

## Judgment Sheet

### IN THE LAHORE HIGH COURT LAHORE

#### JUDICIAL DEPARTMENT

Case No: W. P. No. 29005/2012.

Barrister Sardar Mohammed Ali. **Versus** The Federation of Pakistan, etc.

#### JUDGMENT

Date of hearing	15.01.2013.
Petitioner by:	M/s. Babar Sattar, Syed Raza Ali & Barrister Sardar Mohammed Ali, Advocates.
Respondents by:	Mr. Nasim Kashmiri, Deputy Attorney General for Pakistan for Respondents no. 1, 2 & 4. M/s. Ali Sibtain Fazli and Nasar Ahmed, Advocates for Respondents no.3 & 5. Barrister Mahrukh Hameed, Assistant Director, PTA for Respondent no.3.
Research Assistance by:	M/s. Sohail Shafiq (ASJ/Senior Research Officer), Sher Hassan Parvez, Amir Munir, Nadeem Ahmed Sohail Cheema and Rai Muhammad Khan, (Civil Judges/Research Officers) Lahore High Court Research Centre (LHCRC).

**Syed Mansoor Ali Shah, J:-** These petitions were allowed through the following Short Order dated 15-1-2013:

This short order is being passed in the instant petition, as well as, connected W.P. No.31118/2012, wherein the appointment of Respondent no.5 (Mr. Farooq Ahmed Awan) as Member/Chairman PTA has been challenged by the petitioners.

2. For the reasons to be recorded later these petitions are allowed and the appointment of Respondent no.5 as Member/Chairman PTA is hereby declared to be without lawful authority. The said respondent is directed to relinquish his post before the close of working hours today.

3. Office is directed to dispatch a copy of this order to the concerned quarters immediately.

The reasoning behind the Short Order, and the need to issue one, has been elaborately discussed in this judgment.

2. This judgment will decide the instant case, as well as, W.P. No.31118/2012 alongwith C.M No. 3/2012<sup>1</sup> as both the petitions raise identical questions of law and facts, while the above application raises the question of maintainability of this instant petition.

3. These petitions assail the appointment of Respondent no.5 (i.e., Farooq Ahmed Awan) to the public offices of Member and Chairman of Pakistan Telecommunication Authority (“Authority” or “PTA”). It is contended that Respondent no.5 is holding the said offices without lawful authority, hence seeking a writ of *quo warrant* under article 199(1)(b)(ii) of the Constitution against the aforesaid respondent.

4. Respondent no.5 was appointed as Member, PTA vide Notification dated 28-7-2012 and then as Chairman PTA vide Notification dated 31-7-2012 issued by the Establishment Division, Cabinet Secretariat, Government of Pakistan. The entire process of recruitment, leading to the above Notifications of appointment, has been impugned in these petitions.

5. Learned counsel for the petitioners referred to section 3 of the Pakistan Telecommunication (Re-organization) Act, 1996 (“Act”) to contend that the Authority consists of three Members and the post of a Member is for a term of four years and from amongst the Members, the Federal Government appoints a Chairman. In the absence of any rules under the Act, the concerned Divisions of the Federal Government, authorized under the Rules of Business, 1973, have formulated procedures for appointment of Members and Chairmen of the regulatory authorities. In this regard, he referred to OFFICE MEMORANDUM of the Establishment Division, dated 6-2-2003, duly approved by the Prime Minister, whereby a Selection Committee has been constituted for the Appointment of Chairman/Members of Pakistan Telecommunication Authority, NEPRA and OGRA (The Office Memorandum is reproduced in Schedule-I). Similarly, he also referred to the PROCEDURE FOR APPOINTMENT OF CHAIRMAN AND MEMBERS IN REGULATORY AUTHORITIES issued by the Cabinet Division. This Procedure mandates that vacancies can

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<sup>1</sup> In W. P. No. 29005/2012 raising jurisdictional objection regarding lack of territorial jurisdiction of this Court to entertain the instant petition.

be filled through i). Advertisement in the Press followed by ii). Interview by the Selection Committee and finally on the basis of the recommendations of the Selection Committee and the Establishment Division the appointment is iii). Approved by the Competent Authority i.e., the Prime Minister and notified by the Establishment Division (This Procedure has been reproduced in Schedule-II).

