

P L D 2024 Supreme Court 698

Present: Amin-ud-Din Khan, Jamal Khan Mandokhail, Syed Hasan Azhar Rizvi, Musarrat Hilali and Irfan Saadat Khan, JJ

FEDERATION OF PAKISTAN through the Secretary, Ministry of Law and Justice,

Islamabad and others---Appellants

Versus

SUPREME JUDICIAL COUNCIL through Secretary, Supreme Court Building, Islamabad and others---Respondents

Intra Court Appeals Nos. 1 and 2 of 2024 in Constitutional Petition No.19 of 2020, decided on 21st February, 2024.

(On appeal from the judgment of this Court dated 27.06.2023 passed in Constitution Petition No. 19 of 2020).

Per Amin-ud-Din Khan, J.; Jamal Khan Mandokhail, Musarrat Hilali and Irfan Saadat Khan, JJ. agreeing; Syed Hasan Azhar Rizvi, J. dissenting.

(a) Constitution of Pakistan---

---Arts. 209(5) & 209(6)---Supreme Judicial Council ("SJC")---Proceedings against a Judge pending before the SJC---Resignation/retirement of Judge---Effect--If proceedings have already been initiated by the Supreme Judicial Council ('SJC') against a Judge, same shall not abate on his resignation or retirement, as the case may be, during such proceedings---Proceedings pending before the SJC which are initiated after issuance of notice to a Judge do not automatically drop or become infructuous on superannuation or resignation of the Judge---It is the prerogative of the SJC to proceed with the matter accordingly.

Per Jamal Khan Mandokhail, J; agreeing with Amin-ud-Din Khan, J. [Majority view]

(b) Constitution of Pakistan---

---Arts. 209(5) & 209(6)---Supreme Judicial Council ("SJC")---Proceedings against a Judge pending before the SJC---Resignation/ retirement of Judge---Effect--Proceedings pending before the Supreme Judicial Council ("SJC") shall not abate on account of retirement and resignation of a Judge---Judge who retires or resigns during pendency of proceedings against him/her before the SJC should not be allowed to escape the consequences of removal---Resignation by a Judge during pendency of proceedings against him/her before the SJC does tantamount to circumvention/avoidance of accountability enshrined and envisaged under Article 209 of the Constitution---Circumvention of proceedings under Article 209 of the Constitution would result in erosion of public trust in the Judiciary---When an inquiry into conduct of a judge initiated by the SJC is terminated without an opinion, on account of retirement or resignation of a judge from his office, it would

render Article 209(5) & (6) of the Constitution redundant---Termination of inquiry proceedings upon retirement of a judge would otherwise give an impression that the SJC is dependent on the will of the judge, who can overpower the control of the constitutional body---It may create a perception that the judges are above the law--- There is no express provision in the Constitution, nor is there any enactment, preventing the SJC from continuing its proceedings of inquiry in a situation where a judge is retired or resigns before conclusion of the inquiry, therefore, it is the constitutional obligation of the SJC to conclude the inquiry initiated against a judge and form an opinion regarding his conduct---If after inquiring into the matter, the SJC is of the opinion that the judge has been guilty of misconduct, under such circumstances, he shall not be eligible for post-retirement benefits---His Lordship observed that in order to ensure independence of the SJC, it is imperative that the Supreme Judicial Council Procedure of Inquiry, 2005' ("Procedure of 2005") is suitably amended in line with the provisions of Article 209 of the Constitution, to introduce a regular vigilant mechanism for convening a meeting of the SJC on a regular interval, for initiating and concluding the inquiry proceedings upon a reference or a complaint by the SJC before retirement or resignation of a judge.

In re: Seaman, 627 A. 2d 106, 121 (N.J 1993) and In re Nowell, 293 N.C. 235 and Steensland v. Ala. Judicial Inquiry Comm'n 87 So. 3d 535 ref.

Per Syed Hasan Azhar Rizvi, J.; dissenting with Amin-ud-Din Khan and Jamal Khan Mandokhail, JJ. [Minority view]

(c) Supreme Court Rules, 1980---

---O.XXXIII, R. 6---Inherent powers of the Supreme Court---Scope---Where an express provision is made in a law for a particular purpose, resorting to inherent powers to achieve the same purpose is not permissible---Thus, the inherent power cannot be applied to defeat the express provisions of the statute---Rule 6 of Order XXXIII of the Supreme Court Rules, 1980, can be pressed into service only in a matter which is competently filed before the Supreme Court but it does not give an independent right to initiate proceedings.

Shahkot Bus Service, Shahkot v. The State and another 1969 SCMR 325 and University of Malakand through Registrar and others v. Dr. Alam Zeb and others 2021 SCMR 678 ref.

(d) Limitation Act (IX of 1908)---

---Ss. 3 & 5---Cases involving the Federal or Provincial Government, departments or autonomous bodies filed before the Supreme Court---Limitation prescribed by law not followed without providing any justifiable reasons acceptable under the law---His Lordship observed that the concerned governments, departments or autonomous bodies must understand that the delay in the limitation for filing proceedings can only be condoned if sufficient grounds are provided; otherwise, in the absence of such grounds, no preferential treatment can be offered to the

governments, departments or autonomous bodies, and their cases must be dealt with in the same manner as those of an ordinary litigant or citizen.

Pakistan through Secretary, Ministry of Defence v. Messrs Azhar Brothers Ltd. 1990 SCMR 1059; Government of the Punjab through Secretary (Services), Services General Administration and Information Department, Lahore and another v. Muhammad Saleem PLD 1995 SC 396; Federation of Pakistan through Secretary, Ministry of Foreign Affairs, Government of Pakistan, Islamabad and 5 others v. Jamaluddin and others 1996 SCMR 727; Central Board of Revenue, Islamabad through Collector of Customs, Sialkot v. Messrs Raja Industries (Pvt.) Ltd. through General Manager and 3 others 1998 SCMR 307; Lahore High Court, Lahore through Registrar v. Nazar Muhammad Fatiana and others 1998 SCMR 2376; Chairman, District Evacuee Trust, Jhelum v. Abdul Khaliq through Legal Heirs and others PLD 2002 SC 436 and Principal Public School Sangota, Government of Khyber Pakhtunkhwa through Chief Secretary and others v. Sarbiland and others 2022 SCMR 189 ref.

(e) Limitation Act (IX of 1908)---

---S. 3---Limitation, law of---Object and scope---Public interest requires that there should be an end to litigation---Law of limitation provides an element of certainty in the conduct of human affairs---Law of limitation is a law that is designed to impose quietus on legal dissensions and conflicts---It requires that persons must come to Court and take recourse to legal remedies with due diligence---Therefore, the limitation cannot be regarded as a mere technicality---With the expiration of the limitation period, valuable rights accrue to the other party.

Ghulam Rasool and others v. Ahmad Yar and others 2006 SCMR 1458; Collector Sales Tax (East), Karachi v. Customs, Excise and Sales Tax Appellate Tribunal, Karachi and another 2008 SCMR 435 and Messrs SKB-KNK Joint Venture Contractors through Regional Director v. Water and Power Development Authority and others 2022 SCMR 1615 ref.

(f) Interpretation of Constitution---

---Principles---Constitution should be read as a whole giving every part thereof meaning consistent with the other provisions of the Constitution---As far as possible each provision of the Constitution should be construed to harmonize with all the others---But, in applying these rules the Courts however have to remember that to harmonies is not to destroy---In the interpretation of the Constitutional provision, the Courts always presume that the legislature inserted every part thereof for a purpose and the legislative intention is that every part of the Constitution should have effect---An argument based on what is claimed to be the spirit of the Constitution is always attractive, as it has a powerful appeal to sentiment and emotion---However, a Court of law must derive the spirit of the Constitution from its language---What one may believe or think to be the spirit of the Constitution cannot prevail if the language of the Constitution does not support that view---Strict and faithful adherence to the words of the Constitution, especially so where the words are simple, clear and unambiguous is the rule---Any effort to supply perceived omissions in the Constitution being subjective can have disastrous

consequences---Courts cannot, under the guise of progressive interpretation, amend the Constitution and read that into it which is not enshrined in any provision of the Constitution.

Mc Culloch v. Maryland 17 US (4Wheat) 316 (1819); State v. Superior Court (1944) at 547; Gompers v. U.S. 233 (1914); Benjamin N. Cardozo, The Nature of the Judicial Process, Yale University Press, 1921; Kalpana Mehta and others v. Union of India (UOI) and others AIR 2018 SC 2493; Government of NCT of Delhi v. Union of India (UOI) and others (2018) 8 SCC 501; Justice K.S. Puttaswamy and others v. Union of India (UOI) and others AIR 2017 SC 4161; Al-Jehad Trust v. Federation of Pakistan PLD 1996 SC 324; Begum Nusrat Ali Gonda v. Federation of Pakistan and others PLD 2013 SC 829; Aam Log Itihad and another v. The Election Commission of Pakistan and others PLD 2022 SC 39 and Hamza Rasheed Khan v. Election Appellate Tribunal, Lahore High Court, Lahore and others (Civil Appeal No. 982 of 2018) ref.

(g) Constitution of Pakistan---

---Arts. 209(5) & 209(6)---Supreme Judicial Council ("SJC")---Proceedings against a Judge pending before the SJC---Resignation/retirement of Judge---Effect--Judge, after retirement or resignation, cannot be termed as 'a judge of the Supreme Court or a High Court,' within the purview of Article 209 (5) of the Constitution and as such, the Supreme Judicial Council ('the Council') lacks authority to conduct an inquiry against him/her---Being so, any complaint pending against a judge, whether proceedings have been initiated or not, shall abate after his retirement or resignation, accordingly---To avoid such an eventuality, the Council, being aware of the date of retirement, can inquire into and resolve the complaint before the retirement of the Judge---Unfortunately, Article 209 of the Constitution does not address the scenario in which a Judge, against whom a complaint is pending or under inquiry, resigns before its conclusion---His Lordship observed that it is expected that the Council, to ensure the smooth functioning of its operations and to safeguard the independence of the Judiciary, will implement clear and transparent procedures for fixing, listing, and hearing complaints, thereby preventing any undue delays or manipulation in the process of accountability---Intra-Court Appeals were dismissed. [Minority view]

(h) Legislation---

---Abuse of legal process---If a provision of law is misused and subjected to the abuse of the legal process, it is for the legislature to amend, modify, or repeal it, if deemed necessary---If blunders are found in legislation, they must be corrected by the Legislature, and it is not the function of the Court to repair them.

