JUDGEMENT SHEET

IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

Writ Petition No. 1688/2020

A. Ammar Sehri
Versus
Ministry of Law and Justice through its Secretary & another

PETITIONER BY:	Petitioner, in person.
RESPONDENTS BY:	Barrister Munawar Iqbal Duggal, Additional Attorney General, Mr. Fahad Khan Tareen, Assistant Attorney General.
DATE OF HEARING:	26.08.2025.

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BABAR SATTAR, J. –

> *"Do you believe that a State in which the decisions of the courts can have no validity, but can be reversed and nullified by particular persons, would subsist rather than perish? – Socrates.*

2. Ernst Fraenkel's book, *"The Dual State: A Contribution to The Theory of Dictatorship" (Oxford University Press, 1941)* starts with the aforementioned quotation (The book was translated from German and the oft-quoted version of the quotation presented in Plato's dialogue, *"Crito"*, appears as follows: *"Do you imagine that a city can continue to exist and not be turned upside down, if the legal judgments which are pronounced in it have no force, but are nullified and destroyed by private persons?"*).

3. Fraenkel's *The Dual State* is an account of the Nazi legal system in Hitler's Germany, with dictatorship divided into two existing parts: the Prerogative State being the realm of arbitrary power run by the Nazi party and the Gestapo, with no regard for the law or legal procedure; and the Normative State, being a remnant of the pre-Nazi German institutional system comprising the civil service, courts and administrative bodies functioning on the basis of existing laws and procedures, providing a façade of legality and stability for the non-persecuted population that the Prerogative State did not need to bend to its will. Fraenkel wrote that, *"by the Prerogative State we mean that governmental*

system which exercises unlimited arbitrariness and violence unchecked by any legal guarantees and by the Normative State an administrative body endowed with elaborate powers for safeguarding the legal order as expressed in statutes, decisions of the courts and activities of the administrative agencies." He noted that, *"the essence of the Prerogative State is its refusal to accept legal restraint…"* Fraenkel's argument based on an analysis of judgments of the German Courts was that the two states were separate but interdependent, with the Prerogative State practicing tyranny in a no-holds-barred fashion and the Normative State holding up the fig leaf of legalism to camouflage the nature of totalitarianism at play.

4. Legal literature projects that the hardnosed totalitarianism of the 20th Century may be a thing of the past and has been replaced by Autocratic Legalism that undermines both democracy and constitutionalism. Professor Kim Lane Scheppele, in her essay, *"Autocratic Legalism" ((2018) 85:2 University of Chicago Law Review 545–583*), argues that the contemporary form of autocracy involves the use of legal and constitutional means to dismantle democratic institutions, concentrate power in a few hands and remove the checks and balances that are an integral part of constitutionalism by pitting democracy and majoritarianism against the Rule of Law and the Constitution. She writes that, *"Legalistic Autocrats operate by pitting democracy against constitutionalism to the detriment of liberalism. This is not hard. Democracy and constitutionalism are famously in tension when what the people want at any given moment is (or should be) overridden by constitutional principles that thwart that desire. Democracy is a political system, in which leaders are accountable to the people; constitutionalism is a political system, in which leaders and the people together are additionally accountable within a system of constitutional constraint to uphold basic values that transcend the moment. Democracy and constitutionalism may come into conflict when publics fail in their constitutional obligation and elections produce a majority for unconstitutional change. Or the tensions between constitutionalism and democracy may create a crisis when elites offer choices to democratic publics that put liberalism on the line…the end result when such a plan*

succeeds is simple majoritarianism, which can lead quickly to illiberalism…The Autocratic Legalists often make a giant public show of being governed by and governing within the law, changing the law and even the constitution itself with impeccably legal (if illiberal) methods. But underneath the legal reforms carried out in the name of democracy is the illiberal sensibility of the autocrat and the steady consolidation of power in fewer and fewer hands." Professor Scheppele cites the contemporary example of legal change in Hungary as an archetypical case. She explains the use of lawfare to decimate constitutionalism. She writes that one of the first targets of Autocratic Legalism in Hungary, *"was the Constitutional Court, which nonetheless took three years to capture. Soon all other independent institutions were filled with party loyalists, including the ordinary judiciary, so that they were no longer independent of the governing party… Constitutional institutions survive in the same buildings, but their liberal souls have been killed. How many can really see this until they themselves need constitutional protection and find themselves defenceless? By then it is too late."* She argues that, *"the Autocrats who hijack constitutions seek to benefit from the superficial appearance of both democracy and legality within their states. They use their democratic mandates to launch legal reforms that remove the checks on executive power, limit the challenges to their rule, and undermine the crucial accountability institutions of a democratic state."*

5. Why have we started with Fraenkel's Dual State thesis and Scheppele's Autocratic Legalism? The foundational question that arises in the present petition is whether the Judiciary in Islamabad Capital Territory **("ICT")** can discharge its constitutional and legal functions in terms of Section 6 of the Islamabad High Court Act, 2010 **("IHC Act")**, read with Articles 175 and 203 of the Constitution without being independent of the executive and without the courts and tribunals discharging judicial functions and exercising judicial power within ICT being under the supervision and control of Islamabad High Court **("IHC")**. It is in the context of this perennial legal and constitutional question that academic literature such as that cited above becomes relevant (also see Kim Lane Scheppele, *"The Rule of Law and the Frænkel*

State: Why Governance Checklists Do Not Work" (2013) 26:4 Governance: An International Journal of Policy, Administration, and Institutions 559–562 and Steven Levitsky and Daniel Ziblatt *"How Democracies Die: What History Reveals About Our Future"* (New York: Crown Publishing, 2018)). As Fraenkel cautioned in 1941, the preservation of legal form without substantive legality transforms law into an instrument of arbitrary authority. And Professor Scheppele's formulation of Autocratic Legalism demonstrates precisely how this transformation occurs through a discernible playbook: playing constitutional hardball to push limits of the Constitution to a breaking point, packing courts with loyalists, changing electoral rules to disadvantage opponents, altering the structure of institutions to control them, weaponizing the law to target and harass political opponents, journalists and civil society, nurturing systemic corruption by rewarding personal loyalty within institutions and creating a network of dependents to support the regime's legal changes and on the whole controlling public discourse by censoring critical voices in the media.

6. Central to this phenomenon is the creation of a sycophantic Judiciary through court packing, intimidation and appointment of loyalists–a process wherein legality itself may be instrumentalized to dismantle constitutional safeguards. Levitsky and Ziblatt extend these insights to the political sphere, observing that democracies often perish not through military coups but at the hands of elected leaders who subvert the very processes that brought them to power. And their work establishes that institutional structures alone cannot safeguard democracy but must be reinforced by unwritten norms of forbearance and mutual respect. Collectively, these frameworks demonstrate that democratic decay typically commences not through overt constitutional breach but via incremental normalization of concentrated authority within ostensibly law-bound institutions, and that the erosion of judicial independence and institutional accountability thus proceeds not in contravention of law but through its selective invocation, thereby perverting the rule of law from being a constitutional restraint upon state power into being employed as its most efficacious instrument of legitimation. It is while being wary of Autocratic Legalism and colourable legal

instruments that have the effect of undermining judicial independence and subverting constitutionalism that Articles 175 and 203 of the Constitution have to be understood in their historical context and given effect. And it is in this constitutional context that Section 6 of the IHC Act it is to be interpreted and applied, while considering the means adopted for appointment of Judges, removal of Judges and considering the terms and conditions of public officials comprising courts and tribunals exercising judicial power within the domain of IHC.

Factual Background and Submissions of Counsel

7. Mr. Ammar Sehri, the petitioner, is a member of the Islamabad High Court Bar Association ***("IHCBA")*** and a practicing Lawyer, who has sought enforcement of Section 6 of the IHC Act in letter and spirit and has prayed for the issuance of a writ directing the respondents to constitute the courts and tribunals within IHC in light of Section 6 of the IHC Act, while adhering to the directions that form part of National Judicial Policy, 2009 ***("NJP")***, issued by the National Judicial Policy Making Committee ***("NJPMC")*** and ensure that the courts and tribunals dispensing judicial functions in the ICT do not comprise judicial officers appointed on an ad hoc basis and are staffed by judicial officers in consultation with the IHC.

8. The petition was initially admitted for hearing on 29.06.2020 by the then Chief Justice of IHC and notices were issued to the respondents to explain why judicial posts were lying vacant and various courts and tribunals required to be established in ICT had not been so established. The Court continued to afford opportunities to the respondents to put together Rules prescribing procedures for filling the courts and tribunals for discharge of legal functions in a timely fashion. The Secretary of Law and Justice Division and the Principal Secretary to the Prime Minister were put to notice for such purpose. Notices were also issued to the Islamabad Bar Council ***("IBC")*** and the IHCBA by order dated 01.10.2020 to provide assistance in the matter. The respondents continued to apprise the Court with regard to Rules being prescribed for purposes of appointment of members to tribunals, etc. including, the tribunals constituted under the Income Tax Ordinance, 2001 ***("ITO")***, the Sales Tax Act, 1990 ***("STA")*** and

the Customs Act, 1969 ***("Customs Act")***. Various directions were issued by this Court to render functional a Consumer Court, a Labour Court and other special courts in the ICT. The case was then transferred to the docket of this Court and hearings recommenced earlier this year. This Court once again issued notices to the IBC, the IHCBA and the Islamabad District Bar Association ***("IDBA")*** to provide assistance in the matter in which provisions of the IHC Act are to be given effect. By order dated 29.04.2025 the Attorney General's office was asked to seek directions and assist the Court as to whether the special courts and tribunals established under fiscal laws fell within the supervision and control of the IHC in terms of Article 203 of the Constitution and the law laid down by the Supreme Court in the matter of ***Sheikh Riaz ul Haq v. Federation of Pakistan (PLD 2013 SC 501)*** and the legal framework within which Judicial Officers from other Provinces continue to be appointed on deputation basis against positions in Islamabad District Judiciary.

9. The petitioner, in person, submitted that despite the establishment of IHC under the IHC Act, the courts and tribunals, whether as part of Islamabad District Judiciary or special courts/tribunals, required to discharge judicial functions in ICT were not functioning in accordance with Section 6 of the IHC Act read together with provisions of the Constitution. He submitted that some of the special courts/tribunals remained to be established. While some progress had been made in relation to establishing courts and tribunals pursuant to Section 6(1) of the IHC Act, since the filing of the petition, some courts including, *inter-alia*, Consumer Court, Labour Court and Special Court Customs were yet to be established. He also submitted that Section 6(3) of the IHC Act provided that the IHC shall establish a subordinate Judiciary for ICT within a period of six months and the officers of the subordinate Judiciary, who were serving on deputation when the Court was first established in 2010, were to be sent back to their respective High Courts upon establishment of a subordinate Judiciary for ICT. He submitted that Judicial Officers had continued to be appointed on deputation basis and were being borrowed from other provincial judiciaries in breach of requirements of Section 6(3) of the IHC Act. He submitted that

the Judicial Officers, who were serving on a deputation basis in courts and tribunals in ICT, were not under the supervision and control of IHC as required by Article 203 of the Constitution read with Section 6(3) of the IHC Act as such deputationists were neither under the disciplinary control of IHC nor could their security of tenure be guaranteed as their parent department would recall them at any point. The staffing of courts and tribunals by officers serving in ICT on a deputation basis therefore militated against independence of the Judiciary. He also submitted that despite the Federal Government having been put on notice and directions having been issued by the Court to Secretary, Law Division, as well as the Principal Secretary to the Prime Minister, there were delays in the appointment of officers to courts and tribunals in ICT and due to prolonged vacancies, such courts and tribunals remained dysfunctional for extended periods undermining the right of people to access to justice. He submitted that in view of Section 6 of the IHC Act read together with Article 203 of the Constitution the appointments to courts and tribunals in Islamabad had to be made on the recommendation of IHC as the Executive was not vested with independent administrative authority to make such appointments without effective oversight by IHC.

10. The learned Additional Attorney General submitted that the Law and Justice Division administered various courts and tribunals under respective laws in ICT, which included the following: Special Court (Anti-Terrorism), Competition Appellate Tribunal, Islamabad, Drug Court, Islamabad, Special Court (CNS), Islamabad, Anti-Dumping Appellate Tribunal, NEPRA Appellate Tribunal, Islamabad, Appellate Tribunal Inland Revenue, Islamabad, Banking Court, Islamabad, Offences in Banks Court, Islamabad, Customs Appellate Tribunal, Islamabad, Environmental Protection Tribunal, Islamabad, Intellectual Property Tribunal, Islamabad, Medical Tribunal, Islamabad, Accountability Court, Islamabad, Special Court (Central), Islamabad, Federal Services Tribunal, Islamabad, and National Industrial Relations Commission, Islamabad. He submitted that the Special Court (Customs, Taxation and Anti-smuggling), Rawalpindi, had territorial jurisdiction over ICT as well as

Rawalpindi Division. Presently there were 56 cases relating to the Collectorate of Customs, Islamabad, pending before such Court and it was therefore not financially and administratively feasible to set up an independent Special Court for ICT alone. In relation to the Consumer Court, Islamabad, it was submitted that the Sessions Judge, Islamabad, had been declared the authority in terms of Section 2(a) of the Islamabad Consumer Protection Act, 1995, and such law did not mandate the establishment of an independent Consumer Court. He further submitted that the appointments of Judicial Officers to such courts and tribunals were made under the respective laws pursuant to which the courts had been established in accordance with the mechanism prescribed under such laws. Where the laws so provided, the Ministry of Law and Justice sought the approval of the Federal Government in respect of appointment of Judicial Officers nominated or recommended by the IHC or the Supreme Court, as the case may be. The appointments were then notified, if approved by the Federal Government. He submitted that in terms of Section 6(3) of the IHC Act appointments within the subordinate Judiciary for IHC did not fall within the administrative control of the Ministry of Law and Justice. It was also submitted that it had been brought to the attention of this Court that Appellate Tribunal Inland Revenue (Appointment of Chairperson and Members) Rules, 2020 ***("ATIR Rules 2020")***, had been notified through Gazette Notification dated 31.12.2020 along with the Customs Appellate Tribunal (Appointment of Chairman and Member) Rules, 2020 ***("Customs Rules 2020")***. The ATIR Rules 2020 provided that a member to such Tribunal was to be appointed by the Prime Minister in consultation with the Chief Justice of Pakistan. It was submitted that the ATIR Rules 2020 were later repealed and replaced by the Appellate Tribunal Inland Revenue (Appointment, Terms and Conditions of Service) Rules, 2024 ***(ATIR Rules 2024)***, which were notified in the official gazette on 15.05.2024. Under rule 5 of the ATIR Rules 2024 a Selection Committee was constituted for appointment of members, which comprised a retired judge of the Supreme Court nominated by the Chief Justice of Pakistan, a member of the Public Service Commission and a person of integrity appointed by the Prime Minister. It was submitted that Section 130 of the ITO was amended through the Tax Laws

(Amendment) Act, 2024 ***("Tax Laws Amendment Act")***, and the distinction between a Judicial Member and an Accountant Member that existed pursuant to erstwhile Section 130(3) & (4) of the ITO was done away with. Under the ATIR Rules 2024 an officer of the Inland Revenue in BS-21 or BS-20 could be appointed as a member of the ATIR on the recommendation of Chairman, Federal Board of Revenue ***("FBR")***, in terms of rule 4(2) of the ATIR Rules 2024 or by the Federal Government on the recommendation of the Selection Committee constituted in terms of rule 5 of the ATIR Rules 2024, where the person was eligible to be appointed as a member in terms of sub-clause (a) or (b) or (c) of Section 130(3) of the ITO. He submitted that where a member of the Islamabad District Judiciary was appointed to a judicial post in a special court or tribunal within the administrative domain of the Federal Government, the same was done in consultation with IHC. He submitted that when it came to the appointment of Judicial Officers within the Islamabad District Judiciary on a deputation basis, the Federal Government had no role in the matter as such appointments fell within the domain of IHC under Section 6(3) of the IHC Act. Under the Rules of Business, 1973 ***("Rules of Business")***, the role of the Federal Government was limited to Special Courts and Tribunals established under various laws.

11. The central question raised by the petitioner is giving effect to the letter and spirit of Section 6 of the IHC Act, which states the following:

> ***"6. Other Courts.*** *(1) Subject to the provisions of this Act and any order of the competent authority, all civil, criminal and revenue courts, and all tribunals and special courts established under any law, which were exercising jurisdiction and functions in the Islamabad Capital Territory immediately before the commencement of this Act shall continue to exercise their respective jurisdiction and function and all persons holding office in such courts or tribunals or special courts shall continue to hold their respective offices on the same terms and conditions as were applicable to them immediately before the commencement of this Act, unless otherwise determined by the competent authority.*
>
> *(2) Notwithstanding anything contained in any other law for the time being in force, all civil, criminal and revenue courts and all tribunals and special courts functioning in Islamabad Capital Territory which were within the jurisdiction and under the superintendence and control of the Lahore High Court before the*

commencement of this Act shall, as from the appointed date, fall within the jurisdiction and under the supervision and control of the Islamabad High Court.

