*HCJD/C-121*

**JUDGMENT SHEET**

**IN THE ISLAMABAD HIGH COURT, ISLAMABAD**

**Judicial Service Appeal No.03 of 2016**

**Muhammad Shabbir**

***Versus***

**Registrar, Islamabad High Court and another**

| | | |
|---|---|---|
| **Appellant by** | **:** | **Mr. Asad Iqbal Siddiqui, Advocate**<br>**Mr. A. Ammar Sehri, Advocate** |
| **Respondents by** | **:** | **Malik Abdul Rehman, State Counsel.**<br>**Mr. Rizwan Shabbir Kayani, Advocate and Hafiz Farman Ullah, Advocate for respondent No.2.**<br>**Mr. Muhammad Asif Iqbal, Departmental Representative for respondent No.1** |
| **Date of Hearing** | **:** | **13.03.2025** |

---

***Babar Sattar, J:-*** Through this appeal, the appellant Mr. Muhammad Shabbir (a member of Islamabad District Judiciary) challenged (i) the absorption of respondent No.2 (i.e. Mr. Shahrukh Arjumand, District & Sessions Judge Islamabad) pursuant to notification dated 14.03.2012 as Senior Civil Judge, (ii) notification dated 27.06.2012 pursuant to which the services of respondent No.2 were regularized by curtailing the period of his probation, and (iii) notification dated 27.06.2012 pursuant to which respondent No.2 was promoted as Additional District and Sessions Judge **("AD&SJ")**. The appellant also sought back benefits from 27.06.2012 when respondent No.2 being his junior was promoted to the position of AD&SJ.

2. The facts of the case are straightforward. Respondent No.2 was appointed by the Public Service Commission for the province of Khyber Pakhtunkhwa **("KP")** as a Civil Judge by Notification dated 25.06.2003. He was promoted to the post of

Senior Civil Judge by Peshawar High Court, which was notified on 15.07.2010. The Islamabad High Court **("IHC")** appointed him against the post of Senior Civil Judge in Islamabad on deputation basis, and he assumed charge of his office on 01.02.2012 after being permitted by the Peshawar High Court on 25.01.2012 to serve on deputation in Islamabad High Court. By Notification dated 14.03.2012, a total of 11 Judicial Officers from Khyber Pakhtunkhwa Judicial Service serving on deputation basis in Islamabad were permanently absorbed in Islamabad Judicial Service in exercise of authority under Rule 8 of the Islamabad Judicial Service Rules, 2011 **("Judicial Service Rules")**, purportedly pursuant to a decision rendered by the Chief Justice and Judges of the Islamabad High Court. It was notified on 27.06.2012 that the Chief Justice of IHC on the recommendation of the Administration Committee of IHC has regularized the services of respondent No.2 as Senior Civil Judge, by curtailing his probation period on account of his record and satisfactory performance. On the very same day i.e. 27.06.2012, the Chief Justice promoted respondent No.2 to the post of AD&SJ, on the recommendations of the Administration Committee IHC. The Appellant, being a first-time appointee inducted in Islamabad Judicial Service as Civil Judge in terms of Rule 6 of the Judicial Service Rules, impugned the notifications absorbing respondent No.2 against the post of Senior Civil Judge and promoting him as AD&SJ after curtailing his probation period, all within five months of his appointment in IHC on deputation basis.

**Arguments of the Appellant**

3. Learned counsel for the appellant submitted that in terms of Section 6(3) of the Islamabad High Court Act 2010 **("IHC Act")**, IHC was under a statutory obligation to establish subordinate judiciary for Islamabad Capital Territory **("ICT")** within 6 months of entry into force of IHC Act, which was gazetted on 02.08.2010. Section 6(3) explicitly provided that judges of subordinate judiciary working on deputation were to be sent back to their respective High Courts after establishment of the subordinate judiciary for ICT. Islamabad High Court then enacted Judicial Service Rules, which were gazetted on 13.05.2011. These Rules were enacted pursuant to section 6 of

the IHC Act read with Article 203 of the Constitution. Rule 6 of the Judicial Service Rules provided for first time appointments, which were to be made through a competitive process that was run by the Judicial Selection Board of IHC. The Judicial Officers of all Provincial Judicial Services were eligible to apply. The appellant applied in terms of the Rules 6 and 7 of the Judicial Service Rules and scored the highest score in the interview with the Judicial Selection Board amongst Civil Judges appointed on first time appointment basis by notification dated 15.10.2011.

4. He submitted that respondent No.2 was posted as a Senior Civil Judge in Islamabad Judicial Service on the basis of deputation and he joined his post on 01.02.2012. The notification of his permanent absorption in Islamabad Judicial Service as Senior Civil Judge dated 14.03.2012, was illegal as pursuant to Rule 8 of the Judicial Service Rules only such members of Judicial Services of provinces could be absorbed permanently in Islamabad Judicial Service who were already posted on deputation and serving under the jurisdiction of IHC on the date of enactment of the Judicial Service Rules (i.e. 13.05.2011). As the petitioner was not serving on deputation in Islamabad Judicial Service at the time of enactment of the Judicial Service Rules and was posted to Islamabad Judicial Service on deputation with effect from 01.02.2012, he could not have been absorbed in Islamabad Judicial Service in exercise of authority under Rule 8 of the Judicial Service Rules. He submitted that even his posting on deputation basis was in conflict with Rule 10(b) of the Judicial Service Rules, which provided that appointment to the post of Senior Civil Judge could only be made from amongst civil judges serving in Islamabad Judicial Service on seniority-cum-merit basis on the recommendation of IHC Departmental Promotion Committee. To the extent that the post of Senior Civil Judge was vacant, the appellant was entitled to be considered for such post in terms of rule 13(1) of the Judicial Service Rules, as he had previously served in Balochistan Judicial Service before being appointed in Islamabad Judicial Service on 04.11.2008. After joining the Islamabad Judicial Service on first time appointment basis, he stood confirmed with effect from the date of his appointment (i.e. 15.10.2011) in terms of Rule 20 of the Judicial Service

Rules on a permanent basis. He submitted that while respondent No.2 could not have been absorbed in Islamabad Judicial Service pursuant to Rule 8, even if he could be deemed to have been absorbed while serving on deputation, he was to remain on probation for a period of one year in terms of rule 20(2) of the Judicial Service Rules. In terms of the third proviso to rule 20(2), the High Court in exceptional circumstances could reduce the period of probation. Respondent No.2's probation was curtailed by notification dated 27.06.2012, merely three and a half months after his absorption on 14.03.2012 against the post of Senior Civil Judge. This notification was illegal as the curtailment had been ordered by the Chief Justice of IHC on the recommendations of the Administration Committee IHC, even though the third proviso to rule 20(2) provided that it was the High Court that could reduce the period of probation. The notification was therefore *coram non judice* as the instances where authority was to be exercised by the Chief Justice or the Administration Committee were explicitly specified in the Judicial Service Rules. Further, probation could only be reduced in exceptional circumstances. But the reason mentioned in the impugned notification dated 27.06.2012 curtailing the probation of respondent No.2 was his record of satisfactory performance. Such reason did not constitute any exceptional circumstance. The said notification suffered from malice in law as it also curtailed the probation of Mr. Abdul Ghafoor and Mr. Mohammad Suhail, who were Civil Judges being first time appointees. In terms of Rule 20(1) of the Judicial Service Rules they stood confirmed from the date of their appointments (i.e. 15.10.2011) and were not on probation on 27.06.2012. Learned counsel for the appellant then submitted that on the very same day when respondent No.2's probation was curtailed, he was appointed to the post of AD&SJ on promotion basis. Such appointment by promotion was to be made on a seniority-cum-merit basis, but no seniority list was issued prior to ordering the promotion of respondent No. 2. The said promotion notification was also *coram non judice,* as it stated that the promotion had been approved by the Chief Justice on the recommendations of the Administration Committee of IHC, even though Rule 13(4) clearly provided that it was for the Departmental Promotion

Committee to consider a panel of three Judicial Officers for each post to be filled by promotion, on the basis of seniority. And the recommendations of the Departmental Promotion Committee were to be submitted for the consideration of the Chief Justice IHC for appointment by promotion.

5. He contended that the sequence of events starting from posting of respondent No.2 on deputation against a post of Senior Civil Judge to his absorption, when no provision existed for absorption of deputationists posted to Islamabad Judicial Service after 13.05.2011, to the curtailment of his probation without assigning any exceptional circumstances and his promotion to the post of AD&SJ on the same date reflected that there was a pre-conceived plan to bring respondent No.2 from the KP Judicial Service to Islamabad Judicial Service for purposes of appointment to the post of AD&SJ, which post could only be filled on promotion basis or through initial appointment. He further submitted that it was only where certain vacancies remained unfulfilled after absorption of already serving deputationists at the time of enactment of Judicial Service Rules and after making first time appointments, that a member of the Judicial Service of a province could be posted to Islamabad Judicial Service on deputation basis under Rule 9 of the Judicial Service Rules. Even though the provision was against rule 6(3) of IHC Act, the principles regulating appointment on deputation basis applied and such appointments being temporary in nature, the deputationists so appointed were required to be repatriated to their respective Judicial Services after serving the deputation period. The deputationists, such as respondent No.2, could not be absorbed in the permanent establishment of Islamabad Judicial service as no provision of law existed that permitted the same. Similarly, rule 30(3) of the Judicial Service Rules also created some room for the Chief Justice to borrow services of Judicial Officers from provincial High Courts. But such authority while being contrary to Section 6(3) of the IHC Act was provided for appointments on a temporary basis as evident from Rule 30(4) of the Judicial Service Rules. He submitted that the Supreme Court in ***Ch. Muhammad Akram v. Registrar, Islamabad High Court (PLD 2016 SC 961)*** had declared that appointments made in IHC against the principles of

transparency where absorptions, and promotions having been made against provisions of the IHC Act read with the relevant Rules were to be set aside. And the officials serving in the IHC establishment were to be repatriated back to their parent departments. Learned counsel for the appellant submitted that he had placed all these legal objections in the form of a representation before the Registrar, which had not been decided through a reasoned order, hence the appeal. He submitted in the alternative to the principal prayers in the appeal that in the event that the Tribunal found the appointment of Respondent No. 2 to be legal, he be promoted as AD&SJ with back benefits with effect from 27.06.2012 when respondent No.2 was appointed against the post of AD&SJ.

**Arguments of the State Counsel**

6. Learned State Counsel representing the Registrar IHC also took the Court through the factual background of the matter. He submitted that the Judicial Service Rules made allowance for appointments on deputation basis in terms of Rule 9 of the Judicial Service Rules. It was in exercise of the authority under Rule 9 that respondent No.2 was posted as Senior Civil Judge on deputation basis in Islamabad Judicial Service. He submitted that a deputationist could apply for absorption in terms of Rule 8 of the Judicial Service Rules and the Chief Justice could approve such absorption on the recommendations of the Administration Committee. And in the instant case the notification stated that the decision for absorption had been taken by the Chief Justice and Judges of the IHC. He then submitted that third proviso to Rule 20(2) of the Judicial Service Rules vested authority in the High Court to reduce the period of probation. This authority was used by the Chief Justice on the recommendation of the Administration Committee and the probation period of respondent No.2 was curtailed by notification dated 27.06.2012. The notification itself stated that the satisfactory performance of respondent No.2 was the reason why his probation had been curtailed. Respondent No.2 was the only Senior Civil Judge eligible to be promoted to the post of AD&SJ upon curtailment of his probation and was consequently promoted to the post of AD&SJ in terms of Rule 13 of the Judicial Service Rules. The learned State Counsel further

submitted that, both, Rules 9 and 30(3) provided for appointments to Islamabad Judicial Service on deputation basis, which is why not just respondent No.2 but till date Islamabad High Court was continuing to appoint Judicial Officers within Islamabad Judicial Service on deputation basis by borrowing their services from the Judicial Services of the provinces.

7. By order dated 05.12.2024, the Registrar as respondent No.1 was directed to provide all relevant documents to the State Counsel and such directions were repeated on 19.12.2024 when the State Counsel appearing for respondent No.1 was asked to take this Tribunal through the relevant record and the minutes of meeting of the Administration Committee and the Full Court that rendered the decisions notified in the impugned notifications. He was unable to do so. He submitted that he had not been provided with copies of the minutes of the meetings and was not privy to any reasoning recorded by the Administration Committee and/or the Chief Justice, while rendering the decisions notified through the impugned notifications. When asked to show the Court the orders of IHC directing that respondent No.2 be appointed in Islamabad Judicial Service on deputation basis, he was unable to do so and relied on an order of Peshawar High Court dated 25.01.2012 permitting respondent No.2 and 10 other Judicial Officers of the KP Judicial Service to join Islamabad Judicial Service on deputation basis, and stated that he had not been provided the relevant record of the IHC's decision in terms of Rule 9 of the Judicial Service Rules. When asked as to how the Administration Committee of IHC recommended respondent No.2 for promotion in terms of Rule 13 of the Judicial Service Rules when authority for such purpose was vested in the Departmental Promotion Committee, he was unable to provide a reason and ventured a guess that at the relevant time perhaps the composition of the Departmental Promotion Committee and the Administration Committee was identical. The Deputy Registrar, who appeared on behalf of the Registrar IHC, was also asked the same questions and was directed to produce the relevant record, including minutes of meeting of (i) judges of the High Court rendering decisions on behalf of the High Court, (ii)

Administration Committee, and (iii) Departmental Promotion Committee. But he too expressed his inability to do so and produced no such record.

**Arguments of Respondent No.2**

8. Learned counsel for respondent No.2 also took the Court through the factual details of respondent No.2's service in the KP Judicial Service (which has already been detailed above). He submitted that respondent No.2 was transferred to Islamabad Judicial Service on deputation basis in terms of the order of the Peshawar High Court, dated 25.01.2012. He was then permanently absorbed in Islamabad Judicial Service on 14.03.2012. As he was serving against the post of Senior Civil Judge at the time of his absorption and was on probation, in terms of the third proviso to Rule 20(2) of the Judicial Service Rules his probation was curtailed by notification dated 27.06.2012. This was because he had already served against the post of Senior Civil Judge in KP Judicial Service. He was considered for the post of AD&SJ in terms of Rule 13 of the Judicial Service Rules and promoted to such post on 27.06.2012.

9. He submitted that, at the relevant time no seniority list for Civil Judges or Senior Civil Judges had been issued and consequently the appellant could not take the position that respondent No.2 had been promoted in breach of seniority. He submitted that the appellant had previously filed representations for grant of seniority even against his peers and while deciding his appeal *Muhammad Shabbir v. Registrar, Islamabad High Court (JSA No.1 of 2016)*, this Tribunal by judgment dated 11.07.2023 had held that the appellant was not the senior most Civil Judge appointed on a first-time appointment basis by notification dated 15.10.2011. And consequently, even though seniority list ought to have been issued as held by this Tribunal in its decision in JSA No.1 of 2016, the appellant could not claim to be aggrieved by the promotion of respondent No.2, as it had been held that other first-time appointees, including Mr. Abdul Ghafoor Kakar and Mr. Mohammad Sohail, were senior to the appellant as Civil Judges.

10. He also submitted that in terms of the judgment of the Supreme Court in ***Ch. Muhammad Akram,*** the High Court officials who had been serving in the establishments of other High Courts and had been absorbed in Islamabad High Court were not repatriated to their parent organizations. Thus, even if the Court were to find that there was any irregularity in the absorption or promotion of respondent No.2, the finding in ***Ch. Muhammad Akram*** would be applicable to respondent No.2, who had been serving within KP Judicial Service prior to being posted to Islamabad Judicial Service on deputation basis and being subsequently absorbed on a permanent basis.