Padmasundara Rao (dead) and others v. State of Tamil and others (2002) 255 ITR 147 (SC); Halsbury's Laws of England, 3rd Edition, Volume 36, page 390; Supreme Court Bar Association of Pakistan through President and another v.

Federation of Pakistan through Ministry of Interior Islamabad and others PLD 2023 SC 42 and Muhammad Ismail v. The State PLD 1969 SC 241 ref.

For Appellants in I.C.A. No.1 of 2024
and Respondent No.5 in I.C.A. No.2 of 2024:

Mansoor Usman Awan, Attorney General for Pakistan assisted by Ms. Maryam Ali Abbasi, Advocate, Ms. Maryam Rashid, Advocate, Ch. Aamir Rehman, Additional Attorney General for Pakistan, Malik Javid Iqbal Wains, Additional Attorney General for Pakistan, Raja M. Shafqat Abbasi, Deputy Attorney General and Anis Muhammad Shahzad, Advocate-on-Record.

For Appellants in I.C.A. No. 2 of 2024 and
Respondents Nos. 3, 4, 6, 7, 8 and 10 in I.C.A. No.1 of 2024.

Waqas Ahmad Mir, Advocate Supreme Court assisted by Hammad Hussain Shah, Advocate and Anas Irtiza, Advocate (At Islamabad on 31.01.2024, 19.02.2024 and 21.02.2024 and via video link from Lahore on 12.02.2024) and Ch. Akhtar Ali, Advocate-on-Record.

Amici Curiae:

Kh. Muhammad Haris, Sr.Advocate Supreme Court assisted by Yaser Aman Khan, Advocate Supreme Court.

Faisal Siddiqi, Advocate Supreme Court assisted by Muhammad Usman Mumtaz, Advocate (At Islamabad on 19.2.2024 and via video link from Karachi on 21.2.2024.)

Muhammad Akram Sheikh, Senior Advocate Supreme Court assisted by Abu Bakar Siddique, Advocate and Ms. Sehar Mahsud, Advocate.

Abdul Moiz Jaferii, Advocate High Court (through video link from Karachi.)

Dates of hearing: 31st January, 12th, 19th and 21st February, 2024.

JUDGMENT

AMIN-UD-DIN KHAN, J.---Through these appeals filed under section 5 of the Supreme Court (Practice and Procedure) Act, 2023 read with Article 184(3) of the Constitution of Islamic Republic of Pakistan, 1973 ('the Constitution'), appellants have challenged the judgment passed by the learned two member bench of this Court dated 27.06.2023 in Constitution Petition No. 19 of 2020 filed under Article 184(3) of the Constitution by the appellants of I.C.A. No. 2 of 2024 which was dismissed in limine.

2. According to the brief facts of the case, appellants of I.C.A. No. 2 of 2024 filed a petition under Article 184(3) of the Constitution against the Supreme

Judicial Council ('SJC'), Registrar of the Supreme Court, the President of Islamic Republic of Pakistan and Justice (R) Mian Saqib Nisar with the following prayer:

"In view of the above, the Petitioners most respectfully pray that this Honorable Court may graciously be pleased to:

- A. Direct the Honorable Council to take up References and to render its opinion on the allegations of misconduct contained therein and report its opinion to the President under Article 209(6) of the Constitution.
- B. Pass directions to structure the Honorable Council's discretion in relation to the priority, listing and hearing of complaints/ references and to ensure that the eventual findings of Honorable Council are publicly disclosed and direct the Honorable Council to amend the Supreme Judicial Council Procedure of Enquiry 2005 accordingly.
- C. Give any other directions or pass any interim orders that are required and are necessary for the effective implementation of Article 209."

3. Office raised some objections on the petition filed under Article 184(3) of the Constitution, which were contested and after the acceptance of Miscellaneous Chamber Appeal, the petition was numbered as 19 of 2020, which was heard by the learned two member bench of this Court on 13.06.2023 and the judgment was announced as dismissed in limine on 27.06.2023. Hence, these appeals, I.C.A. No.2 of 2024 by the petitioners of Constitution Petition No.19 of 2020 and I.C.A. No. 1 of 2024 by the Federation of Pakistan.

4. The office has noted that I.C.A. No.1/2024 is barred by 180 days whereas I.C.A. No. 2/2024 is barred by 187 days. On the first date of hearing before this Court on 31.01.2024 after hearing the learned counsel for the appellants, notice was issued to the other side subject to limitation. As the case of Federation is that interpretation of an Article of the Constitution has been made through the impugned judgment and without any notice required under Order XXVII-A of the Code of Civil Procedure, 1908 to the Attorney General for Pakistan and even without any notice to the Federation or the respondents of the Constitution Petition, same was decided in limine, though the petition was dismissed but some interpretation of Article 209 of the Constitution was made, therefore, order impugned is not sustainable under the law. Notice was also issued in I.C.A. No.2 of 2024 as both the appeals were being heard together. In C.M.A. No. 555 of 2024 the case of the appellant is that without any notice the matter was decided, therefore, the appellant was having no knowledge of the impugned judgment holding the field and it was only after the SJC's meeting dated 09.01.2024 when the impugned judgment dated 27.06.2023 was brought to the knowledge of the Attorney General for Pakistan and in consequence thereof the instant appeal was filed. It is further pleaded that as substantial questions pertaining to interpretation of the Constitution particularly Article 209(6) are involved, therefore, it is imperative that delay in filing the instant appeal may be condoned to prevent the ends of justice being defeated.

5. Learned counsel for the appellants in I.C.A. No. 2 of 2024 argued that after hearing of their petition, the judgment was reserved and their counsel fell seriously

ill, therefore, the announcement of judgment could not be attended by her nor it was in her knowledge and even it was not conveyed to the appellants. It is further argued that the Supreme Court (Practice and Procedure) Act, 2023 came into force on 21.04.2023 and even before its enforcement it was suspended by the order of learned eight member bench of this Court through an injunctive order dated 13.04.2023 while hearing Constitution Petition No.6 of 2023 etc. and subsequently the said petitions i.e. Constitution Petition No. 6 of 2023 etc. were dismissed by the learned Full Bench of this Court on 11.10.2023 except the application of section 5 with retrospective effect was not approved by majority, therefore, actually the application of Act came into field from the announcement of the judgment of dismissal of Constitution Petitions dated 11.10.2023 and further that if I.C.A. No.1 of 2024 on the basis of the ground mentioned for condonation is heard on merits, their appeal be also heard on merits. In the above circumstances, we condone the delay in filing of both these appeals. C.M.A. No.555 of 2024 and C.M.A. No.1695 of 2024 are allowed and disposed of.

6. The Secretary, SJC appeared and told the Court that SJC has received 15 complaints against Ex-CJP Mian Saqib Nisar on 12 October, 2018 which were taken up by the Council on 14.2.2019 and dismissed for being infructuous because Justice Mian Saqib Nisar had retired on January 17, 2019.

7. Now we come to the merits of the case. On 12.02.2024, after hearing the learned counsel for the appellants in I.C.A. No. 2/2024, notice under Order XXVII-A of the C.P.C. was issued to the Attorney General for Pakistan, who waived the issuance of formal notice and accepted the same. After hearing the learned counsel for the appellants in I.C.A. No. 2 of 2024 as well as learned Attorney General for Pakistan we were of the view that both are on the same page and showing one side of the picture to this Court, therefore, it was felt necessary to appoint some Amicus Curiae for assistance of the Court to show both the sides of the matter in issue and render their precious opinion about matter in issue and office was directed to send a letter of request along with copy of order to Messrs Makhdoom Ali Khan, Sr. ASC, Khawaja Muhammad Haris, Sr.ASC, Khalid Javed Khan, ASC, Abdul Moiz Jaferii, Advocate High Court and Faisal Siddiqi, ASC on the following questions of law which were framed by the learned Attorney General for Pakistan and produced in the order dated 12.02.2024. Though the learned counsel for the appellants in I.C.A. No. 2 of 2024 also sent some questions of law through C.M.A. No. 1221 of 2024 but as the same were received late, therefore, could not be incorporated in the said order. The questions of law framed by the learned AGP are reproduced as under:

- A. Whether pending proceedings before the Supreme Judicial Council (the 'SJC') do not stand abated on account of retirement and resignation of a Judge?
- B. Whether a Judge who retires or resigns during pendency of proceedings against him/her before the SJC should be allowed to escape the consequences of removal?
- C. Whether resignation by a Judge during pendency of proceedings against him/her before the SJC tantamount to circumvention/ avoidance of

accountability enshrined and envisaged under Article 209 of the Constitution of the Islamic Republic of Pakistan, 1973?

D. Whether circumvention of proceedings under Article 209 of the Constitution would result in erosion of public trust in the Judiciary?

8. The learned Amicus Curiae appointed by the Court namely Makhdoom Ali Khan, Senior ASC and Mr. Khalid Javed Khan, ASC recused, therefore, Mr. Faisal Siddiqui, ASC and Mr. Abdul Moiz Jafferii, AHC were heard. Learned Muhammad Akram Sheikh, Sr. ASC also offered his assistance as Amicus Curiae, he was also heard.