(3) The Islamabad High Court shall take necessary steps for establishing subordinate judiciary for the Islamabad Capital Territory within six month of the commencement of this Act. The Judges of the subordinate judiciary working on deputation shall be sent back to the respective High Court after establishment of the subordinate judiciary for the Islamabad Capital Territory.

(4) There shall be two Sessions Divisions in the Islamabad Capital Territory with such territorial limits as may be determined in this behalf by Notification in the official Gazette."

12. The aforementioned provision needs to be interpreted and given effect while taking note of Article 175(3) of the Constitution, which provides the following:

***"175.** (3) The Judiciary shall be separated progressively from the Executive within fourteen years from the commencing day."*

Within the scheme of the Judicature prescribed by the Constitution, Article 203 of the Constitution deals with the superintendence of subordinate courts by providing the following:

***"203.** Each High Court shall supervise and control all courts subordinate to it."*

Questions for Determination

13. The questions that arise for adjudication in the context of the present petition, include, *inter alia*, the following:

(1) Is the Federal Government liable for breach of fundamental rights of citizens of access to justice and to fair trial and due process guaranteed by Articles 9 and 10 of the Constitution, if they appoint public officials to Courts and Tribunals to discharge judicial functions and exercise judicial powers, where such public officials are not Judicial Officers and are members of the Executive or have been appointed through a process that does not confer primacy to the Judiciary within the decision-making process?

(2) In view of the manner in which independence of the Judiciary has come to be understood as a salient feature of the Constitution in terms of Article 175 of

the Constitution, can Courts and Tribunals be staffed by the Federal Government through exercise of administrative authority independent of judicial oversight?

(3) Can the Legislature and/or the Executive enact laws and/or prescribe rules for appointment of Judicial Officers to Courts and Tribunals that exercise judicial power and discharge judicial functions within ICT, without being placed under the supervision and control of IHC in terms of Article 203 of the Constitution?

(4) Can the Courts and Tribunals subordinate to IHC, including posts in Islamabad District Judiciary, be staffed by Judicial Officers on deputation basis borrowed from other Provinces in terms of Section 6 of the IHC Act and can Judicial Officers serving on deputation basis be deemed to enjoy the judicial independence in the event that their security of tenure does not stand guaranteed and they do not fall within the exclusive administrative and disciplinary control of IHC?

Foundational Constitutional Principles

14. Before we consider the relevant case law elucidating the definition of judicial functions and judicial power within the context of independence of the Judiciary as a salient feature of the Constitution, and how the power to appoint Judicial Officers, remove Judicial Officers and determine the terms and conditions of service of Judicial Officers is to be determined within the scheme of our Constitution, let us remind ourselves, as a preliminary matter, of certain parameters within which Section 6 of the IHC Act has to be understood and implemented. This is essential as notwithstanding the fact that the Constitution mandated the separation of the Judiciary from the executive within a prescribed period back in 1973, and the constitutional principles that guide matters related to appointment, removal and terms and conditions of service of those exercising judicial powers have come to be settled over time, such principles do not

appear to have been embraced by the Executive and the Legislature as a normative matter. Consequently, even after the passage of a quarter of the 21st Century, we find ourselves consumed by the need to state the obvious and re-emphasize how judicial independence remains to be secured within our constitutional framework.

15. For purposes of this preamble, the first point to note is that the understanding of the Constitution is an unfolding narrative. The Constitution is not simply a black-letter law that can be understood and applied in a grammatical or linguistic sense. This is a living document, that defines, moderates and manages the relationship between the State and the citizen. While the provisions of the Constitution defining the fundamental rights guaranteed to the citizens may not undergo change in their textual form, the understanding with regard to the minimum standard of acceptable behaviour on part of the State, to uphold such rights, continues to evolve with time. The Constitution, for example, guarantees the right to life, liberty, dignity, and equality. The understanding of what actions or omissions on part of the State undermine such rights may change in view of the socio-political and economic realities of the day. There was a time in human history when slavery, or discrimination against women and/or religious or ethnic minorities, was deemed acceptable even within legal regimes that committed themselves to upholding the principle of equality. It was without any textual change to the definition of equality that societies came to realize that certain conduct on part of the State was abhorrent to the principle of equality and such societal consensus was reflected in the judgments of the courts interpreting the scope of fundamental rights, as the understanding of such rights evolved over time. This evolutionary role of law is recognized by Article 8(1) of the Constitution, which states that, *"Any law, or any custom or usage having the force of law, in so far as it is inconsistent with the rights conferred by this Chapter, shall, to the extent of such inconsistency, be void."* The use of the concept of a custom having the force of law, alongside any law itself, in Article 8(1) of the Constitution, is not without meaning.

16. The second point to note as an introductory matter for our present purposes is that the right of access to justice and the right of a citizen to have his/her rights and obligations adjudicated by an independent Judiciary has not been defined by the Constitution explicitly as a fundamental right. As we will discuss later in this judgment, the fundamental right of access to justice and to have the laws and the Constitution administered by an independent Judiciary was originally found to have been rooted in Articles 9 and 25 of the Constitution. While the preamble to the Constitution as well as Articles 4 and 175 of the Constitution were understood as endorsing such right, the very right to access justice through an independent Judiciary was found to be embedded within the right of every citizen to be treated in accordance with law as provided in Article 9 of the Constitution, guaranteeing the right to life and liberty and further embedded in the right of a citizen to equality before law, and equal protection of law provided in Article 25(1) of the Constitution. Article 8, cited above, provides that no law or custom or usage inconsistent with the rights conferred by Chapter-I of the Constitution can survive legal scrutiny. It is on the basis of the rights guaranteed by Articles 9 and 25 that the Constitution has been understood and interpreted as guaranteeing the fundamental right of access to justice administered by an independent Judiciary. And it has consequently been held that any law that obstructs the access to justice or undermines the independence of the Judiciary is in breach of the guarantee provided by Articles 9 and 25 of the Constitution, read with Articles 2A, 4 and 175(3) of the Constitution.

17. The third point to note as an introductory matter is that the Constitution is largely a procedural document setting out the structure of constitutional institutions and filling in the procedural details for their functioning. Part-III of the Constitution provides for the structure of the office of the President and the structure and procedures rendering the Parliament and the Federal Government functioning. Part-IV of the Constitution provides for the Provinces and Part-V of the Constitution defines the relationship between the Federation and the Provinces. Part-VII

of the Constitution provides for the structure and functioning of the Judicature. Part-VIII of the Constitution similarly provides for an Election Commission and conduct of elections, etc. and so on. Article 175 of the Constitution falls within the Chapter that deals with the structure of the Judicature. Article 175(3) of the Constitution provides in relevant part that, *"The Judiciary shall be separated progressively from the Executive within fourteen years from the commencing day".* The notion of an independent Judiciary being a salient feature of the Constitution does not exclusively flow from Article 175(3) of the Constitution. Similarly, Article 2A of the Constitution made the Objectives Resolution an integral part of the Constitution. One of the provisions within the objective resolution, now an effective part of the Constitution as part of Article 2A of the Constitution states that, *"the independence of the Judiciary shall be fully secured".*

18. Let us assume for a minute that the Parliament in its wisdom were to repeal Article 2A along with Article 175(3) of the Constitution. Would such amendment to the Constitution result in altering the basic structure and salient features of the Constitution such that the right of access to justice and an independent Judiciary would cease to be recognised as a fundamental right? The short answer is no. Included within the very notion of rule of law is that all citizens are to be subjected to the same law and such laws are to be administered equally and dispassionately without creating a distinction between citizens in any manner. It is for such purpose that the Judiciary is conceived as an independent pillar of the State, separate from and independent of the Legislature, that creates laws, and the Executive, that enforces them. It is this separation of powers within which the Judiciary has come to be recognized as the machinery for enforcement of fundamental rights. And it is in such context that to afford citizens the equal protection of law for purposes of Articles 4 and 25 of the Constitution and guarantee them the right to life and liberty, except when such rights are encumbered in accordance with law, as guaranteed by Article 9 of the Constitution, that the right to an independent Judiciary has come to be recognized as a fundamental right in itself. When the right of a citizen of access to justice and an independent Judiciary

was recognized, as a fundamental right, Article 10A of the Constitution was not a part of the Constitution, which was later introduced through the Constitution (Eighteenth Amendment) Act, 2010. Article 10A of the Constitution now provides that, *"For the determination of his civil rights and obligations or in any criminal charge against him a person shall be entitled to a fair trial and due process."* The right to an independent Judiciary obliged to provide for a fair trial and due process is now more explicitly rooted in Article 10A of the Constitution.

19. The fourth introductory point to note is that any change in the procedural or machinery provisions of the Constitution cannot have the effect of denuding citizens of what has come to be recognized as fundamental rights guaranteed by the Constitution. Likewise, in view of Article 8 of the Constitution, any law that has the effect of interfering with the fundamental rights guaranteed by the Constitution, is to be deemed void to the extent of its inconsistency with the fundamental rights. Article 2A of the Constitution provides that sovereignty belongs to *"Allah Almighty"* alone and is delegated to the State of Pakistan through its people. The power of the State is accordingly exercised through the chosen representatives of the people. In order for the court to conclude that the Legislature or the Executive is vested with authority to deny citizens the right of access to justice or to equal protection of law, by interfering with the independence of the Judiciary, as the principle has come to be understood in view of the innumerable judgments rendered by the Supreme Court over the last few decades, the court would need to reach a conclusion that the will of the people, as reflected in the provisions of the Constitution, no longer wishes to afford to citizens the right of access to justice and equal protection of law. It is only such conclusion that can then support the notion that independence of the Judiciary no longer constitutes a salient feature of the Constitution and ought not be treated as part of the basic structure of our fundamental law. Whether or not the Parliament is competent to bring about such foundational change in the Constitution in exercise of its amendment powers under Article 238 of the Constitution was answered by the Supreme Court in the ***District Bar Association (Rawalpindi) v.***

***Federation of Pakistan* (PLD 2015 SC 401).** And in any event the scope of the amending power of the Parliament is of little relevance to us in the instant matter as the question before the Court relates to implementing Section 6 of the IHC Act under the umbrella of the Constitution and the rights guaranteed by it, as has already been determined by the Supreme Court in the cases that will find mention later in this judgment.

Maintainability

20. After this preamble, let us first briefly advert to how the instant petition is maintainable. This discussion will be followed by the manner in which the right of access to justice and judicial independence, as a fundamental right, have come to be understood under the provisions of the Constitution, and how tests have been laid out to determine what constitutes discharge of judicial functions and exercise of judicial powers, for purposes of determining whether the guarantee of judicial independence is being upheld. Once these concepts have been laid bare, we will proceed to consider the manner in which the power to appoint, remove and determine the terms and conditions of service of public officials discharging judicial functions and exercising judicial power must be exercised such that it does not undermine the principle of independence of the Judiciary on the one hand, and abides by the requirement of Article 203 of the Constitution that the High Court exercises supervision and control over courts within its territorial jurisdiction in terms of Article 203 of the Constitution. After undertaking this analysis, we will then consider the various laws under which Courts and Tribunals have been established within ICT and whether the provisions of such laws are in conformity with the principle of independence of the Judiciary as well as the requirement of Article 203 of the Constitution granting the IHC effective supervision and control over public officials exercising judicial power within ICT.

21. The respondents have not raised any objection to the locus standi of the petitioner to seek the enforcement of the provisions of the IHC Act. The Court has, however, satisfied itself that the petition is maintainable as it seeks the enforcement of provisions of IHC Act providing for enforcement of fundamental rights and the dispensation of justice within ICT where the

discharge of such judicial functions falls within the supervision and control of the IHC.

22. It was held in ***Fazal Din v. Lahore Improvement Trust (PLD 1969 SC 223)*** that a petitioner who disclosed a personal interest in the performance of a legal duty, which, if not so performed, would lead to the curtailment of a personal benefit or privilege or liberty, could seek enforcement of such legal duty by filing a petition even if the benefit in question did not necessarily constitute a right in a strict juristic sense. The rule of locus standi has since been relaxed considerably, especially where the matter in question relates to the enforcement of fundamental rights in public interest litigation.

23. It was held by the Supreme Court in ***Miss Benazir Bhutto v. Federation of Pakistan (PLD 1988 SC 416)*** that, *"proceedings lie for the enforcement of those [Fundamental] rights irrespective of the fact whether any prejudicial order has been passed by the Executive under the law as the Constitution treats the Fundamental Rights as superior to ordinary legislation and for that reason sub-Articles (1) and (2) of Article 8 of the Constitution have been enacted which clearly reflect the object and intention of the framers of the Constitution, that is, to keep the Fundamental Rights at a high pedestal and to save their enjoyment from legislative infractions. Sub-Article (1) of Article 8 lays down that any law in so far as it is inconsistent with the rights conferred by this Chapter shall, to the extent of such inconsistency, be void. This could not have been without a purpose but to preserve and protect the Fundamental Rights. Sub-Article (2) of Article 8 places a restriction on the Legislature not to make law which takes away or abridges the rights so conferred, in any law made in contravention of this clause shall to the extent of such contravention, be void. Article 199(1)(c) authorizes the High Court to enforce the Fundamental Rights of an aggrieved person and to declare that so much of the law which is inconsistent with the Fundamental Rights shall be void."* The principle laid out in ***Benazir Bhutto***, while considering the breach of Article 17 of the Constitution, was that a statute can be challenged if its provisions are ex facie violative of fundamental rights, in which case proof of actual breach of fundamental rights is not required. Where,

however, the provisions themselves do not infringe fundamental rights, but can be employed in a manner that can result in the breach of fundamental rights, actual breach of fundamental rights must be established to bring a legal claim. Justice Abdul Kadir Shaikh, in his opinion, rendered as part of the judgment in ***Benazir Bhutto*** held that, *"there can be no doubt that declaration of Fundamental Rights is meaningless unless there is an effective machinery for the enforcement of the rights. It is the 'remedy' that makes the right real. It is often said that without 'remedy' there is no right. It is for this reason that Constitution-makers provided a long list of Fundamental Rights and the machinery for their enforcement. That machinery is the Superior Courts, namely, the High Courts so far as the Provincial territory is concerned, and the Supreme Court at the apex having jurisdiction over the entire length and breadth of Pakistan."*

Judicial Independence: Evolution and Recognition

24. The seminal case enumerating how judicial independence and access to justice through an independent Judiciary constitutes a fundamental right and form part of the basic structure of the Constitution is ***Sharaf Faridi v. Federation of Pakistan (PLD 1989 Karachi 404)***. Let us consider the dictum from ***Sharaf Faridi*** at some length. It was held by the Sindh High Court that:

> *"The right of 'access to justice to all' is a well-recognised inviolable right enshrined in Article 9 of the Constitution. This right is equally found in the doctrine of 'due process of law'. The right of access to justice includes the right to be treated according to law, the right to have a fair and proper trial and a right to have an impartial Court or Tribunal. This conclusion finds support from the observation of Willoughby in Constitution of United States, Second Edition, Vol. II at page 1709 where the term "due process of law" has been summarized as follows: -*
>
> *(1) He shall have due notice of proceedings which affect his rights.*
>
> *(2) He shall be given reasonable opportunity to defend.*
>
> *(3) That the Tribunal or Court before which his rights are adjudicated is so constituted as to give reasonable assurance of its honesty and impartiality, and*
>
> *(4) That it is a Court of competent jurisdiction."*

25. It was further held that, *"in terms of Article 9 of the Constitution a person is entitled to have an impartial Court and Tribunal. Unless an impartial and independent Court is established the right to have a fair trial according to law cannot be achieved. Therefore justice can only be done if there is an independent judiciary which should be, separate from Executive and not at its mercy or dependent on it. Examining the present controversy from this angle it is clear, that if the State as defined in Article 7 fails to establish independent, and impartial Courts it offends Article 9 of the Constitution."* In relation to Articles 196(b), 200(1)(4) and 203-C(4-B) and (5) of the Constitution, it was held that such provisions were *"not only in conflict with Article 175 but they encroach upon the Fundamental Right which guarantees a fair and proper trial by an impartial and independent judiciary. The denial and failure to establish independent Courts and tribunals by separating them from Executive negates Article 9."*

26. The Sindh High Court then emphasized the obligation of a High Court with regard to enforcing fundamental rights by citing ***Saiyyid Abul A'la Maudoodi v. The Government of West Pakistan (PLD 1964 SC 673)*** where it was held by the Supreme Court that, *"The basic principle underlying a declaration of fundamental rights in a Constitution is that it must be capable of being enforced not only against the Executive but also against the Legislature by judicial process and this is the basic principle that has been incorporated into our Constitution…Where a fundamental right is denied, which the Courts are obliged to enforce…a suppliant cannot be left to such a doubtful relief."* While holding that it was for the High Court in the case to grant effective relief to the claimant the Supreme Court further held that, *"On the view taken by the learned Judge, it was incumbent upon him to seek some mode by which in law, it might have been possible for him to grant relief against the deprivation of Fundamental Right, which he had expressly found."* It was in view of the law laid down in ***Saiyyid Abul A'la Maudoodi*** that the Sindh High Court came to the conclusion that it was not for a Constitutional Court to shirk its constitutional responsibility to grant effective relief where breach of fundamental rights is made out but to utilise all means available in exercise of the jurisdiction and judicial powers vested in the

Court to ensure that perversion of fundamental rights in question is not allowed to subsist.