11. We will start with the constitutional and statutory scheme within which appointments are to be made within Islamabad Judicial Service, followed by considering the principles for making appointments to public offices that have been enumerated and affirmed by the Supreme Court. We will then consider the scope of authority vested in the Chief Justice and the Administration Committee of IHC in terms of the IHC Act and the Judicial Service Rules. We will consider the principles that regulate appointments to public offices on deputation basis as well as principles regulating absorption of deputationists. Such analysis will follow consideration of the scope of power and jurisdiction of this Tribunal and its placement within the judicial hierarchy in terms of provisions of the Constitution as enumerated by the Supreme Court. We will then consider the scope of authority of the Chief Justice in terms of the Constitution, the Islamabad Subordinate Judiciary Service Tribunal Act 2016, and the Islamabad Sub-ordinate Judiciary Service Tribunal Rules 2017, in order to explain the manner in which the Tribunal is to be constituted and reconstituted. We will finally dwell briefly on the notification issued by the President dated 18.03.2025, purportedly reconstituting this Tribunal, which notification was issued after the appeal had been heard and reserved for judgment. As we have suspended our judgment, by virtue of short order released on 21.03.2025 to enable the respondents to avail the remedy of appeal before the Supreme Court, we will state our reasoning for such suspension.

**The Constitutional and Statutory Scheme re Islamabad Judicial Service**

12. In terms of background, the Islamabad High Court 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 Islamabad Capital Territory **("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)*

13. It was pursuant to section 6(3) of the IHC Act that the legislature conferred, on Islamabad High Court, 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 Islamabad High Court 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 Islamabad High Court 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 Islamabad High Court 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.

14. It is essential to take note of the fact that the judges of Islamabad High Court were to be appointed from all territories comprising Pakistan through the appointment process described in Article 175A of the Constitution. Neither the Islamabad High Court nor the Islamabad Judicial Service were envisaged to be representative of the Provincial High Courts and Provincial Judicial Services. For purposes of Islamabad High Court, 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 Islamabad High Court would comprise judges transferred from provincial High Courts, which could have been one way of constituting Islamabad High Court and would make the composition of Islamabad High Court 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.

15. 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 Islamabad 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 Islamabad High Court, Islamabad Judicial Service emerged 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.

16. 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 have a provision requiring 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 ***Government of Sindh vs. Sharaf Faridi (PLD 1994 SC 105)*** upholding Sindh High Court's decision in ***Sharaf Faridi vs. The Federation of Islamic Republic of Pakistan* (PLD 1989 Karachi 404), *Government of Balochistan vs. Azizullah Memon* (PLD 1993 SC 341)** and ***Mehram Ali vs. Federation of Pakistan (PLD 1998 SC 1445)***, amongst other cases, 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.

17. 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 Islamabad High Court 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 Islamabad High Court 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 to for Islamabad High Court 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")**.

18. 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**

19. 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.

20. ***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.

21. The question of illegal orders in relation to appointments and transfers came before the Supreme Court in ***Syed Mubashir Raza Jaffri vs. 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 vs. Federation of Pakistan (PLD 2012 SC 132)***, ***Muhammad Ashraf Tiwana vs. Pakistan (2013 SCMR 1159)***, ***Tariq Aziz-ud-din and others (2010 SCMR 1301)*** *and* ***Syed Mahmood Akhtar Naqvi vs. Federation of Pakistan (PLD 2013 SCMR 195)***.

22. The question of illegal appointments through transfer and absorption once again came before the Supreme Court in ***Ali Azhar Khan Baloch vs. 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.

23. 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 vs. 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 vs. Lahore High Court (1997 SCMR 1043)***.

24. 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 vs. 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 Islamabad High Court 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."*

25. 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 vs. 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**

26. 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."*

27. 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. (We will revert to the 'but for' test applied in ***Gul Taiz Khan Marwat*** later in this judgment where we discuss the scope of jurisdiction of the Islamabad Judicial Service Tribunal while considering the nature of its power and jurisdiction). 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."*

28. The need to ensure compliance with the law and rules in making appointments and upholding the principles of fairness and transparency are therefore well-entrenched. The question of the legality of appointments made by the Executive come before the Judiciary on a daily basis and the principles highlighted above are reiterated and enforced in such matters. This highlights the need to abide by the alarm sounded by the Supreme Court in ***Ch. Muhammad Akram*** that in the event that the judiciary (which bends the ears of appointing authorities within the Executive for any failure to comply with rules or transparency requirements in making such appointments) was to disregard such principles when it comes to making appointments within the Judiciary, at stake is nothing less than the credibility of the Judiciary and public faith in the

ability of the Judiciary to function as an institution that not only enforces the law but also upholds while practicing the highest standards of fairness and transparency to be emulated by other institutions.

**Discretion vested in the Chief Justice/Administration Committee of the High Court**

29. It is a settled proposition that in polities governed by a written constitution all authority flows from the constitution and is exercised by public officials in accordance with provisions of the constitution and the law, on behalf of the state and its citizens. The authority exercised by the Judicature and members of the Judiciary, including the Chief Justice, is no different and must be exercised in accordance with the Constitution and the Law. Article 192(1) of the Constitution provides that *"[a] High Court shall consist of a Chief Justice and so many other Judges as may be determined by law…"* Article 260 of the Constitution defines a Judge and includes within such definition a Chief Justice as well as an Additional Judge. The definition of a High Court has come to be understood as meaning the Chief Justice and Judges of the Court.

30. Section 3(1) of the IHC Act, in consonance with Article 192 of the Constitution, provides that the *"Islamabad High Court shall consist of a Chief Justice and 12 other Judges…"* Similarly, Section 2(d) of the IHC Act defines a judge to mean "*a Judge of the Islamabad High Court and includes the Chief Justice and a person who is an Additional Judge of that court*."

31. Let us also consider provisions of the Islamabad Judicial Service Rules, 2011. The relevant definitions provided in Section 2 are as follows:

> ***2(a) "Administration Committee"*** *means Committee comprising the Chief Justice and two senior Judges;*
>
> ***2(f) "Chief Justice"*** *means the Chief Justice of the Islamabad High Court;*
>
> ***2(g) "Departmental Promotion Committee"*** *means a committee of two Judges constituted by the Chief Justice;*
>
> ***2(j) "High Court"*** *means the Islamabad High Court;*

32. There was a time when the authority of the High Court, especially in administrative matters, was deemed to be vested exclusively in the Chief Justice of the High Court by virtue of him being the *paterfamilias* of the Court. That time is now behind us. It has come to be recognized that in a rule-of-law polity, where judicial power and jurisdiction is to be exercised in a transparent manner while upholding the principles of horizontal and vertical judicial independence, the judicial power of the Chief Justice is no greater than that of any other Judge. In administrative matters, however, the Chief Justice bears additional responsibilities and is regarded as the first among equals within the collegiate environment of the High Court. In ***Ch. Muhammad Akram***, which has already been discussed above, the Supreme Court unequivocally held that the Chief Justice was vested with no discretionary jurisdiction to act as he may please and was under an obligation to act in accordance with law and the rules pursuant to which authority is vested in his office.

33. ***Mustafa Impex vs. The Government of Pakistan (PLD 2016 SC 808)*** was a consequential case in which the Supreme Court considered the definition of the Federal Government as provided in the Constitution and declared that the Federal Government consisted of the Prime Minister and the Federal Ministers and that the Federal Government was obliged to act through the Cabinet. A few observations of the Supreme Court from ***Mustafa Impex*** are relevant in our present context. With regard to the obligation of the Federal Government to follow the Rules of Business, the Supreme Court held that, *"[t]he framer of rules is as much bound by the content thereof as anyone else is subject thereto."* And that *"[t]o allow the executive to depart from the language of the rules, in its discretion, would be to permit, and legitimize, unconstitutional executive actions."*

34. This principle squarely applies to a High Court even where the High Court is the framer of the Rules, such as the Judicial Service Rules. While holding that in terms of Article 90, the Federal Government consisted of the Prime Minister and the Federal Ministers, it was observed that, *"we note, in passing,*

*the similarity with Articles 176 and 192 which respectively define the Supreme Court and the High Court as consisting of the Chief Justice and judges."* This observation leaves no manner of doubt that the Supreme Court acknowledged that just as the Federal Government is to act through the Prime Minister and the Federal Ministers (i.e. the Cabinet), the High Court must similarly act through the Chief Justice and Judges acting together where the law or rules vest in the High Court the authority to take a decision or action. Further, in the context of delegation of authority, emphasizing that the taking of a decision cannot be confused with the execution of a decision, the Supreme Court held that, *"[t]he function of the Chief Executive is to execute and implement the policy decisions taken by the Cabinet i.e. the Federal Government. He executes policy decisions, he does not take them by himself…[t]he Prime Minister cannot take decisions by himself, or by supplanting or ignoring the Cabinet because the power to take decisions is vested with the Federal Government i.e. the Cabinet, and unilateral decisions taken by him would be a usurpation of power."* The principles laid down in ***Mustafa Impex***, therefore, guide the exercise of authority by the High Court, where the Constitution or the law and the rules framed thereunder require an action or decision to be taken by the High Court as distinguishable from an action or decision to be taken by the Chief Justice in his individual capacity.

35. The notion that excessive delegation is bad in law is also well settled. It was held in ***Province of East Pakistan vs. Sirajul Huq Patwari (PLD 1966 SC 854)*** by Justice Muhammad Yaqub Ali, citing with approval dicta from ***Cincinnati W. & Z. R. v. Clinton (1, Ohio St. 77, 88 (1852))***, that *"[t]he true distinction is between the delegation of power to make the law which necessarily involves a discretion as to what it shall be to conferring authority or discretion as to its execution to be exercised under and in pursuance of law."* In other words, the authority to frame rules, render decisions or take actions required by the Constitution or the law to be taken by a particular authority must be taken by such authority. The power of taking action such as framing of rules or rendering of decisions cannot be confused with the function of executing any

rules or decisions rendered by the competent authority. Thus, where an action is required by the Constitution or the law to be taken by the High Court, it must be taken by the Chief Justice and Judges of the High Court in a collegiate fashion acting together, for which purpose the forum of Full Court is available under the High Court Rules.

36. The other principle to note in the context of delegation of authority is that such delegation should be permissible under law. This principle was summed up by the Supreme Court in ***Muhammad Ashraf Tiwana vs. Pakistan (2013 SCMR 1159),*** wherein it was held that, *"it is helpful to reemphasize the general principle of our law that all statutory authority is fiduciary in nature; it is vested in the functionary or body specified in the statute and is therefore, as a rule non-delegable. The maxim delegatus non potest delegare sums it up: the delegate cannot further sub-delegate. A leading authority on administrative law, states the rule thus: "It is a well-known principle of law that when a power has been confided to a person in circumstances indicating that trust is being placed in his individual judgment and discretion, he must exercise that power personally unless he has been expressly empowered to delegate it to another. (DeSmith, S.A. Judicial Review of Administrative Action, p. 263, 3rd Ed. London: 1973)."*

*37.* The principle thus explained is that where the Constitution or the law does not itself provide for further delegation of authority, discretionary authority cannot be further delegated and must be exercised by the person or authority on which such power is conferred. Where the Constitution requires a certain act to be done by the High Court, whether in Article 203 or in Article 208, the power to exercise supervision and control over subordinate judiciary for purposes of Article 203 or the power to frame rules for purposes of Articles 202 and 208 cannot be further delegated by the High Court to the Chief Justice or a committee of the High Court. This, however, does not prevent the delegation of authority to execute and/or implement any decisions rendered by the High Court, as also explained in ***Sirajul Huq Patwari***. The principles as discussed above are

reflected in the Rules and Orders of the Lahore High Court **("LHC Rules")**, which have been adopted by the Islamabad High Court. Chapter 10 Part A of Volume-5 of the LHC Rules provides for disposal of executive and administrative business. Rule 1, Part A, Chapter 10, Volume-5 of LHC Rules provides that the administrative and executive work of the High Court shall be controlled by the Administration Committee. Rule 5 of Part A, Chapter 10 then lists the matters that are to be referred to and disposed of at a meeting of all the Judges notwithstanding anything contained in preceding Rules. The list of such matters to be dealt with by the Full Court includes, inter alia, 'all matters involving questions of principle and policy', 'all cases relating to amendments to be made to existing laws or to the statutory rules of the court', 'all matters concerning the High Court as such or all the Judges', etc.

38. The question of exercise of administrative authority by the Chief Justice and whether it can be allowed to interfere with the exercise of judicial power by the Judges and the High Court has been clarified by the Supreme Court in a series of recent judgments. It was held by the Supreme Court in ***Islamabad High Court Bar Association vs. Election Commission of Pakistan (PLD 2023 SC 720)***, while re-affirming an opinion rendered by Justice Mansoor Ali Shah in ***Human Rights Case No. 14959-K of 2018*** **(PLD 2019 SC 183)** with regard to the administrative powers of the Chief Justice in reconstitution of a bench that, *"once the bench is constituted, cause list is issued and the bench starts hearing the cases, the matter regarding constitution of the bench goes outside the pale of administrative powers of the Chief Justice and rest on the judicial side…"* And that in such circumstance the Chief Justice cannot reconstitute the bench except in case where member recuses or rules require the reconstitution of the matter to be heard by a larger bench. It was held that, *"[r]econstitution of a bench while hearing a case, in the absence of any recusal from any member on the bench or due to any other reason described above, would amount to stifling the independent view of the judge. Any effort to muffle disagreement or to silence dissent or to dampen an alternative viewpoint of a member on the bench, would shake the foundations of a free and impartial justice system... a*

*bench, once it is constituted and is seized of a matter on the judicial side, cannot be reconstituted by the Chief Justice in exercise of his administrative powers, unless a member(s) of the bench recuses or for reasons discussed above."* With regard to the powers of the Chief Justice it was further held that, *"in order to strengthen our institution and to ensure public trust and public confidence in our Court, it is high time that we revisit the power of "one-man show"…This Court cannot be dependent on the solitary decision of one man, the Chief Justice, but must be regulated through a rule-based system approved by all Judges of the Court under Article 191 of the Constitution, in regulating the exercise of its jurisdiction…One-man show leads to the concentration of power in the hands of one individual, making the system more susceptible to the abuse of power. In contrast, a collegial system with checks and balances helps prevent the abuse and mistakes in the exercise of power and promote the transparency and accountability. When one person has too much power, there is a risk that the institution may become autocratic and insulated, resulting in one-man policies being pursued, which may have a tendency of going against the rights and interests of the people."* The Supreme Court reminded itself and all members of the Judicature that, *"ironically, this Court has time and again held how public functionaries ought to structure their discretion* ***[Aman Ullah vs. Federal Government (PLD 1990 SC 1092), Chairman, R.T.A. vs. Pakistan Mutual Insurance Company (PLD 1991 SC 14), Govt. of N.W.F.P. vs. Mejee Flour Mills (1997 SCMR 1084)]*** *but has miserably failed to set the same standard for itself leaving the Chief Justice with unfettered powers..."* It was also noted that, *"the right to have his case heard by a bench or a judge to whom the cases are assigned on the basis of a notified objective criterion is referred to as a 'right to a natural judge' in some jurisdictions",* while referring *to* ***Emmanuel Jeuland, The right to a natural judge and the judicial organization, French Journal of Public Administration (2008)***. It was held that such right to a natural judge is also enshrined in Articles 9, 10A and 25 of our Constitution.