9. Learned Attorney General for Pakistan has reiterated his argument that the impugned order without notice under Order XXVII-A of the C.P.C. to the Attorney General for Pakistan is defective one and not sustainable under the law; that through the impugned judgment Article 209 has been interpreted in a way that the jurisdiction and powers of the SJC have been curtailed in case the Council has taken the cognizance of a complaint/reference/information against a Judge and started proceedings after notice to the Judge and on his resignation if it is declared that the power to proceed with the matter by the Council ends, will be to circumvent the powers of the Council which is not the correct interpretation of Article 209, therefore, AGP has relied upon "Federal Government of Pakistan through the Secretary, Ministry of Law, Justice and Parliamentary Affairs, Islamabad v. M.D.Tahir, Advocate and 12 others" (1989 SCMR 2069) to argue that question of public importance relating to the interpretation of the Constitution needed the consideration of this Court with regard to necessity of issuance of mandatory notice of Order XXVII-A of the C.P.C. He has also relied upon "Federal Government of Pakistan through Secretary, Ministry of Law, Justice and Parliamentary Affairs, Islamabad and others v. Aftab Ahmad Khan Sherpao and others" (PLD 1992 SC 723), "Federal Public Service Commission and others v. Syed Muhammad Afaq and others" (PLD 2002 SC 167), "Pakistan Automobile Corporation Limited through Chairman v. Mansoor-ul-Haque and 2 others" (2004 SCMR 1308), "Superintendent Central Jail, Adyala, Rawalpindi v. Hammad Abbasi" (PLD 2013 SC 223) and "Heman Santlal v. State of Bombay" (AIR (38) 1951 Bombay 121). He has also argued in the light of legislative history/constitutional comparison, right from Government of India Act, 1935, Judicial Committee Act, 1833, Constitution of Pakistan, 1956, Constitution of Islamic Republic of Pakistan, 1962, Interim Constitution of the Islamic Republic of Pakistan, 1972, Constitution of Pakistan (pre-18th Amendment), Constitution of Pakistan (Post-18th Amendment) and the Constitution of India. He has also referred the provisions of Code of Conduct to be observed by the Judges of the Supreme Court and High Courts as notified on 02.09.2009 with regard to Judicial Accountability while relying upon "The State v. Mr. Justice Akhlaque Husain, Judge of the High Court of West Pakistan" (PLD 1960 SC Pak. 26), "Justice Qazi Faez Isa and others v. The President of Pakistan and others" (PLD 2021 SC 1), "Justice Qazi Faez Isa and others v. President of Pakistan and others" (PLD 2022 SC 119) and an American

Jurisdiction Case titled "Johnson v. United States" reported as 208 (Fed Cl.1948), prayed that the appeal be allowed and in the instant case at least it be

declared that during the proceedings by the SJC retirement as well as resignation by a Judge cannot circumvent the proceedings before the SJC. Learned AGP has further argued that tenor of the impugned judgment shows that it is the SJC to conduct its proceedings, no direction can be given by the Supreme Court by stating that SJC is independent to proceed with the matters. While referring paragraph No. 95 of Shaukat Aziz Siddiqui's case from the judgment of this Court reported as PLD 2018 SC 538 the prayer of open proceeding by SJC was not acceded to, whereas the prayer made by Justice Mazahar Ali Akbar Naqvi in the misconduct proceedings against him was accepted. Therefore, it is SJC to proceed with the matter as it wants is within its jurisdiction.

10. Further stated that it is a case of first impression where Government is an aggrieved party, therefore, the appellant should have been heard in the petition. While referring Sections 16 and 16-A of the Supreme Court Judges (Leave, Pension and Privileges) Ordinance, 1997 with regard to payable pension and pension on re-employment etc. states that the retired Judge can be re-employed, therefore, as per the stance of the Federation it is necessary that once the proceedings by the Supreme Judicial Council start against a Judge on a complaint by any person or on its own or on a reference sent by the President, the proceedings shall reach to a logical end despite the fact the Judge resigns during those proceedings or retired after attaining the age of superannuation.

11. Learned counsel for the appellants in I.C.A. No.2 of 2024 while adopting the arguments advanced by the learned AGP has further stated that in fact the complaint was filed by the appellants when Mr. Justice Mian Saqib Nisar was Chief Justice of Supreme Court of Pakistan but unfortunately till his retirement the complaint/reference was not taken up by the SJC, therefore, on his retirement the appellants were forced to file a petition under Article 184(3) of the Constitution, which has been decided by the two member bench of this Court which is under challenge in these appeals. Prays for acceptance of the appeal and setting aside of the order passed by this Court while dismissing the petition of the appellants under Article 184(3) of the Constitution as well as the order of the SJC and prays even if the Judge has retired after superannuation or has resigned, the reference or complaint once filed cannot be consigned to record or dismissed on the ground that the Judge has been retired after superannuation or has resigned from his office.

12. Learned Amicus Mr. Faisal Siddiqui has firstly stated that as the impugned judgment is defective on the basis that notice under Order XXVII-A of the C.P.C. was not issued to Attorney General for Pakistan, therefore, matter be sent back for re-decision after requisite notice. In the alternate initially given his opinion that with the retirement on superannuation or resignation of a Judge, the proceedings of the SJC automatically come to an end and no complaint or reference can be proceeded with by the SJC after the retirement or resignation of a Judge either the proceedings started in his tenure serving as a Judge or pending at that time. While concluding his submissions and opinion stated that to the extent of continuation of proceedings by the SJC in case the cognizance has been taken and proceedings

started against a Judge who retires or resigns may continue for a logical end but for the other questions stated that the very important questions of public importance as well as relating to independence of judiciary are concerned, therefore, same may be decided in an appropriate matter in future. The other learned Amicus Abdul Moiz Jafferii is of the view that the retirement as well as resignation by a Judge does not effect upon the pendency of any reference or complaint against a Judge even if the SJC has not yet taken the cognizance of the matter. Just filing of complaint is sufficient before his/her retirement or resignation. It is the prerogative of the SJC to proceed with the matter.

13. On the other hand, Khawaja Muhammad Haris stated as he is representing a Judge before SJC against whom proceedings are going on despite the fact that Judge has resigned, his opinion may not be considered as biased and not an independent opinion, therefore, he is before the Court to give his opinion if it is taken as independent opinion, he was asked to give the opinion, as it is to assist the Court as friend of the Court. He has submitted lengthy arguments while relying upon the case Law reported as "Chief Justice of Pakistan Iftikhar Muhammad Chaudhry v. President of Pakistan through Secretary and others" (PLD 2010 SC 61), "The State v. Mr. Justice Akhlaque Husain, Judge of the High Court of West Pakistan" (PLD 1960 SC Pak. 26), "Justice Shaukat Aziz Siddiqui and others v. Federation of Pakistan through Secretary Law and Justice, Islamabad and others" (PLD 2018 SC 538), "The President v. Mr. Justice Shaukat Ali" (PLD 1971 SC 585), "Muhammad Ikram Chaudhry and others v. Federation of Pakistan and others" (PLD SC 1998 SC 103), "Syed Zafar Ali Shah and others v. General Pervez Musharraf, Chief Executive of Pakistan and others" (PLD 2000 SC 869), "Al-Jehad Trust through Raeesul Mujahideen Habib-ul-Wahabb-ul-Khairi and others v. Federation of Pakistan and others" (PLD 1996 SC 324), "Justice Qazi Faez Isa and others v. President of Pakistan and others" (PLD 2022 SC 119), "Justice Qazi Faez Isa and others v. The President of Pakistan and others" (PLD 2021 SC 1), "Mr. Justice Ghulam Hyder Lakho, High Court of Sindh, Karachi and others v. Federation of Pakistan through Law, Justice and Parliamentary Affairs, Islamabad and others" (PLD 2000 SC 179), "Khan Asfandyar Wali and others v. Federation of Pakistan through Cabinet Division, Islamabad and others" (PLD 2001 SC 607), "Imran Ahmad Khan Niazi v. Federation of Pakistan through Secretary, Law and Justice Division, Islamabad and another" (PLD 2024 SC 102), Articles 209-211 of the Constitution, Supreme Court Judges (Leave, Pension and Privileges) Order, 1997, "K.Veerawami v. Union of India and others" (1991) 3 SC Case 655, "Krishna Swami v. Union of India and others"(1992) 4 Supreme Court Cases 605, "Union of India and others v. Gopal Chandra Misra and others" (AIR 1978 Supreme Court 694), Constitution of India 9th Edition, Constitution Law of India, Independence and Accountability of the Indian Higher Judiciary as well as with regard to constitutional history of various countries and opined that as per his opinion the proceedings with the retirement or resignation of a Judge come to an end when the Council cannot recommend for removal of a Judge, therefore, as per his opinion it will be a futile exercise by the SJC.

14. The other learned Amicus Mr. Muhammad Akram Sheikh has addressed the Court and has given the opinion that as per his opinion the resignation or retirement

of a Judge does not effect the proceedings pending before the SJC and he has given his opinion that for independence of judiciary and in accordance with the Islamic principles it is necessary that an effective method of accountability of a Judge which is available in the shape of SJC should be effective as well as without any clog even from any judgment of this Court that the SJC may have independence to proceed with the matter in accordance with law. As per his opinion the resignation or retirement does not effect the proceedings pending as well as reference or complaints available with the SJC.

15. We have considered the arguments advanced by learned counsel for the appellants as well as opinion rendered by the learned Amicus Curiae.