6. It has been vehemently urged before this Court that neither the post of Member, PTA was advertised nor was Respondent no.5 ever interviewed by the Selection Committee for appointment to the said post. Without prejudice to the above and for the sake of argument it is submitted that even if the Member stood appointed and assuming that the membership of PTA was complete, appointment to the post of Chairman had to be initiated afresh, the names of all the three Members had to pass through the Selection Committee (mentioned above) and the most suitable person for the job be elected as Chairman, PTA. It is urged that even this process was not adopted in this case.

7. Learned Counsel for the petitioners vehemently submitted that section 3(4) of the Act ensures that the antecedents of the Member are free from any “conflict of interest.” A Member cannot have any direct or indirect financial interest or business connection with any person, establishment or firm, which renders telecommunication services in Pakistan or abroad or supplies telecommunication equipment to any telecommunication sector in Pakistan or abroad. Respondent no.5 resigned as the Chairman of Pakistan Telecommunication Company Limited (PTCL), a company rendering telecommunication services in Pakistan, just before his appointment as Member and Chairman, PTA, after having sat on the board of PTCL for several months and after having received a hefty sum of Rs.2.3 million during the year 2012 including US\$ 8000 as Chairman’s fee per Board meeting.

8. He further contended that Government of Pakistan has majority shareholding in PTCL, which renders telecommunication services in Pakistan, therefore, Respondent no.5 being a civil servant representing the Government of Pakistan cannot be appointed as Member or Chairman of

PTA as this would glaringly offend section 3(4) of the Act, in as much as, Respondent no.5 would pass to have direct/indirect financial interest in the matter. Elaborating the importance of conflict of interest, it is submitted that PTA being a regulator has to be independent and insulated to effectively regulate the telecom sector. "Conflict of interest" introduces a streak of discrimination in the institutional character of a regulator, thereby cracking its insular image and spoiling the air of fair competition in the market. He submitted that section 3(4) of the Act rests on the collective reading of articles 9, 18 and 25 of the Constitution, which buttress the need for a "level playing field" in the market. He supported his submissions by placing reliance on Reliance Energy Ltd. and another v. Maharashtra State Road Development Corpn. Ltd. and others, (2007) 8 SCC 1, (Para 22), Munir Hussain Bhatti, Advocate and others v. Federation of Pakistan and another, (PLD 2011 S.C. 407), Sardar Farooq Ahmad Khan Leghari and others v. Federation of Pakistan and others, (PLD 1999 S.C. 57), Faisal Sultan v. E.D.O. (Education) and others, (2011 PLC (C.S.) 419), Messrs Muhammad Bakhsh & Sons Ltd. and another v. Azhar Wali Muhammad and 11 others, (1986 MLD 1870), Chairman, Regional Transport Authority, Rawalpindi v. Pakistan Mutual Insurance Company Limited, Rawalpindi, (PLD 1991 S.C. 14) and Messrs Gadoon Textile Mills and 814 others v. Wapda and others, (1997 SCMR 641).

9. In explaining the scope and nature of writ of *quo warranto* he submitted that the Court has to see whether the appointment, to public office, was backed by the authority of law and includes the entire process of appointment. He placed reliance on Abdul Jabbar Memon and others, (Human Rights Case) (1996 SCMR 1349), Capt. (Retd.) Muhammad Naseem Hijazi v. Province of Punjab through Secretary, Housing and Physical Planning and 2 others, (2000 SCMR 1720), Muhammad Yasin v. Federation of Pakistan through Secretary, Establishment Division, Islamabad and others, (PLD 2012 S.C. 132) and Munawar Ali Pathan v. Province of Sindh through Chief Secretary and 2 others, (2011 PLC (C.S.) 785).

10. Learned Deputy Attorney General (“DAG”) for Pakistan appearing on behalf of Respondents no.1, 2 & 4, raised preliminary objection that this Court lacks territorial jurisdiction to entertain the matter as cause of action arose in Islamabad and the proper forum for institution of these petitions is the Islamabad High Court. He next contended that this petition is not maintainable under article 212 of the Constitution as the matter in hand pertains to transfer order of Respondent no.5 under section 10 of the Civil Servants Act, 1973 and placed reliance on Peer Muhammad v. Government of Balochistan through Chief Secretary and others, (2007 SCMR 54) in support of this submission. He also urged that the petitioners have no *locus standi* to institute the instant petition.