27. The law laid down by the Sindh High Court was then upheld by the Supreme Court in ***Government of Sindh v. Sharaf Faridi (PLD 1994 SC 105)***. The Supreme Court noted that:

> "The Constitution of the Islamic Republic of Pakistan, 1973 in its preamble (now made a substantive part thereof vide Article 2-A) declares *'the independence of the judiciary shall be fully secured' therein.*
>
> *Now, according to the consensus of the jurists, the independence of the judiciary means:*
>
> *(a) that every Judge is free to decide matters before him in accordance with his assessment of the facts and his understanding of the law without improper influences, inducements or pressures, direct or indirect, from any quarter or for any reason; and*
>
> *(b) that the judiciary is independent of the Executive and Legislature, and has jurisdiction, directly or by way of review, over all issues of a judicial nature."*

28. The next important case where the independence of the Judiciary and its separation from the Executive was found to be a subset of the fundamental rights guaranteed by Articles 9 and 25 of the Constitution was ***Gov. of Balochistan v. Azizullah Memon (PLD 1993 SC 341)***. The Supreme Court reiterated the law laid down by the Sindh High Court in ***Sharaf Faridi*** and went on to emphasize the imperative of placing special tribunals within the supervision and control of the judiciary. It was held that, *"even in such cases where special Tribunals are constituted, arbitrary powers cannot be conferred on executive for appointing persons on the Tribunal, providing procedure or imposing any sentence or conviction. Such Special Tribunals and Courts must follow the ordinary rules of justice, equality and good conscience. In fact the administration of justice cannot be made subject to or controlled by the executive authorities. The Constitution provides for separation of judiciary from the executive. It aims at an independent judiciary which is an important organ of the State within the Constitutional sphere. The Constitution provides for progressive separation of the judiciary and had fixed a time limit for such separation. It expired in the year 1987 and from then*

onwards, irrespective of the fact whether steps have been taken or not, judiciary stands separated and does not and should not seek aid of executive authorities for its separation. Separation of judiciary is the corner-stone of independence of judiciary and unless judiciary is independent, the fundamental right of access to justice cannot be guaranteed. One of the modes for blocking the road of free access to justice is to appoint or hand over the adjudication of rights and trial of offences in the hands of the executive officers. This is merely a semblance of establishing Courts which are authorised to decide cases and adjudicate the rights, but in fact such Courts which are manned and run by executive authorities without being under the control and supervision of the judiciary can hardly meet the demands of Constitution." It was further held in ***Azizullah Memon*** that, *"Our Constitution is based on the principle of trichotomy of power in which Executive, Legislature and Judiciary have their own functions independent from each other. None of these three organs are dependent upon the other nor one can claim superiority over the other. In this context and background to impose executive officers to carry out the judicial work by ignoring the Courts established in that area by itself creates discrimination and negates the very concept of justice and violates fundamental rights... The Constitution envisages independent judiciary separate from the Executive. Thus, any Tribunal created under the control and superintendence of the executive for adjudication of civil or criminal cases will be in complete conflict with Articles 175, 9 and 25."* In ***Azizullah Memon*** the Supreme Court emphasized that while appreciating the fundamental right of citizens to an independent judiciary and access to justice no distinction can be drawn between District Courts and Constitutional Courts. It was held that, *"The lower judiciary is a part of the judicial hierarchy in Pakistan. Its separation and independence is to be equally secured and preserved as that of the superior Judiciary. The lower judiciary is more dependent and prone to financial dependence and harassment at the hands of the Executive. In practice and effect the separation of judiciary is the main problem of the lower judiciary which under several enactments and rules is practically under the control and supervision of the Executive. Articles 175 and 203 lay down that the judiciary including lower judiciary shall*

be separated from the Executive and 'High Court shall supervise and control all Courts subordinate to it'. Such control and supervision can be achieved only when the judiciary is administratively and financially separate from the Executive."

29. As has been highlighted in the introduction to the legal analysis being undertaken earlier in this judgment, the independence of the Judiciary in its separation from the Executive and the Legislature has not been treated as a product of Articles 175 or 203 of the Constitution. The right to an independent Judiciary has been found to be rooted in Articles 9 and 25 of the Constitution, read with Article 2A and 4 of the Constitution, for which purpose machinery provisions within Part-VII of the Constitution dealing with the Judicature provide the relevant infrastructure.

30. The approach to interpreting fundamental rights is also well settled by now in the case of ***Mian Muhammad Nawaz Sharif v. President of Pakistan (PLD 1993 SC 473)***. The question of enforcement of the fundamental right guaranteed by Article 17 of the Constitution came before the Supreme Court, and it was held that, *"our approach [to fundamental rights] should not be narrow and pedantic but elastic enough to march with the changing times and guided by the object for which it was embodied in the Constitution as a fundamental right. Its full import and meaning must be gathered from other provisions such as preamble of the Constitution, principles of policy and the Objectives Resolution, which shed luster on the whole Constitution."* It was further highlighted in ***Workers Party Pakistan v. Federation of Pakistan PLD 2012 SC 681)*** that when it came to the interpretation of fundamental rights, the Constitution placed such rights on a higher pedestal and it was for the Courts to undertake an interpretive exercise such that the scope of the rights guaranteed to citizens expands and doesn't contract.

31. In ***Al-Jehad Trust v. Fed. of Pakistan (PLD 1996 SC 324)*** the law laid down in ***Sharaf Faridi*** was reiterated and it was held that, *"without having an independent judiciary, the fundamental rights enshrined in our Constitution will be meaningless."* It was further held that, *"the independence of the*

judiciary is inextricably linked and connected with the process of appointment of Judges and the security of their tenure and other terms and conditions." ***Al-Jehad Trust*** laid down the principle that for purposes of upholding the independence of the Judiciary, the Judiciary must have primacy in the decision-making process for appointment of Judges. This principle laid down in ***Al-Jehad Trust*** has been consistently applied in relation to the appointment and removal of Judges even after the enactment of the subsequent Constitutional Amendments, changing the manner of judicial appointments. It was held by the Supreme Court that, *"Judicial Magistrates have been separated from the Executive Magistrates and the former are to act under the supervision and control of the High Courts and would have no connection whatsoever with the Executive."*

32. In ***Mehram Ali v. Fed. of Pakistan (PLD 1998 SC 1445)*** the question before the Supreme Court related to the appointment of Judges pursuant to the Anti-Terrorism Act, 1997 ***("Anti-Terrorism Act")***. It was held by the Supreme Court that, *"The security of tenure of Judges is a sine qua non for independence of judiciary",* while reiterating the law laid down in ***Al-Jehad Trust***, in view of the enumeration of constitutional principles by the Supreme Court in ***Mehram Ali***, appropriate amendments were then made in the Anti-terrorism Act. It was held that, *"the hallmark of our Constitution is that it envisages separation of the judiciary from the Executive (which is founded on the Islamic Judicial System) in order to ensure independence of Judiciary and, therefore, any Court or Tribunal which is not subject to judicial review and administrative control of the High Court and/or the Supreme Court does not fit in within the judicial framework of the Constitution."*

33. In ***Sheikh Liaquat Hussain v. Federation of Pakistan (PLD 1999 SC 504)*** the law laid down in the aforementioned judgments was reiterated and the Pakistan Armed Forces (Acting in Aid of Civil Power) Ordinance, 1998, was declared to be void and unconstitutional for seeking to establish Military Courts, which could not be treated as Courts or Tribunals vested with judicial power. It was held by the then Chief Justice Ajmal Mian that, *"we must look to the scheme of the Constitution which is based on the*

principle of trichotomy of power, meaning thereby that the power is divided between the Executive, the Legislature and the judiciary. Each of these three limbs of the State enjoys complete independence in their own sphere." Justice Saeeduzzaman Siddiqui held that, *"creation of Courts outside the control and supervision of the Supreme Court or the High Courts, therefore, not only militates against independence of judiciary but it also negates the principle of trichotomy of power which is the basic feature of the Constitution."*

34. The next statute that came up for judicial scrutiny was the National Accountability Ordinance, 1999 ***("NAB Ordinance")***, the legality of which was considered by the Supreme Court in ***Khan Asfandyar Wali vs. Federation of Pakistan (PLD 2001 SC 607)***. It was held that, *"any legislative instrument which undermines independence of judiciary may be regarded as repugnant to the spirit of the Constitution. The Superior Courts have the power to declare such legislative instruments as un-enforceable."* In view of the judgment in ***Khan Asfandyar Wali***, provisions of the NAB Ordinance were appropriately amended to bring them in sync with the requirements of the Constitution to uphold the independence of Judiciary.

35. The next significant judgment elaborating the constituent elements of the principle of independence of Judiciary was ***Chief Justice Iftikhar Muhammad Chaudhary v. President of Pakistan (PLD 2010 SC 61)***. It was held by the Supreme Court that, *"the independence of judiciary is inextricably linked and connected with the constitutional process of appointment of Judges of the Superior Judiciary."* It was reiterated that, *"the right of access to justice was a well recognized and an inviolable Fundamental Right enshrined in Article 9 of the Constitution and its denial, an infringement of the said right."* It was further held that, *"since access to justice was inconceivable and would be a mere farce and a mirage in the absence of an independent judiciary guaranteeing impartial, fair and a just adjudicatory mechanism, therefore, the demand for a judiciary which was free of Executive influence and pressures; was not manipulatable and which was not a subservient judiciary, was also an integral part and an indispensable ingredient of the said Fundamental Right of*

access to justice." Justice Khalil-ur-Rehman Ramday concluded by holding that, *"access to justice was a fundamental right which the Constitution had guaranteed to the people; that the existence of an independent and vibrant judiciary was indispensable and crucial for the enjoyment of the said constitutional assurance and in the absence thereof, this right would be a mere illusion; that without security to the Judges of the Superior Courts vis-à-vis, inter alia, their service and the tenure thereof, the independence of judiciary would be a mere delusion and a chimera."*

36. In ***Baz Mohammad Kakar v. Federation of Pakistan (PLD 2012 SC 923)*** while reiterating the law laid down in ***Chairman N.W.F.P. Forest Development Corporation v. Khursheed Anwar Khan (1992 SCMR 1202)***, it was held that, *"Article 2A of the Constitution (Objectives Resolution) commands that independence of the judiciary has to be fully secured. Words 'fully' and 'secured' are explicit enough not to leave any doubt that Constitutional set up of Pakistan preserves the independence of Supreme Court by a definite mandate."* It was further explained that in case of any conflict between constitutional provisions, such conflict must be resolved in favour of independence of the Judiciary.

37. The most relevant case for our present purposes is the law laid down by the Supreme Court in ***Province of Sindh v. Rasheed A. Rizvi (PLD 2012 SC 649)***. The matter before the Court related to the manner in which appointments of Judicial Officers were to be made in the District Judiciary in the Province of Sindh, which process had been amended by Rules enacted by the Government of Sindh. While relying on the settled principles of law, the Supreme Court explained the link between the independence of the Judiciary and the process of appointment of Judges as follows:

> *"9. Our constitutional courts have consistently held that the process of appointments to the judiciary must be carefully scrutinized through the lens of constitutional principles such as the principle of separation of powers. In the Al-Jehad Trust case, this Court stated with reference to appointment of judges of the superior judiciary '...that the independence of the judiciary is inextricably linked and connected with the process of appointment of judges and the security of their*

tenure and other terms and conditions.' (PLD 1996 SC 324, 429) Although this was said in the context of appointment to the High Court, the principle applies with equal force to all judicial appointments, including those in the District Judiciary. Accordingly, the dictum laid down in the Al-Jehad case was soon reaffirmed by this Court in the case of Mehram Ali and others v. Federation of Pakistan (PLD 1998 SC 1445, 1474) and Sh. Liaquat Hussain v. Federation of Pakistan (PLD 1999 SC 504, 658), both cases which concerned the District Judiciary. The aforesaid dictum has also been recently reiterated in Sindh High Court Bar Association v. Federation of Pakistan (PLD 2010 SC 879, 1182) and Munir Hussain Bhatti v. Federation of Pakistan (PLD 2011 SC 407). In the latter case, the Court, after examining the case-law, concluded that 'it is an undisputed tenet of our Constitutional scheme that in matters of appointment, security of tenure and removal of Judges the independence of the Judiciary should remain fully secured.' (PLD 2011 SC 407, 467)"

While acknowledging that in a federal structure the Provinces were free to adopt mechanisms for appointment of Judges, it was held that, *"the only requirement is that the policy and practice adopted by each Province must conform to constitutional imperatives elaborated in Articles 175 and 203 and the relevant precedents which demand, inter alia, that the High Courts must retain a significant degree of 'control' over the appointment and selection process of Judicial Officers."*

Sheikh Riaz-ul Haq: Scope of Judicial Power

38. In the question of whether the Judiciary ought to have any say in the appointment of members comprising the Federal Services Tribunal ***("FST")*** came before the Supreme Court in ***Sheikh Riaz-ul-Haq v. Federation of Pakistan (PLD 2013 SC 501)***. The Supreme Court once again held that, *"It is to be noted that the right of 'access to justice to all' is a well recognized inviolable right enshrined in Article 9 of the Constitution and is equally found in the doctrine of 'due process of law'. It includes the right to be treated according to law, the right to have a fair and proper trial and a right to have an impartial court or tribunal."* While reiterating the law, much of which has been discussed above and restating dicta from ***Sharaf Faridi***, it was held that, "*the independence of judiciary is one of the salient features of our Constitution… The Objectives Resolution, which is now a*

substantive part of the Constitution by means of Article 2A of the Constitution, also commands that independence of judiciary has to be fully secured." The Supreme Court emphasized that, "*in terms of Article 9 of the Constitution a person is entitled to have an impartial Court and Tribunal. Unless an impartial and independent Court is established the right to have a fair trial according to law cannot be achieved. Therefore justice can only be done if there is an independent judiciary which should be separate from Executive and not at its mercy or dependent on it.*" Accordingly, it was held that the members of the FST were to be appointed in consultation with the Chief Justice of the IHC and members of the Provincial Services Tribunal were to be appointed in consultation with the Chief Justice of the respective High Courts.

39. In ***Sheikh Riaz-ul-Haq*** the definition of a Court and what constitutes discharge of judicial function and exercise of judicial power was clarified. It was held that, "*although the term 'Court' is at times used for quasi judicial or administrative Tribunals also but on this premise it cannot be inferred that such forums should be equated with the 'Court' of Law. Therefore, in our opinion, 'Courts' are such organs of the State which administer justice strictly in accordance with law, meaning thereby that while applying law to the controversies, they follow certain rules with regard to procedures and evidence and are not left altogether unguided and uncontrolled to act on their whims and fancies…*" It was held that, in view of dictionary meanings, "*following three elements are essential for the conception of Court (1) Time when Judicial functions may be exercised. (2) A place for exercise of Judicial functions. (3) A person or persons exercising Judicial functions. Thus, the judicial functions are the common characteristic of each element. The term 'judicial function' has also not been clearly spelt out either in any dictionary or in any other book. However, Griffith, C.J. in Huddart Parker's case has defined the term as, 'the words 'judicial power' as used in section 71 of the Constitution mean the power which every sovereign authority must of necessity have to decide controversies between its subject, or between itself and its subjects, whether the rights relate to life, liberty, or property. The exercise of this power does not come into being until some tribunal which has power to give binding and authoritative decision*

(whether subject to appeal or not) is called upon to take action'." *While considering the distinction between a Court and an administrative Tribunal, it was held that, "the character of the action taken in a given case and the nature of the right on which it operates must determine whether that action is judicial, ministerial or legislative or whether it is simply the act of a public agent. A Tribunal acts judicially in the full sense of the term if it has to determine a dispute; the dispute relates to a right or liability which, whatever its immediate aspect, is ultimately referable to some right or liability, recognised by the Constitution or statute or by custom or equity which by the domestic law is declared to be the rule of decision; since every right or liability depends upon facts, the Tribunal is under an obligation to discover the relevant facts; the ascertainment of the facts is in the presence of the parties either of whom is entitled to produce evidence in support of its respective case and to question the truth of the evidence produced by his opponent; and after an investigation of the facts and hearing legal arguments the Tribunal renders a judgment which so far as the Tribunal is concerned terminates the dispute. In the case of an administrative Tribunal, however, the emphasis is on policy, expediency and discretion to enable it to achieve the object with which it was set up. In the case of such a Tribunal the approach in determining the relevant facts is therefore often subjective and not objective, there being generally no lis before it in which the parties are arrayed against each other for the enforcement of a private right or liability and who for that purpose are entitled to produce evidence and adduce legal argument. "*

40. ***Sheikh Riaz ul Haq*** went on to explain judicial power as, *"the legal right, ability and authority to hear and decide, objectively and after allowing opportunity to produce evidence, a justiciable issue, dispute, or controversy, concerning the existing legal rights, duties or interests of persons or property, arising out of relations and dealings, between two or more parties, who bring the same for an authoritative decision, binding on them and may include the authority to execute or get executed its decision and protect rights, prevent and redress wrongs and punish offences through legal process. Further, the judicial power must be conferred by the State under Constitution or law and not the mere*

consent of parties, or persons who are paid by the State and removable by it only. The authority or body in which this power is vested is generally called 'Court' and in performing its functions it declares, construes and applies law or custom or usage, having the force of law. The 'judicial power' is thus the instrument to be used by the Court."