16. The first and foremost consideration before us is that as SJC is an independent constitutional body, it is the prerogative of the Council to proceed with the matter in accordance with the Constitution and the law. In the instant case the basic question is whether Article 209 envisages that by resignation of a Judge or retirement on superannuation the proceedings which are pending before the SJC will automatically come to end or it is the prerogative of the SJC to proceed with the matter. The Amicus Curiae who are of the opinion that with the resignation of a Judge, proceedings automatically end or become infructuous have banked upon their opinion or argument that when the misconduct proceedings are underway and the Judge resigns or is retired, his removal cannot be reported to the President, therefore, there is no need to continue the proceedings whereas the view of the learned AGP and learned counsel for the appellants in I.C.A. No. 2 of 2024 as well as Mr. Muhammad Akram Sheikh and Abdul Moiz Jaffari is on the basis that there is no clog available in Article 209 that the Council will be having no jurisdiction to proceed with the matter, when the judge retires on superannuation or resigns. Even reference is made to Sub-Article 6(a) read with Sections 16 and 16-A of the Supreme Court Judges (Leave, Pension and Privileges) Order, 1997 to state that if the proceedings on the retirement or resignation of a Judge are automatically drop then even a complaint of serious misconduct which was underway and visibly proven, the SJC having a solid material with it, if cannot proceed further upon resignation or retirement of a Judge, the proceeding as well as the question will remain incomplete and unanswered in case the proceedings are not completed and the opinion of the Council is not reported to the President, it will be on record and while dealing with the matters sections 16 and 16-A will be effected. We posed a question to the Amicus Curiae, who were having the view that the proceedings end with the superannuation or resignation of a Judge, if there are any proceedings of misconduct pending against a Judge of the High Court and he resigns in order to avoid the proceedings, whether he can be appointed/elevated as a Judge of the Supreme Court or Federal Shariat Court etc. thereafter, the answer of this query was 'yes', he can be appointed. The further question was, if upon completion of proceedings there is a report of misconduct with the President whether in that case the Judge of a High Court who resigns can be appointed as Judge of Supreme Court or Federal Shariat Court etc., the answer was that if the matter is brought in the knowledge of the Judicial Commission constituted under Article 175-A then he may not be appointed as Judge of the Supreme Court or the Federal Shariat Court.

17. We have noted that at the time of hearing of petition filed by the appellants of I.C.A. No. 2 of 2024, the Judge had already been retired against whom complaints filed by the said appellants were pressed, though the complaint was filed against the Judge when he was a Chief Justice but unfortunately the complaint could not be placed before the SJC and after the retirement of said Judge when it was placed before the SJC same was dismissed as having become infructuous. The

main consideration before the learned two member Bench of this Court while hearing the Constitution Petition was that the SJC has declared the complaint as having become infructuous, therefore, mainly the emphasis of the Court was upon the said point whereas it was not a case before the Court that after considering the complaint some steps were taken in the complaint i.e. issuance of notice to the Judge against whom complaint was filed or any reply or the response to the complaint, not it was the question before the Court that during the pendency of the complaint after issuance of notice by the SJC the effect of retirement of a Judge or resignation but the effect of the impugned judgment is that even if the complaint is pending after taking cognizance by the SJC, it abates on retirement of a Judge or resignation, therefore, Federal Government was aggrieved and filed the instant appeal, on which point we agree with the appellant. So far as other prayers like passing of direction to the SJC as prayer B in the original petition and prayer C are concerned, we are of the view that the SJC can consider all these points or same may be taken in any other suitable case as we are dealing with the matter in appeal when without any notice the original Constitutional Petition was dismissed by the learned two member Bench of this Court in limine.

18. In this view of the matter, we partially allow both the appeals, we are of the view that it is the prerogative of the SJC to proceed with the matter and the proceedings pending before the SJC which are initiated after issuance of notice to a Judge do not automatically drop or become infructuous on superannuation or resignation of a Judge. These are the reasons of our short order announced on 21.02.2024, which is reproduced:

"For the reasons to be recorded later, the delay in filing both the appeals is condoned. Both the appeals are partially allowed to the extent that if the proceedings have already been initiated by the Supreme Judicial Council ('SJC') against a Judge, same shall not abate on his resignation or retirement, as the case may be, during such proceedings. It is the prerogative of the SJC to proceed with the matter accordingly. The impugned judgment is modified to that extent. This order is with the majority of four by one disagreeing (Syed Hasan Azhar Rizvi, J.) on the point of limitation as well as on merits."

19. These appeals are partially allowed in the above terms.

I have also gone through the additional note added by Mr. J. Jamal Khan Mandokhail. I agree with the additional note.

JUDGE

I agree. However, I have appended my additional note.

JUDGE

I am disagreed and will file my separate note.

JUDGE

I agree with the findings of this judgment.

JUDGE

I agree with the findings recorded by my brothers namely Aminuddin Khan J. and Jamal Khan Mandokhail J.

JUDGE

JAMAL KHAN MANDOKHAIL, J.---I have had the privilege of going through the judgment authored by my learned brother Amin-un-Din Khan, J. Although, I fully subscribe to the conclusions drawn in the judgment, however, I

feel it appropriate to add my own opinion to further supplement the resolution of issues involved in these appeals.

Facts:

2. Detailed facts of the instant case have already been given in the main judgment, however, at the expense of repetition, I would like to reiterate some facts of the case. The private appellants (in I.C.A. No. 02 of 2024) filed a complaint on 10 October 2018, before the Supreme Judicial Council ("SJC") against Mr Justice Mian Saqib Nisar, the Hon'ble Chief Justice ("HCJ") of this Court, as he then was. The complaint was unattended and subsequently was dismissed on 08.03.2019 for having become infructuous on account of retirement of the HCJ on 17 January 2019. Feeling aggrieved, the private appellants filed a petition under Article 184(3) of the Constitution of the Islamic Republic of Pakistan, 1973 ("Constitution") against the respondents and the former HCJ, but, by the order of this Court, the name of former HCJ was deleted. The petition was dismissed by a Division Bench of this Court on 27.06.2023. The Federation of Pakistan assailed the said judgment through I.C.A. No 01 of 2024 and so by the private appellants through I.C.A. No. 02 of 2024. In the impugned judgement, a two member Bench of this Court has held as under:

"5. Therefore, it is our conclusion that on any view of the matter Article 209 does not apply to a person who has retired or resigned from the office of a Judge of this Court or a High Court."

Objection of Limitation:

3. An objection regarding delay in filing of appeals has been discussed by his lordship Amin-ud-Din Khan, J.--in detail, however, I would like to add in support of the reasoning in the main judgment. It is a fact that the petition under Article 184(3) of the Constitution was filed by the private appellants, but the Federal Government was not arrayed as party to the proceedings. Through the said petition, interpretation of Article 209 of the Constitution was required, therefore, it was mandatory for the Court to have had issued a notice to the Attorney General for Pakistan ("AG") as required by Order XXVII-A, Rule 1, C.P.C. The ground mentioned in the application by the Federation of Pakistan is that the impugned judgment was not within the knowledge of the Federation of Pakistan; and that the learned AG came to know about the said judgment for the first time on 9 January 2024 during the proceedings of the Supreme Judicial Council. The AG states that even otherwise, the question of public importance relating to interpretation of Constitution is involved, therefore, the delay in filing of appeal may be condoned. He relied upon the case reported as Federal Govt. of Pakistan v. M.D.Tahir Advocate¹. I have no doubt in my mind that the matter involved in these appeals is of great public importance and has great significance. The reasoning advanced by the learned AG is reasonable. Since neither the Federal Government was arrayed as party to the proceedings nor mandatory notice required under Order XXVII-A, Rule 1, C.P.C. was issued to the AG, therefore, there is no reason to disbelieve his contention regarding his unawareness of the date of the pronouncement of the impugned judgment. Even otherwise, a Ten Member Bench of this Court through the referred judgment has condoned the delay of 257 days in filing of petition

solely on the ground of public importance, therefore, I concur with Amin-ud-Din Khan, J. for condoning the delay in filing of these appeals.

Independence of Judiciary:

4. Judiciary is one of the fundamental pillars of the State, comprising of judges, vested with the authority to preside over, hear, determine legal matters and safeguard the fundamental rights of citizens. The judges also serve to protect the Constitution and democracy and deal with politically sensitive cases, thereby, are exposed to the general public. In order to perform its judicial functions and deliver justice, an independent, impartial and strong judiciary is essential, without which, the fundamental rights of the citizens guaranteed by the Constitution and the democracy cannot be safeguarded. Preamble of the Constitution, therefore, explicitly states and guarantees that independence of judiciary shall be fully secured. Reliance is placed in the case of Muhammad Aslam Awan², relevant portion whereof is reproduced herein below:

"Judicial independence both of the individual judge and of the judiciary as an institution is essential so that those who bring their causes/cases before the Judges and the public in general have confidence that their cases would be decided justly and in accordance with law. Judicial independence is one of the foundational values of the Constitution of Islamic Republic of Pakistan which is based on trichotomy of powers in which the functions of each organ of the State have been constitutionally delineated. The very Preamble of the Constitution pledges "wherein the independence of judiciary shall be fully secured." The Constitution makers conferred this independence because they wanted the Judges to "do right to all manner of people" according to law, without fear or favour, affection or ill-will." (Oath of office of Judges). The fundamental rights guaranteed under the Constitution cannot be secured unless Judiciary is independent because the enforcement of these rights has been left to Judiciary in terms of Articles 184(3) and 199 of the Constitution and the relevant law. Judiciary has not been made part of the Executive or the Legislature (Article 7). The separation of judiciary from the Executive was made a Constitutional mandate (Article 175(3))." (Emphasis supplied)

5. To ensure independence of judiciary, the judges require protection of their judicial work. Though, the Islamic Law and our Constitution requires absolute equality between men, between the ruler and the ruled, between the rich and the poor and so on, but judicial immunity is the only exception for judges in performance of their judicial work, in order to protect and shield them from any external pressure, harm or from prosecution. Article 68 of the Constitution provides that the conduct of any judge of the Supreme Court or of a High Court in the discharge of his duties is immune from discussion in the Parliament. Similarly, section 77 of the Pakistan Penal Code ("P.P.C.") protects judges from criminal liability for the act, performed during their judicial work. Such protection extended to the judges is not harmful for others. It is not a favour to the judges nor is it for their personal benefit, rather it is essential so that judges could perform their judicial functions independently, freely, without fear or favour, and with peace of