39. Similarly, in his opinion, Justice Athar Minnallah noted that, *"Chief Justice exercises the powers conferred under the Rules of 1980 as a delegate, trustee or an agent. The Master of the Roster, therefore, owes a fiduciary duty of care towards the Supreme Court. As a fiduciary it is the duty of the Master of the Roster to preserve good faith and exercise the discretion with utmost care and in the best interest of the Supreme Court. The discretion under the Rules of 1980 is not unfettered nor can it be exercised arbitrarily…The discretion ought to be structured by organising it and producing order in it… It is the duty of the Master of the Roster to exercise discretion in a manner that preserves and promotes public trust and confidence…If public trust is to be restored, the court has to assume that each litigant has a right to a lawful judge."*

40. A similar issue with regard to exercise of administrative powers of the Chief Justice in constituting and reconstituting benches came before the Supreme Court in ***Suo Moto Case No. 4 of 2002* (PLD 2023 SC 387)**, wherein it was held in a judgment authored by Justice Qazi Faez Isa that, *"constituting a special bench provides detractors an opportunity to allege that the bench was tailor-made to give a particular decision. For a decision to be credible, and acceptable, there must be an established adjudication process. If an identifiable, transparent, and delineated mechanism for the fixation of cases and for constitution of benches is not in place… public confidence in the Judiciary erodes."* It was observed in Para 24 that, *"[n]either the Constitution nor the Rules grant to the Chief Justice (or to the Registrar) the power to make special benches, select judges who will be on these benches and decide the cases which they will hear. There is also no additional, incidental, ancillary, or residual power with the Chief Justice which could be used to do this… when benches are tailored and Judges of a particular understanding or inclination are placed together to hear a particular case, then doubts, suspicion, and misgivings arise. A decision from an adjudicatory process, which is perceived to be structured to obtain a particular decision, invariably results in severe criticism."* The Supreme Court went on to note that, *"[t]he Supreme Court comprises of the Chief Justice and all Judges. The Constitution does not grant to the Chief Justice*

*unilateral and arbitrary power to decide the above matters. With respect, the Chief Justice cannot substitute his personal wisdom with that of the Constitution. Collective determination by the Chief Justice and the Judges of the Supreme Court can also not be assumed by an individual, albeit the Chief Justice."*

41. The question of the manner of exercise of authority by the Supreme Court was discussed at length in the opinions that form part of the judgment of the Supreme Court in ***Raja Amer Khan vs. Federation of Pakistan (PLJ 2024 Supreme Court 114)***, where the Supreme Court considered the vires of the Supreme Court (Practice and Procedure) Act, 2023. In the judgment authored by Chief Justice Qazi Faez Isa, it was observed that, *"[t]he Supreme Court comprises of the Chief Justice and all the Judges of the Supreme Court. The Constitution does not grant to the Chief Justice power to decide cases unilaterally and arbitrarily. The Chief Justice cannot substitute his wisdom with that of the Constitution. Nor can the Chief Justice's opinion prevail over that of the Judges of the Supreme Court. And, the term 'Master of the Roster' is not mentioned in the Constitution, in any law or even in the rules, let alone stating wherein that the Chief Justice, is the Master of the Roster and empowered to act completely in his discretion… The word master is offensive in a constitutional dispensation founded on democracy. Master also connotes servitude, the extreme form of which is slavery which is prohibited in the Constitution."* While acknowledging the furtherance of collegiate action through introduction of the Supreme Court (Practice and Procedure) Act, 2023, it was held that, *"[t]he Office of the Chief Justice has also been strengthened as there is an element of continuity when consultation takes place with the two most senior judges. The measures taken in the Act ensure judicial independence, and the Supreme Court has been made to better serve the people; we endorse the following definition of judicial independence:*

> *"Judicial independence refers to the existence of judges who are not manipulated for political gain, who are impartial towards the parties of a dispute, and who form a judicial branch which has the power as an institution to*

*regulate the legality of government behavior, enact 'neutral' justice, and determine significant constitutional and legal values."*

In his separate opinion, in the case, Justice Yahya Afridi (as he then was), while endorsing the collegiate system of decision-making in the Supreme Court observed that, "*we must always remember that since the real strength of any judicial system lies in public confidence, the public perception regarding the composition of Benches and allocation of cases is of prime importance."*

42. The safest institutional design that prevents abuse of power is a design that provides for wider distribution of power. The key function of the judiciary is to render judicial decisions, and each judge of the High Court enjoys equal and identical judicial power for such purpose. It is a settled matter that there is no hierarchy when it comes to exercise of judicial power and a judge of a court cannot issue a writ to another judge. This is a requirement that underpins horizontal independence of the judiciary. It is thus that the administrative powers of the court are also to be exercise in a collegiate manner, such that administrative power is not allowed to interfere with or influence the exercise of judicial power by judges. And this is why the Constitution requires in Articles 202 and 208 that rules be made by the High Court (i.e. the Chief Justice and all the Judges), and the High Court Rules then provide for collegiate decision-making in all matters that affect the High Court and all its judges.

43. The oft-quoted Lord Atkin had warned that "*power tends to corrupt and absolute power corrupts absolutely*". It is to prevent this tendency to corrupt that power must not vest in an individual and must be distributed amongst judges more widely so it is exercised in a consultative manner. The history of the Judicature has been a chequered one with an unhealthy focus on the person of the Chief Justice. History also tells us that the Executive has unfortunately continued to work on institutional designs to acquire control over such appointment. History has also witnessed judges falling over each other in a race to secure the office of Chief Justice, which does not shine a bright light on

the judiciary or inspire public confidence. This obsession with the office of the Chief Justice would wither away if the manner of exercise of administrative power within the Judicature is such that does not permit "one-man show". And this is what was held by the Supreme Court in ***Raja Amer Khan*** while endorsing collegiate decision-making for case fixation provided under the Supreme Court (Practice and Procedure) Act, 2023.

44. The scope of authority of the Chief Justice of the High Court to reconstitute benches is not directly relevant for the decision of the instant matter. It will, however, be relevant for purposes of drawing an inference when we consider the role of the Chief Justice to constitute and/or reconstitute the Judicial Services Tribunal in terms of Section 3 of the Islamabad Subordinate Judiciary Service Tribunal Act, 2016 (which will be discussed later in the judgment). What can be derived from the judgments of the Supreme Court quoted at some length above is that where the Constitution or a statute requires a certain thing to be done by the High Court, it must be done by the High Court (i.e. by the Chief Justice and all Judges of the High Court). Where the IHC Act in Section 6(3) confers a power and a responsibility on the High Court, it is for the High Court to exercise such power in a collegiate manner and such power cannot be further delegated to the Chief Justice or an Administration Committee even by the High Court itself by framing rules or passing instructions etc. What can be delegated is the power to give effect to decisions and to implement the rules and take consequential steps in accordance with the rules adopted and approved by the High Court. To state the obvious, the Chief Justice is not the High Court, which comprises all Judges of the High Court, including the Chief Justice. And to use the words used by the Supreme Court in ***Mustafa Impex***, to treat the Chief Justice as the High Court or to allow a one-man rule of the Chief Justice when the Constitution mandates collegiate decision making by the High Court is tantamount to usurpation of power, which cannot be countenanced in any circumstance, and especially not within the Judicature that exists as the constitutional machinery to uphold the Constitution.

**The Scope of Powers of The Tribunal**

45. Before we proceed to consider the merits of the dispute before us, it is imperative to determine the nature of power exercised by this Tribunal, the scope of its jurisdiction and its placement within the hierarchy of the judicature. For such purpose, we will need to consider the scope of Tribunals created in terms of Article 212 of the Constitution and the jurisdiction vested in such tribunals in view of the law laid down by the Supreme Court. We will also need to consider the concept of independence of the Judiciary as enumerated by the Supreme Court and what it means both in relation to the subordinate judiciary and for purposes of exercising supervision and control over the subordinate judiciary by a High Court in terms of Article 203 of the Constitution. And we will also consider whether sitting Judges of a High Court that comprise the Tribunal, act as Judges of the High Court or act as persona designata. Whether or not judges comprising the Tribunal act as persona designata or not is of no consequence for the decision in this appeal or the declarations and directions issued. It is however relevant for an understanding of the manner in which the High Court exercises adjudicatory authority over grievances of members of subordinate judiciary, and how such role squares with the power of the High Court to exercise supervision and control over subordinate judiciary in terms of Article 203 of the Constitution. While this part of our opinion is obiter, we are stating it for consideration by the Supreme Court, in this matter or another appropriate case.

46. Article 212(1)(a) of the Constitution provides for the creation of Administrative Courts or Tribunals. Article 212(1) provides for the establishment of "*Administrative Courts or Tribunals to exercise exclusive jurisdiction in respect of…(a) matters relating to the terms and conditions of persons who are or have been in the service of Pakistan, including disciplinary matters.*" Article 212(2) ousts the jurisdiction of all courts in relation to any matter which falls within the jurisdiction of a Tribunal established in terms of Article 212(1) of the Constitution. Article 212(3) provides for an appeal before the Supreme Court against any judgment of a Tribunal created in

terms of Article 212(1) of the Constitution. The question of whether a Court or Tribunal created in terms of Article 212(1) of the Constitution exercises judicial power, and whether the jurisdiction of courts, including the High Court, stands ousted in relation to a matter that falls within the domain of such Tribunal, has arisen in various contexts. The question was considered at some length in ***Mehram Ali vs. Federation of Pakistan (PLD 1998 SC 1445)*** in the context of independence of the Judiciary. It was held by a five-member bench of the Supreme Court that, *"the constitutional framework relating to judiciary does not admit/permit the establishment of a parallel system of the Courts or Tribunals, which are not under the judicial review and administrative control and supervision of the High Court…[w]here the Constitution makers wanted to provide judicial forums other than what is envisaged by Articles 175, 202 and 203, they expressly provided for the same in the Constitution. In this regard reference may again be made to Article 212 of the Constitution…"* ***Mehram Ali*** therefore, acknowledged that Courts and Tribunals created in terms of Articles 212(1) of the Constitution could exercise judicial powers without offending Article 175 and the requirement of independence of the Judiciary from the Executive. It however also noted while reiterating ***AL-Jehad Trust vs. Federation of Pakistan (PLD 1996 SC 324)*** that, *"[t]he security of tenure of Judges is sine qua non for independence of Judiciary."*

47. The next case that we wish to refer to in the context of an Article 212 Tribunal is ***Riaz ul Haq v. Federation of Pakistan (PLD 2013 SC 501)*.** The matter before the Supreme Court was the nature of powers exercised by the Federal Services Tribunal in terms of provisions of the Services Tribunal Act 1973. The Supreme Court held that, *"[t]he Tribunal is deemed to be a civil Court having all the powers which are vested in the civil Court."* It reaffirmed ***Imran Raza Zaidi vs. Government of Punjab (1996 SCMR 645)***, where it was held that, *"[t]he Federal Services Tribunal has the power to grant interim relief...".* While relying on the opinion of Chief Justice Muhammad Munir in ***Tariq Transport Company vs. The Sargodha Bhera Bus Service (PLD 1958 SC 437)***, the Supreme Court noted that, *"A tribunal acts judicially in the full*

*sense of the term if it has to determine a dispute…[which] relates to a right or liability."* The judgment in ***Riaz ul Haq*** was rendered in full view of ***Mehram Ali*** and ***Liaquat Hussain vs. Federation (PLD 1999 SC 504)***, wherein it was recognized that Article 212(1) tribunals share judicial powers with the courts. In ***Riaz ul Haq***, the Supreme Court held that the determining factor of whether the tribunal is 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. Further, such Tribunals have to be manned, controlled and regulated in accordance with established judicial principle."* It went on to hold that, *"[t]he principle of separation and independence of Judiciary as envisaged in Article 175 of the Constitution is also applicable to the lower judiciary as it is the part of the judicial hierarchy."* It then made such principle applicable to Article 212(1) tribunals directing that*, "whenever the appointment of a 'judicial officer' or the Chairman/Member of a Tribunal performing 'judicial functions' is made, the consultation with the concerned Chief Justice is [a] prerequisite."* In other words, it was declared in ***Riaz ul Haq*** that Article 212(1) Tribunals exercising judicial power are Courts and the principles applicable for purposes of upholding the independence of the judiciary are attracted in cases of such Tribunals as well.

48. It was held most recently in ***Syed Asghar Ali Shah vs. Kaleem Arshad*** **(*2024 SCMR 563*),** while declaring that an appeal against the judgment of Khyber Pakhtunkhwa Subordinate Judiciary Service Tribunal was maintainable before the Supreme Court in terms of Article 212(3) of the Constitution, and that the KP Judicial Service Tribunal was a Tribunal for purposes of Article 212(1)(a) of the Constitution and an appeal against the judgment of such Tribunal lies before the Supreme Court pursuant to Article 212(3) of the Constitution. The Islamabad Subordinate Judiciary Service

Tribunal is created under provisions of the Islamabad Subordinate Judiciary Service Tribunal Act, 2016, which is a federal statute and vests in the Tribunal the power and jurisdiction to adjudicate disputes arising from the terms and conditions of service of members of the Subordinate Judiciary who fall within the administrative control of Islamabad High Court. This Judicial Service Tribunal is not just a Tribunal in terms of Article 212(1)(a) of the Constitution as held by the Supreme Court in ***Syed Asghar Ali Shah***, but is also a Court in terms of the law laid down by the Supreme Court in ***Riaz ul Haq***.

49. The second question that arises is the scope of authority offered by Article 212(1) to the Tribunal. This question has also arisen before the Supreme Court in terms of the jurisdiction of the Federal Services Tribunal. The question of scope of adjudicatory power of an authority other than a court established in terms of Article 175 came before the Supreme Court in ***Pir Sabir Shah vs. Shad Muhammad Khan (PLD 1995 SC 66)***. The majority decision rendered by Chief Justice Sajjad Ali Shah endorsed the law laid down in ***Humayun Saifullah Khan vs. Federation of Pakistan (PLD 1990 SC 599)*** and held that the Election Commission had no jurisdiction to determine the vires of a provision of the Political Parties Act, 1962, and that a question of vires could only be determined by a court of general jurisdiction. The distinction in the said case, from what is under consideration in the present matter, is that the Election Commission is admittedly not a court and does not exercise judicial power. What is however relevant for our purposes is the opinion of Justice Fazal Karim, who observed that, *"included in the power to decide a question of law is the power to decide the vires of legislation. The whole theory of ultra vires is that the act in question, be it a legislative act or an administrative act, is beyond the legal power of the person or authority doing it."* In his opinion, he cited with approval ***Akhtar Ali Parvez vs. Altafur Rehman (PLD 1963 WP 390)***, where in relation to the jurisdiction of the Rent Controller, it was held that where questions of law arose, *"(i) that the law under which the Tribunal is created is defective or invalid; (ii) that the Tribunal is not constituted or appointed*

*validly under the law,"* the Special Tribunal being a feature of such law or constituted by the action under challenge would not be the appropriate forum to adjudicate such questions. He however went on to refer to ***Anisminic Limited vs. Foreign Compensation Commission*** **((1969) 2 AC 147)**, where the House of Lords held that our administrative law in UK had reached the stage where specialized tribunals could also decide questions of law.

50. In the interest of clarity, no objection to the jurisdiction of this Tribunal to adjudicate the instant appeal was raised before us. There is the matter of purported reconstitution of the Tribunal, which we have considered later in this judgment and in the short order already released. But such reconstitution was attempted after we had heard and reserved judgment in this matter, and is of no consequence for decision in the instant appeal. We have considered the legality of the reconstitution notification later in this judgment, as we find we are vested with authority to do so and propriety demands that members of Tribunal purportedly appointed pursuant to the reconstitution notification not rule over the legality of such notifications, in terms of the principle highlighted by Justice Fazal Karim in ***Sabir Shah***, being the products of such notification.