41. While citing approvingly the law laid down in ***M/s Ranyal Textile v. Sindh Labour Court (PLD 2010 Karachi 27)***, it was held that besides the Election Tribunal constituted pursuant to Article 225, Administrative Tribunals constituted pursuant to Article 212 and Tribunals relating to military affairs constituted in terms of Article 199(5), *"whenever judicial power is vested in a forum, whatever be its designation, be it called a Court, be it called a Tribunal or be it called a Commission, for all legal intents and purposes it is a Court and therefore has to be manned, controlled and regulated in accordance with the established judicial principles and the law relating to manning, regulation and control of Courts in Pakistan."* It was further emphasized that*, "the determining factor [as to whether the Tribunal functions as a Court] is the nature of the dispute to be resolved by the Tribunal, if the Tribunal has to determine a dispute relating to a right or liability, recognised by the Constitution or law and is under an obligation to discover the relevant facts, in the presence of the parties, in the light of the evidence produced by them, it acts judicially. Besides, whenever judicial power is vested in a forum, be it called a Court or Tribunal, for all legal intents and purposes it is a Court."*

42. With regard to Service Tribunals, it was held that, *"we are in agreement with the learned counsel for the petitioner that the Tribunal should not be under the administrative or financial control of the Executive. On the analogy of the Judges of the High Courts and Federal Shariat Court, the terms and conditions of the Chairman and Members of the Tribunal may be independently determined so as to make them outside the Executive influence and to ensure uniformity."* It was further held that in making the appointments of the Chairman and Members of the Service Tribunals consultation with the respective Chief Justices was a mandatory obligation and, *"such 'consultation' cannot be treated lightly as a mere formality, rather supposed to be effective,*

meaningful, purposive, consensus oriented, leaving no room for complaint of arbitrariness or unfair play." While relying on the test laid down in ***Mehram Ali***, it was further held that the removal of Judges of special Courts and Tribunals could also not be ordered except in consultation with the Chief Justice. It was held that, *"all judicial appointments must be subordinate to the High Court and it is only High Court which can and should exercise exclusive administrative and supervisory control over subordinate judiciary. Such supervisory and administrative control cannot exist if a credible and pivotal role is denied to the High Court in appointment of such persons. It will be axiomatic to say that a Court is subordinate to High Court but its Presiding Officers is to be appointed by the Provincial Government without consulting High Court… Thus, the appointments of the Chairman/Member of the Service Tribunal, Federal or Provincial, must be made in consultation with the Chief Justice of Pakistan or the Chief Justice of concerned High Court, as the case may be, and all appointments made without such consultation are void."*

Judicial Primacy in the Appointment of Officials Exercising Judicial Functions

43. The constitutionality of the mechanism for appointment of Judges as that was changed through the 18th Constitutional Amendment came before the Supreme Court in ***District Bar Association (Rawalpindi)***. While considering the history of the process for appointment of Judges, the dicta from ***Al-Jehad Trust*** was reiterated where it was held that, *"the words 'after consultation' referred to inter alia in Articles 177 and 193 of the Constitution involve participatory consultative process between the consultees and also with the Executive. It should be effective, meaningful, purposive, consensus oriented, leaving no room for complaint or unfair play…The object of the above participatory consultative process should be to arrive at a consensus to select best persons for the Judgeship of a superior Court keeping in view the object enshrined in the Preamble of the Constitution, which is part of the Constitution by virtue of Article 2A thereof, and ordained by our religion Islam to ensure independence of judiciary."* It was explained that the ratio in ***Al-Jehad Trust*** was that, *"in process of appointment of Judges, the opinion of the Chief*

Justice of the Court concerned and the Chief Justice of Pakistan has primacy."

44. What constitutes judicial independence was also considered by the Supreme Court in ***Justice Shaukat Aziz Siddiqui v. Federation of Pakistan (PLD 2018 SC 538)***, in which it was held that, *"the jurisprudence, both nationally and internationally which has evolved over the ages, around the concept of independence of the judiciary recognizes that the security of tenure of Judges is a critical pre-condition for such independence. This is a universally accepted principle and has also been laid down by a Larger Bench of this Court in the case reported as* ***Chief Justice of Pakistan Iftikhar Muhammad Chaudhary****."* It was further held that, *"the security of tenure of Judges more so those of the Superior Courts is imperative and, therefore, adequate safeguards in this behalf are provided including by enacting what appears to be a rather cumbersome and strict process for their removal. This cardinal principle is reflected in the constitutional dispensation of almost all democratic countries peopled by citizens and not subjects. The exceptions, in this behalf, are almost always found in countries either under Military Dictatorships or ruled by Fascist regimes."* The Supreme Court most recently reiterated the principle that independence of Judiciary and access to justice fall within the ambit of fundamental rights in ***Abdul Sattar v. The Judicial Commission of Pakistan (PLD 2023 SC 32)***.

45. The question of whether the Federal Ombudsman for Protection against Harassment of Women at Workplace exercises judicial powers and functions, and can do so, came before this Court in ***Saleem Ahmed Jan vs. Deputy Commissioner, Islamabad (2024 CLC 953)***. It was clarified that, *"within our constitutional structure, only such powers can be implied to have been vested in an institution, which are not repugnant to the scheme of separation of powers that constitutes a salient feature of our Constitution."* While relying on the law laid down in ***Sheikh Riaz-ul-Haq***, it was held that the Ombudsman sought to exercise judicial powers, which was not permissible under the Constitution. In the said judgment, the scope of Article 203 of the Constitution was considered and it was held that, *"Article 203 grants High Courts supervisory jurisdiction over subordinate courts, which*

forms part of the design of the judicial institution as set up by the Constitution… This judicial control and oversight of all courts and tribunals that exercise judicial powers and dispense judicial functions is a salient feature of the Constitution that is often referred to as the independence of the judiciary within the larger framework of separation of powers. In other words, any forum exercising judicial powers and dispensing judicial functions falls within the exclusive domain of the judiciary and is independent of the authority and power exercised by other constitutional pillars of the State i.e. the Executive and the Legislature."

46. The principles arising from the law laid down by the Supreme Court in ***Sharaf Faridi***, ***Azizullah Memon***, ***Sheikh Liaquat Hussain*** and ***Mehram Ali*** were then summarized as follows:

"(1) The power to adjudicate disputes involving the rights and obligations of citizens, imposing penalties upon citizens, the power to issue binding decision in such matters, and the power to use the coercive authority of the State to enforce such decisions are quintessential judicial functions that entail the exercise of judicial power.

(2) Judicial power cannot be conferred on executive functionaries or legislative bodies, and within the scheme of separation of powers that forms a salient feature of our Constitution, judicial power is to be exercised by the judiciary that is independent of the executive and legislative branches of the State.

(3) Articles 175 and 203 envisage that a tribunal exercising judicial powers must fall within the overall supervision and control of High Courts, with tribunals constituted under Articles 212 and 225 of the Constitution being the only exceptions to the rule.

(4) In order to uphold the right of citizens to be meted out justice in accordance with the law, the appointment process and terms and conditions of service of those exercising judicial powers must be such that they are afforded security of tenure and can discharge their adjudicatory functions while being independent of their peers as well as other branches of the State."

47. The question of whether Executive Magistrates could exercise judicial powers and dispense judicial functions under

provisions of the Constitution in ICT came before this Court in ***Lugman Zafar, Advocate v. Federation of Pakistan*** ***(Writ Petition No.1838 of 2024)*** and it was held that, *"any provision in an Act or any rule or a notification empowering any executive functionary to, have administrative supervision and control over the subordinate judiciary will be violative of above Article 203 of the Constitution. Besides, it will militate against the concept of separation and independence of judiciary as envisaged by Article 175 of the Constitution and the Objectives Resolution"* It was noted while relying on the law laid down in ***Tariq Transport Company v. The Sargodha-Behra Bus Services*** ***(PLD 1958 SC 437)*** that, *"the exercise of judicial power is considered to be an essential feature of a Court, and it distinguishes a Court from an administrative tribunal."*

48. It was held by this Court in ***Lugman Zafar*** that, *"independence of judiciary and its separation from the executive is not a technical term nor can the provisions of Articles 175(3), 202 and 203 be circumvented. It is the constitutional mandate that whenever there is exercise of judicial power, for determination of rights and liabilities of citizens under the Constitution and/or law, such exercise of power shall be exercised (i) by a forum which [is] completely independent from the Executive [Article 175(3)], (ii) such exercise of judicial power shall be subject to the Rules of procedure framed by the concerned High Court [Article 202] and (iii) such forum shall be subject to the supervisory jurisdiction of the concerned High Court [Article 203]; except the Tribunals created under constitutional provisions."* The Court then concluded that, *"within the Islamabad Capital Territory, judicial power can only be exercised by Courts in accordance with the provisions of Articles 175(3), 202 and 203 of the Constitution and other enabling constitutional provisions and the exercise of judicial power in contravention of such constitutional provisions would be unconstitutional and nullity in the eyes of law."*

49. The settled principles emerging from the consistent pronouncements of the Superior Courts in Pakistan, as highlighted above, may be summarized as follows:

(1) The right to an independent Judiciary and access to justice is a fundamental right guaranteed by Articles 9, 10A and 25

of the Constitution, read together with Articles 2A and 4 of the Constitution.

(2) Separation of powers and Independence of the Judiciary are salient features of the Constitution that constitute its basic structure, which can only be altered by the people of Pakistan through exercise of constituent power and not by exercise of the amending power vested in the Parliament under Article 238 of the Constitution.

(3) So long as the Constitution guarantees to citizens the right to life, liberty and equality and to be treated in accordance with law, to be afforded equal protection of law, and the right to due process and fair trial, the procedural and machinery provisions of the Constitution cannot be read so as to militate against the principle of independence of the Judiciary.

(4) The independence of the Judiciary entails that any public official discharging judicial functions and exercising judicial powers in determining the civil rights and obligations or any criminal charge against a person whether as part of a Court or Tribunal or Commission or any other authority exercises a quintessential judicial function, must do so within the supervision and control of the Judiciary.

(5) Judicial independence entails that all public officials exercising judicial functions, whether their posts are designated as judicial posts or not, must be appointed through a process within which the Judiciary has primacy, and must be provided security of tenure such that the transfer and/or removal of such public official is in consultation with the Judiciary, and the terms and conditions of service of such public official must be such that he/she can exercise his/her judicial functions independent of the influence of the Executive or any other authority, to be able to exercise such functions impartially and independently.

(6) All Tribunals, Commissions, Authorities and Public Bodies, notwithstanding their nomenclature or title, that perform judicial functions and exercise judicial power must be placed within the supervision and control of the IHC to the extent that they exercise such functions within the territorial jurisdiction of IHC, and any actions, including *inter alia,* appointments made to such posts or removal of individuals from such posts or interference with the terms and conditions of service of those discharging judicial functions within the territorial jurisdiction of the IHC without consultation with and approval of IHC is in breach of the requirements of Articles 203 and 175(3) read with Articles 2A, 4, 9 and 25 of the Constitution and not sustainable in the eyes of law.

(7) Any acts and omissions of the Executive in not establishing Courts, Tribunals, Commissions and Authorities, as required by law, to discharge judicial functions and exercise judicial powers for the benefit of citizens within the territorial jurisdiction of IHC would constitute a breach of the requirements of the respective law read with Articles 4, 9, 10A, 25 and 175 of the Constitution and such acts and omissions together with any delay in filling vacancies to posts created for or to be created for purposes of discharge of judicial functions and exercise of judicial powers constitutes a denial to citizens of their right to access to justice by the Executive.

(8) Any laws promulgated by the Legislature or Rules enacted by the Executive that have the effect of undermining independence of the Judiciary or interfering with the supervision and control of IHC over public functionaries discharging judicial functions and exercising judicial power, would be in breach of the requirements of Articles 2A, 4, 9, 10A, 25 and 175 of the Constitution.

Statutory Framework for Establishment of Courts and Tribunals in ICT

50. Let us now apply the principles discussed above to the special courts and tribunals that are established or ought to be established in ICT, which fall within the supervision and control of IHC in terms of Article 203 of the Constitution. Despite repeated opportunities and reminders, the respondents have failed to provide a comprehensive list of all the laws that require establishment of courts, tribunals and authorities for the exercise of judicial power and discharge of judicial functions within ICT. This Court has put together a list of laws and the courts/tribunals/authorities to be established by the Federal Government for the benefit of citizens residing in ICT, which is attached as **Annex-A** to this judgment. This may not be a comprehensive list of the relevant laws reflecting all the courts, tribunals, commissions and other authorities that are required to be established by the Federal Government ICT, but provides a starting point for purposes of the directions to be issued in the instant matter.

51. While we will consider a few of the relevant statutes to enumerate the manner in which the principles highlighted above are to be applied, such analysis ought not be considered a comprehensive discussion in relation to all statutes creating

judicial authority within ICT. The Accountability Court created under provisions of the NAB Ordinance provides under Section 5A of the NAB Ordinance that a Judge shall not be removed without consultation with the Chief Justice of the High Court concerned. Similarly, Section 5(g) of the NAB Ordinance provides that a Judge is to be appointed by the President in consultation with the Chief Justice of the High Court of the province concerned. These provisions were enacted through the NAB (Amendment) Ordinance, 2001, in view of the law laid down by the Supreme Court in ***Khan Asfandyar Wali***.

52. Similarly, the Anti-Terrorism Act, 1997 pursuant to which Special Court (Anti-Terrorism) is established provides for the appointment of judges in consultation with the Chief Justice, prescribes a term of two and a half years for the appointment, and further provides that a Judge can only be removed prior to the completion of his tenure after consultation with the Chief Justice of the High Court, under Sections 14(2), (3) and (4) of the Anti-Terrorism Act, which provisions were enacted in view of the law laid down by the Supreme Court in ***Mehram Ali***.

53. The Financial Institutions (Recovery of Finances) Ordinance, 2001, provides for the establishment of Banking Courts. It requires appointment of Judges to be made in consultation with the Chief Justice of the High Court of the Province concerned and also prescribes a 3-year period of service pursuant to Sections 5(4) and 5(6) of the said Ordinance. The provisions of the Intellectual Property Organization of Pakistan Act, 2012, which provide for the establishment of Intellectual Property Tribunals, require appointment of Presiding Officers in consultation with the Chief Justice of the High Court concerned and also require that such Presiding Officers may only be removed or transferred prior to completion of their tenure in consultation with the Chief Justice concerned. Section 3 of the Offences in Respect of Banks (Special Courts) Ordinance, 1984, similarly provides for appointment and removal of Judges in consultation with the Chief Justice concerned and also provides for a prescribed term of office. In relation to the FST, it has already been held by the Supreme Court in ***Sheikh Riaz-ul-Haq*** that the appointments of the Chairman and Members

of such Tribunals are to be made in consultation with the Chief Justice concerned.