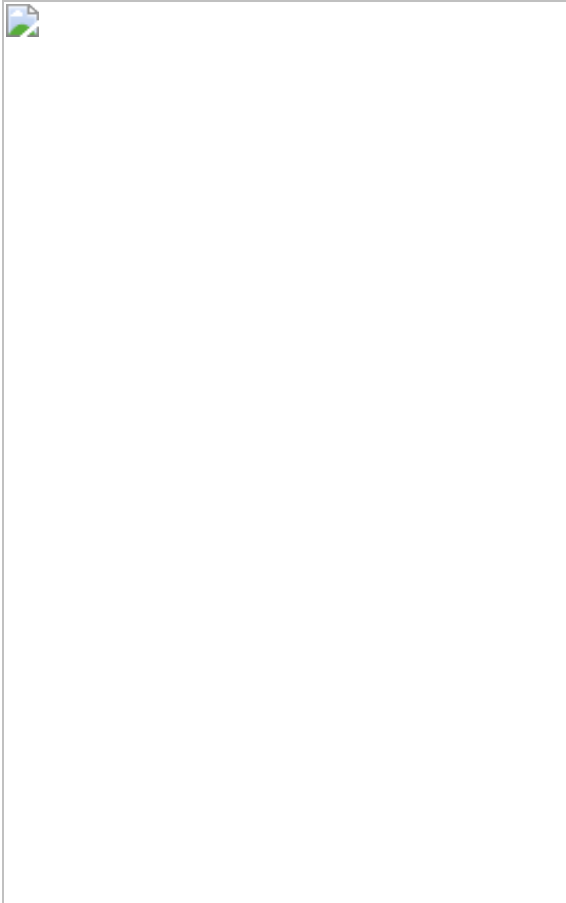
mind. The sole purpose of an independent and impartial judiciary as an institution and of a judge is to provide justice to the citizens and to protect their fundamental rights, guaranteed by the Constitution, in order to enjoy the confidence of citizens.

Accountability of Judges:

6. A person who chooses to become a judge has a notion in mind that upon his elevation, he must be God fearing, trustworthy, honest; he has to maintain and enforce high moral and professional standards of conduct, in order to preserve his integrity and ensure independence to serve justice. The public has a right to expect that of him and if he does not choose to impose such a standard on himself, he should not accept judicial appointment. The Prophet Muhammad (PBUH) said that Judges are of three types, one of whom will go to Paradise and two to Hell. The one who will go to Paradise is a man who knows what is right and gives judgment accordingly; but a man who knows what is right and acts tyrannically in his judgment will go to Hell; and a man who gives judgment for people when he is ignorant will go to Hell³. Basing on such principle of higher morality, a reference is also made to a situation where in the year 763 AD, Abu Jafar Abdullah ibn Mohammad Al-Mansur, the ruler/Khalifa at that time, offered a renowned Muslim Jurist and Scholar Imam Abu Hanifa, the post of Chief Justice of the State, "but the Imam declined the offer because he knew that on becoming a judge, the ruler/Khalifa would pressure him into passing judgments according to his own desire. He refused the offer saying that he would never be able to pass fair judgment according to his conscience". This regarded the position of a judge so sacred, because justice is one of the most

important moral concepts that individuals are to be treated in a manner that is equitable and fair. On becoming a judge, the following Oath is administered to him:

CHIEF JUSTICE PAKISTAN OR OF A HIGH COURT OR JUDGE OF THE SUPREME COURT OR A HIGH COURT



[Articles 178 and 194]

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

I, _____, do solemnly swear that I will bear true faith and allegiance to Pakistan.

That, as Chief Justice of Pakistan (or a Judge of the Supreme Court of Pakistan of Chief Justice or a Judge of the High Court for the Province or Provinces of). I will discharge my duties, and perform my functions,

honestly, to the best of my ability, and faithfully, in accordance with the Constitution of the Islamic Republic of Pakistan and the law.

That I will abide by the code of conduct issued by the Supreme Court Judicial Council.

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

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

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

¹[May Allah Almighty help and guide me (A'meen).]

7. An Oath is a public pledge under "Allah Almighty" (God), in presence of witnesses that a person will perform his duty honestly and truthfully; to maintain and restore public confidence in the integrity, independence and impartiality of judiciary. Holding such a prestigious post, a judge is expected to abide strictly by each and every word of the Oath and is supposed to follow the Constitution, law and the Code of Conduct issued by the Council. In this way, a person who becomes a judge imposes a mechanism of self-accountability. Rule of law is a principle under which all persons, institutions and entities are accountable. In holding the judges of the Supreme Court and a High Court accountable for guilty of misconduct, Article 209 of the Constitution has bestowed upon the Council being the only forum, the power to investigate and inquire into their capacity or conduct. The formation and functions of the Council are as under:

"209. (1) There shall be a Supreme Judicial Council of Pakistan, in this Chapter referred to as the Council.

(2) The Council shall consist of-----

(a) the Chief Justice of Pakistan;

(b) the two next most senior Judges of the Supreme Court; and

(c) the two most senior Chief Justices of High Courts.

Explanation.---For the purpose of this clause, the inter se seniority of the Chief Justices of the High Courts shall be determined with reference to their dates of appointment as Chief Justice [otherwise than as acting Chief Justice], and

in case the dates of such appointment are the same, with reference to their dates of appointment as Judges of any of the High Courts.

- (3) If at any time the Council is inquiring into the capacity or conduct of a Judge who is a member of the Council, or a member of the Council is absent or is unable to act due to illness or any other cause, then----
 - (a) if such member is the Chief Justice of the Supreme Court, the Judge of the Supreme Court who is next in seniority below the Judges referred to in paragraph (b) of clause (2), and
 - (b) if such member is the Chief Justice of a High Court, the Chief Justice of another High Court who is next in seniority amongst the Chief Justices of the remaining High Courts, shall act as a member of the Council in his place.
- (4) If, upon any matter inquired into by the Council, there is a difference of opinion amongst its members, the opinion of the majority shall prevail, and the report of the Council to the President shall be expressed in terms of the view of the majority.
- (5) If, on information from any source, the Council or the President is of the opinion that a Judge of the Supreme Court or of a High Court----
 - (a) may be incapable of properly performing the duties of his office by reason of physical or mental incapacity; or
 - (b) may have been guilty of misconduct, the President shall direct the Council to, or the Council may, on its own motion, inquire into the matter.
- (6) If, after inquiring into the matter, the Council reports to the President that it is of the opinion---
 - (a) that the Judge is incapable of performing the duties of his office or has been guilty of misconduct, and
 - (b) that he should be removed from office, the President may remove the Judge from office.
- (7) A Judge of the Supreme Court or of a High Court shall not be removed from office except as provided by this Article.
- (8) The Council shall issue a code of conduct to be observed by Judges of the Supreme Court and of the High Courts."

8. The members of the Council are the highest adjudicators of the country, who are independent from legislature and executive, and are under Oath, to perform functions of accountability of their brother judges, honestly, independently and without fear or favour. The concept of assigning power to the Council to inquire into the capacity or conduct of a judge, is to eliminate a slightest possibility of external interference, or pressure and undue influence from within the judiciary, and to protect judges from frivolous and malicious prosecution to guarantee their

independence. Reliance is placed in the case of Justice Shaukat Ali, wherein this Court has determined as under:

Moreover, an inquiry into the conduct of a Judge is neither a criminal indictment nor even a quasi-criminal proceeding but it is mainly an administrative proceeding conducted by a domestic forum to examine the professional fitness of a Judge. The subject-matter of these proceedings is neither civil rights and duties nor criminal liabilities. It is simply the conduct of a Judge which is to be properly reviewed in the interest of the purity and honour of the judiciary. The forum consists of Judges of superior Courts who also belong to the same profession. To be tried by one's peers is a protection because they understand one's difficulties, problems and the situation in which one was. Doctors, architects, accountants and lawyers aim at having and have their domestic tribunals, that is to say, the tribunals which judge their conduct are manned by their own peers⁴." (Emphasis supplied).

Even otherwise, If the task of inquiring into the conduct of judges is assigned to any institution, other than the Council, it would put the judges in fear of repercussions that could hinder delivery of justice, and independence of judiciary would be undermined. Self-regulating method of supervising judges conferred upon the Council by the Constitution is on account of separation of judiciary from the legislature and executive, as provided by Article 175 of the Constitution. It also reflects the confidence of Constitution makers in the highest constitutional disciplinary body.

Jurisdiction and Power of the Council:

9. The moot question before this Court is to consider as to whether the Council can inquire into the capacity or conduct of a judge, who has retired or has resigned from his office? And whether the Council can continue to inquire into the conduct or capacity of a judge, who during the pendency of the inquiry proceedings, retires or resigns from his office? Sub-Article (5) of Article 209 of the Constitution provides the following mechanism to inquire into the matter as under:

Article 209(5) If, on information from any source, the Council or] the President is of the opinion that a Judge of the Supreme Court or of a High Court---

- (a) may be incapable of properly performing the duties of his office by reason of physical or mental incapacity; or
- (b) may have been guilty of misconduct, the President shall direct the Council to, or the Council may, on its own motion,] inquire into the matter.

10. A plain reading of the said provision of the Constitution makes it clear that the Constitution has mandated the President that on information from any source, he shall direct the Council to inquire into the matter. The phrase, 'the President Shall direct the Council' used in this provision of the Constitution makes it mandatory upon the Council that it has no option, but to initiate inquiry against the judge accordingly in a case the reference is received from the president. Similarly, if the Council deems it appropriate, may on its own motion inquire into the matter.

After a preliminary inquiry, the Council may dismiss the complaint for lack of evidence or untrue information. In both circumstances, once the Council invokes its constitutional jurisdiction by initiating inquiry into the matter against a judge, it has to take the proceedings to its logical conclusion. Sub-Article (6) of Article 209 of the Constitution starts with words if, after inquiring into the matter, that further shows the intent of the Legislature that before invoking the said provisions of the Constitution, the Council has to comply the mandate of Sub-Article (5) of Article 209 of the Constitution, pursuant to which, it has to conclude inquiry initiated against a judge. Upon completion of the inquiry proceedings, the Council can form its opinion pursuant to sub-Article (6). If, the Council is of the opinion that the judge is incapable of properly performing the duties of his office by reason of physical or mental incapacity or has been guilty of misconduct, shall report to the President with a recommendation that he should be removed from his office; the President may then remove the judge from the office. However, if, after inquiring into the matter upon a reference from the President, the Council opines that nothing adverse was found against the judge, it has to close the proceedings and report to the President with its opinion accordingly. Moreover, upon completion of inquiry initiated by the Council on its own motion on information from any source, nothing adverse could be found against the judge, the Council has to close the inquiry with an observation in this behalf, without report to the President.