51. ***Sabir Shah*** is of relevance for us in two contexts. The first is that a court or tribunal is vested with authority to decide a question with regard to its own jurisdiction, except where the question of jurisdiction relates to the legality of the law under which the Tribunal has been created or with regard to valid constitution or appointment of the Tribunal. It was clearly held by the Supreme Court in ***Asma Jilani vs. Government of Punjab (PLD 1972 SC 139)*** that, *"[t]he courts undoubtedly have the power to hear and determine any matter or controversy which brought before them, even if it be to decide whether they have the jurisdiction to determine such a matter or not. The superior courts are, as is now well settled, the Judges of their own jurisdiction."* This principle was again reiterated in ***Government of Punjab vs. Ms. Sarosh Sultan (PLD 1995 SC 541)*.** What constitutes jurisdiction was addressed by the Supreme Court in the ***State vs. Zia ur***

***Rahman* (PLD 1973 SC 49)**, while distinguishing between jurisdiction and judicial power. It was held that, *"Apart from setting up the organs the Constitution may well provide for a great many other things, such as, the subjects in respect of which that power may be exercised and the manner of the exercise of that power. Thus it may provide that the Courts set up will exercise revisional or appellate powers or only act as a Court of cessation or only decide constitutional issues. It may demarcate the territories in which a particular Court shall function and over which its writs shall run. It may specify the persons in respect of whom the judicial power to hear and determine will be exercisable. These are all matters which are commonly comprised in what is called the jurisdiction of the Court. It expresses the concept of the particular res or subject-matter over which the judicial power is to be exercised and the manner of its exercise. Jurisdiction is, therefore, a right to adjudicate concerning a particular subject-matter in a given case, as also the authority to exercise in a particular manner the judicial power vested in the Court."*

52. It was held in ***Nawab Syed Raunaq Ali vs. Chief Settlement Commissioner* (PLD 1973 SC 236)** that, *"[i]t is no doubt true that there is a clear distinction between an act wholly without jurisdiction and an act done in the improper exercise of that jurisdiction. Where there is jurisdiction to decide, then as it has often been said there is jurisdiction to decide either rightly or wrongly, and merely a wrong decision does not render the decision without jurisdiction. To amount to a nullity, an act must be non-existent in the eye of law; that is to say, it must be wholly without jurisdiction or performed in such a way that the law regards it as a mere colourable exercise of jurisdiction or unlawful usurpation of jurisdiction."*

53. It was most recently reaffirmed in ***Muhammad Salman vs. Naveed Anjum* (2021 SCMR 1675)** *that, "there is no legal impediment in the way of a court or tribunal to decide its own jurisdiction."* The aforementioned case now clarifies that a Tribunal created under Article 212(1) that exercises judicial power is to be regarded as a Court and is vested with authority to decide any question with regard to its own jurisdiction. The

only possible exception is noted in the opinion of Justice Fazal Kareem rendered in ***Sabir Shah***, which has already been discussed above, pointing to the lack of propriety of a court or tribunal deciding the question of vires of a law under which such court or tribunal is created, or to rule on its own valid constitution, where such jurisdictional objection is raised before it.

**Ouster of Jurisdiction of Court in Terms of Article 212(2)**

54. The question of ouster of jurisdiction of courts in terms of Article 212(2), including the jurisdiction of the High Court under Article 199 of the Constitution, has been considered by the Supreme Court along with scope of jurisdiction of the Federal Services Tribunal and the matter now stands settled. In ***Iqan Ahmed Khurram vs. Government of Pakistan (PLD 1980 SC 153)*** the petitioners had impugned rules relating to appointments. The Sindh High Court found that the petitions were not maintainable on the basis of Article 212(2) of the Constitution. The argument made before the Supreme Court was that the Federal Services Tribunal was not competent to decide the vires of the rules. The Supreme Court held that as the rules affected the terms and conditions of service, the bar of Article 212 of the Constitution would be applicable with full force. It held that, *"[t]he Rules per force alter the method of recruitment and promotion in supersession of the existing Rules which provide a cause of action for the grievance qua the alteration of terms and conditions of service and hence an appeal will lie to the Service Tribunal."*

55. The scope of jurisdiction of FST came before the Supreme Court in ***I.A. Sharwani vs. Govt. of Pakistan (1991 SCMR 1041)*** where it was clarified that, *"[i]f the Service Tribunal does not have jurisdiction to adjudicate upon a particular type of grievance, the jurisdiction of the courts remains intact." However, it was clarified that, "[i]t has been consistently held by this Court inter alia that a civil servant if is aggrieved by a final order, whether original or appellate, passed by a departmental authority in respect of his terms and conditions, his remedy, if any, is by way of an appeal before the Services Tribunal even where the case involves vires of a particular*

*Service Rule or a notification…[i]f a statutory rule or a notification adversely affects the terms and conditions of a civil servant, the same can be treated as an order in terms of subsection (1) of section 4 of the Act in order to file an appeal before the Service Tribunal...[c]ivil servant cannot by-pass the jurisdiction of the Service Tribunal by adding a ground of violation of the Fundamental Rights."*

56. The ouster clause of Article 212 was again considered by the Supreme Court in ***Pir Muhammad vs. Govt. of Balochistan (2007 SCMR 54)*** wherein it was held that Article 212 *"ousts jurisdiction of all other Courts and orders of the departmental authority even though without jurisdiction or mala fide can be challenged only before the Service Tribunal and jurisdiction of Civil Court including High Court is specifically ousted. The plea of mala fide does not confer upon High Court jurisdiction to act in the matter in view of the Constitutional ouster as contained in Article 212 of the Constitution of Islamic Republic of Pakistan and learned Service Tribunal has full jurisdiction to interfere in such-like matters."* In ***Engineer Musharaf Shah vs. Govt. of Khyber Pakhtunkhwa*** **(2015 PLC(CS) 215)** a Division Bench of the Peshawar High Court held that the *"Service Tribunal was competent to adjudicate on the question of 'vires' of rules framed by the department, even if the same were challenged on the basis of violating fundamental rights of the civil servant. The very rules were deemed to be the 'final order'."*

57. The latest view of the Supreme Court reiterating the scope of jurisdiction of Federal Service Tribunal was expressed in ***Muhammad Hassanullah vs. Chief Secretary Govt. of Balochistan (2025 SCMR 134),*** in which it was held that the ouster through the non obstante clause in Article 212, *"curtails the jurisdiction of a High Court in respect of matters which fall within the ambit of the exclusive jurisdiction of an administrative court or tribunal…even if the grievance arises from an order which may involve questions of mala fide, coram non-judice or having been passed without jurisdiction. In **I.A. Shirwani's case**, a larger bench of this Court has held and observed that a civil servant cannot bypass the jurisdiction of*

*the service tribunal by adding a ground of violation of fundamental right(s)…It has been further held that the Service Tribunal will be vested with jurisdiction even where the case involves the vires of a statutory rule or notification."*

58. The aforementioned cases leave no manner of doubt with regard to the expansive jurisdiction of a tribunal constituted for purposes of Article 212(1)(a) of the Constitution and the corresponding ouster in terms of Article 212(2), where the Tribunal has been created under a federal law passed by the Parliament. (In view of the law laid down by the Supreme Court in ***Syed Asghar Ali Shah*** holding that the Khyber Pakhtunkhwa Subordinate Judiciary Tribunal was created in terms of Article 212(1)(a) of the Constitution and an appeal against its judgment lied before the Supreme Court in terms of Article 212(3) of the Constitution, wherein it was held that the ouster in Article 212(1)(2) would not apply where a Tribunal has been created under a law passed by the Provincial Assembly. This is, however, not relevant for our purposes as the Judicial Service Tribunal in the present case has been created under a federal law.)

**The Relevance of the Principles of Independence of the Judiciary**

59. Whether or not a Tribunal constituted for purposes of Article 212(1)(a) exercises judicial power is to be determined in view of the provisions of the statute creating such Tribunal. In the event that the Tribunal is exercising judicial power the principle of judicial independence applies equally to such Tribunal as held in ***Mehram Ali*** and ***Riaz ul Haq.*** This is also a requirement under Article 10A of the Constitution, which guarantees the right of every citizen to fair trial and due process for determination of his/her civil rights and obligations. And the manner in which the principle of judicial independence and separation of powers have come to be understood in Pakistan, fair trial and due process can only be provided by a Tribunal exercising judicial power that enjoys judicial independence. ***Al-Jihad Trust vs. Federation of Pakistan*** ***(PLD 1996 SC 324)*** is the seminal case on the matter of judicial independence and separation of powers. The judgment authored by Justice Ajmal

Mian, while reaffirming dicta from ***Sharaf Faridi,*** endorsed the observations of Justice Salim Akhtar who had held that, *"[t]he right of 'access to justice to all' is a well-recognized inviolable right enshrined in Article 9 of the Constitution…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."* In the judgment authored by Chief Justice Sajjad Ali Shah, it was held that, *"appointment of a Judge must be made transparent so that the litigant public and people at large should have faith in the independence of Judiciary… Appointment of a Judge and the mode and manner in which he is appointed has close nexus with the independence of the Judiciary and cannot be separated from each other."* ***Mehram Ali*** reaffirmed and reiterated the requirement of judicial independence as has already been discussed above where it was held that the principle of judicial independence applies equally to subordinate courts as well as the Tribunals that exercise judicial power.

60. In ***Suo Moto Case No. 4 of 2021 (PLD 2022 SC 306)***, in the context of separation of powers, while relying on ***State vs. Zia-ur-Rehman (PLD 1973 SC 49)***, and ***Jurists Foundation vs. Federal Government (PLD 2020 Supreme Court 1)***, it was held that, "*the distinction between these branches [executive and legislature] on the one hand, and the judicial branch on the other, is much more rigid and strictly enforced. This is so, among other reasons, in order to ensure and protect the vital constitutional principles of the independence of the judiciary and access to justice, which are now regarded as fundamental rights in and of themselves. The intermingling and overlapping of executive and legislative powers is thus to be contrasted with their rigid separateness from the judicial power."* The Supreme Court cited with approval ***Wilson v. Minister for Aboriginal and Islander Affairs ((1996) 189 CLR 1)***, where High Court of Australia held that, *"[t]he separation of functions is designed to provide checks and balances on the exercise of power by the respective organs of government in which the powers are reposed…The institutional separation of the judicial power assists the public perception, central to the system of government as a whole, that these*

*controversies have been quelled by judges acting independently of either of the other branches of the government."* The Supreme Court endorsed the definition of judicial independence as articulated by the High Court of Australia in ***Huddart, Parker and Co. v. Moorehead*** ***((1909) 8 CLR 330)***, (also applied by the Privy Council and by the Courts in India and Pakistan) to mean, *"[t]he power which every sovereign authority must of necessity have to decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property. The exercise of this power does not begin until some tribunal which has power to give a binding and authoritative decision is called upon to take action."*

61. What emerges from the above case law is that judicial power is the sovereign power of a state to conclusively decide disputes between two parties, which decision is binding and has the force of law. Where a court or tribunal exercises such power, it must have the relevant subject matter and territorial jurisdiction. The court or tribunal that exercises judicial power in relation to the jurisdiction vested in it must enjoy judicial independence in order to uphold the rights of the contesting parties (i) to access to justice, (ii) to an impartial and neutral judge, and (iii) to a fair trial and due process. The scope of judicial independence is not limited to the court or tribunal being independent of other branches of the state such as the Executive and the Legislature. It also entails independence from all extraneous considerations or influences, including influence of peers of judges presiding over a court or tribunal.

62. The horizontal and vertical independence of a judge within the hierarchy of the judiciary is a quintessential feature of judicial independence. This is manifest in the oath of office sworn by judges of the Supreme Court and the High Courts, which provides amongst other things that, *"I will do right to all manner of people according to the law without fear or favour, affection or ill-will."* The requirement of judicial independence as articulated by the Bangalore Principles of Judicial Conduct also emphasizes this aspect of judicial independence. The relevant principle states that judicial independence is a prerequisite to

the rule of law and a fundamental guarantee of a fair trial. A judge shall therefore uphold and exemplify judicial independence in both its individual and institutional aspects. This principle emphasizes that within the Judiciary there is a normative aspect of judicial independence that relates to the state of mind of the judge and his conviction not to be influenced by anyone including his colleagues, friends and relatives. And then there is an institutional aspect of judicial independence where the processes of the court or tribunal must be set up in a manner that does not allow for any authority in exercise of its judicial or administrative power, to inform or affect the outcome of a matter pending before a judge.

63. Clause 1.4 of the Bangalore Principles of Judicial Conduct provides that: *"In performing judicial duties a judge shall be independent of judicial colleagues in respect of decisions which the judge is obliged to make independently."* The need for horizontal and vertical independence within the Judiciary could not have been stated with any more clarity. The Commentary on Bangalore Principles of Judicial Conduct in relation to the above principle (see the United Nations Office of Drugs and Crime Report dated September 2007, page 50) states that, *"[i]n performance of his or her functions, a judge is no one's employee. He or she is a servant of, and answerable only to, the law and to his or her conscience which the judge is obliged to constantly examine. It is axiomatic that, apart from any system of appeal, a judge deciding a case does not act on any order or instruction of a third party inside or outside the judiciary. Any hierarchical organization of the judiciary and any difference in grade or rank shall, in no way, interfere with the right of a judge to pronounce the judgment freely, uninfluenced by extrinsic considerations or influences."*

64. The judges in Pakistan hold public office, but are not in the employment of a particular organization. The exercise of judicial power by them amounts to the exercise of a sovereign power the exercise of which, where it suffers from any infirmity, is subject to correction through an appellate process. To the extent that judges are public servants, they are therefore the servants of the Constitution and the law and answerable

accordingly. The relevance of this aspect of judicial independence, as explained above, will become apparent as we consider the scope of authority of the Judicial Service Tribunal, its placement within the hierarchy of the Judiciary, and the effect of temporary appointments made on transfer or deputation basis within the subordinate judiciary.

**The Scope of Authority and Jurisdiction of the Judicial Service Tribunal**

65. In construing the scope of authority of the Judicial Service Tribunal we will need to take into account (i) Article 175 of the Constitution that provides for the separation of the Judiciary from the Executive and vests judicial power of the state in the Judiciary, (ii) Article 212 of the Constitution that authorizes the legislature to establish courts and tribunals, to adjudicate disputes relating to the terms and conditions of service of persons in the service of state, and (iii) Article 203 of the Constitution that provides that *"[e]ach High Court shall supervise and control all courts subordinate to it."*

66. The first point to be noted for the purposes of this discussion is that it was declared in ***Muhammad Asghar Khan vs. Mirza Aslam Baig (PLD 2013 SC 1)*** that Judges of the superior courts of Pakistan are in the service of Pakistan in terms of Article 260 of the Constitution. This was reiterated by the Supreme Court in ***Justice Qazi Faez Isa vs. President of Pakistan (PLD 2021 SC 1)***, wherein it was held that the office of a public servant is to be characterized on the basis of five ingredients (i.e. *"(a). The office is a trust conferred for a public purpose; (b). The functions of the office are conferred by law; (c). The office involves the exercise of a portion of the sovereign functions of Government whether that be executive, legislative or judicial; (d). The term and tenure of the office are determined by law; and (e). Remuneration is paid from public funds."*) On the basis of such test, members of the district Judiciary also qualify as public servants. Accordingly, the Supreme Court in ***Sayed Asghar Ali Shah*** has clarified that Khyber Pakhtunkhwa Subordinate Judiciary Service Tribunal constituted to determine disputes and grievances in relation to the terms and conditions of members of Khyber Pakhtunkhwa

Subordinate Judiciary is a Tribunal for purposes of Article 212(1) of the Constitution. The Judicial Service Tribunal for purposes of adjudication of disputes and grievances in relation to terms and conditions of service of members of Islamabad Judicial Service would also, accordingly, qualify as a Tribunal in terms of Article 212(1)(a). The only distinction between the two Tribunals is that while the Tribunal established in Khyber Pakhtunkhwa is established under a law promulgated by the Provincial Assembly, the Islamabad Subordinate Judiciary Service Tribunal is constituted under a law promulgated by the Parliament and consequently the ouster clause of Article 212(2) applies in the instant case, in view of the law laid down in ***Sayed Asghar Ali Shah***.