54. Section 46(4) of the Control of Narcotic Substances Act, 1997, and Section 44(1) of the Prevention of Electronic Crimes Act, 2016, provide for appointment of Judges in Courts constituted under such provisions in consultation with the Chief Justice of the concerned High Court. There are certain other statutes including, *inter alia*, the Foreign Exchange Regulation Act, 1947, the Anti-Money Laundering Act, 2010, and the Consumer Protection Act, 1995, that vest jurisdiction to exercise judicial powers, under provisions of the said statutes, in judges serving within the District Judiciary. Still other statutes such as the Drugs Act, 1976, the Customs Act, the ITO, the Sales Tax Act, the Payment of Wages Act, 1936, that do not provide for appointment or removal of officials exercising judicial powers under such Acts are to be appointed and/or removed in consultation with the Chief Justice of the relevant High Court.

55. The manner of implementation of the constitutional principles delineated above would be that it would need to be read within each statute providing for the discharge of judicial functions and exercise of judicial powers within the territorial jurisdiction of IHC that all appointments of public officials exercising judicial powers and discharging judicial functions, in terms of the test laid down by the Supreme Court in ***Sheikh Riaz-ul-Haq*** would be required to be made in consultation with the IHC and any removal or transfer of such officials, prior to the expiration of his or her term, would also need to be made in consultation with the IHC. Further, the Tribunals, Commissions or Authorities that do not exclusively exercise jurisdiction within ICT but, nevertheless, exercise judicial power and discharge judicial functions such as authorities created, including, inter alia, under the Industrial Relations Act, 2012, the Customs Act, the Sales Tax Act, the ITO, the Competition Act, 2010, the Insurance Ordinance, 2000, the Anti-Dumping Act, 2015, the power of appointment and removal of public functionaries exercising judicial powers would need to be exercised in consultation with the Supreme Court of Pakistan. The manner of consultation must meet the test laid down by the Supreme Court in ***Al-Jehad Trust*** in the sense that the

consultation must be meaningful, purposive and consensus-oriented. Further, in terms of exercise of appointment and removal powers, the decision-making process must be such that the Judiciary has primacy within such process to ensure independence of the Judiciary and to ensure that the Judiciary has supervision and control over the exercise of judicial power as required by Articles 203 and 175 of the Constitution.

ATIR Appointments — Constitutional Compliance

56. Having examined the constitutional framework and the principles delineated above, we may also consider the manner in which appointments are made under the Appellate Tribunal Inland Revenue Rules, 2024 **("ATIR Rules")**. During the proceedings in the instant matter the Federal Government placed on record the ATIR Rules, 2020. The ATIR Rules 2020 provided for the appointments of Members to be made by the Federal Government in consultation with the Chief Justice of Pakistan. Subsequently, however, the Federal Government placed on record the ATIR Rules, 2024, which provide for the creation of a Selection Committee in which one Member is to be appointed by the Chief Justice of Pakistan, one Member is to be appointed by the Prime Minister and one Member is the Chairman of Federal Public Service Commission, who is also a person appointed by the Federal Government. In such a scenario, the representative appointed by the Judiciary would at all times be in a minority.

57. There are two matters to be considered here. First, that judicial appointments are a matter of selection and not election. Where a judicial appointment is to be made, it entails the exercise of discretionary authority guided by subjective assessment of the expertise and antecedents of the candidates in question guided by objective criteria. It is thus that it was held by the Supreme Court in ***Al-Jehad Trust*** that consultation on judicial appointments must be *"effective, meaningful, purposive, consensus-oriented, leaving no room for complaint of arbitrariness or unfair play."* Any process of appointment where such selection process is transformed into an election process with Selection Committee Members casting votes driven by policy considerations cannot pass constitutional muster. Second, there must be primacy vested

in the role of the Judiciary in the decision-making process leading to judicial appointments to comply with the principles and the test laid down in ***Al-Jehad Trust,*** read with Article 203 of the Constitution, when it comes to appointments made to Courts and Tribunals that fall within the supervision and control of the High Court. The ATIR Rules 2024 clearly fall foul of the requirements of Article 203 of the Constitution read with the test laid down in ***Al-Jehad Trust*** and do not comply with the Constitution and the principle of judicial independence as discussed above.

58. Let us briefly clarify here the question of whether the ATIR constituted a Court for purposes of Article 185(2)(d) of the Constitution came before the Supreme Court in ***Army Welfare Trust v. Collector of Sales Tax*** ***(PTCL 2019 CL 356)*** and the Supreme Court held that, *"The Appellate Tribunal is not mentioned or provided for in the Constitution, therefore, it cannot be categorized or be deemed to be a court in terms, of Paragraph (d) of clause (2) of Article 185 of the Constitution."* And consequently, the correct course of action in the said case was for the petitioner to prefer a petition seeking leave to appeal the impugned judgment. ***Army Welfare Trust*** is, therefore, not a precedent on whether the ATIR exercises judicial powers and discharges judicial functions in terms of the law laid down by the Supreme Court in ***Sheikh Riaz-ul-Haq*** and is only limited to considering the proper remedy where one is sought ultimately before the Supreme Court in terms of Article 185 of the Constitution in relation to a judgment of the ATIR.

The Constitutional and Statutory Scheme re Islamabad Judicial Service

59. The second aspect of the subject-matter of the instant petition relates to the manner in which judicial appointments are to be made within Islamabad District Judiciary. Analysis in this part of the judgment that follows was undertaken in ***Muhammed Shabbir v. Registrar, Islamabad High Court and another (Judicial Service Appeal No.03 of 2016)*** decided by judgment dated 29.04.2025 (which was authored by me). The relevant parts of the said judgment dealing with the question of legality of appointments in Islamabad District Judiciary on deputation basis is being adopted and reproduced here. (The said judgment was

considered by a Single Member Bench of IHC in ***Abdul Hasnat, Muhammad Zulqarnain v. Muhammed Shabbir*** ***(Writ Petition No.1341 of 2025)*** whereby judgment dated 02.05.2025 the order of three Member Judicial Services Tribunal was set-aside, but *"only to the extent of [such judgment] setting aside notification dated 18.03.2025",* pursuant to which the Judicial Services Tribunal was reconstituted. The interpretation of Section 6(3) of the IHC Act, as originally undertaken by three Member Judicial Services Tribunal, is being adopted by this Bench being the correct enunciation of the law.)

60. In terms of background, the IHC was first created by the Islamabad High Court (Establishment) Order, 2007 (President's Order No. 7 of 2007) issued by General Pervez Musharraf. Such statutory High Court continued to function from 15.12.2007 to 31.07.2009 when it was disbanded pursuant to the judgment of the Supreme Court in ***Sindh High Court Bar Association v. Federation of Pakistan*** ***(PLD 2009 SC 789)***. The Constitution was amended through the Constitution (Eighteenth Amendment) Act, 2010, and the provisions in Part 7 of the Constitution related to the Judicature were amended to provide for a High Court for the ICT. In the aftermath of such amendment, Parliament enacted the IHC Act, which entered into force on 02.08.2010 when it was gazetted. Section 6(3) of the IHC Act provided the following:

> *"(3) The Islamabad High Court shall take necessary steps for establishing sub-ordinate judiciary for the Islamabad Capital territory within six month of the commencement of this Act. The judges of the sub-ordinate judiciary working on deputation shall be sent back to the respective High Courts after establishment of the sub-ordinate judiciary for the Islamabad Capital Territory"*
>
> *(Underlined for emphasis)*

61. It was pursuant to section 6(3) of the IHC Act that the legislature conferred, on IHC, the authority to take all necessary steps to establish an independent Judicial Service for ICT within six months of the enactment of the IHC Act. The said section mandated that judges working in Islamabad District Judiciary on deputation *"shall be sent back to the respective High Courts after establishment of the sub-ordinate judiciary for the Islamabad*

Capital Territory". In other words, section 6(3) of the IHC Act conferred on IHC a power to establish a Judicial Service for ICT, comprising civil, criminal, revenue and special courts and tribunals referred to in section 6(1) and 6(2) of the IHC Act. Such courts were previously under the superintendence and control of the Lahore High Court in terms of Article 203 of the Constitution and fell within the supervision and control of IHC since its establishment. This power to take necessary steps for the establishment of Islamabad Judicial Service within a period of six months was accompanied with a duty to repatriate judicial officers working on deputation that belonged to judicial services of the provinces. Article 175 that provided for an independent High Court for ICT together with provisions of the IHC Act manifested the legislative intent that IHC was to be an independent High Court mandated to assemble and invigorate a Judicial Service comprising judicial officers to serve the subordinate courts in ICT and to exercise supervision and control over such courts in terms of Article 203 of the Constitution.

62. It is essential to take note of the fact that the judges of IHC were to be appointed from all territories comprising Pakistan through the appointment process described in Article 175A of the Constitution. Neither the IHC nor the Islamabad Judicial Service were envisaged to be representative of the Provincial High Courts and Provincial Judicial Services. For purposes of IHC, the Constitution and the IHC Act provided for appointment of judges from across all provinces and territories comprising Pakistan on an initial appointment basis. It was not provided that IHC would comprise judges transferred from provincial High Courts, which could have been one way of constituting IHC and would make the composition of IHC a product of the resource pool of judges comprising provincial High Courts. This was, however, not done and judges of IHC were appointed through initial appointments from across Pakistan in accordance with the procedure prescribed for initial appointments for other provincial High Courts. The IHC Act borrowed the same principle for purposes of comprising Islamabad Judicial Service, which is why it bestowed on the IHC the responsibility for establishing a Judicial Service for ICT as opposed to providing that those judicial officers already serving in

the courts in ICT, belonging to Judicial Services of provinces, would comprise the Islamabad Judicial Service and more could be appointed through transfer from the Judicial Services of provinces.

63. The wisdom behind such legislative direction was to ensure that Islamabad Judicial Service is not disproportionately represented by the Judicial Service of any one province, as previously the courts in ICT fell within the domain of Lahore High Court. The legislative intent was to assemble a new and independent Judicial Service for ICT, on an initial appointment basis, such that the judicial officers serving in such service could be sourced from across the provinces and territories of Islamabad. And just like IHC, Islamabad Judicial Service was conceived as an independent service and not an extension of provincial Judicial Services. Article 203 of the Constitution provides that *"each High Court shall supervise and control all courts subordinate to it."* Article 202 of the Constitution vests in a High Court the power *"to make rules regulating the practice and procedure of the Court or of any court subordinate to it."* Likewise, Article 208 of the Constitution vests in the High Court the power to *"make rules providing for the appointment by the Court of officers and servants of the Court and for their terms and conditions of employment."* Articles 202 and 208 therefore vest in High Courts the power to make rules for purposes mentioned therein. And Article 203 confers the power to the High Court to supervise and control subordinate courts without specifying the tools to be used for such purpose.

64. The notions of independence of the Judiciary and separation of powers between the Executive and the Judiciary has evolved since the enactment of the Constitution back in 1973. Unlike Article 175(3) of the Constitution, the Constitution of 1962 did not explicitly require the separation of the Judiciary from the Executive. The Judicial Service after the independence of Pakistan was considered to be a part of the Civil Service, the terms and conditions of which were regulated by the Executive. This changed after the period prescribed in Article 175(3) of the Constitution expired and the courts began to rule that the Judiciary was to be separated from the Executive and the control and supervision of the courts exercising judicial powers must fall exclusively within

the domain of the Judicature. In ***Sharaf Faridi***, ***Azizullah Memon*** and ***Mehram Ali***, amongst other cases, discussed earlier in this judgment, the Supreme Court laid down requirements to be satisfied such that courts and tribunals exercising judicial powers were overseen by the Judiciary alone. Given that Judicial Services of the provinces had existed even prior to the promulgation of the Constitution in 1973, the judicial service rules had been enacted by provincial governments in exercise of authority under provincial civil service statutes.

65. It was subsequent to the judgments mentioned above that the rules were amended to provide the respective High Courts with effective control over the terms and conditions of service of judicial officers. It was in view of requirements meant to uphold independence of the Judiciary and separation of powers, as salient features of the Constitution, that the power and responsibility of establishing a Judicial Service for ICT was conferred on the IHC in terms of Section 6(3) of the IHC Act. The said Act did not include any explicit provision for promulgation of Rules, and much like Article 203 of the Constitution, left it to the IHC to employ whatever tools necessary for establishing a Judicial Service for ICT. It was within this constitutional and statutory scheme that IHC enacted the Judicial Service Rules *"in pursuance of section 6 of the Islamabad High Court Act, 2010 read with Article 203 of the Constitution."* The only point to be noted here is that the nomenclature of Judicial Service Rules is of no consequence. While the rules have been enacted in exercise of the constitutional authority vested in IHC under Article 203 of the Constitution and the statutory authority vested in IHC under Section 6(3) of the IHC Act, there is no explicit provision within the Constitution or any law conferring on IHC statutory authority to promulgate sub-statutory legislation for purposes of prescribing the terms and conditions of service of Islamabad District Judiciary. However, as the High Court was under the statutory obligation to establish Islamabad Judicial Service and prescribe the modes of appointment, promotion and other terms and conditions for such service, it was imperative for IHC to structure its discretion in the interest of transparency and certainty. Such authority was

structured and discharged by enactment of the Islamabad Judicial Service Rules, 2011 **("Judicial Service Rules")**.

66. It is settled law that where the legislature itself delegates legislative authority to the executive for enactment of sub-statutory legislative instruments such as rules, the rules enacted in exercise of such delegated authority are akin to provisions of the statute. In case of the Judicial Service Rules, the same are more in the nature of instructions issued by the IHC in exercise of its statutory mandate under section 6(3) of the IHC Act and its constitutional responsibility to supervise and control subordinate courts under Article 203 of the Constitution, as opposed to the exercise of any explicit rule making authority vested in it by the Constitution or the Parliament. This will have to be borne in mind while interpreting provisions of the Judicial Service Rules for their consistency with provisions of the IHC Act, as the principle that any sub-statutory instrument must not be in conflict with the provisions of the statute would apply equally in case of Judicial Service Rules, if not more strictly.

Principles Regulating Appointments to Public Offices: Legality and Transparency

67. It is now settled that an appointment to any public office must be made strictly in accordance with law while providing a level playing field to all eligible candidates through a transparent process. The principles as highlighted in the judgments that will be discussed here are equally applicable in relation to judicial appointments.

68. ***In The Matter of Contempt Proceedings Against Chief Secretary Sindh (2013 SCMR 1752)***, the Supreme Court set aside appointments in the province of Sindh, including appointments made by absorption of deputationists from other cadres, affecting the inter-se seniority of employees within various cadres and services of the provincial government. In doing so, the principle of legality and transparency in making appointments and promotions was highlighted.

69. The question of illegal orders in relation to appointments and transfers came before the Supreme Court in ***Syed Mubashir Raza Jaffri v. EOBI (2014 SCMR 949)***, in which it was held that

"*the jurisprudence of this Court has been clear and consistent with regard to the manner in which appointments to public offices are to be made strictly in accordance with rules and regulations, without any discrimination and in a transparent manner. Thus, it is essential that all appointments to public institutions must be based on a process that is palpably and tangibly fair and within the parameters of its applicable rules, regulations and by-laws.*" In reiterating the above principles, the Supreme Court reaffirmed the law laid down in ***Muhammad Yasin v. Federation of Pakistan (PLD 2012 SC 132)***, ***Muhammad Ashraf Tiwana v. Pakistan (2013 SCMR 1159)***, ***Tariq Aziz-ud-din and others (2010 SCMR 1301)*** *and* ***Syed Mahmood Akhtar Naqvi v. Federation of Pakistan (PLD 2013 SCMR 195)***.

70. The question of illegal appointments through transfer and absorption once again came before the Supreme Court in ***Ali Azhar Khan Baloch v. Province of Sindh (2015 SCMR 459)***. While interpreting the Civil Servants Rules, 1974, in relation to the Province of Sindh, it was held that*, "[T]here is neither procedure nor mechanism provided under the Act or the Rules to treat appointment by transfer as absorption in the transferee department. Rule 9(1) cannot be used as a tool to allow horizontal movement of a civil servant from his original cadre to another cadre against scheme of the Act and the Rules of 1974…Any appointment by transfer under Rule 9(1) has to be for a fixed term, and, on completion of such term, the Civil Servant has to join back his parent department…restricted meaning has to be given to the expression 'appointment by transfer'."* It was further held that, "*The ordinary dictionary meaning of the term 'transfer' means 'to move from one position to another'. If this meaning is attached to the term 'transfer' used in Rule 9(1), it would lead to mean an ordinary posting of a civil servant from one position to another. Such transfer, however, cannot be construed to qualify the term 'absorption'…"* It was therefore clarified in ***Ali Azhar Khan Baloch*** that any appointment by transfer is an appointment of a temporary nature that does not entitle a transferee to permanent absorption within the borrowing department.

