

IN THE HIGH COURT OF SINDH AT KARACHI

Before:

Mr. Justice Irfan Saadat Khan

Mr. Justice Adnan-ul-Karim Memon

Constitutional Petition No. D-1736 of 2013

Akhlaque Hussain Memon

& others, petitioners through:

Mr. Salahuddin Chandio, advocate
along with petitioner No.1

Province of Sindh & others

Respondents through:

Mr. Ali Safdar Deepar, AAG along with
Mr. Liaquat Ali Abro and Mr. Nadeem
Ahmed Qureshi, Law Officers.

Dates of hearing:

09.4.2021, 19.4.2021, 27.4.2021 and
01.6.2021

JUDGMENT

ADNAN-UL-KARIM MEMON, J: Through this petition, the petitioners have sought the following relief(s).

- a) *To declare that non-formation of Service Structure of District Attorneys and Deputy District Attorneys regarding their promotion and other due benefits is against the law, violation of fundamental rights of the persons working against such posts and against the Sindh Civil Servant Act, 1973.*
- b) *To further declare that the District Attorneys and Deputy District Attorneys are entitled for the appointment or further promotion on equivalent/similar posts and higher pay scales in various departments of the Government of Sindh instead of appointment of retired officers on contract basis.*
- c) *To direct the respondents for formation of service structure of the District Attorneys and Deputy District Attorneys within certain stipulated period and thereafter consider from amongst District Attorneys and Deputy District Attorneys for their further promotions/postings on merits.*

2. Facts of the case, as per the pleadings of the parties, are that the petitioners are serving as Deputy/District Attorneys as regular employees and are posted at different places in the Province of Sindh to act as Government Pleaders to conduct civil cases under Administrative Control of the Ministry of Law. The main grievance of the petitioners is about their deficient service structure and non-availability of promotion venues beyond BPS-19 and discrimination in perks and privileges. In this regard a proposal was also put forward by the National Judicial Policy Making Committee (**NJPMC**) to the competent authority of the respondent-department vide letter dated 27.07.2014 issued by the Law & Justice Commission of Pakistan for implementation.

3. Mr. Salahuddin Chandio, learned counsel for the petitioners, has emphasized that the petitioners are entitled to get the benefits under the NJMPC recommendations dated 20.9.2014, as confirmed by the respondents. Learned counsel referred to the letter dated 17.11.2014 of the learned Advocate General

Sindh and submitted that he has opined and recommended to the competent authority to reserve some posts of Assistant Advocate Generals and Additional Advocate Generals for District Attorneys to be filled on a permanent basis. Per learned counsel, the respondent-Law Department vide notification dated 10.5.2016 issued Recruitment Rules for the post of Additional Advocate General Sindh and Assistant Advocate General Sindh (BPS-20) (page 125) and argued that petitioners deserve to be promoted on the post of Assistant Advocate General (BPS-20), as per Recruitment Rules notified on 10.5.2016. He pointed out the Article 140 of the Constitution of the Islamic Republic of Pakistan, 1973, which provides the appointment of Advocate Generals of the Provinces and also referred to Law Department Manual Rules, 1940, which provides the procedure of the appointments Assistant Advocate General and Additional Advocate Generals, Sindh. Per learned counsel, the posts of Assistant Advocate General and Additional Advocate Generals of the province are not a constitutional office and the same are governed by the express provisions of the Law Department Manual Rules, 1940, made by the Governor of Sindh. He pointed out that since the constitutional provision is not applicable for the posts of Assistant Advocate General and Additional Advocate Generals of the province as this is not a constitutional office under Article 140 of the Constitution of the Islamic Republic of Pakistan, 1973, as such the observation of the learned Chairman of National Judicial Policy for reserving some posts of Assistant Advocate Generals and Additional Advocate Generals for District Attorneys of the province is required to be implemented, as per the direction vide minutes of the meeting of NJPMC held on 20.9.2014. Learned counsel further argued that in compliance of the order dated 17.3.2017 passed by the Honorable Supreme Court in Civil Misc. Application No.114-K of 2016, the Government of Sindh could not employ any officer on contract basis, but still, the respondents are bent upon to appoint persons on contract basis. Learned counsel asserted that the respondents framed the Recruitment Rules for the subject posts on 10.5.2016 which ensued a right in favour of the petitioners, as such they are precluded from acting detrimental to the rights accrued in favour of the petitioners. It is urged by him that the executive authority cannot, in the exercise of the rule-making power or the power to amend, vary or rescind an earlier order or take away the rights vested in the citizen by law. In the alternative, he prayed for the directions to the respondents to streamline the civil service structure of the District Attorneys and Deputy District Attorneys for their further promotions/postings on merits. He eventually prayed to allow the instant petition.