11. Without prejudice to above, even otherwise, a judge is appointed for the interest of general public and his judicial conduct is a matter of great public interest. Without the trust and confidence of people, judiciary cannot exist. Therefore, the purpose of inquiring into the conduct of a judge while in office, is to ensure accountability, to preserve the integrity of judicial process, maintain public trust and confidence in the judiciary. As a general rule, the Authority inquiring into the conduct of a judge loses its jurisdiction to initiate proceedings against a person who retires or resigns from his office, before initiation of inquiry proceedings. Whereas, when an inquiry about the conduct of a judge in office is initiated by the Council, it is the constitutional obligation of the Council to conclude the proceedings, form its opinion and report to the President with recommendations. In this provision of the Constitution, the word 'inquiry' has been used. The primary purpose of inquiry is to gather information in order to address a specific issue of public interest and to make recommendations for improvement and prevention of future occurrences. It is not to focus on enforcing laws or prosecuting individuals as is mandated in investigation, rather to inquire into the ethical violations and misconduct of a judge. It promotes accountability and trust in the process by the public. Reliance is placed in the case of *In re Proceedings before the Common. On Judicial Tenure and Discipline*,⁵ relevant portion whereof is reproduced herein below:

"This statutory scheme enables the commission to regulate the conduct of judges. The regulation of judges is necessary to ensure that judges behave properly and to preserve the public's confidence in the judiciary. The public's confidence in the judiciary and the commission would be shaken if the system for the regulation of the conduct of the judiciary could be frustrated simply by the resignation of the judge under investigation. Hence

I do not believe that the Legislature intended to allow the frustration of the statutory scheme by denying the commission's jurisdiction over a judge who has resigned."

It is for good reason in the public interest that citizens having fundamental right to know about the fate of the proceedings. When an inquiry into conduct of a judge initiated by the Council is terminated without an opinion, on account of retirement or resignation of a judge from his office, it would render Articles 209 (5) and (6) of the Constitution redundant and would also give an authority to the judge to make the constitutional body abandoned.

12. Termination of inquiry proceedings upon retirement of a judge would otherwise give an impression that the Council is dependent on the will of the judge, who can overpower the control of the constitutional body. It may create a perception that the judges are above the law. After his retirement or resignation, prior to inquiry initiated, a judge enjoys a status of a retired judge, with lucrative post-retirement benefits from public ex-chequer. He is also eligible for his re-appointment against some important constitutional, quasi-judicial and administrative posts, for which evaluation of his conduct and reputation is essential. The jurisdiction of the Council to inquire into the matter pertaining to misconduct of a judge is a constitutional mandate. In absence of express words or an enactment, preventing the Council from inquiring into the matter upon resignation or retirement of a judge, jurisdiction of the Council cannot be abolished, ousted or terminated. Since there is no express provision in the Constitution, nor is there any enactment, preventing the Council from continuing its proceedings of inquiry in a situation where a judge is retired or resigns before conclusion of the inquiry, it is the constitutional obligation of the Council to conclude the inquiry initiated against a judge and form an opinion regarding his conduct. If after inquiring into the matter, the Council is of the opinion that the judge has been guilty of misconduct, under such circumstances, he shall not be eligible for post-retirement benefits. The purpose of removal of a judge is not a punishment, rather a judge may only be removed in the larger interest of the people. His Removal is to protect the public from an unfit judge and to appoint a better one⁶. It would also be an appropriate way to discourage others from violating oath of office and will be a precedent for the judges. Reliance is placed on *Steensland v. Ala. Judicial Inquiry Comm'n*⁷. Relevant portion whereof is reproduced herein below:

"Once the jurisdiction of a court or administrative agency attaches, the general rule is that it will not be ousted by subsequent events." In *re Peoples*, 296 N.C. 109, 146, 250 S.E.2d 890, 911 (1978). The jurisdiction of the court or administrative agency, thus invoked, continues until the process is completed. See *In re Marriage of Clark*, 232 Ill. App. 3d 342, 347, 597 N.E.2d 240, 243, 173 Ill. Dec. 532 (1992) ("It is clear that once jurisdiction attaches in a cause, it continues until all issues of fact and law have been finally determined."). Indeed, HN8 the COJ is constitutionally required to convene and to entertain the charges brought by the JIC.⁴ See *In re Fuyat*, 578 A.2d 1387, 1388-89 (R.I. 1990) [****19**] (HN9 "[A] judge ... who has removed himself or herself from judicial office by resignation [during the pendency of an investigation commenced by the 'Commission on Judicial

Tenure and Discipline' (the commission'), but before the 'institution of formal proceedings,'] is not by that fact immune from action by the commission, which may recommend some sanction other than removal."). In short, we hold that Judge Steensland's retirement during the JIC's pending investigation of the complaints filed against him did not deprive the JIC or the COJ of jurisdiction to adjudicate the charges in the complaint."

Impact of Resignation of a Judge:

13. The person who wishes to resign from his office is mostly on the basis of his personal reasons, including health issues, or on account of instances where he wishes an honourable exit, before initiation of any proceedings regarding his conduct. But, when a judge who is facing inquiry on the allegations of misconduct, initiated by the Council by invoking Article 209 of the Constitution, if senses an adverse outcome of the proceedings, resigns and leaves the Bench in response to credible allegations, it would be an attempt to escape the consequence of inquiry proceedings and bad faith. If the proceedings are made dependent upon the will of the judge on account of his resignation, at any stage before conclusion of inquiry, it would let the judge, who is guilty of misconduct, to go Scott free by defeating the process of accountability. This would damage rule of law norms and public trust in the role of judges and the judiciary. In a situation, where inquiry into the matter in respect of misconduct of a judge is underway, and he considers himself innocent, he would not opt for resignation, rather would like to face the proceedings even after his retirement, to get rid of the baseless and frivolous reference of complaint. He will naturally want to secure his integrity and would prefer to not live with stigma. For these reasons, it is imperative that once the Council in exercise of its constitutional authority, initiates inquiry into conduct of a judge, it cannot terminate or abate upon retirement or resignation of the judge from his office. The citizens have a right to know about the outcome of the complaints.

Procedure for Inquiry:

14. For effective performance of functions and proceedings to give effect to Article 209 of the Constitution, the Council has laid down a procedure called 'the Supreme Judicial Council Procedure of Inquiry, 2005' ("Procedure of 2005"). Paragraph 7(1) whereof provides that once information in respect of inquiry into the capacity or conduct of a judge is received by any member of the Council, it shall be presented to the Chairman of the Council for further action. Under Article 209 of the Constitution, if a reference/complaint is received against any of the member, who is a judge of the Supreme Court, the judge of the Supreme Court who is next in seniority shall become a member of the Council in his place. In the present case, admittedly, the complaint was filed by the private appellants against the former HCJ, but he sat upon the same and did not refer the matter to the Council by recusing himself, rather held the Council hostage by not convening a meeting. It was not only his constitutional obligation, but was also moral and ethical responsibility to have had referred the matter to the Council and asked a judge of the Supreme Court who was next in seniority below him to become a member, with further request to the Council to proceed against him accordingly. As a Chief Justice, he was burdened with more responsibility to maintain a high moral and ethical standard by placing himself before the Council for his accountability, but he failed to do so, what was expected from him. Failure to refer his matter to the Council by the former HCJ, not only resulted into undermining the constitutional provisions, but also amounts to preventing the Council from performing its constitutional function. It is a fact that during his tenure, under his chairmanship, the Council conducted proceedings against some other judges, but

withholding the complaint filed against him, is a violation of principle of equality regarding accountability amongst the judges. It is important to mention here that it was equally the responsibility of other Hon'ble Members of the Council to have had inquired about pendency of references or complaints against judges of the Supreme Court or a High Court(s), but unfortunately they also did not vigilantly perform their constitutional duty, which rendered several complaints, including the one against former HCJ as infructuous on account of retirement or resignation of judges. It had shattered the confidence of the appellants and many more, which had a negative impact upon the mechanism and procedure of inquiry proceedings into the conduct of judges. Had that complaint and many more filed against other judges been taken up and decided in time by the Council, before the retirement of the former HCJ and other judges, there would not have been any violation of the relevant provision of the Constitution nor would have created any doubt regarding the working of the Council and integrity of its Chairman and members. The private appellants and the public could have been satisfied and thereby their confidence and trust in the working of the Council would not have been shattered. In any case, it was necessary for the Council to have decided the fate of the complaint before retirement of the former HCJ, but the needful was not done, therefore, after his retirement, the Council cannot proceed.

15. We have observed that in the past, the Hon'ble Members of the Council did not take pain to convene its meeting in time and on regular basis. The complaints remained unattended and institution of new ones was going on, which resulted into increase in the number of complaints manifold. During this period, several judges were retired or resigned from their offices. The petition filed under Article 184(3) of the Constitution by the private appellants and the present appeals poses a valid question on the mechanism of initiating inquiry and working of the Council. The appellants presume that the Council by not taking action on the complaints has facilitated the judges to retire or resign, who were required to be subjected to disciplinary proceedings. No doubt, majority of the complaints against the judges are frivolous and baseless, but still, it is the constitutional obligation of the Council to decide fate of the same as early as possible. The Procedure of 2005 has empowered the Chief Justice being Chairman of the Council to convene a meeting for the purpose of inquiring into the matter. Empowering the Chairman of the Council alone to convene a meeting would make the Council subservient the Chairman, hence, undermines the independence and authority of the Council. In order to ensure independence of the Council, it is imperative that the Procedure of 2005 is suitably amended in line with the provisions of Article 209 of the Constitution, to introduce a regular vigilant mechanism for convening a meeting of the Council on a regular interval, for initiating and concluding the inquiry proceedings upon a reference or a complaint by the Council before retirement or resignation of a judge. Independent, effective and vigilant Council will strengthen the trust and confidence of the citizens of Pakistan in the disciplinary proceedings, involving judges of the Supreme Court, the Federal Shariat Court and of the High Courts. It will also enable the judges to perform their judicial functions with peace of mind, freely, without any fear or favour and without any external or internal pressure. However, disciplinary proceedings against judges must be based on the

rule of law and in accordance with the basic principles of justice and internal safeguards, to ensure judicial independence.