71. The question of illegal appointments came before the Supreme Court while it considered the vires of the Sacked

Employees (Re-instatement) Act, 2010, which was declared to be ultra vires the Constitution and all reinstatements and appointments made thereunder were set aside as being ultra vires the Constitution and thus void. A review against such judgment was considered in ***Hadayat Ullah v. Federation of Pakistan (2022 SCMR 1691)*****.** It was reiterated by the Supreme Court, while providing some relief to non-skilled workers employed under the Sacked Employees (Re-instatement) Act, 2010, in exercise of authority under Article 187 of the Constitution, that *"It is then…the responsibility of appointing authorities to ensure that appointments are made strictly in accordance with the relevant laws (including the applicable rules and regulations) that incorporate the principles of merit (selection through a competitive process), non-discrimination, transparency and fairness…[T]hese cherished principles are not merely fruit of judge made law but they also emanate from fundamental rights enshrined in the Constitution especially Article 18…"* The Supreme Court relied on the law earlier laid down in ***Mushtaq Ahmed Mohal v. Lahore High Court (1997 SCMR 1043)***.

72. The question of legality of appointments made in IHC's establishment, in exercise of authority under Article 208 of the Constitution, came before the Supreme Court in ***Ch. Muhammad Akram v. Registrar IHC (PLD 2016 SC 961)***. There were two questions addressed in this judgment. The first related to the manner of appointments and the obligation of the High Court to comply with the relevant rules. And the second question related to the maintainability of a challenge to the appointments made by the High Court in exercise of administrative powers in view of Article 199(5) of the Constitution. On the first question i.e. the legality and merit of the appointments it was held that *"if appointments in the Islamabad High Court are made in colorable exercise of power or by bypassing the transparent process of recruitment provided under the Rules, it will have far reaching undulate effects on the public at large. If the torchbearers of justice are permitted to make appointments overlooking merits, the sanctity of the judicial system will be in peril… Such an unlawful exercise of power is also an abrogation of, the fundamental rights guaranteed under Article 18 of the*

Constitution, which protects an individual's right to enter upon a lawful profession or occupation. The right conferred under Article 18 has to be read with Article 4 of the Constitution, which provides every citizen the right to be dealt with in accordance with law." Part of the argument raised on behalf of the respondents in the matter was that the appointments had been made by the Chief Justice in exercise of authority provided to him under the relevant Rules to relax such Rules, and that IHC was a new establishment and ought to be given some leeway if it did not comply with the Rules strictly. With regard to the first defence, the Supreme Court held that *"absolute power to relax a certain service rule has not been conferred on the Chief Justices of both the High Courts [Lahore High Court and Islamabad High Court] and this power is limited only to be exercised where it does not encroach upon the statutory right of other persons or employees. These two Rules cannot be interpreted in such a manner as to bestow an absolute power upon the Chief Justices to deal with the case of a person/employee in a manner they like. The Chief Justices can exercise powers under these Rules only in a manner that may not cause injustice or prejudice to any individual/employee."* With regard to the justification of IHC being a new Court it was held that, *"[t]he justification that the Islamabad High Court was a new Establishment is not sufficient to override the mandatory requirement for the appointments."* In terms of consequences, the Supreme Court held that *"We have noticed numerous infirmities in the appointments…made by the Chief Justice/Administration Committee, and these infirmities are incurable by the Chief Justice under the powers conferred on him under Rule 26 of the Lahore High Court Rules and Rule 16 of the Islamabad High Court Rules."*

73. While the Supreme Court endorsed absorption of employees recruited from the establishment of different provincial High Courts, in relation to deputationists it directed that *"[a]ny appointments made on the basis of deputation without observing the required codal formalities under the rules and absorption of the deputationist thereafter against a permanent post or promotion post, in complete disregard of the eligibility or qualification required for initial appointment should also be de-notified."* In relation to initial appointments, it was directed that,

"[i]nitial appointments made against a permanent post without following the required procedure as provided in the Rules, particularly the provisions related to the advertisement of posts, eligibility and competitive examination are also to be de-notified." On the question of maintainability of a petition against the administrative actions of the Chief Justice of the High Court or the Administrative Committee the Supreme Court declared that the law previously laid down in ***Muhammad Iqbal v. Lahore High Court through Register (2010 SCMR 632)*** was not good law, while creating a distinction between the judicial powers and administrative powers of the High Court and holding that while the judicial powers of the High Court were immune to challenge in terms of Article 199(5) of the Constitution, administrative actions of the Chief Justice and/or the administrative committee did not enjoy such protection and were amenable to writ jurisdiction. The Supreme Court concluded its judgment while emphasizing the need for the Judiciary to uphold the highest standards of fairness and transparency in making appointments by noting that, *"[t]he Chief Justice, Islamabad High Court and or the Administration Committee of Islamabad High Court have made appointments in the Establishment in complete disregard of the mandate given by the rules framed under Article 208 of the Constitution. If the competent authority itself starts cherry picking by deliberately ignoring and overlooking meritorious candidates in appointment…the image of the institution will be tainted beyond repair. Such practice may lead to distrust of the public in the judicial institution of the country."*

Gul Taiz Khan Marwat and the 'But For' Test

74. While the law laid down ***Ch. Muhammad Akram*** with regard to the exercise of authority by the High Court and its obligation to comply with the rules remains good law, the finding with regard to the maintainability of a petition against administrative actions of a High Court was reconsidered by the Supreme Court in ***Gul Taiz Khan Marwat v. The Registrar Peshawar High Court (PLD 2021 SC 391)***, which declaring the law laid down in ***Ch. Muhammad Akram*** with regard to maintainability of a challenge to administrative actions of a High Court to be *per incuriam*. It was held that, *"[w]e differ with the*

view taken in the said judgment in the meaning, interpretation, scope, extent and interplay of Articles 199 and 208 of the Constitution. Keeping in view Articles 176, 192, 199 and 208 of the Constitution, and upon a harmonious interpretation thereof, in our humble opinion, no distinction whatsoever has been made between the various functions of the Supreme Court and the High Courts in the Constitution and the wording is clear, straightforward and unambiguous in this regard. There is no sound basis on which judges acting in their judicial capacity fall within the definition of 'person' and judges acting in their administrative, executive or consultative capacity do not fall within such definition. In essence, the definitions of a High Court and Supreme Court provided in Articles 192 and 176 supra respectively are being split into two when the Constitution itself does not disclose such intention." The Supreme Court found that, "*[T]o bifurcate the functions on the basis of something which is manifestly absent is tantamount to reading something into the Constitution which we are not willing to do...[T]he powers exercisable under the rules framed pursuant to Article 208 supra form a part and parcel of the functioning of the superior courts. In other words, the power under Article 208 supra would not be there but for the existence of the superior courts. This 'but for' test, as mentioned by the learned Attorney General, is pivotal in determining whether or not a particular act or function carried out by a judge is immune to challenge under the writ jurisdiction under Article 199…[I]n the instant matter, but for the person's appointment as a Judge (thereby constituting a part of a High Court or the Supreme Court under Articles 192 and 176 supra respectively), would the function in issue be exercised? If the answer to this question is yes, then such function would not be immune to challenge under Article 199 supra. In this case with respect to the administrative, executive or consultative acts or orders in question, the answer to the 'but for' test is an unqualified no, therefore such acts or orders would in our opinion be protected by Article 199(5) of the Constitution and thereby be immune to challenge under the writ jurisdiction of the High Court.*"

75. Thus, in ***Gul Taiz Khan Marwat***, a five-member bench of the Supreme Court declared that ***Ch. Muhammad Akram***, to the extent that it found that administrative actions of the Chief

Justice/Administration Committee/Judges were amenable to constitutional challenge under Article 199 of the Constitution, was declared not to be good law. The Supreme Court in ***Hadayat Ullah*** reaffirmed the principles of legality and transparency emphasized in ***Ch. Muhammad Akram***, while noting that it was overruled in ***Gul Taiz Khan Marwat*** *"only to the extent that the administrative orders of a Chief Justice of a High Court are not amenable to writ jurisdiction."*

Deputation and Absorption as a Method of Appointment in Islamabad Judiciary Service

76. We have noted the requirements of Section 6(3) of the IHC Act, creating an obligation for IHC to establish a subordinate Judiciary and to repatriate Judges serving on deputation within courts that fell within the administrative control of IHC after its creation. In view of the fact that there was need to establish a subordinate Judiciary almost from scratch, Rule 6 of the Judicial Service Rules provided for first time appointments. The said provision authorized the IHC to invite applications from members of all provincial Judicial Services and make appointments after the Judicial Selection Board of IHC had subjected the applicants to a competitive selection process. The eligibility, criteria, and qualifications of candidates who applied through the first-time appointment process, were prescribed in Rule 7 of the Judicial Service Rules. Rule 8(1) of the Judicial Service Rules then provided that, *"[t]he members of Judicial Services of the Provinces posted on deputation under the jurisdiction of Islamabad High Court may apply for absorption in the Service and the Chief Justice on recommendations of Administration Committee may order their absorption and appoint them against the posts for which they are eligible under these rules."* The said rule applied in relation to judicial officers who were already serving on deputation at the time of establishment of IHC in terms of the IHC Act and subsequent enactment of the Judicial Service Rules, i.e. on 13.05.2011. In exercise of the power under such Rule, various judicial officers serving on deputation at the relevant time were absorbed in the Islamabad Judicial Service.

77. Rule 9 of the Judicial Service Rules provided that in the event that certain vacancies remained unfilled after IHC had made

first time appointments and appointments by absorption, the posts could be filled on the basis of deputation from the High Courts of other provinces. The proviso to Rule 9 clearly provided that, "*such unfilled vacancies may not be brought forward for first time appointment, but filled through initial recruitment or promotion in the manner as prescribed.*" The proviso clarifies that Rule 9 constituted a transitory arrangement for a limited time period to meet an administrative exigency. But any posts not filled through the competitive first time appointment process or through the absorption of judicial officers already serving on deputation at the time of enactment of the Judicial Service Rules could not be filled through another round of first time appointments or absorptions, but were to be filled exclusively through initial recruitment or promotion, which constitute the regular means of appointment within Islamabad Judicial Service as provided under Part-V and Part-VI of the Judicial Service Rules.

78. Rule 10(1) provides that, "*[a]fter the first time appointment or absorption, the subsequent appointments to the Service shall be made in the following manner…*" It provides that the posts of Civil Judges are to be filled through initial appointment and the posts of Additional District and Session Judges are to be filled through initial appointment and through promotion in accordance with the quotas prescribed in the Rules. On the other hand, appointments to the posts of Senior Civil Judges and District and Session Judges are to be filled exclusively on the basis of promotion in accordance with recommendations of the Departmental Promotion Committee. Rule 11 deals with the procedure for initial appointments to be undertaken through a competitive process. Rule 12 prescribes the ratio of promotes and appointees through direct recruitment for posts of Additional District and Session Judges. And Rule 13 prescribes the procedure for appointment and promotion, requiring the Departmental Promotion Committee to consider a panel of three members of the Islamabad Judicial Service against each post to be filled before making a recommendation for promotion, which recommendation is then to be considered by the Chief Justice for making an appointment by promotion.

79. Rules 14, 15, 16, 17, 18 and 19 of the Judicial Service Rules deal with qualifications and disqualifications for appointments within Islamabad Judicial Service. Rule 20 regulates probation as part of the terms and conditions of service. Rule 20(1) provides that those appointed on a first-time appointment basis shall stand confirmed from the date of their appointment in the event that they were previously confirmed as judicial officers. Rule 20(2) provides that officers appointed through initial recruitment would remain on probation for a period of two years. The third proviso to Rule 20(2) vests in the IHC the power to reduce the period of probation in exceptional circumstances. The vesting of the power in the High Court must be taken note of as it is primarily in case of filling a post on deputation in terms of Rule 9 of the Judicial Service Rules and reduction of the period of probation where authority is vested in the High Court, i.e. to be exercised by the Chief Justice and all Judges of the Court. Most of the decisions under the Judicial Service Rules are to be taken not by the High Court but by other specified authorities, such as the Chief Justice, the Administration Committee, the Departmental Promotion Committee and the Judicial Selection Board.

80. Rule 21 deals with seniority and provides for the seniority in cases of first-time appointment, in cases of initial recruitment, and in cases of promotion. It is evident that the Rules only conceive of these three modes of appointment within the Islamabad Judicial Service and accordingly provide for the manner in which the seniority in each category is to be reckoned. Rule 28 deals with relaxation of Rules and provides that, *"the Chief Justice may relax any Rule for the reasons to be recorded in writing, if he is satisfied that strict application of these Rules would cause undue hardship to the individual concerned or any other matter as the case may be."* It must be borne in mind that such power of the Chief Justice was considered by the Supreme Court in ***Ch. Muhammad Akram*** and it was held in the context of appointments made in exercise of authority under Article 208 of the Constitution that the Chief Justice was vested with no arbitrary authority to relax Rules, and the argument that the Chief Justice could regularize illegal appointments in exercise of authority under such rule was dismissed by the Supreme Court. The findings of the Supreme

Court in relation to such discretionary authority remain good law and are binding in terms of Article 189 of the Constitution.

81. Article 30 of the Judicial Service Rules deals with interim arrangements and provides the following:

> **30. Interim arrangements.** __ (1) On the commencement of these rules the judicial officers holding posts of the district judiciary in the Islamabad Capital Territory shall stand repatriated to the Lahore High Court, Lahore, within thirty days.
>
> (2) The Chief Justice, at his discretion, may appoint the eligible members of the service against the posts under sub-rule (1) or other posts under the administrative control of the High Court, from time to time.
>
> (3) The Chief Justice, at his discretion, may also borrow the services of suitable judicial officers from provincial High Courts for appointment on deputation against the posts under sub-rule (1) or posts created under these rules or other posts under the administrative control of the High Court, from time to time.
>
> (4) As soon as the composition and strength as determined by the High Court or under these rules, as the case may be, is completed the judicial officers appointed on deputation under sub-rule (3), unless earlier directed by the Chief Justice, shall be repatriated to the concerned provincial High Courts.

It is evident from plain reading of Rule 30(3) that it also vests transitory and temporary authority in the Chief Justice to make appointments on deputation basis and the temporary nature of such appointments through deputation is reaffirmed by Rule 30(4). The application of Rule 30(3) is not in question before us but we flag this issue to the extent that it creates room for the Chief Justice to make appointments on deputation basis, which has been considered later in this judgment in the context of Section 6(3) of the IHC Act.

82. Rule 31 provides that, *"[t]he Chief Justice on recommendations of the Administration Committee of the High Court may amend these Rules."* This rule is also not directly in question in the case before us. We would however note that in view of the doctrine of ultra vires, this rule is not consistent with the requirements of Article 203 and Section 6(3) of the IHC Act.

There is no provision in the Constitution that vests authority in the office of the Chief Justice to amend High Court Rules in his individual capacity or through the decision of a committee of the High Court. The Constitution confers power and authority on the High Court to supervise and control subordinate courts in terms of Article 203 of the Constitution, and to frame rules of practice and procedure under Article 202 and rules for purposes of its own court staff and officials under Article 208 of the Constitution. Neither the Constitution nor any law vests power in the Chief Justice or any committee of the High Court, including the Administration Committee, to enact or amend High Court Rules.

83. It is well settled that any act or subordinate legislation in contravention of the Constitution is ultra vires the fundamental law. Similarly, where the power to enact sub-statutory legislation is vested in any authority, the same can only be exercised within the four corners of the statute, in a manner consistent with the provisions of the statute. This principle was most recently reiterated by the Supreme Court in ***Shaukat Mehmood v. ECP (PLD 2024 SC 653),*** where dicta from ***Province of East Pakistan v. Nur Ahmed (PLD 1964 SC 451)*** was reiterated, where it was held that, *"[t]he rule-making authority cannot clothe itself with power which the statute itself does not give."* And that "[*r]ules have to be consistent with the statute under which they are framed."* The principle of delegation has already been discussed earlier in this judgment. Where the Constitution or the statute vests discretionary power in an authority to render decisions, the same cannot be sub-delegated unless the legislation itself provides for such sub-delegation, and it is only the execution of decisions that can be delegated. It was similarly held by the Supreme Court in ***Farrukh Raza Sheikh v. Appellate Tribunal Inland Revenue (2022 SCMR 1787),*** that, *"[i]t is axiomatic that Rules being subordinate or delegated legislation, are framed under the authority of the parent statute, and are therefore subservient to the primary legislation…Any rule to the extent of any inconsistency with the parent statute is, therefore, ultra-vires the parent statute."*

84. The rule making power of the High Court is similarly subject to the doctrine of ultra vires, as discussed above. The issue has

been discussed by Justice Fazal Karim in the ***Judicial Review of Public Actions*** (2nd edition, Vol. 3, pp. 1827), where he notes that the power to make subordinate legislation has been delegated to the superior courts by Articles 191 and 202 of the Constitution. *And that, "by Section 122 of the Code of Criminal Procedure, 1898, there is power in the High Court to make rules of procedure. The rule-making power under such provisions, as we shall see, is also of the character of subordinate legislation and is liable, like any other subordinate legislation, to have its validity challenged on ground of ultra-vires."* It has already been discussed above in this judgment, that the Judicial Service Rules are not rules stricto sensu, as they have not been enacted in exercise of any explicit rule making power. Rule 31 of the Judicial Service Rules is, however, not in consonance with the Constitution and Section 6(3) of the IHC Act. And Rules 9 and 33 of the Judicial Service Rules, to the extent that provide for continuous filling of posts in Islamabad Judicial Service on deputation-basis, by borrowing judicial officers from Provincial Judicial Services, instead of filling posts by initial appointments or promotions as the prescribed method of appointment under the Judicial Service Rules, also fall foul of Section 6(3) of the IHC Act. These Rules will need to be read down to uphold principles regulating deputation laid down by the Supreme Court, as appointment on deputation can only be made in extraordinary circumstances where no officer is available within the Islamabad Judicial Service to perform the responsibilities of an office that requires to be filled urgently.