67. In terms of historical background, as has briefly been mentioned earlier in this judgment, the rules regulating the terms and conditions of judicial officers were enacted in exercise of authority under Provincial Civil Service laws enacted by the respective governments. In similar fashion the adjudication of disputes and grievances in relation to terms and conditions of judicial officers in provinces was also adjudicated by provincial Service Tribunals. This changed after ***Sharaf Faridi*** and appropriate amendments were made to grant the Judiciary effective control over the terms and conditions of the judicial officers subordinate to the High Courts and adjudicatory authority over grievances emanating from the terms and conditions of service, in order to give effect to the principle of independence of the judiciary as understood in terms of Article 203 of the Constitution.

68. Let us consider adjudicatory forums in the Provinces that have been created to address grievances of members of subordinate judiciary. An amendment was made in the Sindh Services Tribunal Act 1973, to introduce Section 3-B of the said Act to provide that tribunals for members of Subordinate Judiciary were to be established by the Chief Justice of the High Court, "*consisting of three Judges of the High Court, the most senior of whom shall be the Chairman and the other two judges shall act as members of the Tribunal and the Tribunal so established shall have exclusive jurisdiction in respect of matter*

*relating to the terms and conditions of service of members of the Subordinate Judiciary, including the disciplinary matters*." This amendment was introduced through Sindh Service Tribunal (Amendment) Act, 1991. The service disputes of judges of subordinate judiciary in Punjab are adjudicated by a tribunal constituted under the Punjab Subordinate Judiciary Service Tribunal Act, 1991. Like the Islamabad Subordinate Judiciary Service Tribunal, (where the Tribunal is to be established by the President) this tribunal was to be established by the Governor, and consists of three Judges of the Lahore High Court nominated by the Chief Justice. The disputes of members of subordinate judiciary in Khyber Pakhtunkhwa are adjudicated by the Khyber Pakhtunkhwa Subordinate Judiciary Service Tribunal Act, 1991, which has a scheme similar to the Tribunals established in Punjab and Islamabad. It was to be established by the Governor, and consists of four sitting Judges of the Peshawar High Court to be nominated by the Chief Justice. The Tribunal in Balochistan is established under the Balochistan Subordinate Judiciary Service Tribunal Act, 1989. This Tribunal was to be established by the Government of Balochistan and consists of the Chief Justice or acting chief Justice as its chairman and two sitting Judges of the High Court of Balochistan as its members. The provincial Judicial Service Tribunals as well as the Judicial Service Tribunal in Islamabad have been vested with exclusive jurisdiction in respect of matters relating to terms and conditions of service of members of the subordinate judiciary including their disciplinary matters. The Judicial Service Tribunal established in terms of provisions of the Islamabad Subordinate Judiciary Service Tribunal Act, 2016, qualifies as a civil court for purposes of deciding appeals of members of Islamabad District Judiciary.

69. The organizational architecture of the Judicial Service Tribunals has certain distinct features that determine its character and the scope of its authority.

> (i) The Tribunal is a Civil Court for purposes of exercising appellate powers, in view of ***Riaz ul Haq***, which declared the Federal Service Tribunal to be a Civil Court. In view of the dicta in ***Zuhair Siddiqi vs. MH Sufi*** ***(PLD 1964***

***(W.P.) Lahore 453), Industrial Development Bank vs. Nadeem Flour Mills (1981 SCMR 143)*** *and* ***Province of East Pakistan vs. Sirajul Huq Patwari (PLD 1966 SC 854)****,* it is also clarified that the title of a court versus that of a tribunal is of no consequence. It is the nature of power exercised by a forum that determines whether it is a court or an administrative tribunal.

(ii) The Tribunal exercises judicial power as it has been vested with exclusive jurisdiction in terms of Section 3(2) of the Act, *"in respect of matters relating to the terms and conditions of service of the members of subordinate judiciary including disciplinary matters*." The Tribunal, adjudicates the rights and liabilities of members of the subordinate judiciary that fall under the administrative control of Islamabad High Court, and exclusive jurisdiction is vested in it to afford fair trial and due process to members of the subordinate judiciary of Islamabad in relation to their rights and liabilities within their service. The Tribunal is meant to afford members of the Subordinate Judiciary of Islamabad access to justice and uphold their rights to fair trial and due process.

(iii) The Judges to be nominated to constitute the Tribunal must be sitting Judges of the High Court (i.e. Members of the Tribunal must be nominated from amongst a class of persons that constitute sitting Judges of the Islamabad High Court).

(iv) The Government is not free to pick and choose individual Judges as members of the Tribunal but only such Judges can be appointed to the Tribunal that are nominated by the Chief Justice of Islamabad High Court. The power vested in the Chief Justice, to nominate sitting Judges of the High Court, is in consonance with the principles of judicial independence, already discussed above, and the administrative function of making a nomination is vested within the Judiciary and not in any individual and/or authority outside of the Judiciary.

(v) The sitting Judges of Islamabad High Court who exercise jurisdiction and judicial power can only exercise such jurisdiction and power within the territory in which they exercise authority as Judges of the High Court (by virtue of which they exercise supervision and control over members of the subordinate judiciary). In other words, no Judge of any other High Court can be appointed by the Government as a member of the Judicial Service Tribunal to exercise judicial power and authority in relation to members of Subordinate Judiciary under the administrative control of Islamabad High Court and vice versa.

70. What is clear in view of the above is that the Islamabad Subordinate Judiciary Service Tribunal constituted under the 2016 Act, is a Court that exercises Judicial Power. It is also not in question that the Judicial Service Tribunal qualifies as a Tribunal for purposes of Article 212(1) of the Constitution, which is vested with exclusive jurisdiction in relation to service disputes of members of Subordinate Judiciary of Islamabad under a Federal law. Consequently, the jurisdiction of the High Court in relation to such disputes is ousted in terms of Article 212(2) of the Constitution. The jurisdiction of Islamabad High Court under Article 199 of the Constitution is even otherwise ousted in terms of the law laid down by the Supreme Court in ***Gul Taiz Khan Marwat***, wherein the Supreme Court clarified that administrative decisions or actions of a High Court, including those of the Chief Justice or a Committee of the High Court, are not amenable to writ jurisdiction of High Court in view of Article 199(5) of the Constitution. Thus, had Parliament not promulgated the Islamabad Subordinate Judiciary Tribunal Act, no legal remedy against decision rendered by the Chief Justice as the appointing authority under Islamabad Judicial Service Rules or against decisions of the Administration Committee or the Departmental Promotion Committee, which have been identified as authorities vested with the power to make decisions under provisions of the Islamabad Judicial Service Rules, would have been available to an aggrieved judge in ICT in relation to service grievances.

**Judicial Service Tribunal within the Hierarchy of Judiciary**

71. The only question that remains is the placement of the Judicial Service Tribunal within the hierarchy of the judiciary. Should it be considered a Tribunal inferior to Islamabad High Court? Or should it be treated as a Tribunal independent of and/or superior to Islamabad High Court to the extent that it sits as an appellate forum to decide the legality of the decisions rendered by the Islamabad High Court in administrative matters, including the decisions of the Chief Justice, Administration Committee and Departmental Promotion Committee of Islamabad High Court? Or can it be considered a Tribunal constituted within the Islamabad High Court with the Islamabad Subordinate Judiciary Service Tribunal Act merely regulating the practice and procedure of such Tribunal, while conferring on the High Court additional authority and jurisdiction in terms of Article 212(1)(a) of the Constitution, which is otherwise not available under Article 199 of the Constitution?

72. To answer the above question, it will be useful to consider the concept of *persona designata*. The concept of *persona designata* emerged in common law jurisdictions that had written constitutions which provided for separation of powers. The concept came into focus in cases where judges were seen as exercising functions conferred on them by name which were of a non-judicial nature, and conceiving of such function as being performed by a judge in his capacity as a court would fall foul of the concept of separation of powers. The concept of *persona designata* evolved differently in different jurisdictions in view of the facts that came before the courts and the provisions of statutes that required interpretation. The jurisprudence from other jurisdictions establishes that there is no single test that has emerged to determine when a sitting judge can be considered to be performing functions as persona designata as opposed to in his/her capacity as a judge of the court he sits in. The determination depends on interpretation of the statute under which authority is vested in the judge, the authority conferred with power to make the appointment, and the nature of function performed and power exercised.

73. The definition of *persona designata* was considered by the Supreme Court of India in the case of ***The Central Talkies Ltd., Kanpur vs. Dwarka Prasad* (AIR 1961 SC 606).** The Indian Supreme Court relied on definition from Osborn's Concise Law Dictionary, 4th Edn., p.253, which defined *persona designata* as *"a person who is pointed out or described as an individual, as opposed to a person ascertained as a member of a class, or as filling a particular character."* It also cited with approval the observation of Schwabe, C.J., in ***Parthasaradhi Naidu vs. Koteswara Rao* (AIR 1924 Madras 561)** who explained that *personae designatae* are *"persons selected to act in the matter in their private capacity and not in their capacity as Judges."*

74. The question of when a judge exercising function is not to be considered a court, but *persona designata* came before the High Court of Dhaka in ***Afsaruddin Bhuiyan vs. Wazed Ali Khan* (PLD 1953 Dacca 209)** where it was held that, *"[I]n legal phraseology the expression 'persona designate, means a person described in a statue or legal instrument by his official designation or as a member of a class. A function may be given to a person describing him by his official designation, and the function may be judicial* or otherwise. If the function is a judicial, then he is a court, though he is described not as court but by official designation." The observations of Fazal Ali, J, speaking for the full bench in ***Mr. Dirji v. Smt. Goal* (AIR 1941 Patna 65),** was cited wherein it held that, *"there is no real antithesis between the expression 'persona designata' and a 'Court', in other words, even a persona designata may be a Court. Whether he is a Court or not depends upon his powers and function which he has to discharge."*

75. The question whether a High Court Judge appointed as a member of the Election Tribunal under the National and Provincial Assemblies Elections Act 1964, was persona designata came before the Supreme Court in ***Mian Jamal Shah vs. The Member, Election Commission* (PLD 1966 SC 1).** The Member of the Election Tribunal had decided an election dispute. The decision was challenged before the High Court which constituted a three-member bench to hear the

petition and overturned the decision of the Tribunal. In appeal, the Supreme Court set aside the order of the High Court. Of relevance for our purposes is the discussion re *persona designata*. The Supreme Court found that the High Court had correctly treated the Judge in his capacity as member of the Election Tribunal being *persona designata*. But the reasoning is relevant. The Supreme Court took into consideration section 61 of the National and Provincial Assemblies Elections Act 1964, which prescribed the qualifications of members of the Election Tribunal two of whom were required to possess the qualifications necessary to be a Judge of the High Court and the third should have held the office of a District Judge. The law did not require that a sitting Judge of the High Court be appointed as a member of the Election Tribunal. With regard to the nature of the power exercised, the Supreme Court held that, *"such authorities act, not as members of the Judiciary, but as an agency to exercise the jurisdiction belonging essentially to the legislature."* The Supreme Court found that while the High Court was right in considering the member to be *persona designata*, as the member made his determination in exercise of the authority vested in him, a writ of certiorari would not lie against such order and his decision was not susceptible to interference by the High Court in its constitutional jurisdiction.

76. The Supreme Court also reproduced certain observations of the High Court with regard to the "ludicrous position" that the High Court had been put in, where it was required to issue a show cause to itself i.e. to a sitting Judge of a High Court as to why its order ought not be quashed. The Supreme Court then observed that, *"in the present case, the order in question is made by a single Judge of the High Court acting as the relevant authority, but it is conceivable that a statute may appoint a Tribunal of say two or three High Court Judges to adjudicate matters arising thereunder, and then indeed the aspect of 'ludicrousness' might arise if a writ were sought from a Single Judge of the High Court to avoid actions by such Tribunals. In a number of statutes in the United Kingdom express provisions are included which avoid the writ jurisdiction in relation to such adjudications, and it is a matter*

*for consideration whether such provisions should not be made use of in Pakistan as well. Quite apart from the aspect of 'ludicrousness' there are other and more weighty considerations involved, such as the necessity of maintaining a high degree of comity among the Judges of the Superior Courts, which could be urged in support of such a provision."* In our present context we note that such a provision is in field in terms of Article 212(2) of the Constitution when it comes to the exercise of jurisdiction by a Tribunal constituted for purposes of Article 212(1) of the Constitution.

77. Let us note here that in in ***Syed Muhammad Ali Bokhari vs. Federation of Pakistan (PLD 2025 Islamabad 48)***, a single bench of Islamabad High Court, while relying on ***Jamal Shah***, held that a sitting judge of the High Court, while exercising jurisdiction as an Election Tribunal under provisions of the Election Act, 2017, acts as persona designate. This judgement has been impugned before a Divisional Bench of Islamabad High Court in appeal and so we would not like to comment on it at all. We will briefly note here though that the Supreme Court judgments it relies on deal with whether an appeal lies to the Supreme Court against an order of a special court presided over by a sitting judge of the High Court. And the Supreme Court has held in such cases that where a judge of the High Court exercises special jurisdiction, not under the Constitution but under a statute, the remedy of appeal against his/her judgment would not automatically lie under Article 185 of the Constitution, and any right would have to be construed in accordance with provisions of the statute under which jurisdiction is vested in the High Court judge. It is not in dispute for our purposes that the Judicial Services Tribunal exercises special jurisdiction not under Article 199 of the Constitution, but under a statute. In such case the right to appeal before the Supreme Court flows from Article 212(3) and not Article 185 of the Constitution. On the contrary, in a case where a single judge of the High Court exercises jurisdiction as a Banking Court, he/she does not exercise jurisdiction vested by Article 199 of the Constitution, but by a special law. However, a single bench of the High Court, in exercise of authority under Article 199 of the Constitution, cannot issue a

writ of certiorari or prohibition to a single judge of the High Court exercising authority as the Banking Court. The remedy against the judgment of the judge acting as Banking Court lies in appeal, in terms of Section 2 of the Law Reforms Ordinance, 1972, before a Divisional Bench of the High Court.

78. The question of whether a sitting High Court Judge was acting as persona designata was also considered in ***Asghar Ali vs. State (1999 SCMR 654)***. The Supreme Court considered past precedents. It took note of the law laid down in ***Krishna vs. State (PLD 1972 SC 1***). In such case, the provisions of Enemy Agents Ordinance 1949, provided for appointing a special Judge and a reviewing authority, and the reviewing authority was to be a Judge of the High Court in Pakistan. The Supreme Court, in the case while finding that the Judge sitting as reviewing authority was acting *persona designate,* took into account the fact that the reviewing Judge was not required to be a sitting Judge of the High Court within whose jurisdiction the offence was alleged to have been committed. And that a Judge from the East Pakistan High Court could be appointed to exercise jurisdiction within the territories of West Pakistan. The Supreme Court also cited with approval ***Altaf Hussain vs. State (PLD 1985 Lahore 10)***, in which the character of the Special Court constituted under Section 3 of the Banking (Special Courts) Ordinance 1984, was considered and it was held that the Special Court could be constituted for the whole of Pakistan and the person to be appointed as a Judge to the Special Court only needed to be qualified for appointment as a Judge of the High Court i.e. he/she did not need to be a sitting Judge of the High Court. In these circumstances, it was found that even where a sitting Judge of the High Court was appointed as a Special Court, he would act as *persona designata* and not as a Judge of the High Court, especially where the nomination had to be made by the Federal Government and not by the Chief Justice.