Result:

16. On the basis of what has been discussed herein above, the questions framed by this Court on 12.02.2024 are answered as under:

A. Whether pending proceedings before the Supreme Judicial Council (the 'Council') do not stand abated on account of retirement and resignation of a Judge?

Answer: My answer to this question is "No". Proceedings, once initiated by the Council, shall not abate upon the retirement and resignation of a judge.⁸

B. Whether a Judge who retires or resigns during pendency of proceedings against him/her before the Council should be allowed to escape the consequences of removal?

Answer: My answer to this question is also in negative.⁹

C. Whether resignation by a Judge during pendency of proceedings against him/her before the Council tantamount to circumvention/ avoidance of accountability enshrined and envisaged under Article 209 of the Constitution of the Islamic Republic of Pakistan, 1973?

Answer: This question is easily answered as "Yes"¹⁰.

D. Whether circumvention of proceedings under Article 209 of the Constitution would result in erosion of public trust in the Judiciary?

Answer: This question is also answered in affirmative.¹¹

Sd/-
(Jamal Khan Mandokhail)
Judge

JUDGMENT

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

Intra Court Appeal No.1 of 2024

2. The Federation of Pakistan was not a party to the original proceedings, however it has filed this Intra-Court Appeal under Section 5 of the Supreme Court (Practice and Procedure) Act, 2023 ("SCPPA"), against the judgment dated 13.06.2023 ("impugned judgment"), on the grounds that it is directly affected by the interpretation of Article 209, as rendered by a two-member bench of this Court

in the impugned judgment. Thus, the instant appeal has been filed in view of the law laid down by this Court in the case of H.M. Saya & Co. v. Wazir Ali Industries Ltd. (PLD 1969 SC 65).

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

However, the other two instances where a judge may vacate his office are upon resignation under Article 206 and removal under Article 209(6) of the Constitution. Section 15 of the Supreme Court Judges Leave, Pension, and Privileges Order, 1997 ("Order of 1997") provides that a judge who retires or resigns is entitled to a pension, as are those who are removed due to ill health or physical or mental incapacity. Thus, a judge removed under Article 209(6) of the Constitution is not entitled to pensionary benefits. Moreover, a former judge, other than the one who is removed under Article 209 of the Constitution, may be called upon to perform such function, as is requested to perform or be appointed to a post in connection with the affairs of the Federation or Province in terms of clause 16 of the Order of 1997. By simply resigning from office during the pendency of proceedings before the Supreme Judicial Council ("Council"), without any findings rendered by it, a former judge can make himself eligible for post-retirement appointment. This runs contrary to the principles of transparency and fairness, diminishes the faith of the public in the judiciary, and thus, undermines the independence of the judiciary, which is contrary to Articles 9, 25, and 175 of the constitution.

Intra Court Appeal No.2 of 2024

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

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

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

of the Constitution and made the following prayers:

- A. Declare the failure of the Hon'ble Council to duly examine the Reference No. SJC-398 of 2018 and to render an opinion on the allegations of misconduct in the reference, to be illegal, and an unlawful omission to exercise jurisdiction, granted under the law.
- B. Set aside the imputed order dated 08.03.2019 of the Hon'ble Council as void ab initio and a nullity in the eye of the law.
- C. Declare that the Reference No. SJC-398 of 2018 is still pending before the Hon'ble Council.
- D. Direct the Hon'ble Council to take up the reference and to render its opinion on the allegations of misconduct contained therein and report its opinion to the President under Article 209(6) of the Constitution.
- E. Pass directions to structure the Hon'ble Council's discretion in relation to the priority, listing and hearing of complaints/ references and to ensure that the eventual findings of the Hon'ble Council are publicly disclosed and direct the Hon'ble Council to amend the Supreme Judicial Council Procedure of Enquiry 2005, accordingly.
- F. Give any other directions or pass any interim orders that are required and are necessary for the effective implementation of Article 209.

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

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

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

The record shows that the appeals were not filed within the above-prescribed period of limitation. The ICA 1 of 2024 was filed belatedly, with a delay of 180 days, while ICA 2 of 2024 was filed with a delay of 186 days. To seek condonation of delay, both appellants filed separate applications under Order XIII Rule 1 read with Order XXXIII Rule 6 of the Supreme Court Rules, 1980 ("the Rule"). The bare reading of Rule 1 of Order VIII reveals that it relates to the filing of a petition for leave under Article 185 of the Constitution and provides a specific limitation period for the said purpose. Undoubtedly, the proviso to Rule 1 supra empowers this Court to extend such a limitation period for sufficient cause. In my understanding, the aforementioned provision of Rule 1 does not allow for the extension of the limitation period for an appeal or an Intra Court Appeal to be filed under Section 5 of the SCPPA, and thus it does not support the stance of the

appellants, by any stretch of imagination, which is deemed irrelevant and misconceived.

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

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

6. The ground mentioned in the application by the Federation of Pakistan that impugned judgment was not within the notice of the Federation of Pakistan and the same came to the knowledge of the learned Attorney General for Pakistan after the Council meeting of the dated 09.01.2024 does not appeal to reasons.

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

screenshot² from the official website of this Court is provided below for ease of reference:



7. The Attorney General for Pakistan is the Principal Law Officer of the Federation, with the office located within the premises of this Court. The Office of the Attorney General comprises a team of law officers, including Additional Attorneys General, Deputy Attorneys General, and Assistant Attorneys General. The Office represents, defends, and protects the interests of the Federal Government before this Court and provides invaluable legal guidance to the Federal Government in matters of policy formulation and execution of its decisions. As a highly responsible and sensitive office, it is its duty to be and keep the government aware of all the important decisions made by this Court. Any statement claiming a lack of knowledge about a particular decision, especially when it has been uploaded on the official website of this Court and published in August 2023 as PLD 2023 SC 510 in the monthly edition of the All Pakistan Legal Decisions (PLD), undermines its position and reputation not only among the citizens of Pakistan but also in the eyes of people outside the country. It has also been observed that on numerous occasions, cases involving the Federal or Provincial Government, departments or autonomous bodies were filed before this Court beyond the limitation prescribed by law without providing any justifiable reasons acceptable under the law for not approaching the Court within the specified time. In the applications seeking condonation of delay, if filed, general pleas for condonation of delay were invariably made. The concerned governments, departments or autonomous bodies must understand that the delay in the limitation for filing proceedings can only be condoned if sufficient grounds are provided. Otherwise, in the absence of such grounds, no preferential treatment can be offered to the governments, departments or autonomous bodies. Their cases must be dealt with in the same manner as those of an ordinary litigant or citizen. Reference in this behalf may be made to the case of the Pakistan through Secretary, Ministry of Defence v. Messrs Azhar Brothers Ltd. (1990 SCMR 1059); Government of the Punjab through Secretary (Services), Services General Administration and Information Department, Lahore and another v. Muhammad Saleem (PLD 1995 SC 396); Federation of Pakistan through Secretary, Ministry of Foreign Affairs, Government of Pakistan, Islamabad and 5 others v. Jamaluddin and others (1996 SCMR 727); Central Board of Revenue, Islamabad through Collector of Customs, Sialkot v. Messrs Raja Industries (Pvt.) Ltd. through General Manager and 3 others (1998 SCMR 307), Lahore High Court, Lahore through Registrar v. Nazar Muhammad Fatiana and others (1998 SCMR 2376); Chairman, District Evacuee Trust, Jhelum v. Abdul Khaliq through Legal Heirs and others (PLD 2002 SC 436) and Principal Public School Sangota,

Government of Khyber Pakhtunkhwa through Chief Secretary and others v. Sarbiland and others (2022 SCMR 189)

8. The private appellants, in their application for condonation of delay, have raised somewhat similar grounds regarding their knowledge of the impugned judgment. They asserted that they came to know about the impugned judgment on 09.01.2024 when it was widely reported through electronic and social media that the Federal Government announced its intention to file an appeal against the decision in the Afiya Shehrbano Zia case. The private appellant in their main petition themselves pleaded that they actively pursued their complaint before the Council and feeling aggrieved by the order of the Council, immediately filed the Constitution Petition before this Court under Article 184(3) of the Constitution.