85. The principles regulating appointment on deputation basis have also evolved over time and are well settled. In ***Province of Punjab v. Ikramul Haq*** ***(1986 SCMR 1994)***, the concept of deputation as articulated by FST was endorsed which had held that, *"the departmental authorities in accordance with the practice in vogue have defined a 'deputationist' to be a Government servant who is appointed or transferred through the process of selection to a post in a department or service altogether different from the one to which he permanently belongs."* The definition was endorsed and reiterated by the Supreme Court in ***Muhammad Arshad Sultan v. Prime Minister of Pakistan (PLD 1996 SC 771).*** The question before the Supreme Court was

how to reckon the seniority of transferees. In doing so the Supreme Court endorsed and relied upon certain instructions issued by the Federal Government which provided that, *"in fairness to the persons employed in the office in which a vacancy occurs, a person from another office should be appointed only if no person eligible and suitable for appointment is available in the office; concerned."*

86. In ***Muhammad Ramzan Khan v. Government of Pakistan (1999 PLC(CS) 1149)*** *while relying on* ***Muhammad Arshad Sultan*** the Supreme Court reaffirmed that deputationist is a government servant, *"appointed or transferred through the process of selection to a post in a department or service altogether different from the one to which he permanently belongs*." In ***Dr. Shafi-ur-Rehman Afridi v. CDA (2010 SCMR 378***), the Supreme Court held that*, "the deputationist by no stretch of imagination and in absence of any specific provision of law can ask to serve the total period of deputation…no legal or vested rights whatsoever are available to a deputationist to serve his entire period of deputation in the borrowing Department."* It was further held that *"a deputationist could not be treated as an aggrieved person…a deputationist has no vested right to remain on a post as deputationist forever or for a stipulated period as mentioned in the notification and can be repatriated at any time…deputation can be defined as an administrative arrangement between borrowing and lending Authorities for utilizing the services of an employee in the public interest and exigency of services against a particular post and the deputationist cannot remain on deputation for an indefinite period."* It was further held that a deputationist could not remain on deputation for an indefinite period.

87. In ***Contempt Proceedings against Chief Secretary Sindh (2014 PLC(CS) 82)*** before the Supreme Court amongst others matters were appointments through transfer on deputation basis and subsequent inductions of such deputationists affecting inter se seniority of civil servants. The appointments on deputation and subsequent inductions were set aside as illegal. While discussing the concept of deputation and its statutory basis, it was held that, *"the term 'deputation' has not been provided under any civil service law and this term has been borrowed from ESTACODE,*

2009 Edition Chapter-III at page 385. Part-II at page 426 of ESTACODE, which deals with the issue of deputation and serial No.29 which defines 'deputation'." The Court reiterated the definition of a deputationist provided in ***Muhammad Arshad Sultan*** while highlighting that appointment on a deputation basis was to be through a process of selection. It further noted that directions issued to repatriate deputationists to their parent departments and Federal Government in ***Lal Khan v. EOBI (2010 PLC(CS) 1377)*** were upheld by the Supreme Court and leave was refused in the said matter.

88. In ***Sudhir Ahmed v. the Speaker, Balochistan Provincial Assembly (2017 SCMR 2051)***, the matter before the Supreme Court related to a deputationist who had been absorbed in the borrowing department and subsequently repatriated in view of judgments of the Supreme Court in ***Contempt Proceedings against Chief Secretary Sindh (2013 SCMR 1752)*** and ***Ali Azhar Khan Baloch v. Province of Sindh (2015 SCMR 459)***. The Supreme Court held that *"[where] the post…cannot be filled except by promotion…[a]ppointment by deputation or by absorption being against law cannot be maintained."* The notification of repatriation was upheld by the Supreme Court and it was held that, *"appointments of the persons who parachuted in any autonomous body, authority or department from above without undergoing the process laid down by law and the relevant rules for appointment"* could not be approved.

89. In ***Muhammad Sharif Kareem v. Government of Balochistan (2018 SCMR 54)***, the Supreme Court dismissed the appeals of those aggrieved by repatriation orders in view of the law laid down in ***Contempt proceedings against Chief Secretary Sindh*** and ***Ali Azhar Khan Baloch***. It held, while summarizing the law in the aforementioned cases that, *"appointments made on deputation, by absorption or by transfer under the garb of exigencies of service in an outrageous disregard of merit, impaired efficiency and paralyzed the good governance and that perpetuation of this phenomenon, even for a day more would further deteriorate the state of efficiency and good governance."* In relation to absorption of those appointed by transfer it was held that, *"the appointment cannot become*

permanent nor could it lead to absorption because such appointment being a stop-gap-arrangement holds the field till the time a suitable person is appointed against the post. Absorption of a person thus appointed not only damages the fabric of civil service but also barricades the channels of promotion for those who sweat therefor but have no political links and connections to achieve the desired goal."

90. In ***The Chairman Board of Governors v. Syed Roidar Shah (2021 SCMR 867)***, the Supreme Court reiterating the law laid down in ***Dr. Shafiur Rehman Afridi*** held that, *"[a] deputationist has no right to continue in an employment as a deputationist and the employer, where the deputationist is employed, is competent to terminate the deputation and relieve the deputationist…without assigning any reason. No right of the [deputationist] at all is violated and thus, the very writ petition…before the High Court was on its face not maintainable",* due to the lack of a grievance on part of the deputationist.

91. The latest view of the Supreme Court with regard to deputation is expressed in ***Ghansham Das v. Govt. of Khyber Pakhtunkhwa*** **(2024 SCMR 188)** where the extraordinary circumstances in which a transfer on deputation could be made was underscored and it was held that, *"deputation within a government department holds a significant role, necessitating recruitment under exceptional circumstances when there is a lack of expertise within the department in the relevant subject or field…it is imperative to emphasize that deputation should not entail an indefinite period of service but should conform to the specified duration for the deputation…"*, by reiterating that, *"no legal or vested rights whatsoever are available to a deputationist to serve his entire period of deputation in the borrowing Department."*

92. In ***Safdar Ali Sohito v. Province of Sindh (2011 PLC(CS) 956)*** it was held by a Division Bench of the Sindh High Court that, *"our constitutional and legal system attaches foremost importance to transparency and fairness in the administration of matters relating to appointment and career building of civil servants who are required to perform sensitive*

public duties strictly in accordance with law. There is no room for spoils system in our jurisprudence."

93. In ***Muhammad Mansoor ul Haq v. Federation of Pakistan (2017 PLC(CS) 1365)*** a Division Bench of this Court while relying on the principles laid down by the Supreme Court held that, *"in case of transfer on deputation, no vested right accrued to a deputationist to continue for the period of deputation."* It was held that, *"a deputationist cannot occupy a post reserved for promotion quota",* while relying on ***Zubair v. Federation of Pakistan*** (***2016 PLC(CS) 259)*** wherein a division bench of the Sindh High Court had held that, *"deputationist could not hold a post which was required to be filled by promotion or direct appointment."*

94. This Court in ***Mrs. Nusrat Rashid v. Federation of Pakistan (2021 PLC(CS) 777)*** discussed at length the jurisprudence on the question of deputation and held that as deputation was to be made through a selection process, as has already been discussed by citing the law laid down by the Supreme Court, *"an appointment of an officer on deputation basis would be void if such appointment is not preceded by a process of selection of the officer in question."* It was emphasized that, *"equally abhorrent is the practice of appointing deputationists to posts which under the recruitment rules are reserved for appointment by direct recruitment."* While summarizing what was held by the Supreme Court in ***Contempt Proceedings against Chief Secretary Sind (2013 SCMR 1752)*** this Court noted that the Supreme Court, *"after making reference to the three modes for the appointment of civil servants prescribed in the APT Rules, held inter alia that 'absorption' itself is an appointment by transfer."* Similarly, reiterating the law laid down by the Sindh High Court in ***Zubair***, it was held that, *"the filling of a post on deputation is necessary only if no suitable person is available for appointment to a particular post and where it is in the public interest to make an appointment on temporary basis or by deputation. It is my view that public functionaries who facilitate or cause such appointments of deputationists without having carried out a process for promotion or initial appointment to fill the post in question are not just guilty of inefficiency and misconduct by violating the*

applicable recruitment rules, but also of misuse of authority by bestowing a service advantage on the deputationists."

95. What emerges from the above case law is that an authority vested with power to appoint a person to a public office is bound to act strictly in accordance with the law and the rules regulating such appointments. Where an appointment is to be made through a certain method of appointment, such as initial appointment or promotion, no parallel mode or method of appointment can be employed to scuttle the prescribed method of appointment. Appointment by deputation is a subset of appointment by transfer, except that it is appointment by transfer for a limited period in extraordinary circumstances to meet the exigencies of a service. The extraordinary circumstance that creates justification for appointment on deputation basis is that there is no person qualified to perform the responsibilities of a post within the service, leaving the appointing authorities with no option but to temporarily appoint a person on deputation basis from another service to meet the emergent situation. Even where an appointment by deputation is justifiable in face of the extraordinary circumstances such as lack of ability and skill within the service, such appointment must be the outcome of a selection process. And where such appointment by deputation is made, the appointment must not be made against posts reserved to be filled by another method of appointment, such as initial appointment or promotion, and the appointment by deputation must not undermine the rights of permanent members of the service to serve against an available post or in breach of their legitimate expectancy of professional advancement within the service.

96. It in view of these principles regulating appointments by deputation read with Section 6(3) of the IHC Act, Rules 9 and 33 of the Judicial Service Rules, which are even otherwise framed as transitory provisions, cannot be employed as a method of appointment to fill posts reserved to be filled through initial appointments or promotion. Further, neither Rule 9 nor Rule 33 of the Judicial Service Rules can continue to be employed by the High Court to import judicial officers from provincial Judicial Services and post them against key judicial posts in Islamabad Judicial

Service. Such action would be in breach of Section 6(3) of the IHC Act, the legislative intent behind which is unambiguous.

97. The IHC has been placed under a statutory responsibility to establish, build, and nurture an independent Judicial Service for ICT. For purposes of establishing such service at the time of enactment of the Judicial Service Rules, Rules 6, 8 and 9 were provided as extraordinary provisions of limited time utility, while Rules 6 and 8 provided for first time appointments and absorption of already serving deputationists. Rule 9 provided a temporary fix to fill posts on deputation basis, in the event that the relevant skill and ability to fill a vacant judicial office was not available within Islamabad Judicial Service, after making appointments on a first-time appointment basis and absorptions under Rules 6 and 8, respectively. It was nevertheless clarified that the posts to be filled on deputation basis as an extraordinary measure could only be filled on permanent basis through initial appointment or promotion, which constitute the regular means of appointment in Islamabad Judicial Service.

98. It is noteworthy that appointment by transfer is not provided as a method of appointment in Islamabad Judicial Service under the IHC Act or the Judicial Service Rules. Consequently, the question of appointment on deputation basis, which is a temporary appointment through transfer, and/or absorption of deputationists appointed in exercise of authority under Rule 9 of the Judicial Service Rules, has no basis in law (i.e. the IHC Act and the Judicial Service Rules). Rules 9 and 30(3) of the Judicial Service Rules, therefore, have to be read down and cannot be employed by IHC to continue to fill posts in Islamabad Judicial Service on a deputation basis. To the extent that posts have presently been filled on a deputation basis, it is for the IHC to take appropriate steps to give effect to Section 6 of the IHC Act, and establish and supervise the Islamabad Judicial Service such that its members have security of tenure and that such Judiciary does not comprise those serving on a temporary basis who and consequently do not effectively fall within the supervision and control of the IHC.

99. It was held by the Supreme Court in ***Dr. Shafi-ur-Rehman Afridi***, as affirmed by the Supreme Court in subsequent

judgments, that a deputationist has no vested right to claim to serve in the borrowing department and in case of repatriation, a deputationist cannot claim to be an aggrieved person who is to be afforded the right to a hearing.

100. The disapproval of appointments by deputation in Islamabad Judicial Services doesn't flow simply from an interpretation of Section 6(3) of the IHC Act. The issue quintessentially is one of independence of the Judiciary. The Constitution mandates judicial independence, which includes independence of the subordinate Judiciary. This is most important tier of the Judicature as this is primarily where ordinary citizens interface with the justice system. If the subordinate Judiciary is not independent, the right of citizens to access to justice and fair trial is undermined. A judge discharging judicial functions while serving on deputation serves on a temporary basis and has no security of tenure. He/she can be repatriated any time the lending or the borrowing employer chooses to terminate the period of deputation. A judge whose security of tenure is not protected does not enjoy independence.

101. As has been discussed above, the concept of judicial independence is not limited to the Judicature being separate and independent of the Executive and the Legislature. It also entails vertical and horizontal independence within the Judicature. A judge serving on a transfer-basis enjoys no vertical independence. And this why rules regulating judicial services do not provide for appointment by transfer. Unlike the Civil Servants (Appointment, Promotion and Transfer) Rules, 1973, that provide for transfer as one of the regular modes of appointment along with promotion and initial appointment, there is no such provision in the Judicial Service Rules, that prescribe only two modes of appointment: promotion and initial appointment. Appointment by transfer, which by definition is temporary in nature, is antithetical to security of tenure that is a prerequisite for securing the independence of a judge.

102. Neither the Constitution nor the IHC Act and Judicial Service Rules envisage a rent-a-judiciary for ICT borrowed from provincial High Courts. Such conception of subordinate Judiciary for ICT is irreconcilable with an independent Judiciary. IHC continuing to

borrow judicial officers by writing to other High Courts is an admission of its inability to establish a subordinate Judiciary that it can exercise effective administrative control over. The only means available to IHC to hold a judge to account, who serving on deputation, is to repatriate the judge and request the parent High Court to initiate disciplinary proceedings. In continuing to sustain a subordinate Judiciary staff by borrowed judges serving on deputation, IHC would in effect be abandoning its obligation to effectively supervise and control the subordinate Judiciary in terms of Article 203 of the Constitution.

103. IHC also cannot disregard the demoralizing effect deputationists occupying key judicial posts in ICT has on permanent members of Islamabad Judicial Service. Deputationists acting as presiding judges occupy positions required to be filled under the Judicial Service Rules on the basis of initial appointment or promotion. Staffing a deputationist against a promotion post, for example, is akin to IHC declaring that there is no one available in Islamabad District Judiciary with the ability, qualification and expertise to serve against such post. This in effect is a vote of no confidence in members of Islamabad Judicial Service. The practice also disrupts the avenues of upward professional mobility that ought to be made available by them.

104. And why should one High Court loan its best and brightest officers to another High Court? Staffing courts in ICT with borrowed deputationsists would thus suggest IHC's willingness to work with subpar human resource instead of investing in a capable Islamabad Judicial Service. IHC must not eschew developing a potent Human Resource Management System that recruits, trains and grooms the best talent within Islamabad Judicial Service. Its HR Management System must be capable of matching judicial training, ability and expertise with judicial functions to be performed, while incentivizing top talent with fast-track career progression based on performance. It is for IHC to oversee the growth of district judges who are capable of being elevated as judges of IHC. IHC continuing to work with borrowed deputationists would be tantamount to acknowledging its own delinquency.