79. The circumstances before us are different. In construing provisions of the Islamabad Subordinate Judiciary Service Tribunal Act we make note of the fact that in terms of Section 3, the Federal Government is not at liberty to appoint any

individual qualified to be a Judge of the High Court as a member of the Judicial Service Tribunal. It is only a sitting Judge of Islamabad High Court who can be appointed as a member, with the Tribunal comprising three sitting Judges of Islamabad High Court. The Judges to be nominated cannot be picked by the Federal Government in its discretion, but the nomination must come from the Chief Justice of Islamabad High Court. The Tribunal comprising three sitting Judges of the High Court then exercises exclusive jurisdiction in relation to service disputes of members of Subordinate Judiciary under the administrative control of Islamabad High Court to the exclusion of any other courts in terms of Section 3(2) of the Islamabad Subordinate Judiciary Service Tribunal Act read with Article 212(2) of the Constitution. The Tribunal so constituted exercises jurisdiction within the territory in relation to which jurisdiction is vested in members of the Tribunal as Judges of the Islamabad High Court, pursuant to their oaths of office sworn in terms of Article 194 of the Constitution. It is in view of such circumstances, that the *'but for'* test prescribed in ***Gul Taiz Khan Marwat*** is squarely applicable to the provisions of the Islamabad Subordinate Judiciary Service Tribunal Act, where, but for being Judges of Islamabad High Court, the members of the Tribunal cannot be nominated and appointed under provisions of the Act. It is also of relevance that the Judges of Islamabad High Court that constitute the Tribunal are not personally named in the Islamabad Subordinate Judiciary Service Tribunal Act and are part of a certain class i.e. Judges of Islamabad High Court, any of whom can be appointed to the Tribunal, once a vacancy in the Tribunal is created and a sitting Judge is nominated by the Chief Justice as a replacement for a member of the Tribunal who has quit or retired.

80. Can the actions of sitting Judges of Islamabad High Court acting as members of the Judicial Service Tribunal then be considered as actions of *persona designatae*? The answer has to be no. Where the sitting Judges of a High Court are called upon to exercise judicial power within the territorial jurisdiction in which they act as Judges of the High Court, and their appointment is a consequence of a nomination by the Chief

Justice, and they are not named in the statute, but form part of a class that comprises all Judges of the High Court, and no one other than a Judge of that High Court can be appointed as a member of the Tribunal, which exercises jurisdiction within a territory that is co-terminus with the jurisdiction of the High Court, the Judge as a member of the Tribunal cannot be deemed to be acting *persona designata*, but as a Judge of the High Court. The contrary argument would create multiple problems. The first has been flagged by the Supreme Court in ***Jamal Shah***, i.e. in theory, a single Judge of the High Court would have jurisdiction in certain circumstances to issue a writ to three of his/her peers when they render a decision as members of the Tribunal. This cannot be countenanced for reasons mentioned in ***Jamal Shah***. Further, in the event that the Tribunal is considered separate from the High Court and inferior to the High Court, how can such Tribunal be allowed to sit in appeal over administrative decisions approved by the Administration Committee, Departmental Promotion Committee, the Chief Justice, or the High Court acting collectively (for example in a case where the vires of High Court Rules is impugned). On the contrary, if the Tribunal is considered independent of and superior to the High Court, the law creating such Tribunal would fall foul of Article 203 of the Constitution which vests in the High Court the exclusive power to supervise and control the courts subordinate to it.

81. Where a Tribunal is constituted for the exclusive purpose of deciding service disputes of subordinate court judges that fall within the administrative control of the High Court, such Tribunal by design exercises some measure of supervision and control over judges of the subordinate courts. The Constitution does not empower the legislature to vest such power in any authority other than the High Court. It is in view of Articles 175, 212 and 203 of the Constitution as enumerated by the Supreme Court that provisions of the Islamabad Subordinate Judiciary Service Tribunal Act must be construed as vesting a special jurisdiction in the High Court, even if such words have not expressly been used in the said Act, to be exercised in the manner prescribed by the Act, by a Tribunal comprising three sitting Judges of the Islamabad High Court. Looking at the

design of all such Service Tribunals, especially the Judicial Service Tribunal for Balochistan, where Section 3 of the Balochistan Subordinate Judiciary Service Tribunal Act 1989, the Chief Justice of the High Court acts as the Chairman of the Tribunal, it would be ludicrous if a single Judge of the High Court were to be deemed competent to issue a writ to such Tribunal in his/her constitutional jurisdiction.

82. In view of the test laid out above, we find that the Judicial Service Tribunal is a Tribunal constituted within the Islamabad High Court. It cannot be conceived as a Court or Tribunal independent of, or external to, the Islamabad High Court. The jurisdiction vested in it, in terms of Article 212(1) of the Constitution read with provisions of the Subordinate Judiciary Service Tribunal Act, is to be considered as conferment of jurisdiction by a special law to be exercised in accordance with provisions of such law. Once the provisions of the Islamabad Judiciary Service Tribunal Act are conceived as conferring jurisdiction from the High Court to be exercised by Judges nominated and appointed as members of the Tribunal, one can see that there is nothing unique about this arrangement. The Parliament, under various laws, has conferred special jurisdiction on the High Court. The High Court acts as a Banking Court under Section 5 of the Financial Institutions (Recovery of Finances) Ordinance, 2001. Likewise, the High Court is vested with special jurisdiction under Section 6 of the Companies Act, 2017. The High Court is similarly vested with original jurisdiction under Section 28 of the Privatization Commission Ordinance, 2000. These are just a few examples to emphasize that where the High Court and Judges of the High Court exercise a certain jurisdiction vested in them by special law, they do not stop acting as Judges of the High Court, but exercise such special jurisdiction by virtue of their offices as Judges of the High Court.

83. With such construction, an obvious question arises: what would be the point of ousting the jurisdiction of courts in terms of Article 212(2) of the Constitution, if such jurisdiction were to be vested in the High Court in terms of the law establishing the Tribunal for purposes of Article 212(1)? The argument is

appealing at first. However, it loses force when considered in view of the language of Article 212(1) that places no restraint on the Parliament as to the composition of an Article 212(1) tribunal, together with the need to uphold independence of the judiciary and the letter and spirit of Article 203 of the Constitution when it comes to adjudication of service disputes of Judges that fall within the supervision and control of a High Court. It is in this context that the Judicial Service Tribunal must be considered as a Tribunal created within the Islamabad High Court with its members exercising jurisdiction and judicial power by virtue of their office as Judges of Islamabad High Court.

84. We have already explained earlier in this judgment that the answer to the question of whether members of the Tribunal act as persona designate or as Judges of Islamabad High Court does not directly affect the jurisdiction of the Tribunal to adjudicate the present appeal or the nature of orders that the Tribunal can pass or has passed. As an Article 212(1) tribunal exercising judicial power, this Tribunal is competent, even if its members were deemed to be acting as persona designate, to determine its own jurisdiction and adjudicate all sorts of grievances of members of subordinate judiciary, including those involving fundamental rights of appellants, questions of mala fide, corum non judice and vires of High Court Rules etc. We have expressed our opinion on its placement with the Judiciary, as doing so helps understand that the Tribunal is meant to function as a corrective forum internal to the High Court and it is in this spirit that it must approach the appeals that come before it.

**The Constitution of the Judicial Service Tribunal and the Scope of its Authority**

85. The Judicial Service Tribunal was to be established in terms of Section 3 of the Islamabad Subordinate Judiciary Service Tribunal Act. Section 3(1) provides that the President is to establish a Service Tribunal subject to subsection (3) of Section 3. Section 3(3) then provides that the Tribunal is to consist of three Judges of the Islamabad High Court, nominated by the Chief Justices and further provides that a

Judge against whose order an appeal is preferred cannot be member of the Tribunal. It is important to note that provisions of the Islamabad Subordinate Judiciary Service Tribunal Act do not vest in the Federal Government any power to appoint a member to the Tribunal. Similarly, while Section 3(3) vests in the Chief Justice the power to nominate Judges, there is no explicit appointment power created by the statute. This is striking when compared with Section 3(4) of the Balochistan Subordinate Judiciary Service Tribunal Act 1989, which provides that, *"Chairman and members of the Tribunal shall be appointed by the Governor."* In other words, the power vested in the President, who was to act on the advice of the Federal Government for establishing the Tribunal (in terms of Article 48 of the Constitution), is limited to the establishment the Tribunal. Once the Tribunal stands established, the President becomes functus officio and has no further role to play. A joint reading of Sections 3(1) and 3(3) of the Islamabad Subordinate Judiciary Service Tribunal Act manifests that at the time of its establishment, the president was barred from appointing any member(s) to the Tribunal other than the member(s) nominated by the Chief Justice in terms of Section 3(3) of the Act.

86. The proviso of Section 3(3) caters for conflict of interest in view of the fact that the Judges of the Islamabad High Court may also be exercising administrative authority to the extent that they are on relevant committees of the High Court, including for example the Administration Committee, the Departmental Promotion Committee and the Judicial Selection Board etc., that have a key role to play in rendering service-related decisions under the Judicial Service Rules. The Chief Justice by making his nominations would therefore take into account the possibility of conflict of interest and would nominate Judges who would not be so conflicted. However, once the Tribunal is established and Judges nominated by the Chief Justice become members of the Tribunal, neither the Federal Government nor the Chief Justice has any role to play in the functioning of the Tribunal.

87. Section 4 of the Islamabad Subordinate Judiciary Service Tribunal Act provides for constitution of benches of the Tribunal and vests such authority in the Chairman of the Tribunal, who is the senior most amongst the three sitting High Court Judges who act as members of the Tribunal. The Khyber Pakhtunkhwa Subordinate Judiciary Service Tribunal Act, 1991, has a similar scheme catering to the possibility of conflict of interest of Judges acting as members of the Tribunal. The scheme of the Islamabad Subordinate Judiciary Service Tribunal Act makes logical and functional sense as the adjudicatory process and the day-to-day functioning of the Tribunal has been placed beyond the pale of the administrative authority of the Chief Justice, who is otherwise vested with the responsibility of overseeing the constitution of benches in the High Court. The legislative purpose for such separation is to uphold the right of members of the subordinate judiciary to neutral judges to adjudicate their service-related disputes that arise from a decision-making process headed by the Chief Justice of the High Court.

88. It has already been held by the Supreme Court in ***Human Rights Case No. 14959-K of 2018*** ***(PLD 2019 SC 183), Suo Motu case no.4 of 2022*** ***(PLD 2023 SC 387)***, ***Islamabad High Court Bar Association vs. Election Commission of Pakistan*** ***(PLD 2023 SC 720)*** and ***Raja Amir Khan vs. Federation*** ***(PLJ 2024 SC 114)*** that once a bench has been constituted and the Judges are seized of a case, the administrative authority of the Chief Justice comes to an end and the bench cannot be reconstituted to affect the outcome of a case. The same principle has been enshrined under the provisions of Sections 3 and 4 of the Islamabad Subordinate Judiciary Service Tribunal Act, where the power to nominate a Judge vests in the Chief Justice of the High Court. But once appointed, the Judge as member of the Tribunal is a keeper of his own conscience and has to be guided by the principles of neutrality, propriety and lack of bias applicable to Judges. The term of a member of the Tribunal cannot be cut short by the Chief Justice in exercise of his administrative authority in terms of section 3(3) of the Islamabad Subordinate Judiciary Service Tribunal Act by withdrawing a

nomination previously made and acted upon. This scheme is meant to ensure not just the Article 10A rights of members of the subordinate judiciary, but also to apply the principle of horizontal independence of the Judiciary to the functioning of the Tribunal.

89. The power of a Chief Justice for purposes of nominating a member to the Tribunal in terms of section 3(3) of the Islamabad Subordinate Judiciary Service Tribunal Act would come into play whenever there is a vacancy created in the Tribunal by virtue of a member recusing himself for personal reasons, retiring from the office of Judge of the High Court or otherwise resigning in view of other administrative responsibilities that such Judge may be conferred with in the High Court. In such case, it would then be for the Chief Justice to nominate another Judge to the Tribunal to fill the vacancy created. However, such Judge would simply assume the jurisdiction as member of the Tribunal without there being any need for the Federal Government to appoint him as such and issue a notification for such purpose. In the past, there has been followed a practice with the Federal Government issuing a notification whenever the membership of the Judicial Service Tribunal changed and the Tribunal were to be reconstituted to fill any vacancy that arose in its membership. Such practice is not supported by the provisions and texts of the Islamabad Subordinate Judiciary Service Tribunal Act as has been discussed above. A member of the Tribunal nominated by the Chief Justice to fill a vacancy that has emerged requires no notification of appointment issued by the Federal Government to assume jurisdiction as a member of the Tribunal.

90. The scope of authority of an Article 212(1) Tribunal has been determined by the Supreme Court in relation to the FST, which has been discussed above in detail. Within the scope of its jurisdiction, the Judicial Service Tribunal is vested with similar authority. The Tribunal is vested with exclusive jurisdiction in relation to service disputes of members of the Subordinate Judiciary. In exercising such jurisdiction, it can issue interim orders, decide questions with regard to the vires of any rules, instructions or orders that affect the terms and

conditions of service of members of the subordinate judiciary and rule on any breach of fundamental rights of members of the subordinate judiciary in relation to the manner in which the terms and conditions of their service are given effect. In all such matters, the jurisdiction of the High Court in terms of Article 199 stands ousted by virtue of Article 212(2) of the Constitution read together with Section 3(2) of the Islamabad Subordinate Judiciary Service Tribunal Act, as well as by virtue of Article 199(5) of the Constitution as held by the Supreme Court in ***Gul Taiz Khan Marwat***. Where a question of jurisdiction of Tribunal arises, the Tribunal being a court is vested with judicial power to determine its own jurisdiction (see for example ***Asma Jilani*** and ***Ms. Sarosh Sultan*** *already cited above*).

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

91. Let us now consider the merits of the controversy before us. We have already discussed the requirements of Section 6(3) of the Islamabad High Court Act, creating an obligation for Islamabad High Court to establish a subordinate judiciary and to repatriate Judges serving on deputation within courts that fell within the administrative control of Islamabad High Court 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 Islamabad High Court to invite applications from members of all provincial Judicial Services and make appointments after the Judicial Selection Board of Islamabad High Court 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 Islamabad High Court 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.

92. Rule 9 of the Judicial Service Rules provided that in the event that certain vacancies remained unfilled after Islamabad High Court 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.

93. 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.

94. 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 High Court 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.

95. 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.

96. 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.

97. 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. It is in view of the constitutional scheme that the Lahore High Rules and Orders have been framed and the provisions of Rule 5(2) of Chapter 10, Part A of Volume-V of the Lahore High Court Rules, already cited above, provide that all cases relating to amendments to be made to

existing rules or the statutory rules of the High Court, are to be decided by all the Judges of the High Court.

98. 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 vs. ECP (PLD 2024 SC 653),*** where dicta from ***Province of East Pakistan vs. 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 vs. 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."*

99. 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. We, however, find that Rule 31 of the Judicial Service Rules is ultra vires the Constitution, as well as 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.

100. The principles regulating appointment on deputation basis have also evolved over time and are well settled. In ***Province of Punjab vs. 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 vs. 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."*

101. In ***Muhammad Ramzan Khan vs. 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 vs. 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.

102. 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 vs. EOBI (2010 PLC(CS) 1377)*** were upheld by the Supreme Court and leave was refused in the said matter.

103. In ***Sudhir Ahmed vs. 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 vs. 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.

104. In ***Muhammad Sharif Kareem vs. 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."*

105. In ***The Chairman Board of Governors vs. 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.

106. The latest view of the Supreme Court with regard to deputation is expressed in ***Ghansham Das vs. 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."*

107. In ***Safdar Ali Sohito vs. 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."*

108. In ***Muhammad Mansoor ul Haq vs. 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 vs. 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."*

109. This Court in ***Mrs. Nusrat Rashid vs. 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."*

110. 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 was 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.