11. Learned DAG, on merits, submitted that Respondent no.5 has simply been appointed as Member and then Chairman, PTA through transfer under section 10 of the Civil Servants Act, 1973, hence, his appointment is not in conflict with the Act. He submitted that the requirement of “conflict of interest” under section 3(4) of the Act arises if the appointment is being made from the private sector and has no application when civil servants are being appointed to the said post. He admitted that Respondent no.5 was the Chairman of PTCL but qualified the same by submitting that he was merely an *ex-officio* Chairman of the Board of PTCL and was not holding the said post when he was appointed as Member/Chairman. He submitted that the requirement of public advertisement to fill the said post is only if Members are inducted from the private sector and has no application to appointment made from the public sector. He also submitted that appointment of Respondent no.5 is somewhat temporary and is simply to fill the vacuum created because of the retirement of Dr. Muhammad Yasin, the outgoing Chairman. He assured the Court that once the rules are framed under the Act, the appointment shall be made strictly in accordance with the said rules. In the end learned Deputy Attorney General submitted that Respondent no.5 is well qualified for the said post, therefore, this case does not call for judicial interference.

12. M/s. Ali Sibtain Fazli and Nasar Ahmed, Advocates for Respondents no. 3 & 5 also raised preliminary objection regarding territorial jurisdiction

of this court and placed reliance on Mian Jamal Shah v. The Member Election Commission, Government of Pakistan, Lahore and others, (PLD 1966 S.C. 1), LPG Association of Pakistan through Chairman v. Federation of Pakistan through Secretary, Ministry of Petroleum and Natural Resources, Islamabad and 8 others, (2009 CLD 1498) and Sandalbar Enterprises (Pvt.) Ltd. v. Central Board of Revenue and others, (PLD 1997 S.C. 334). They also submitted that rules under the Act are being framed and the process of appointment will be made strictly according to the rules, implying, like the learned Deputy Attorney General, that current appointment of Respondent no.5 is temporary or a stopgap arrangement.

13. On merits they submitted that the Federal Government has the executive authority to appoint any person as Member or Chairman of PTA and courts should not interfere in the exercise of this executive authority, which being a policy matter, is not justiciable. In the end, they half heartedly, submitted that notice under Order 27-A CPC ought to have been issued to the Attorney General for Pakistan as this case involves substantial interpretation of constitutional law. He, however, failed to pin-point the issue before the Court that required substantial interpretation of constitutional law.

14. In rebuttal learned counsel for the petitioners submitted that this Court has the territorial jurisdiction to entertain the matter because the public office held by Respondent no.5 enjoys jurisdiction all over Pakistan and placed reliance on LPG Association of Pakistan through Chairman v. Federation of Pakistan through Secretary, Ministry of Petroleum and Natural Resources, Islamabad and 8 others (2009 CLD 1498), Messrs Sethi & Sethi Sons through Humayun Khan v. Federation of Pakistan through Secretary, Ministry of Finance, Islamabad and others (2012 PTD 1869), Asghar Hussain v. The Election Commission of Pakistan, etc. (PLD 1968 SC 387), Messrs Al-Iblagh Limited, Lahore v. The Copyright Board, Karachi and others (1985 SCMR 1758), Muhammad Idrees v. Govt. of Pakistan through Secretary, Establishment Division, Islamabad and 5 others (1998 PLC (CS) 239), Messrs Lucky Cement Limited v. The Central Board of Revenue and others (PLD 2001 Pesh 7), Khaista Gul v. Akbar Khan and