4. Mr. Ali Safdar Depar, learned AAG, has controverted the stance of the petitioners, on the ground that the petitioners because of their job descriptions, service structure, emoluments and allowances constitute a distinct and separate group of officers as compared to the post of Additional Advocate

General Sindh and Assistant Advocate General Sindh. He further pointed out that the petitioners could not be adjusted to the aforesaid posts as suggested by them on the premise that the functions and duties of the office of the petitioners are not similar or akin to that of the offices of Advocate General and Additional/Assistant Advocate General, Sindh, therefore, they are not justified in seeking promotion, being civil servants, against the aforesaid contractual posts; and, there is difference between the two sets of offices and officers, which can easily be differentiated on the ground that the post of Additional/Assistant Advocate General are tenure posts and are purely at the discretion of the Government, whereas the post of Deputy/District Attorney (BS-18-19) are civil servants as provided in the Sindh Civil Servants Act, 1973. He pointed out that through the instant petition a number of relief(s) have been sought which include directions for framing of service structure which cannot be entertained by this court being a policy decision of the Government of Sindh, relating to service structure of the Deputy /District Attorneys, their further promotion venues and ancillary relief. Learned AAG referred to the amendment brought into the Sindh Law Officers (Conditions of Service Rules), 1940 and argued that under the recruitment rules notified on 09.4.2018 and 6.5.2021 for the post of Additional/Assistant Advocate General, the Deputy /District Attorneys could not be brought into the strength of cadre of service of the office of Advocate General Sindh, as suggested by the Joint Secretary, Law & Justice Commission of Pakistan vide letter dated 27.9.2014. He also emphasized that the previous rules notified on 10.5.2016 were never applied and acted upon. He lastly prayed for dismissal of the instant petition.

5. Mr. Liaquat Ali Abro, learned law officer, in principle has agreed for directions to the competent authority of respondents to streamline the civil service structure of the District Attorneys and Deputy District Attorneys for their further promotions/postings on merits. In support of his contention, he relied upon the statement dated 01.06.2021 and placed on record notification dated 06.05.2021 whereby the competent authority i.e. Chief Minister Sindh has cancelled/withdrawn the earlier notification bearing No.S.REG:1(22)2015/2017 dated 10.05.2016 of the Law Department.

6. We have heard all the learned counsel for the parties and have perused the material available on record.

7. The pivotal question involved in these proceedings is whether the post of Additional/Assistant Advocate General could be filled amongst District Attorneys as per the Sindh Law Officers (Conditions of Service Rules), 1940 as amended up to date; and, whether between the notification dated 10.5.2016 bearing S.REG:1(22)2015/117 and notification dated 9.4.2018 bearing

S.REG.4(07)/2018 which one is to prevail; and, whether the service structure for Deputy District Attorney and District Attorney in Solicitor Department, Government of Sindh needs to be streamlined ?

8. Before proceeding with the above proposition, we need to look at the recommendations of the NJPMC. Primarily, NJPMC was constituted through National Judicial (Policy Making) Committee Ordinance, 2002; and, is the highest statutory judicial policy-making body, which consists of the Honorable Chief Justices of all High Courts and Chief Justice of Pakistan, as its Chairman. NJPMC attend all matters concerning with the judiciary' and in recent times has taken a bold initiative to bring reform in justice delivery mechanism and for framing coherent policy to combat delays, promote automation, and to bring out administrative reforms indeed an arduous responsibility that ensures free, fair, independent and conscious judiciary and in shortest time achieved enviable results. Its primary objective is to ensure timely justice for the general public and to decide voluminous litigation as soon as possible.

9. In the present case, we have been informed that the NJPMC had submitted its recommendations for the petitioner's deficient service structure, non-availability of promotion venue and discrimination in perks and privileges vide its Minutes of meeting held on 20.9.2014, vide letter dated 27.9.2014. In the said meeting, it was decided by the NJPMC, vide Item No.5, that some posts of Assistant Advocate Generals and Additional Advocate Generals may be reserved for District Attorneys to be filled on a permanent basis. In this context, the then Advocate General, Sindh, had also asked to reserve certain positions of Deputy Advocate General and Additional Advocate General for district prosecutors. The cited matter was placed before the Chief Minister, Sindh with the aforesaid proposal to reserve 10% posts of the sanctioned strength of the Assistant Advocate Generals and Additional Advocate Generals for the District Attorneys (BP-19), office of the Solicitor to the Government of Sindh to be filled on a permanent basis by way of promotion. Consequent to the decision of the NJPMC advice tendered by the then Advocate General, Sindh and with the approval of the competent authority, amendments were made in the Sindh Law Officers (Conditions of Service Rules), 1940, in the method, qualification and other conditions for appointment in respect of the post in the office of Advocate General, Sindh in consultation with the Services General Administration & Coordination Department (SGA&CD) vide notification dated 10.5.2016, however, the same could not be acted upon since its amendment for the reason that the aforesaid posts could only be filled under the Sindh Law Officers (Conditions of Service) Rules, 1940 and not under the provision of Sindh Civil Servants (Appointment, Promotion and Transfer) Rules, 1974 which is why the above notification was put on hold until it was replaced with another amendment. For