105. In view of the law laid down in ***Gul Taiz Khan Marwat*** as well as the entrenched principle of law and propriety that it is not for a High Court to issue a writ to itself, this Court would be loath to issue any direction in terms of Article 199 of the Constitution to IHC or the Registrar of IHC with regard to the consequence of the declarations made in this judgment, holding that in order for the IHC to exercise effective supervision and control over Islamabad District Judiciary and to give effect to provisions of section 6 of the IHC Act, the Islamabad District Judiciary cannot be manned by deputationists. Consequently, while making the declarations that follow, this Court leaves it to the wisdom of IHC as to how it wishes to give effect to Section 6 of the IHC Act read together with Article 203 of the Constitution, to bring the practice of appointment, removal and terms and conditions of service of Members of the Islamabad District Judiciary in consonance with the requirements of the law and the Constitution:

(i) Article 175 provides for a High Court for the ICT, just as it provides for High Courts for the federating units of Pakistan. The Constitution does not envisage members of IHC, and the subordinate courts supervised by IHC, to be sourced from the Provincial High Courts and/or the subordinate courts supervised by such High Courts. The letter and intent of the Constitution has been deciphered by the Parliament in enacting the IHC Act. The representative principle is enshrined in Section 3(1) of the IHC Act, 2010, read together with Article 27 of the Constitution. Section 6(3) of the IHC Act, that mandated the establishment of a subordinate judiciary within six months of the enactment of the IHC Act, also required the repatriation of all members of the subordinate judiciary serving on deputation in ICT.

(ii) Articles 175 and 203 of the Constitution, read with Section 6 of the IHC Act, envisage an independent and autonomous judiciary for ICT supervised by IHC, and not a judiciary comprising judges sourced on deputation from the provinces serving under the supervision of Provincial High Courts. Section 6(3) unequivocally required all deputationists to be returned to their respective High Courts and provinces from the date of enactment of IHC Act, which entered into force on 02.08.2010. Neither the letter nor the spirit of IHC Act, allows filling permanent posts in the subordinate judiciary established for ICT on deputation basis, by borrowing judges from Provincial High Courts.

(iii) To the extent that Rules 9 and 30 Islamabad Judicial Service Rules, 2011, make provision for continuing appointment and service within the subordinate judiciary established for ICTon deputation basis, such provisions are contrary to Section 6(3) of the IHC Act, and would need to be read down. Islamabad Judicial Service must be staffed by permanent judges whose terms and conditions of service afford them security of tenure and do not render them vulnerable to transfer or repatriation as a consequence of independent exercise of judicial power.

106. Since the filing of the petition and during its adjudication, Article 199(1A) was enacted by the Parliament through the 26th Constitution Amendment. While the respondents did not raise any objection to the maintainability of the petition or the relief that can be granted by this Court in the exercise of its authority, this Court has taken into account the provision of Article 199(1A) of the Constitution, the rationale and effect of which was considered in ***Usama Khilji v. Federation of Pakistan* (Writ Petition No. 1561 of 2023)** in judgment dated 16.09.2025 as follows:

> *"75. To reiterate, the scope or manner of exercise of the original jurisdiction of the High Court under Article 199 of the Constitution has not changed following the insertion of Article 199(1A). The provision only clarifies what has long been established by case law: the High Court is not vested with suo motu jurisdiction and must not exercise its judicial power in a manner that results in deciding a case that has no direct nexus with the lis brought before it by an applicant. But moulding relief to dispense substantial justice or taking cognizance of events subsequent to the filing of an application, that are connected with the lis before the Court and in relation to which contesting parties have the opportunity to make submissions before it, does not equate to exercise of suo motu jurisdiction.*
>
> *76. Article 199(1A) of the Constitution clarifies that the High Court may not make an order 'on its own…beyond the contents of any application filed', as it is such exercise of judicial power that would qualify as the Court acting on its own in relation to a case not brought before it and in transgression of its jurisdiction. Article 199(1A) does not refer to the 'prayer clause' of the application or state that High Court may not make an order beyond what is sought by the prayer clause. The reference to the 'contents of the application' reaffirms the obligation for the Court to reasonably, sensibly and holistically appreciate the entire body of the application to understand the nature of the dispute it has been called upon to adjudicate. The legislative*

intent behind enacting Article 199(1A) of the Constitution was not to castrate the constitutional machinery for enforcement of fundamental rights. If anything, the reference to the contents of the application has clarified that in granting relief, the High Court is not hostage to the wording of the prayer clause, as mistakenly held in some precedents pre-dating Article 199(1A).

77. Nothing in Article 199(1A) prevents the High Court from moulding relief in view of the facts of the case to dispense substantive justice and remedy the injury being caused..."

Declarations of Court

107. Having found that Article 199(1A) does not prohibit this Court from giving effect to the fundamental right of independence of Judiciary and access to justice as guaranteed by the Constitution read together with Articles 2A, 4, 175 and 203 of the Constitution, this Court **allows** the instant petition with the following declarations and directions to the Federal Government:

(I) The Federal Government shall not make any appointment to an office that entails exercise of judicial power and discharge of judicial functions within the ICT, under any law for the time being in force, except through a decision-making process wherein the Judiciary has primacy over the process and any consultation between the Executive and the Judiciary for purposes of making such appointments complies with the test laid down by the Supreme Court in ***Al-Jehad Trust*** and upholds the requirement of Article 203 of the Constitution that the Judiciary has supervision and control over such process. The same direction would apply to any transfer or removal of such official from the post prior to the expiry of the period prescribed by law or prescribed in the notification of the appointment to such office.

(II) The terms and conditions of service of public of an official exercising judicial powers and discharging judicial functions shall be such that the official is able to exercise adjudicatory authority independently and impartially without being influenced by any other person or authority. The terms and conditions of service shall neither be amended to the disadvantage of the official discharging judicial functions nor shall administrative authority be exercised in relation to such official in a manner that interferes with his or her exercise of judicial authority.

(III) In relation to appointment and removal of officials exercising judicial authority, the Federal Government shall exercise the powers of appointment and transfer/removal in consultation

with the IHC in a case where such judicial function is being discharged exclusively within ICT, and in consultation with the Supreme Court where such judicial function is partly being discharged in ICT and partly beyond the territorial jurisdiction of IHC.

(IV) The Federal Government shall initiate appropriate amendments in all relevant laws pursuant to which appointments are made for purposes of exercise of judicial powers in ICT and till such time that appropriate amendments are made within these laws (as was done in case of the Anti-Terrorism Act, 1997. And the National Accountability Ordinance, 1999, in view of the law laid down by the Supreme Court in **Mehram Ali** and **Khan Asfandyar Wali**, respectively), it will be deemed that no appointments and transfers/removals can be made except in consultation with the IHC or the Supreme Court, as the case may be.

(V) The Federal Government shall take steps to prescribe within the laws, that provide for appointment of officials for exercise of judicial functions, a term for office in relation to each appointment to ensure security of tenure for those discharging judicial functions. Until such time that such amendments are made, any notification for such appointments shall mention a fixed term for which the official will discharge judicial functions, and such official shall not be transferred or removed from office except in consultation with the IHC or the Supreme Court, as the case may be.

(VI) To the extent that any appointment has been made for discharge of judicial functions within ICT, under any law for the time being in force, which appointment has not been made in consultation with the IHC or the Supreme Court, as the case may be, the Federal Government shall initiate appropriate summaries to seek the concurrence of the IHC and the Supreme Court, as the case may be, within a period of thirty days, failing which such appointments will be deemed to have been made without lawful authority. Such summaries will be initiated notwithstanding the lack of requirement for consultation, by deeming that such constitutional requirement exists and has existed at all times, pending amendments in respective laws to bring them in conformity with the requirements of the Constitution.

(VII) The Federal Government will initiate the process of consultation for appointment of any official to an office that discharges judicial functions and exercises judicial powers at least thirty days prior to the expiry of the term of the incumbent and once the consultation with the IHC is complete and a recommendation for appointment has been

made, the recommendation shall be given effect, except where the recommendation cannot be given effect in compliance with the test laid down by the Supreme Court in ***Al-Jehad Trust,*** for which reasons shall be recorded and shared with the IHC, within two weeks of the receipt of such recommendation from IHC to ensure that offices created for discharge of judicial functions do not remain vacant and appointments are made in a timely fashion to uphold the rights of citizens of access to justice.

(VIII) The Secretary Ministry of Law and Justice will file a compliance report listing all laws under which appointments are to be made to offices that exercise judicial powers and discharge judicial functions within ICT in a tabular form, and further state within such report whether the directions listed above have been complied with in relation to the appointments under each of such law. Such compliance report shall be submitted to the Registrar of IHC, who may seek instructions from the Chief Justice of IHC for purposes of compliance in the event that the aforementioned directions have not been complied with.

108. As is evident from the principles of law recapitulated above, the principles of separation of powers, access to justice and independence of the Judiciary as rooted in the fundamental rights guaranteed by the Constitution are well understood and entrenched in view of the jurisprudence produced by the Superior Courts of Pakistan over the last three and a half decades. The IHC was created in 2010, and the fact that a detailed judgment is required to be issued for purposes of giving effect to the commands of the Constitution only manifests that the notion of independence of the Judiciary as a prerequisite for upholding the fundamental rights of citizens, including the right to have their rights and obligations adjudicated by independent and impartial courts and tribunals, despite being a salient feature of the basic structure of our Constitution, remains to be accepted and/or adhered to by the Executive.

109. The Supreme Court in ***Justice Shaukat Aziz Siddiqui*** had aptly noted that it is only in countries suffering military dictatorships or fascist regimes that independence of the Judiciary and the norms required to uphold the same remain contested. In this context, it was observed by the Supreme Court in ***District Bar Association (Rawalpindi)***, while tracking the chequered judicial and constitutional history of the country, that "*The lack of*

independence of the judiciary was always ascribed to the personalities of different Judges of the Court – and not to the mode of appointment. (If Munir, CJ and his colleagues had so chosen they could have decided the Tamiz-ud-Din case differently. There was nothing in the then Constitution preventing them from doing so)."

110. As mentioned in the initial part of this judgment, the threat to rule of law, democracy, separation of powers and an independent Judiciary remain alive and well in the 21st Century. It is only the means employed to subdue and circumvent democracy, rule of law and judicial independence that have changed.

111. In the book *"Rule by Law: The Politics of Courts in Authoritarian Regimes", (Cambridge University Press, 2008), edited by Tom Ginsburg and Tamir Moustafa, t*he authors argue authoritarian regimes do not conceive of courts as passive or irrelevant actors. Instead, authoritarian regimes weaponize courts to maintain social control, legitimize power and persecute political opponents. There is abundant academic literature that emphasizes how courts that are oblivious to their constitutional obligation to uphold fundamental rights of citizens and their own independence, as a prerequisite to function as the machinery for enforcement of fundamental rights, become tools of lawfare employed instead to circumvent the very rights of citizens that the Judiciary is designed to protect. In the Article *"How to Fight Court-Packing?" (2020 Vol.6 Constitutional Studies 133), David Kosař and Katarína Šipulová*, while citing contemporary examples from other countries, explain how *"(1) the expanding strategy, which includes techniques that increase the size of the court; (2) the emptying strategy, which results in a decrease in the number of sitting judges; and (3) the swapping strategy, which aims at replacing sitting judges"* form a part of strategies in use to castrate judicial independence as a prequel to indefinite regime perpetuation.

112. Cognizant of Pakistan's constitutional history and the unfortunate role of individuals within the Judicature who were co-opted, or were complicit, or otherwise reneged on their obligations to uphold the Constitution and its promise of an independent Judiciary obliged to protect and defend the fundamental rights of

citizens, this Court must exercise the authority vested in it by the Constitution and the law to ensure that the exercise of judicial power and the discharge of judicial functions within the territorial jurisdiction of the IHC are neither subservient to the diktat of the Executive nor is the Judiciary staffed in a manner that renders it incapable of realizing the purpose of its existence i.e. to uphold the Constitution and protect and defend the fundamental rights of citizens without considerations of fear or favour and without being influenced by the transient entrusts of the executive.

113. This court would like to acknowledge the contribution of the petitioner as the member of the Bar in raising this essential matter regarding the enforcement of fundamental rights through this public interest litigation. This court is grateful to the office of the attorney general for the valuable assistance provided during arguments. The court would also like to acknowledge the valuable assistance provided by Mr. Mustafa Sajid Zuberi, Judicial Law Clerk assigned to this court, in researching the questions of law involved.

114. Let a copy of this order be sent to the Secretary, Ministry of Law & Justice and Secretary, Cabinet Division, for compliance.

(BABAR SATTAR)
JUDGE

This judgment has been signed and released on **10.11.2025.** Let the office notify the parties accordingly.

(BABAR SATTAR)
JUDGE

Approved for Reporting

Abdul Rahman Abbasi.

Annex-A

Sr #	Name of Court & Act	Establishing & Appointing Authority	Whether Judicial Primacy in appointment
1.	**Competition Appellate Tribunal** Competition Act, 2010	Fed. Gov. pursuant to S.43	No Consultation with the IHC
2.	**NIRC** Industrial Relations Act, 2012 Appointment of Chairman and Members Qualification Rules, 2022	S.53 – Fed. Gov. R.4 – Fed. Gov.	No Consultation with the IHC
3.	**Chief Commissioner/Magistrate to be appointed** Payment of Wages Act 1936	S.15 – Federal Gov.	No Consultation with the IHC
4.	**Banking Court** Financial Institutions (Recovery of Finances) Ordinance, 2001	S.5 – Fed. Gov.	Fed. Gov. After Consultation with the IHC
5.	**Special Court (offences in Banks)** Offences in Respect of Banks (Special Courts) Ordinance 1984	S.3 – Fed. Gov.	In Consultation with IHC
6.	**Foreign Exchange Regulation Appellate Court** Foreign Exchange Regulation Act, 1947	S.23 – Fed. Gov.	No Consultation with the IHC
7.	**Intellectual Property Tribunal** IPO Act, 2012	S. 16 – Fed. Gov.	Fed. Gov. After Consultation with the IHC
8.	**Insurance Appellate Tribunal** Insurance Ordinance, 2000	S.121 – Fed. Gov. Powers may be conferred to District or Addl. District & Sessions Judge	No Consultation with the IHC
9.	**Environment Protection Tribunal** Environmental Protection Act, 1997 Environmental Tribunal Rules, 1999	S.20 – Fed. Gov. R.3(1) – Fed. Gov. may Transfer…	No Consultation with the IHC
10.	**Anti-Dumping Appellate Tribunal** Anti-Dumping Act, 2015	S.64 – Fed. Gov.	No Consultation with the IHC
11.	**Appellate Tribunal Income Tax** Income Tax Ordinance, 2001	S.130 – Fed. Gov.	No Consultation with the IHC
12.	**Customs Appellate Tribunal** Customs Act, 1969	S.194 – Fed. Gov.	No Consultation with the IHC

13.	**Special Court (Customs, Taxation & Smuggling)** Customs Act, 1969	S.185 – Fed. Gov. may appoint special judges who must be, or must have been, a Sessions Judge	No Consultation with the IHC
14.	**NAB Court** National Accountability Bureau Ordinance, 1999	S.5-A – Fed. Gov.	Fed. Gov. After Consultation with the IHC
15.	**Drugs Courts** Drugs Act 1976	S.31 – Fed. Gov.	No Consultation with the IHC
16.	**Special Court (Control of Narcotics Substances)** CNS Act, 1997	S.46 – Fed. Gov.	Fed. Gov. in Consultation with the IHC
17.	**Presiding Officers under PECA** PECA, 2016	S.44 – Fed. Gov.	Fed. Gov. in Consultation with the IHC
18.	**Social Media Protection Tribunals** PECA, 2016	S.2V – Fed. Gov.	No Consultation with the IHC
19.	**Federal Services Tribunal** Services Tribunal Act, 1973	S.3 – Fed. Gov.	No Consultation with the IHC
20.	**Special Court (Anti-Terrorism)** Anti-Terrorism Act, 1997	S.13 & 14 – Fed. Gov.	Fed. Gov. in consultation with the IHC
21.	**Consumer Court** Consumer Protection Act, 1995	S.2(a) – Sessions Court to be Competent Authority	Ambiguity re power to appoint
22.	**Special Court (Central)** Pakistan Criminal Law Amendment Act, 1958	S.3 Fede. Gov.	No Consultation with the IHC
23.	**Appellate Tribunal NEPRA** NEPRA Act, 1997	S.12A	No Consultation with the IHC

Table of Contents

Factual Background and Submissions of Counsel 5
Questions for Determination..... 10
Foundational Constitutional Principles..... 11
Maintainability..... 16
Judicial Independence: Evolution and Recognition..... 18
Sheikh Riaz-ul Haq: Scope of Judicial Power..... 26
Judicial Primacy in the Appointment of Officials Exercising Judicial Functions..... 30
Statutory Framework for Establishment of Courts and Tribunals in ICT ... 35
ATIR Appointments — Constitutional Compliance..... 38
The Constitutional and Statutory Scheme re Islamabad Judicial Service.. 39
Principles Regulating Appointments to Public Offices: Legality and Transparency 44
Gul Taiz Khan Marwat and the 'But For' Test 48
Deputation and Absorption as a Method of Appointment in Islamabad Judiciary Service..... 50
Declarations of Court..... 66
Annex-A 71