7 others (PLD 1975 Pesh 146), Trading Corporation of Pakistan (Private) Limited v. Pakistan Agro Forestry Corporation (Private) Limited and another (2000 SCMR 1703), Sh. Abdul Sattar Lasi v. Federation of Pakistan and 6 others (2006 CLD 18), Nawabzada Muhammad Shahabuddin v. The Chairman, Federal Land Commission (1996 CLC 539), Gulzar Ahmad Khan v. The Chief Election Commissioner of Pakistan, Islamabad and 7 others (PLD 1997 Lahore 643), Sandalbar Enterprises (Pvt.) Ltd. v. Central Board of Revenue and others (PLD 1997 SC 334), Messrs Ibrahim Fibres Ltd. through Secretary/Director Finance v. Federation of Pakistan through Secretary/Revenue Division and 3 others (PLD 2009 Karachi 154), Sabir Din v. Government of Pakistan through Secretary, Ministry of Defence and others (1979 SCMR 555), Zulfikar Ali Bhutto v. The Federation of Pakistan through the Secretary, Ministry of Interior, Government of Pakistan Islamabad and 4 others (PLD 1980 Karachi 113), Muhammad Shoaib v. Project Director, National ICT Scholarship Program, Ministry of Information Technology, Islamabad and another (2011 CLD 23), Sohail Jute Mills (Pvt.) Ltd. Rawalpindi through Chairman v. Central Board of Revenue, C.B.R., Islamabad through Chairman (1997 CLC 574), Amin Textile Mills (Pvt) Ltd. v. Islamic Republic of Pakistan and 3 others (1988 SCMR 2389) and A.R. Khan & Sons (Pvt.) Ltd. v. Federation of Pakistan through Secretary, Ministry of Commerce, Islamabad and 3 others (2010 CLD 1648).

15. Arguments heard. Record perused.

PRELIMINARY OBJECTION.

16. Learned Deputy Attorney General representing Respondents no. 1, 2 and 4 has raised the following preliminary objections<sup>2</sup>:

- a. That the transfer / posting order of Respondent no.5 (a civil servant) cannot be assailed before this Court in terms of the bar contained under article 212 of the Constitution and placed reliance on Peer Muhammad v. Government of Balochistan through Chief Secretary and others, (2007 SCMR 54).

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<sup>2</sup> Reference: Parawise comments on behalf of respondents No.2 & 4.

- b. That the appointment of Respondent no.5 under section 10 of the Civil Servants Act, 1973 has been made by the Competent Authority i.e., the Prime Minister, hence the order is lawful and no interference is called for by this Court in terms of the law laid down in Lt. Col. (R) Abdul Wajid Malik v. Government of the Punjab and another, (2006 SCMR 1360).
- c. The petitioner has no *locus standi* to invoke the constitutional jurisdiction of this Court as no vested right of the petitioner has been infringed.

17. Learned counsel for Respondents no.3 & 5 on the other hand, have raised a preliminary objection<sup>3</sup> that this Court lacks territorial jurisdiction to hear the matter on the ground that “all the Respondents to the petition are either residing in Islamabad or work for gain in Islamabad, therefore, the Islamabad High Court has exclusive jurisdiction to entertain such petition and the Lahore High Court has no jurisdiction in the matter.”

Territorial Jurisdiction of this Court and scope of writ of Quo Warranto.

18. In order to answer the preliminary objections it is important to understand the nature of relief under article 199(1)(b)(ii) of the Constitution, traditionally and more popularly referred to as writ of *quo warranto*. “The *quo warranto* proceeding affords a judicial remedy by which any person, who holds an independent substantive public office ... is called upon to show by what right he holds the said office, ... so that his title to it may be duly determined, and in case the finding is that the holder of the office has no title, he would be ousted from that office by judicial order. In other words, the procedure of *quo warranto* gives the judiciary a weapon to control the executive from making appointments to public office against law and to protect a citizen from being deprived of public office to which he has a right. These proceedings also tend to protect the public from usurpers of public office, who might be allowed to continue either with the connivance of the executive or by reason of its apathy.”<sup>4</sup>

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<sup>3</sup> through C.M. No. 3/2012

<sup>4</sup> Halsbury's Law of India – Vol 35 (Constitutional Law-II)- Lexis Nexis Butterworths-2007-p.145

19. The object of this constitutional remedy is to protect the sanctity of the “public office” by safeguarding against unlawful appointments. The constitutional objective appears to be more institutional. Acting as gatekeepers, the constitutional courts protect the sanctity of a “public office” and, as a result, shield public institutions from usurpers. The constitutional obligation is to ensure that persons selected to man public institutions are appointed in accordance with law without the slightest taint of impropriety. It is also a constitutional platform for the “whistle-blowers” to come forward in public interest and raise their concern about wrongdoing within organizations.<sup>5</sup> The result is that institutions/organizations are more open and accountable to their employees, shareholders and the greater public in their activities.