ease of reference, an excerpt from the notifications dated 10.05.2016 and 09.04.2018 is reproduced as follows:

“Government of Sindh
Law Department
Karachi dated 10th May 2016

NOTIFICATION

No.S.REG:1 (22)2015/117:- In pursuance of sub-rule(2) and rule 3 of the Sindh Civil Servants (Appointment, Promotion and Transfer) Rules, 1974 and in consultation with the Services, General Administration and Coordination Department, the method, qualification and other conditions for appointment in respect of the post in the Office of Advocate General Sindh Law Department Government of Sindh, mentioned in column02 of the table below, shall be as laid down in columns 3,4 and 5 thereof:-

<u>Table</u>				
S.No	Name of post with BPS	Method of appointment	Minimum Academic qualification and experience for initial appointment	Age Limited Min- Max
1	2	3	4	5
01	Additional Advocate General Sindh (Special (SLBSP)	i. Ninety percent by initial appointment. ii. Ten percent by promotion from amongst the Assistant Advocate General Sindh (BPS-20) having at least five years' experience as such on seniority-cum-fitness basis.	Lawyer with ten years standing as an Advocate of High Court	40 - 50
02	Assistant Advocate General Sindh (BPS-20)	i. Ninety percent by initial appointment. ii. Ten percent by promotion from amongst the District Attorneys (BPS-19) having at least five years' experience as such on seniority-cum-fitness basis.	Lawyer with ten years standing as an Advocate of High Court	40 - 50

“Government of Sindh
Law Department
Karachi dated 09th April, 2018

NOTIFICATION

No.S.REG:4 (07)2018:- In pursuance of the provisions contained in Article 241 of the constitution of the Islamic Republic of Pakistan, the Government of Sindh are pleased to make the following amendments in the Sindh Law Officers (Conditions of Service) Rules, 1940:-

AMENDMENT

For rule 3-C, the following shall be substituted:-

1. “3-C. **Appointment of Additional Advocate General.** The appointment of Additional Advocate General shall be made by the Chief Minister from amongst the Lawyers with not less than seven years standing as an Advocate of High Court.”
2. After rule 3-C, the following new Rule 3-D shall be added:-
“3-C. **Appointment of Assistant Advocate General.** The appointment of Assistant Advocate General shall be made by the Chief Minister from amongst the Lawyers with not less than five years standing as an Advocate of High Court.”

10. Another crucial point is that, whether the recommendations of NJPMC could supersede the Sindh Law Officers (Conditions of Service Rules), 1940. Though, the respondent-law department apprised the Chief Minister, Sindh that the posts of Additional/Assistant Advocate General are tenure posts; and, are purely at the discretion of the Government, whereas the District Attorneys (BS-19) are civil servants, as defined under the Sindh Civil Servants Act, 1973, however they proposed two posts of Additional Advocate General (BS-21) and three posts of Assistant Advocate General (BS-20) which could be created on a permanent basis for the reservation of 10% quota for the District Attorneys (BS-19), which proposal was declined by the competent authority vide summary dated 20.05.2019 and in the meanwhile learned Advocate General Sindh endorsed the proposal of administrative department at para-16 of the summary for de-notifying the law department's notification dated 10.05.2016.

11. To elaborate further on the topic, mainly, two provisions of the Constitution are relevant to the subject i.e. Article 139(3) of the Constitution, which stipulates that "the Provincial Government shall make rules for the allocation and transaction of its business; and Article 240 of the Constitution which provides that "subject to the Constitution, the appointments and the conditions of service of persons in the service of a Province and posts in connection with the affairs of a Province" shall be determined by or under the Act of the Provincial Assembly. Article 241 stipulates that until the appropriate legislature makes a law under Article 240, "all rules and orders in force immediately before the commencing day shall, so far as consistent with the provisions of the Constitution, continue in force". The Sindh Civil Servants Act, 1973, has been enacted under the provisions of Article 240 of the Constitution of Pakistan, 1973 and deals with the appointments and conditions of service of persons and the terms and conditions of service of persons in connection with the affairs of the Province of Sindh and to provide for matters connected therewith and ancillary thereto. Section 8 of the Sindh Civil Servants Act, 1973 provides that for the proper administration of service, cadre or post the appointing authority shall cause a seniority list of the members for the time being of such service, cadre or post to be prepared. The eligibility for promotion is to be considered in terms of section 9 of the Sindh Civil Servants Act, 1973, which provides for reserving of quota for departmental promotion. Section 9 of this Act further provides that a civil servant possessing such minimum qualifications, as may be prescribed, shall be eligible for promotion to a higher post for the time being reserved under the rules for departmental promotion in the service or cadre to which he belongs. Rule 9 of the Sindh Civil Servants (Probation, Confirmation, and Seniority) Rules, 1975 provides that in each cadre in a department, there shall be a separate seniority list of a group of civil servants