111. It in view of these principles regulating appointments by deputation read with Section 6(3) of the IHC Act that we find that Rule 9 and 33 of the Judicial Service Rules, which are even otherwise framed as transitory provisions, could not have been employed and cannot continue to 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 first of all is in breach of Section 6(3) of the IHC Act, the legislative intent behind which is unambiguous. The Islamabad High Court has been placed under a statutory responsibility to establish, build, and nurture an independent Judicial Service for ICT.

112. 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.

113. 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). We therefore hold that Rules 9 and 30(3) of the Judicial Service Rules have to be read down and cannot be employed by Islamabad High Court to continue to fill posts in Islamabad Judicial Service on a deputation basis. To the extent that posts have presently been filled on deputation basis, such deputationists must be repatriated to their parent provincial Judicial Services within a period of 6 months at the most.

114. In issuing this direction, we are providing for a period of 6 months in view of the original instruction in section 6(3) of

the IHC Act requiring Islamabad High Court to repatriate all deputationists within a period of 6 months of the enactment of the IHC Act, back to their respective High Courts. We feel that Islamabad High Court may not have applied its mind to the requirements of section 6(3) of the IHC Act since his establishment in 2010 and has continued to fill posts in Islamabad Judicial Service on deputation basis under the misconception that appointments by deputation can be used as a parallel method of appointment to that prescribed in the Judicial Service Rules (i.e. initial appointment and promotion). In passing such direction, we are guided by the law laid down 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.

115. We find that the deputationists currently serving against posts in Islamabad Judicial Service are, therefore, not aggrieved persons and need not be heard for purposes of interpreting provisions of the IHC Act read with the Judicial Service Rules. As they are not aggrieved persons, their rights to natural justice are not in question. In this regard, we also take guidance from the law laid down by the Supreme Court in ***Justice Khurshid Anwar Bhinder vs. Federation of Pakistan (PLD 2010 SC 483),*** wherein exceptions to the right to be heard as a subset of the right to natural justice were listed, and included in the exceptions were circumstances where nothing unfair could be inferred and where the order did not deprive the person of any right. As has been held by the Supreme Court repeatedly in the cases already cited above, that a deputationist has no vested right to continue to serve in a borrowing department and his repatriation does not make him an aggrieved person, we find that the deputationist, presently serving in Islamabad Judicial Service to be repatriated, have no natural justice rights that need to be upheld while issuing the direction above.

116. We also draw guidance from ***Hadayat Ullah vs. Federation (2022 SCMR 1691)***, reiterating the law laid

down by a 14-member bench of the Supreme Court in ***Justice Khurshid Anwar Bhinder***, where Judges of superior courts had been dismissed from service for swearing an oath under the PCO without affording them a right to be heard. In ***Hadayat Ullah,*** the Sacked Employees (Re-instatement) Act, 2010, had been declared ultra vires the Constitution and consequently, the employees reinstated under such law lost their jobs.

117. 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.

118. 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.

119. Neither the Constitution nor the IHC Act and Judicial Service Rules envisage a rent-a-judiciary for Islamabad Capital Territory borrowed from provincial High Courts. Such conception of subordinate judiciary for Islamabad Capital Territory is irreconcilable with an independent judiciary. Islamabad High Court 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 Islamabad High Court 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, Islamabad High Court would in effect be abandoning its obligation to effectively supervise and control the subordinate judiciary in terms of Article 203 of the Constitution.

120. Islamabad High Court also cannot disregard the demoralizing effect deputationists occupying key judicial posts in Islamabad Capital Territory 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 Islamabad High Court 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.

121. And why should one High Court loan its best and brightest officers to another High Court? Staffing courts in Islamabad with borrowed deputationsists would thus suggest Islamabad High Court's willingness to work with subpar human resource instead of investing in a capable Islamabad Judicial

Service. Islamabad High Court 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 Islamabad High Court to oversees the growth of district judges who are capable of being elevated as judges of Islamabad High Court. Islamabad High Court continuing to work with borrowed deputationists is tantamount to acknowledging its own delinquency. This must end.

**The Application of Principles Enumerated Above to the Facts of the Present Case**

122. It is not disputed that respondent No.2 was not posted on deputation at the time of enactment of the IHC Act or the Judicial Service Rules. The appellant, as a Civil Judge was appointed in terms of Rule 6 on a first-time appointment basis and was aggrieved by the subsequent appointment of respondent No.2 against the post in Islamabad Judicial Service on deputation basis that led to respondent No.2 taking charge of the office of Senior Civil Judge on 01.01.2012. It was the appellant's contention that the post of Senior Civil Judge could only be filled on the basis of promotion on seniority-cum-merit basis from amongst Civil Judges on the recommendations of the Departmental Promotion Committee of the IHC in terms of Rule 10(1)(b) read with Rule 13(1) of the Islamabad Judicial Service Rules. We agree with this contention. Within the scheme of the Judicial Service Rules that has been discussed at length, appointment through absorption could only be made in relation to judicial officers already serving on deputation at the time of establishment of Islamabad High Court under IHC Act as an extraordinary means of appointment in the process of establishing Islamabad District Judiciary in terms of Section 6(3) of IHC Act read with Rule 8 of the Judicial Service Rules. The language used in section 6(3) required that subordinate judiciary for ICT be established *"within six month of the commencement of this Act"* and that *"judges of the subordinate judiciary working on deputation shall be sent back*

*to the respective High Courts after establishment of the subordinate judiciary for the Islamabad Capital Territory."* Consequently, the only means of reconciling Rule 8 of the Judicial Service Rules with section 6(3) of the IHC Act is to treat absorption as a method of appointment to Islamabad Judicial Service as a step taken during the process of establishment of subordinate judiciary for ICT.

123. In other words, such absorption could only take place during the transitional phase in which subordinate judiciary for ICT was being established by Islamabad High Court. And such intent is also evident from the language of Rule 8 of the Judicial Service Rules. During the phase of establishment of Islamabad Judicial Service as a subordinate district judiciary, the Judicial Service Rules were enacted creating an option for deputationists already serving as Judicial Officers in ICT to opt for absorption in Islamabad Judicial Service in terms of Rule 8 of the Judicial Service Rules. Once the deputationists exercised such option and were absorbed and appointed in exercise of the power under Rule 8 of the Judicial Service Rules, absorption as a method for appointment in Islamabad Judicial Service stood extinguished. This is evident from Rule 9 as well as Part-V and Part-VI of the Judicial Service Rules that provide for initial appointment and promotion as the only methods of appointment in Islamabad Judicial Service.

124. During the course of arguments, the Registrar's office failed to place on record any decision of Islamabad High Court in terms of Rule 9 of the Judicial Service Rules explaining the extraordinary circumstances in which it was decided by the High Court (i.e. all Judges of the High Court) that judicial officers from the Khyber Pakhtunkhwa Judicial Service were to be appointed against posts in Islamabad Judicial Service on deputation basis. The only thing produced before us was an order of the Peshawar High Court dated 25.01.2012 revealing that 11 judicial officers belonging to KP Judicial Service were allowed to join their new assignments. There is nothing before us to establish that it was the Islamabad High Court which, in its collegiate capacity, passed an order to fill posts in Islamabad Judicial Service on deputation by borrowing officers from the High Courts of other provinces in January or February

of 2012 when respondent No.2 was appointed on deputation basis and assumed charge of the office of Senior Civil Judge on 01.02.2012. Even if any such order was passed, nothing has been produced before us where the High Court documented its reasons to fill such posts on a deputation basis while noting that the relevant expertise and ability was not available amongst members of Islamabad Judicial Service, as was required in view of the principles regulating appointments by deputation already discussed above. It is also no one's case that the officers belonging to KP Judicial Service underwent a selection process before being appointed by Islamabad High Court on deputation basis. There is therefore nothing before us to conclude that such appointments on deputation basis were made in accordance with law.

125. The second aspect of the appointment of respondent No.2 on deputation basis is that he was appointed against the post of Senior Civil Judge. The post of Senior Civil Judge was reserved to be filled on promotion made on seniority-cum-fitness basis from amongst the civil judges serving in Islamabad District Judicial, in terms of Rules 10 and 13 of the Judicial Service Rules. As the method of appointment by promotion was prescribed for such post, it could not have been filled through transfer on deputation basis. We, therefore, find that the appointment of respondent No.2 against the post of Senior Civil Judge on deputation basis was in breach of requirements of Rules 10 and 13 of the Judicial Service Rules and was, thus, illegal.

126. Let us now consider notification dated 14.03.2012 pursuant to which respondent No.2, who was serving against the post of Senior Civil Judge on deputation, was absorbed on permanent basis in Islamabad Judicial Service along with ten other judicial officers from KP Judicial Service serving on deputation against the post of District and Sessions Judges and Civil Judges. We have already discussed the scheme of the Judicial Service Rule where the window for purposes of absorption stood closed in terms of Rule 8 of the Judicial Service Rules read with Section 6(3) of the IHC Act, once an opportunity to apply for absorption was provided to deputationists who were already serving in Islamabad Capital

Territory on deputation basis when Islamabad High Court was created in terms of IHC Act and the Judicial Service Rules were enacted for purposes of establishing Islamabad Judicial Service. There is no provision in the IHC Act or the Judicial Service Rules that vested any authority in the High Court to fill posts in Islamabad Judicial Service on deputation basis and affording such deputationists the option to be absorbed in Islamabad Judicial Service making the two-step process of posting on deputation and subsequent absorption an alternative method of recruitment and appointment within Islamabad Judicial Service. This is exactly what was declared illegal by the Supreme Court in the matter of ***Contempt of Court Proceedings Against Chief Secretary Sindh*** and ***Ali Azhar Khan Baloch*** in relation to appointments within the Executive, as well as ***Ch. Mohammad Akram***, in relation to appointments made by Islamabad High Court in terms of Article 208 of the Constitution. As there was no power vested in the High Court to afford the option of absorption to deputationists who were posted on deputation in January and February of 2012 and were not already serving on deputation at the time of creation of Islamabad High Court and the subsequent enactment of Judicial Service Rules, we find that notification dated 14.3.2012 was in breach of Rules 8, 9, 10 and 13 of the Judicial Service Rules and devoid of legal authority. We therefore declare that the absorption of respondent No. 2 in terms of notification dated 14.03.2012 in Islamabad Judicial Service against the post of Senior Civil Judge, which post could only be filled by promotion on seniority-cum-fitness basis from amongst the civil judges serving in Islamabad Judicial Service, was illegal.

127. We next come to the legality of notification dated 27.06.2012 pursuant to which the probation of respondent No.2 was curtailed and his services were regularized. The notification itself states that such regularization was approved by the Chief Justice on the recommendation of the Administration Committee of Islamabad High Court. Under the third proviso to Rule 20(2) of the Judicial Service Rules, it was the High Court (i.e. all Judges of the High Court) who as a collegiate capacity were vested with authority to reduce the

period of probation of a member of the Islamabad Judicial Service. As it was on the recommendation of the Administration Committee that Chief Justice curtailed respondent's probation period, where neither the Chief Justice nor the Administration Committee were vested with authority for such purpose under Judicial Service Rules, such curtailment of probation was devoid of jurisdiction.

128. We now consider the notification dated 17.06.2012 pursuant to which respondent No.2 was considered for promotion to the post of AD&SJ on the date on which his probation period was curtailed and he was declared to be in regular service. The procedure of appointment by promotion is described in Rule 13 of the Judicial Service Rules. Rule 13(4) provides that it is the Departmental Promotion Committee that is to consider a panel of three members of Islamabad Judicial Service against each post to be filled by promotion. The recommendations made by the Departmental Promotion Committee are then to be forwarded to the Chief Justice in terms of Rule 13(5) and the Chief Justice is to appoint a successful candidate on promotion basis in terms of Rule 13(6) of the Judicial Service Rules. The notification of promotion of respondent No. 2 to the post of AD&SJ states that the Chief Justice has been pleased to promote him on the recommendation of the Administration Committee. Rule 2(a) defines the Administration Committee and Rule 2(g) defines the Departmental Promotion Committee. Despite our asking, respondent No.1 failed to provide us with a composition of the two committees at the relevant time. On the face of it, given that the promotion was ordered on the basis of recommendation of the Administration Committee and the Administration Committee was vested with no power under Rule 13(4) of the Judicial Service Rules to recommend judicial officers for promotion, the said notification is *coram non judice* and devoid of legal authority. We accordingly find that the promotion order was not in accordance with the requirements of Rule 13 of the Judicial Service Rules.

129. The series of events, if considered holistically, do not project a favourable light on the manner in which appointments were made within the Islamabad Judicial

Service. Respondent No.2 was appointed on deputation basis without being subjected to any selection process (i.e. temporarily against the post of Senior Civil Judge otherwise reserved to be filled by promotion alone). No reasons were recorded as to why extraordinary power to fill a post on deputation basis, contrary to the prescribed method of appointment, was exercised. Respondent No.2 took charge of the post of Senior Civil Judge on 01.02.2012. On 14.03.2012, in less than a month and a half, he along with 10 other judges from KP Judicial Service were absorbed in Islamabad judicial service on a permanent basis. After absorption, respondent No.2 was to serve on probation for a period of one year in terms of Rule 20(2). The probation period was curtailed and his service as Senior Civil Judge was regularized on 27.06.2012 (i.e. within three and a half months of him being absorbed). No reasons were recorded as to the exceptional circumstances that informed the decision to curtail the probation period. And the decision to curtail such period was also not taken by the High Court, which the authority competent for such purpose. On the very same day when his service as Senior Civil Judge was regularized, he was promoted to the post of Additional District & Sessions Judge.

130. Given that all of this was done in exercise of power by the High Court, and the manner in which High Court exercised its administrative powers at the time got a scathing review by the Supreme Court in ***Ch. Muhammad Akram***, we need not dwell any further on the manner of exercise of authority manifest in the chain of events that led to respondent No. 2 being temporarily posted within Islamabad Judicial Service on 01.02.2012, to his absorption, regularization and promotion to the post of Additional District & Sessions Judge on 27.06.2012. As members of the Tribunal and Judges of Islamabad High Court, we can only remind ourselves that our judicial authority is rooted in the moral sanction of our decisions, which in turn flows from public faith in our ability to set the highest standards of conduct as public servants that make our actions and decisions beyond reproach.

131. We therefore find that the notifications that have been impugned in the instant appeal are liable to be set aside and as

a consequence, respondent No.2's appointment on deputation basis, his absorption in Islamabad Judicial Service, the regularization of his service upon curtailment of his probation period, and his promotion to the post of Additional District & Sessions Judge were illegal and he is liable to be repatriated to his parent judicial service. While we are aware that respondent No.2 has continued to serve in Islamabad Judicial Service since 2012, in view of the law laid down by the Supreme Court in ***Ch. Muhammad Akram*** in relation to appointments made by Islamabad High Court as well as the law laid down in ***Contempt of Court Proceedings Against Chief Secretary Sindh***, ***Ali Azhar Khan Baloch*** and ***Hadayat Ullah,*** the consequence of a finding that an appointment is illegal can only be that such appointment is to be set aside. While in ***Hadayat Ullah***, the Supreme Court condoned certain appointments of lower staff made under Sacked Employees (Re-instatement) Act, 2010, such condonation was ordered after converting review proceedings into proceedings for purposes of Article 187 of the Constitution where the Supreme Court is vested with exclusive jurisdiction to do complete justice in a matter before it. The High Court or this Tribunal is not vested with any such jurisdiction and service of respondent No.2 in Islamabad Judicial Service cannot, therefore, be a consideration for us in determining the consequences that must flow, once a determination has been made that his transfer, induction/absorption, regularization and subsequent promotion were all illegal.