20. Article 199 (1)(ii)(b) of the Constitution requires “a person within the territorial jurisdiction of the Court holding a public office to show under what authority of law he claims to hold office.” The emphasis is on the “public office” being held by a person within the territorial jurisdiction of the Court. The sole constitutional concern is to protect the “public office.” It is for this reason that these proceedings are not strictly adversarial in nature and can be put into motion by any person (who need not be aggrieved). These proceedings, therefore, carry an inquisitorial rigour to protect the “public office” and, more importantly, the public institution behind it.

21. With this background, it is easier to assess the span of territorial jurisdiction of this Court for the purposes of a writ of *quo warranto*. The focus is on the jurisdictional locale of the public office rather than the physical presence (i.e., residence or office) of person holding the office. The process of recruitment and appointment to the “public office” is under judicial review, therefore, geographical location of the individual holding the said office is of little significance. The real test is to see the geographical extent of the jurisdiction enjoyed by the “public office.” In this case the Act being a federal law, the three Members including the Chairman, exercise jurisdiction nationwide. The physical location of the place of work or

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<sup>5</sup> See UK Committee on Standards in Public Life quoted in “The Status of Whistleblowing in South Africa”-Taking Stock- *Patricia Martin*.

residence of the “person” holding public office is insignificant and the territorial jurisdiction of the “public office” under the law is relevant. In the instant case, the appointment to public offices of Members and Chairman of PTA can, therefore, be challenged in any High Court in Pakistan. The following example further explains this point: Person A is appointed as Chairman, PTA, who is a resident of Quetta, Baluchistan. Person B is appointed as Chairman, PTA and is an overseas Pakistani, with no permanent residential address in Pakistan. Does it mean that writ of *quo warranto* against person A lies only before Baluchistan High Court? while no High Court in the country can issue a writ against person B ? The answer is a resounding “No.” Only the jurisdictional extent of the “public office” under the law is to be seen to determine its territorial jurisdiction.

22. Even if the Act provided that the head office of Chairman PTA is in Islamabad it would still make no difference because the test is the territorial jurisdiction of the public office. The geographical jurisdiction of the “public office” is determined under the law that establishes the said public office. It is the same law that helps determine whether the public office falls within the territorial jurisdiction of a particular High Court. No person can be deprived of the constitutional remedy of *quo warranto*, under article 199 of the Constitution, against a statutory or public sector institution that operates nationwide, on mere cosmetics and technicalities like the location of the place of work, head office or the residence of the incumbent to the public office.

23. In the present case Members and Chairman PTA enjoy nation-wide jurisdiction hence a nation-wide presence. These public offices, therefore, fall within the territorial jurisdiction of every High Court in the country. It would be different if the public office belonged to a provincial public or statutory authority with its jurisdiction limited to a Province. In such a case, the public offices of the said authority, will fall within the territorial jurisdiction of the High Court of the relevant Province. The foundational concept of territorial jurisdiction for the purposes of article 199 has already been deliberated in detail in Messrs Sethi & Sethi Sons through Humayun Khan v. Federation of Pakistan through Secretary, Ministry of Finance,

Islamabad and other, (2012 PTD 1869) and LPG Association of Pakistan through Chairman v. Federation of Pakistan through Secretary, Ministry of Petroleum and Natural Resources, Islamabad and 8 others, (2009 CLD 1498). The reasoning and logic of the above judgments has been simply extended to the writ of *quo warranto*.

Bar under article 212 of the Constitution.