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

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

10. As the matter involves an important issue regarding the true intent and interpretation of Article 209 of the Constitution, I deem it imperative to give my observations despite the matter being squarely time-barred. Undoubtedly, judicial accountability is a cardinal principle of the system of administration of justice and is essential to its successful working. In the modern democratic system of government, unlike other public functionaries, Judges of the Superior Courts are not immune from the process of accountability. However, to prevent Judges from being subject to ordinary courts or tribunals and to uphold the concept of 'judicial independence,' a highest constitutional body i.e. the Council is established for the removal of judges, comprised of their fellow judges. I believe that if a person loses or abandons the necessary attributes of a Judge integrity, impartiality, legal expertise, and mental balance then he is not entitled to any security of tenure and must be promptly removed through due process as outlined in Article 209 of the

	<p>appointment are the same, with reference to their dates of appointment as Judges of any of the High Courts.</p>			<p>Justice, and in case the dates of such appointment are the same, with reference to their dates of appointment as Judges of any of the High Courts.</p>
3.	<p>(3) If at any time the Council is inquiring into the capacity or conduct of a Judge who is a member of the Council or a member of the Council is absent or is unable to act due to illness or any other cause, then (a) if such member is a Judge of the Supreme Court, the Judge of the Supreme Court who is next in seniority below the Judges referred to in paragraph (b) of clause (2), and (b) if such member is the Chief Justice of a High Court; the Chief Justice of another High Court who is next in seniority amongst the Chief Justices of the remaining High Courts,</p>			<p>(3) If at any time the Council is inquiring into the capacity or conduct of a Judge who is a member of the Council or a member of the Council is absent or is unable to act due to illness or any other cause, then (a) if such member is a Judge of the Supreme Court, the Judge of the Supreme Court who is next in seniority below the Judges referred to in paragraph (b) of clause (2), and (b) if such member is the Chief Justice of a High Court; the Chief Justice of another High Court who is next in seniority amongst the Chief Justices of the remaining</p>

	shall act as a member of the Council in his place.			High Courts, shall act as a member of the Council in his place.
4.	(4) If, upon any matter inquired into by the Council, there is a difference of opinion amongst its members, the opinion of the majority shall prevail, and the report of the Council to the President shall be expressed in terms of the view of the majority.			(4) If, upon any matter inquired into by the Council, there is a difference of opinion amongst its members, the opinion of the majority shall prevail, and the report of the Council to the President shall be expressed in terms of the view of the majority.
5.	(5) If, on information received from the Council or from any other source, the President is of the opinion that a Judge of the Supreme Court or of a High Court- (a) may be incapable of properly performing the duties of his office by reason of physical or mental incapacity; or (b) may have been guilty of misconduct, the President shall direct the		In clause (5)-(i) for the words and comma "received from the Council or from any other source," the words and comma "from any source, the Council or" shall be substituted: and (ii) after the words "Council to", the commas and words ", or the Council may, on its own motion," shall be inserted.	(5) If, on information from any source, the Council or the President is of the opinion that a Judge of the Supreme Court or of a High Court- (a) may be incapable of properly performing the duties of his office by reason of physical or mental incapacity; or (b) may have been guilty of misconduct, the President shall direct the Council to, or

	Council to inquire into the matter.			the Council may, on its own motion, inquire into the matter.
6.	(6) If, after inquiring into the matter, the Council reports to the President that it is of the opinion- (a) that the Judge is incapable of performing the duties of his office or has been guilty of misconduct, and (b) that he should be removed from office, the President may remove the Judge from office.			(6) If, after inquiring into the matter, the Council reports to the President that it is of the opinion- (a) that the Judge is incapable of performing the duties of his office or has been guilty of misconduct, and (b) that he should be removed from office, the President may remove the Judge from office.
7.	(7) A Judge of the Supreme Court or of a High Court shall not be removed from office except as provided by this Article.			(7) A Judge of the Supreme Court or of a High Court shall not be removed from office except as provided by this Article.
8.	(8) The Council shall issue a code of conduct to be observed by Judges of the Supreme Court and of the High Courts.			(8) The Council shall issue a code of conduct to be observed by Judges of the Supreme Court and of the High Courts.

A perusal of the above-quoted provisions of Article 209 would reveal that clauses (1) to (4) thereof envisage the existence and the constitution of the Council while the provisions of clauses (5) and (6) provide various steps of the exercise leading to

the removal of a Judge of the Superior Courts. The notable change since its inception is that initially, proceedings under Article 209 could only be initiated by the President, but now they can also be invoked by both the President and the Council itself.

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

eye view as to how the jurists and Superior Courts of different jurisdictions have contextually perceived the science of constitutional interpretation.

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

13. The Supreme Court of India in numerous cases has articulated the principles of constitutional interpretation, emphasizing that courts are obligated to adopt an

interpretation that upholds the democratic spirit of the Constitution. Passages from some of the leading judgments are quoted below for ease of reference:

I) In *Kalpna Mehta and others v. Union of India (UOI) and others* (AIR 2018 SC 2493), the Supreme Court of India held as follows:

"38. The Constitution being an organic document, its ongoing interpretation is permissible. The supremacy of the Constitution is essential to bring social changes in the national polity evolved with the passage of time. The interpretation of the Constitution is a difficult task. While doing so, the Constitutional Courts are not only required to take into consideration their own experience over time, the international treaties and covenants but also keep the doctrine of flexibility in mind."

Underlining is for emphasis.

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

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

Underlining is for emphasis.

III) In *Justice K.S. Puttaswamy and others v. Union of India (UOI) and others* (AIR 2017 SC 4161), the Supreme Court of India observed as under:

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

Constitution today, the Court must leave open the path for succeeding generations to meet the challenges to privacy that may be unknown today."

Underlining is for emphasis.

14. This Court has had an almost similar approach regarding the interpretation of a Constitutional provision. As in *Al-Jehad Trust v. Federation of Pakistan* (PLD 1996 Supreme Court 324), it was held that:

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

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

- a. That the entire Constitution has to be read as an integrated whole;
- b. No one particular provision should be so construed as to destroying the other, but each sustaining the other provision.
- c. This is the rule of harmony, rule of completeness and exhaustiveness;
- d. Interpretation to be consistent with the Injunctions of Islam;
- e. It must always be borne in mind that it is only where the words are not clear, or the provision in question is ambiguous, that is, it is fairly and equally open to diverse meanings, that the duty of interpretation arises;
- f. Intention to be gathered from the language of the enactment, otherwise known as the 'plain meaning rule';
- g. It is elementary rule of construction that it is to be assumed that the words and phrases of technical legislation are used in their technical meaning, if they have acquired one, and otherwise in their ordinary meaning. Critical and

subtle distinctions are to be avoided and the obvious and popular meaning of the language should, as a general rule, be followed;

- h. It is a cardinal rule of construction of statutes that no words are to be added or omitted or treated as surplusage or redundant;
- i. That the words of written Constitution prevail over all unwritten conventions, precedents and practices to the contrary; and
- j. Legislative history is relevant for interpreting constitutional provisions.

Underlining is for Emphasis.

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

"25. This brings us to the fourth aspect of the answer, which may be put in the form of a question: what, if any, is the way forward? We have carefully considered the situation. In our view, the answer to the question just posed lies in two points. The first is straightforward and part of settled constitutional jurisprudence. It is that the Constitution is a living document, which must be given a dynamic and progressive meaning and interpretation. It evolves and develops not just by way of textual changes (i.e., constitutional amendments) but also in a (continually) maturing understanding of the constitutional provisions. And this means not just the very words of the Constitution but also the concepts and aspirations that lie behind and underpin those words..."

Underlining is for Emphasis.

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

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

that does not have any textual mooring or is not entrenched in or flows from any constitutional provision passes for a constitutional amendment by unwarranted reading into the Constitution and is beyond the permissible scope of the judicial act of interpreting the Constitution." (Internal Citations are omitted)

Underlining is for Emphasis.

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

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

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

issue into two different categories: Judges of this Court or High Courts against whom a complaint under Article 209 is pending, where

- (a) no further steps have been taken by the Council, and
 - (b) the Council has initiated the proceeding by issuing notices,
- etc.

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

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

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

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

The above clause clearly suggests that the President or the Council is competent to inquire into a matter under Article 209 against 'a judge of the Supreme Court or a

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

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

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

24. The argument of the learned AGP and learned counsel for the appellants in I.C.A. No. 2 of 2024 as well as Mr. Muhammad Akram Sheikh and Abdul Moiz Jaffarii that the above vacuum necessitates interference of this Court is untenable as the provision of Article 209 is simple, clear and unambiguous. Strict and faithful adherence to the words of the Constitution, especially so where the words are simple, clear and unambiguous is the rule. Any effort to supply perceived omissions in the Constitution being subjective can have disastrous consequences. If blunders are found in legislation, they must be corrected by the Legislature, and it is not the function of the Court to repair them (see Halsbury's Laws of England, 3rd Edition, Volume 36, page 390). The purpose of construction or interpretation of a provision

is, no doubt, to ascertain the true intention of the Legislature, yet that intention has, of necessity, to be gathered from the words used by the Legislature itself. If those words are so clear and unmistakable that they cannot be given any meaning other than what they carry in their ordinary grammatical sense, then the courts are not concerned with the consequences of the interpretation. However drastic or convenient the result, the function of the court is interpretation, not legislation. Reference may be made to the cases of Supreme Court Bar Association of Pakistan through President and another v. Federation of Pakistan through Ministry of Interior Islamabad and others (PLD 2023 SC 42) and Muhammad Ismail v. The State (PLD 1969 SC 241). It is only in very exceptional and challenging circumstances that this Court considers reading into a provision of Constitution.

25. It is also to be borne in mind that the Constitution envisages the trichotomy of powers amongst three organs of the State, namely the legislature, executive and the judiciary. The legislature is assigned the task of law-making, the executive executes such laws and the judiciary interprets the laws. None of the organs of the State can encroach upon the field of the others. Reference may be made to the cases of State v. Ziaur Rahman (PLD 1973 SC 49); Federation of Pakistan v. Saeed Ahrnaci Khan (PLD 1974 SC 151); Government of Balochistan v. Azizullah Memon (PLD 1993 SC 341); Mahmood Khan Achakzai v. Federation of Pakistan (PLD 1997 SC 426); Liaquat Hussain v. Federation of Pakistan (PLD 1999 SC 504); Syed Zafar Ali Shah v. General Pervez Musharraf (PLD 2000 SC 869); Nazir Abbas Jaffri v. Secretary Government of the Punjab (2006 SCMR 606); Sindh High Court Bar Association's case (PLD 2009 SC 879); Dr. Mobashir Hassan v. Federation of Pakistan (PLD 2010 SC 265); Executive District Officer (Revenue) v. Ijaz Hussain (2011 SCMR 1864) and Jurists Foundation v. Federal Government (PLD 2020 SC 1).

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

undue delays or manipulation in the process of accountability. In this regard, I feel appropriate to quote a passage from famous letter of Hazrat Ali Ibn-e-Abi Talib (a.s.) to Malik Ashtar, Governor of Egypt, to emphasis on the importance of accountability of Judges of the Superior Courts for administration of Justice:-

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

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

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

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

MWA/F-1/SC Order accordingly.