132. The principles laid down in cases of repatriation as mentioned in ***Contempt of Court Proceedings against Chief Secretary Sindh*** would apply to respondent No.2 and we therefore expect that he would be accepted in his parent judicial service and accorded seniority in accordance with his peers in view of the date of his induction in KP Judicial Service.

133. We also expect that the High Court as a collegiate body would convene a full court meeting and consider appropriate revisions to the Judicial Service Rules to ensure that they are consistent with the provisions of the Constitution and the IHC Act. And that the High Court will take requisite steps to ensure that not only the deputationists currently serving in Islamabad

Judicial Service are repatriated at the earliest, appropriate steps are taken to ensure that appointments in Islamabad Judicial Service are made strictly in accordance with the law and the Judicial Service Rules, while upholding the requirements of fairness and transparency backed by Articles 9, 18 and 25 of the Constitution. We further expect that Islamabad High Court will address the human resource needs of Islamabad District Judiciary in a manner that permanent members of the Islamabad District Judiciary appointed on a first time appointment basis, through the process of absorption at the time of enactment of Judicial Service Rules, and those appointed on an initial appointment basis are afforded their due rights to be considered for promotion such that their legitimate expectation of upward professional mobility is upheld and the channels of promotion are not thwarted by using appointments on deputation basis as a parallel process for filling permanent posts in Islamabad Judicial Service.

134. The decision of this appeal required interpretation of provisions of the IHC Act and application of the Judicial Service Rules, while delineating the nature of power vested in the Judicial Service Tribunal and its scope of jurisdiction, making this a case of first impression. While we received excellent assistance from the learned counsel for the parties and also conducted a detailed judicial conference amongst members of the Tribunal on the date of final hearing before rendering this decision, we believe that it would be in the interest of justice if we are to suspend this judgment ourselves to enable any aggrieved party to approach the Supreme Court, before which an appeal against this judgment lies in terms of Article 212(3) of the Constitution.

135. We are cognizant of the fact that Section 7 of the Islamabad Judicial Service Tribunal Act vests in us the power of review. However, we are also aware that the scope of review is very limited. It was held by the Supreme Court in ***Hadayat Ullah***, while reaffirming the scope of review as laid down by the Supreme Court in ***Mukhtar Mai vs. Abdul Khaliq (2019 SCMR 1302)*** that a review, *"will be warranted [not] merely because the conclusion drawn is wrong or erroneous but is limited to eventualities where something*

*obvious has been overlooked where there is a glaring omission or patent mistake of fact or law, which is self-evident, manifest and floating on the surface, materially affecting the outcome of the adjudicatory process."* It is in view of the limited scope of review together with this being a case of first instance, that we are suspending this judgment for a period of 30 days.

136. These are the reasons for the short order passed by us, which is reproduced below.

**Short Order**

After conclusion of the arguments of all parties this matter was reserved for order and judgment on 13.03.2025. The contesting parties submitted to the jurisdiction of the Tribunal and raised no objection to its composition or jurisdiction to hear this appeal. The Chairman and Members of the Tribunal convened a judicial conference on 13.03.2025 and agreed to allow the appeal in the terms detailed in the short order below, for reasons to be recorded. The short order is being released today in peculiar circumstances that require some explanation.

2. The Registrar of the Tribunal informed the Personal Secretary of the Chairman of the Tribunal that the Personal Secretary of the Hon'ble Acting Chief Justice had issued verbal direction to the Registrar of the Tribunal on 17.03.2025 to advise members of the Tribunal not to issue any orders in pending appeals, including those reserved for judgment, as the Hon'ble Acting Chief Justice had decided that the Tribunal be dissolved. The Hon'ble Acting Chief Justice is vested with no administrative authority to issue such directions or otherwise interfere with the outcome of grievances of the members of the subordinate judiciary pending before the Tribunal against decisions rendered by the departmental authorities that report to the office of the Chief Justice.

3. By notification dated 18.03.2025 the President purportedly sought to reconstitute the Tribunal on the advice of the Hon'ble Acting Chief Justice Islamabad High

Court. The Tribunal is constituted in terms of Article 212 of the Constitution pursuant to Islamabad Subordinate Judiciary Service Tribunal Act, 2016, Section 3 of which provides the following:

> *3.* ***Tribunal****.—(1) The President may, subject to subsection (3), by notification in the official Gazette, establish a Service Tribunal for the members of the subordinate judiciary of the Islamabad Capital Territory.*
>
> *(2) The Tribunal shall have exclusive jurisdiction in respect of matters relating to the terms and conditions of service of the members of subordinate judiciary including disciplinary matters.*
>
> *(3) The Tribunal shall consist of three judges of the Islamabad High Court nominated by the Chief Justice, the most senior of whom shall be the Chairman:*
>
> *Provided that a Judge against whose orders an appeal is preferred shall not be member of the Tribunal.*

4. The Tribunal was previously reconstituted by notification dated 09.01.2024 as some of the erstwhile members of the Tribunal were unable to serve in such capacity given that they were members of, inter alia, the Administration Committee against the decisions of which appeals are filed before the Tribunal. It was therefore in view of the proviso to section 3(3) of the Islamabad Subordinate Judiciary Service Tribunal Act, 2016, that the Tribunal was reconstituted with the consent of members serving on such Tribunal. No such conflict arose in relation to the Chairman and Members of the Tribunal as is presently constituted. Consequently, there was no occasion to reconstitute the Tribunal pursuant to notification dated 18.03.2025.

5. The President was under an obligation to establish the Tribunal in terms of section 3(1) of the Act. The President discharged his duty and the Tribunal was established in 2016. The Tribunal comprises three Judges of the Islamabad High Court nominated by Chief Justice

Islamabad High Court in terms of section 3(3) of the Act. The Tribunal was last constituted pursuant to notification dated 09.01.2024 on the basis of nominations made by Chief Justice. Once the Tribunal was duly constituted, the Chief Justice became functus officio. The Hon'ble Acting Chief Justice had no role to play in the functioning of the Tribunal and could no longer withdraw earlier nominations made by the Chief Justice on the basis of which this Tribunal was constituted pursuant to notification dated 09.01.2024. Likewise, the Federal Government and the President were vested with no authority to reconstitute the Tribunal, unless a vacancy emerged, which required to be filled in accordance with the Chief Justice's nomination.

6. The staff from the office of the Hon'ble Acting Chief Justice have been insisting that the files in appeals reserved for judgment be handed over to them to enable them to have the appeals placed before members of the Tribunal notified pursuant to notification dated 18.03.2025. As we have noted above, neither the President had the power to reconstitute the Tribunal, nor the Hon'ble Acting Chief Justice had the power to nominate new members in the place of the duly nominated members serving on a duly-constituted Tribunal. As notification dated 18.03.2025 and the Tribunal sought to be established pursuant to such notification would have no authority to determine its legality in terms of the law laid down by the Supreme Court in ***Pir Sabir Shah vs. Shah Muhammad Khan (PLD 1995 SC 66)***, we hold that notification dated 18.03.2025 is without legal authority and of no legal effect. Just as Judges of the High Court cannot be removed from office and bereft of their jurisdiction based on an illegal notification issued by the Federal Government, the same cannot be done to usurp jurisdiction vested in judges under a statutory enactment.

7. It is in these circumstances that we are releasing this short order to allow the appeal, for detailed reasons to be recorded later, in the following terms:

*(i) The appointment of respondent no. 2 as Senior Civil Judge Islamabad by notification dated 14.03.2012, on deputation basis, was in breach of Section 6(3) of the Islamabad High Court Act, 2010, as well as Rules 10(1)(b) and 13 of the Islamabad Judicial Service Rules, 2011. Further, his confirmation in the post of Senior Civil Judge, by reduction of his period of probation was in breach of the third proviso of Rule 20(2) of the Islamabad Judicial Service Rules, 2011, and as such the two-year probation mandatory period was never reduced by the High Court, as defined by the Constitution and the law. And his subsequent promotion to the post of Additional District and Sessions Judge was also in breach of Rules 13(2) and (4) of the Islamabad Judicial Service Rules, 2011.*

*(ii) The initial appointment of Respondent No. 2 is declared to be ultra vires the Islamabad High Court Act, 2010, and the Islamabad Judicial Service Rules, 2011. The consequence of the finding that the appointment and absorption of a deputationist against a permanent or promotion post has been made in disregard of the law has been laid down by the Supreme Court in* ***Ch. Muhammad Akram vs. Registrar Islamabad High Court*** *(PLD 2016 SC 961). Respondent no. 2 will stand de-notified as a member of Islamabad subordinate judiciary and shall be repatriated to his parent department (i.e. the Judicial Service of the Province of Khyber Pakhtunkhwa) in accordance the law laid down by the Supreme Court in* ***Re Contempt Proceedings Against Chief Secretary Sindh*** *(2013 SCMR 1752) and* ***Ali Azhar Khan Baloch vs. Province of Sindh*** *(2015 SCMR 456). It is settled law that where the foundation of a claim or entitlement is found to be*

*illegal, the entire superstructure built on such foundation comes crumbling down along with the foundation. Respondent No. 2 will however be entitled to his seniority along with his batchmates in the KP Judicial Service in terms of the law laid down by the Supreme Court in PLD 2016 SC 961.*

*(iii) Where law prescribes a thing to be done in a certain way, it must be done in such way or not at all. Article 192 of the Constitution defines the High Court as a collegiate body comprising the Chief Justice and the Judges of the High Court. Articles 203, 202 and 208, vest the power of supervising subordinate courts and to frame rules in the High Court, and not the Chief Justice of the High Court or any committee constituted by him. Similarly, neither the Islamabad High Court Act, 2010, nor any other law vests power in the Chief Justice or a committee of the High Court appointed by him to frame rules that have not been approved by the High Court, as defined by Article 192 of the Constitution. Islamabad High Court can only enact or amend rules by convening a full court meeting of all Judges of the High Court.*

*(iv) The office of the Chief Justice is vested with no inherent administrative authority. The office of the Chief Justice is a creature of the Constitution, and the Chief Justice, who is the first among equals in a High Court, can only exercise such authority as vested in him/her by the Constitution and the law. As the High Court is a collegium, the administrative authority vested in the office of the Chief Justice must be exercised in a consensual manner, in accordance with the principles laid down by the Supreme Court in* ***Raja Amer vs. Federation of Pakistan*** *(PLJ 2024 SC 114). It is also settled law that the higher the office, the greater the responsibility for exercising discretionary authority in accordance with law. Consequently, any decision by the Chief Justice or a*

*committee appointed by the Chief Justice, that is not in accordance with the requirements of the law is not sustainable in the eyes of law, including decisions with regard to an appointment on deputations, induction, or promotion, and is liable to be set aside by this Tribunal.*

*(v) Article 175 provides for a High Court for the Islamabad Capital Territory, just as it provides for High Courts for the federating units of Pakistan. The Constitution does not envisage members of Islamabad High Court, and the subordinate courts supervised by Islamabad High Court, 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 Islamabad High Court Act, 2010. The representative principle is enshrined in Section 3(1) of the Islamabad High Court Act, 2010, read together with Article 27 of the Constitution. Section 6(3) of the Islamabad High Court Act, 2010, that mandated the establishment of a subordinate judiciary within six months of the enactment of the Islamabad High Court Act, 2010, also required the repatriation of all members of the subordinate judiciary serving on deputation in Islamabad Capital Territory.*

*(vi) Articles 175 and 203 of the Constitution, read with Section 6 of the Islamabad High Court Act, 2010, envisage an independent and autonomous judiciary for Islamabad Capital Territory supervised by Islamabad High Court, 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 Islamabad High Court Act, 2010, which entered into*

*force on 02.08.2010. Neither the letter nor the spirit of Islamabad High Court Act, 2010, allows filling permanent posts in the subordinate judiciary established for Islamabad Capital Territory on deputation basis, by borrowing judges from Provincial High Courts.*

*(vii) 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 Islamabad Capital Territory on deputation basis, such provisions are contrary to Section 6(3) of the Islamabad High Court Act, 2010, and would need to be read down. These rules were framed in the year 2011 in full view of the Islamabad High Court Act, 2010, and ought not have sought to circumvent requirements of Section 6(3) of such Act. It is a settled proposition of law that what cannot be done directly cannot be done indirectly, and that subordinate legislation cannot travel beyond the four corners of the primary legislation. As the mandatory requirements of Section 6(3) of the Islamabad High Court Act, 2010, appear not to have been appreciated by successive administrations of Islamabad High Court, the office of the Registrar of Islamabad High Court will make arrangements to return all members presently serving in the subordinate judiciary for Islamabad Capital Territory on deputation within six months from the date of this order, in consonance and compliance with requirements of Section 6(3) of the Islamabad High Court Act, 2010.*

8. As we are cognizant that (i) the power of review available in terms of Section 7 of the Islamabad Subordinate Judiciary Service Tribunal Act, 2016, is a very limited power, and (ii) this Tribunal constitutes three judges of Islamabad High Court, and any judge-in-chambers exercising the High Court's discretionary jurisdiction in terms of Article 199, even in considering

jurisdictional defects, would be loath to interfere with the opinion of three peers, we therefore suspend the enforcement of this order for a period of 30 days, to enable any aggrieved party to avail the remedy of appeal before the Supreme Court of Pakistan.

9. Let the Registrar of the Tribunal provide a copy of this Order to the Hon'ble Acting Chief Justice, Islamabad High Court and the Hon'ble Judges nominated by him to serve on the Tribunal, while purportedly seeking to reconstitute this Tribunal. We have been informed that a cause list has been issued by the Registrar's office, to fix for hearing a miscellaneous application under office objection in this appeal, which had been reserved for orders and judgment on 13.03.2025. We would not wish to embarrass ourselves or our Hon'ble brother judges nominated by the Hon'ble Acting Chief Justice to the Tribunal, under the mistaken belief that the Chief Justice was vested with power to reconstitute the Tribunal, with the newly nominated members assuming jurisdiction over this matter under notification dated 18.03.2025, which notification is devoid of legal authority and has been issued in breach of Section 3 of the Islamabad Subordinate Judiciary Service Tribunal Act, 2016.

10. This order is being announced on 21.03.2025 and shall be uploaded on the website of Islamabad High Court under the authority of the Tribunal.

**(SARDAR EJAZ ISHAQ KHAN)**
**Member/Judge**

**(BABAR SATTAR)**
**Member/Judge**

**(TARIQ MEHMOOD JAHANGIRI)**
**Chairman/Judge**

*Saeed*
Dated: 29.04.2025

## Annex

Table of Contents

Arguments of the Appellant ..... 2
Arguments of the State Counsel ..... 6
Arguments of Respondent No.2 ..... 8
The Constitutional and Statutory Scheme re Islamabad Judicial Service ..... 10
Principles Regulating Appointments to Public Offices: Legality and Transparency ..... 14
Gul Taiz Khan Marwat and the 'But For' Test ..... 19
Discretion vested in the Chief Justice/Administration Committee of the High Court ..... 21
The Scope of Powers of The Tribunal ..... 31
Ouster of Jurisdiction of Court in Terms of Article 212(2) ..... 37
The Relevance of the Principles of Independence of the Judiciary ..... 39
The Scope of Authority and Jurisdiction of the Judicial Service Tribunal ..... 43
Judicial Service Tribunal within the Hierarchy of Judiciary ..... 48
The Constitution of the Judicial Service Tribunal and the Scope of its Authority ..... 56
Deputation and Absorption as a Method of Appointment in Islamabad Judiciary Service ..... 60
The Application of Principles Enumerated Above to the Facts of the Present Case ..... 76
Short Order ..... 84