governor while acting as Chancellor is a statutory functionary in terms of section 11(1) of the Bahauddin Zakariya University Act and in the performance of his functions under the Act, he is to act and is bound by the advice tendered by the Chief Minister in the manner provided in section 11(8) of the Act read with Article 105 of the Constitution of Islamic Republic of Pakistan;
- (ii) that the Chancellor of the University/Governor of Punjab is bound by the timeline given in proviso to Article 105 of the Constitution which stands incorporated in the Act by legislative reference i.e. within fifteen (15) days he may require the Chief Minister or the Cabinet, as the case may be, to reconsider the advice and if such a reference/advice is tendered after reconsideration by the Chief Minister, he is bound to act within ten (10) days of having received it;
- (iii) that the Chief Minister had sent the summary for appointment of Dr. Syed Khawaja Alqama as Vice Chancellor on 25.6.2011. The Chancellor/ Governor

of Punjab instead of acting on such advice, vide memo dated 7.7.2011, purported to appoint Prof. Dr. Muhammad Zafarullah as Vice Chancellor, which shall be deemed as a reference to the Chief Minister for reconsideration. The summary of the Chief Minister dated 11.7.2011 in terms of which the Chief Minister reiterated his earlier advice with regard to appointment of Dr. Syed Khawaja Alqama as Vice Chancellor shall be deemed to be the advice tendered by him after reconsideration;

- (iv) that as the Chancellor/Governor of Punjab was to act on the reconsidered advice within ten (10) days and as more than three months have elapsed since the tendering of reconsidered advice, the same shall be deemed to have been acted upon and the concerned department may issue requisite notification accordingly;
- (v) that since respondent No.1 was the only Ph.D. among the shortlisted candidates for appointment as Assistant Professor Computer Sciences and despite having been called for interview, he was not considered, the interference by the learned High Court and direction for a denovo exercise of selection from amongst the shortlisted candidates has not been found by us to be against the canons of

equity and no case for interference except partial modification of the impugned judgment is made out; and

- (vi) that the meeting of the Selection Committee shall be convened by the new Vice Chancellor forthwith and he shall ensure that the matter is processed in terms of Paras 42 & 43 of this judgment.

The petition is partly converted into appeal and allowed i.e. the impugned judgment is modified in terms noted above.

JUDGE

JUDGE

JUDGE

Announced in Open Court at Islamabad on **07.10.2011**.

JUDGE

APPROVED FOR REPORTING
Khurram Anees

Asif Saeed Khan Khosa, J.: The proposed judgment authored by my learned brother Tassaduq Hussain Jilani, J. is quite comprehensive and I fully endorse the same but there are certain aspects of the relevant constitutional issue which I would like to highlight and explain through the present note.

2. By virtue of subsection (1) of section 11 of the Bahauddin Zakariya University Act, 1975 the Governor of the Punjab is ex officio to be the Chancellor of that University and, thus, the said statute adds another function to the many other constitutional and statutory functions to be performed by the Governor. In terms of clause (1) of Article 105 of the Constitution of the Islamic Republic of Pakistan, 1973 “in the performance of his functions, the Governor shall act on and in accordance with the advice of the Cabinet or the Chief Minister” and the said constitutional provision does not recognize any distinction between the Governor’s functions under the Constitution and his functions under any statute.

3. It is generally accepted that the position of a Governor in a Province is by and large similar to that of the President in the Federation and clause (5) of Article 105 of the Constitution makes such similarity explicit. In the case of Mian Muhammad Nawaz Sharif v. President of Pakistan and others (PLD 1993 SC 473) it had been made abundantly clear by this Court that the President has no other powers except those which are expressly conferred upon him by the Constitution. In this view of the matter any attempt to expound or advance any distinction between the President/Governor’s constitutional powers or functions and his powers or functions under any statute runs contrary to the law so clearly declared by this Court. It had been held by this Court in that case as under:

“Unfortunately, this belief that he enjoys some inherent or implied powers besides those specifically conferred on him under Articles 46, 48(6), 101, 242(1A) and 243(2)(c) is a mistaken one. In a Constitution contained in a written document wherein the powers and duties of the various agencies

established by it are formulated with precision, it is the wording of the Constitution itself that is enforced and applied and this wording can never be overridden or supplemented by extraneous principles or non-specified enabling powers not explicitly incorporated in the Constitution itself. In view of the express provisions of our written Constitution detailing with fullness, the powers and duties of the various agencies of the Government that it holds in balance there is no room of any residual or enabling powers inhering in any authority established by it besides those conferred upon it by specific words.

Our Constitution, in fact, is designed to create a parliamentary democracy. The President in this set-up is bound to act, in the exercise of his functions, in accordance with the advice of the Cabinet or the Prime Minister [Article 48(1)] and the Cabinet in its turn is collectively responsible to the National Assembly [Article 91(4)] though the Prime Minister holds office at the pleasure of the President. However, the President cannot remove him from his office as long as he commands the confidence of the majority of the members of the National Assembly [Article 91(5)]. In view of these provisions, the system of Government envisaged by the Constitution of 1973 is of the Parliamentary type wherein the Prime Minister as Head of the Cabinet is responsible to the Parliament, which consists of the representatives of the nation.