doing similar duties and performing similar functions and for whose appointment the same qualifications and experience have been laid down. The term "Cadre" has been defined in rule 9(4) of Fundamental Rules, 1922. The said Rule defines "cadre" to mean "the strength of the service or a part of the service sanctioned as a separate unit. Section 26(2) of the Sindh Civil Servants Act, 1973 provides that any rules, orders, or instructions regarding any terms and conditions of service of civil servants duly made or issued by an authority competent to make them and enforce immediately before the commencement of this Act shall, in so far as such rules, orders or instructions are not inconsistent with the provisions of this Act, be deemed to be rules made under this Act. The terms "department" and "cadre" are not defined in the Sindh Civil Servants Act, 1973 and the term "cadre" given in the Fundamental Rules is not inconsistent with any of the provisions of the Sindh Civil Servants Act, 1973. The same, therefore, will apply to the service laws of the Province. What is of significance is that the cadre to which a civil servant belongs and the terms and conditions of his service or even the matter of promotion within his cadre can only be made by or under laws which are traced to and sourced in Article 240 of the Constitution. Article 139(3) does not extend to matters specified in Article 240 relating to "appointments to and the conditions of service of persons in the service of a Province" because such matters can only be dealt with and regulated "by or under Act of a Provincial Assembly" as per requirements of Article 240 of the Constitution. It is well-settled law that no department can absorb any employee to another cadre, as such the aforesaid two cadres could not be merged under the law which are distinct from each cadre and should continue their parallel existence. What is even more relevant is that even after framing of 2016 Rules, which were later on superseded by another notification dated 6.5.2021 even the same rules does not speak about the merger of the two cadres. Thus this petition on the aforementioned analogy fails from every point of view.

12. Adverting to the main contention of the petitioners that respondents framed the Recruitment Rules for the subject posts on 10.5.2016 which ensued a right in their favour, as such they are precluded from acting detrimental to the rights of the petitioners by cancelling/withdrawing the same notification through another notification dated 06.5.2021. Suffice it to say that the above notification was never acted upon hence no rights have accrued in favour of the petitioners. Even otherwise, it was/is not viable under the law to allow District Attorneys (BS-19)/ civil servants to change their cadre and to become non-civil servants by their induction in the office of Advocate General Sindh, through the Law Department's notification dated 10.5.2016, which by virtue of the legal implication could not be implemented since its inception on the premise that the aforesaid posts were/are not existing on a regular budget in the office of the Advocate General, Sindh.

13. Even otherwise it is well-settled law that in case of conflict, preference is to be given to the new law, and the implied repeal of the earlier law could be inferred only when there was enactment of later law, which had the power to override the earlier law, however when there was two laws the earlier and later law could not stand together, therefore, later laws abrogate the earlier laws. An excerpt of the notification dated 06.05.2021 is reproduced as under:

“Government of Sindh
Law, Parliamentary Affairs &
Criminal Prosecution Department
Karachi, dated the 06th May, 2021

NOTIFICATION

No.S.GENL:2-54/2009: With the approval of the competent authority i.e. Hon’ble Chief Minister, Sindh, this department’s Notification bearing No.S.Reg:1(22)2015/117, dated 10th May, 2016, is hereby cancelled / withdrawn, with immediate effect.

Dr. Mansoor Abbas Rizvi
Secretary”

14. Since the petitioners have confined their prayers to the extent of streamlining the service structure of District Attorneys and Deputy District Attorneys, on this proposition, we are inclined to consider their viewpoint and it would be more appropriate to direct the respondents to take measures and initiate such legislative measures, as may be necessary, to frame the service structure for the post of Deputy/District Attorney (BS-18-19) in higher grade to avoid disparity amongst them, within reasonable time, preferably two months.

15. With these observations, the instant petition stands disposed of along with the pending application(s) with no order as to costs.

JUDGE

JUDGE

Nadir