It is manifest, therefore, that in the scheme of our Constitution the Prime Minister in administering the affairs of the Government is neither answerable to the President nor in any way subordinate to him. In formulation of the policies of his Government and in the running of its affairs, the Prime Minister is answerable only to the National Assembly and not to the President. *Indeed, it is the president who is bound by the advice of the Prime Minister or the Cabinet in all matters concerning formulation of policies and administration of the affairs of the Government and not the other way about, as appears to have been mistakenly understood.* Undoubtedly, the President may require the Cabinet or the Prime Minister, as the case may be, to reconsider any advice tendered to him but *the President is bound to act on the advice tendered, even if it be the same, after consideration.*"

(italics have been supplied for emphasis)

In a recent case of Shahid Orakzai v. Pakistan through Secretary Law, Ministry of Law, Islamabad (PLD 2011 SC 365) an Hon'ble former Judge of this Court had been appointed by the President of Pakistan as Chairman, National Accountability Bureau without the advice of the Prime Minister under an impression that the power derived for such appointment from the National Accountability Ordinance, 1999 was a statutory power of the President and not a function of the President conditioned by the Constitution to be performed upon an advice of the Prime Minister but upon the initiative of the learned counsel for the Federation of Pakistan the President had cancelled the notification of appointment and a fresh appointment of the Chairman was made upon the advice of the Prime Minister. Maulvi Anwarul Haq, the learned Attorney-General

for Pakistan, had appeared before this Court in that case as well and in the present proceedings he was reminded of that case and he had no other option but to concede that in that case the understanding of the Federation of Pakistan was that even in the matter of exercise of powers derived from a statute the President is to act on the advice of the Prime Minister or the Cabinet. It has already been observed by me above that the position of a Governor in a Province is by and large similar to that of the President in the Federation and, thus, the impression entertained by the Governor of the Punjab in the present case about any distinction between his powers or functions under the Constitution and his powers or functions under a statute may be, in the words of the judgment rendered by this Court in the case of Mian Muhammad Nawaz Sharif (supra), “mistaken” and I observe so with respect to the exalted office that he holds.

4. In his Concise Statement submitted before this Court the Governor of the Punjab, in his capacity as the Chancellor, has maintained that he may be bound by the provisions of Article 105 of the Constitution in his functions exercised as the Governor but when it comes to exercise of his powers or functions as the Chancellor of the relevant University the provisions of Article 105 of the Constitution do not remain relevant. This stance of the Governor/Chancellor, however, overlooks the fact that any doubt in this regard was removed by the relevant legislature itself through insertion of subsection (8) in section 11 of the Bahauddin Zakariya University Act, 1975 through an amendment Act of 1975 and the added provision reads as under:

“In performance of his functions under the Act the Chancellor shall act and be bound in the same manner as the Governor of the Province acts and is bound under Article 105 of the Constitution of the Islamic Republic of Pakistan.”

I understand that the Governor of the time, who had already ex officio become the Chancellor of the said University under the main

Act, had assented to the amendment Act without any demur and also that no Governor/Chancellor has so far challenged the said amendment in the relevant law before any court of law on any ground whatsoever and, thus, the above mentioned amendment is still very much a part of the relevant statute.

5. The issue at hand may also be addressed from another angle and perspective. The Governor of a Province is generally acknowledged to be a nominee, agent or representative of the Federation or the Federal Government in the Province concerned. A Governor is appointed by the President on the advice of the Prime Minister [Article 101(1) of the Constitution], he holds his office during the pleasure of the President [Article 101(3) of the Constitution], the President may make such provision as he thinks fit for the discharge of the functions of a Governor in any contingency not provided for in Part IV of the Constitution [Article 101(5) of the Constitution] and a Governor enjoys the same discretionary constitutional powers in his Province as are enjoyed by the President under the Constitution [Article 105(5) of the Constitution]. A perusal of the Fourth Schedule of the Constitution containing the Federal Legislative List shows that except for "Education as respects Pakistani students in foreign countries and foreign students in Pakistan" the subject of Education falls within the exclusive legislative domain of the Provinces. According to Article 97 of the Constitution "the executive authority of the federation shall extend to the matters with respect to which Majlis-e-Shoora (Parliament) has power to make laws" and by virtue of Article 137 of the Constitution "the executive authority of the Province shall extend to the matters with respect to which the Provincial Assembly has power to make laws". It is not disputed that the authority exercised by a Chancellor vis-à-vis the affairs of his University is essentially an executive authority and if a Governor in his capacity as a Chancellor of a University situated within a Province starts exercising the relevant executive authority treating

the same as his personal and discretionary authority to be exercised without the advice of the Chief Executive of the Province, i.e. the Chief Minister then it would practically amount to the Federation or the Federal Government exercising that executive authority in the Province through its nominee, agent or representative and that would surely be violative of the express constitutional intent and mandate besides being offensive to the principle of provincial autonomy which is a cornerstone of our constitutional dispensation.

6. Before entering upon his office a Governor of a Province makes an oath, prescribed in the Third Schedule of the Constitution, and solemnly swears, inter alia, “That as the Governor of the Province of -----, 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 -----” (italics have been supplied for emphasis). The constitutional position regarding the issue at hand has already been clarified by this Court in the case of Mian Muhammad Nawaz Sharif (*supra*) and the same is being reiterated through the present judgment and the legal position in respect of the issue before us is evident in no uncertain terms from the provisions of subsection (8) of section 11 of the Bahauddin Zakariya University Act, 1975 reproduced above and, therefore, it is expected that the worthy Governor of the Punjab shall perform all his functions as Chancellor in accordance with the Constitution and the law while adhering to the oath of his gubernatorial office.

(Asif Saeed Khan Khosa)
Judge