24. The second preliminary objection is regarding the bar contained in article 212 of the Constitution to the effect that the appointment through transfer of Respondent no. 5 have been impugned in these petitions which relate to the terms and conditions of service of a Civil Servant (Respondent no.5). This objection is hopelessly misconceived. Article 212 is attracted only if the concerned Service Tribunal has the jurisdiction to entertain the appeal under section 4 of the Service Tribunals Act, 1973 (“STA”) (see article 212(2)). Under section 4 of the STA, only a Civil Servant aggrieved can agitate a matter before the Service Tribunal. In the present case the transferee and appointee i.e., Respondent no. 5 is not aggrieved of his transfer/posting order but a member of the general public is. Hence, article 212 is not attracted in this case.

Locus Standi.

25. Third preliminary objection raised by the learned DAG is that the petitioners have no *locus standi* to institute this petition. This objection is equally misconceived, as there is no requirement of an ‘aggrieved person’ for maintaining a writ of *quo warranto* under article 199(1)(b)(ii) of the Constitution. As discussed later in the judgment, a “whistle blower” need not be personally aggrieved in the strict sense.

Order 27-A CPC.

26. At the fag end of the arguments, learned counsel for Respondents no. 3 and 5, somewhat gingerly, raised an objection that notice under Order 27-A CPC is required to be issued to the Attorney General for Pakistan when substantial question as to interpretation of constitutional law arise in the case. He, however, failed to pinpoint the substantial question of interpretation of constitutional law raised in this case. Be that as it may, neither the constitutionality of any statute nor any substantial interpretation

of the Constitution is under discussion in this case. The scope of this petition is restricted to judicial review of the process of appointment of Respondent no. 5 to the public offices of Member and Chairman, PTA. The question of territorial jurisdiction has already been decided by this Court in the above cited judgments and the same ratio has been extended to the present case without any substantial interpretation of the Constitution. This objection is, therefore, misplaced and hence overruled.

#### ON MERITS.

27. Brief facts as culled out from different documents on the record including summaries of the Cabinet Division, Notes put up by the Establishment Division, the approval of the Competent Authority i.e., the Prime Minister and the subsequent Notifications of appointment. The learned DAG or the learned counsel for Respondents no. 3 & 5 has not disputed these documents. The narrative hereunder is, therefore, the admitted factual position between the parties.

#### Appointment process of Respondent no.5.

28. The chronological account of the mode and manner of appointment of Respondent no.5 as Member and then Chairman PTA is as follows:

- a. On 20-7-2012 a Summary<sup>6</sup> for the Prime Minister was prepared by Secretary,<sup>7</sup> Cabinet Division, Government of Pakistan, titled: “ASSIGNING THE RESPONSIBILITIES OF CHAIRMAN PTA TO MR. KHAWAR SIDDIQUE KHOKHAR, MEMBER (TECHNICAL).” This Summary recommended that as the tenure of Dr. Muhammad Yaseen, ex-Chairman PTA is expiring on 23-7-2012, therefore, Mr. Khawar Siddiqui Khokhar be made the acting Chairman. The relevant extract is as follows:

**“4. For smooth working of PTA, Cabinet Division recommends that Mr. Khawar Siddique Khokhar, Member (Technical) may be allowed to Act as Chairman PTA till further orders or appointment of Chairman PTA, whichever is earlier.”**

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<sup>6</sup> Cabinet Division’s U.O. No. 1/17/2002 TL-I/RA-I/PTA dated 20<sup>th</sup> July, 2012.

<sup>7</sup> Ms. Nargis Sethi.

- b. The fate of the above Summary is unknown, but in total disregard of the same, on 24-7-2012 Secretary,<sup>8</sup> Establishment Division, Government of Pakistan, moved a “**confidential**”<sup>9</sup> letter to the Cabinet Division stating that “**it has been desired** that Mr. Farooq Awan (DMG/BS-21) presently posted as Acting Secretary Information Technology & Telecom Division may be considered for appointment as Member, Pakistan Telecommunication Authority (PTA)...”(emphasis supplied). The bio-data of Respondent no.5 was also attached with this letter for information.
- c. On 26-7-2012, Cabinet Division through its Secretary<sup>10</sup> on the initiation of the matter by the Establishment Division prepared a second Summary for the Prime Minister recommending as follows:

“6. ...

(i) ...

(ii) **Mr. Farooq Ahmad Awan, an officer of DMG (BS-21) presently posted as Acting Secretary IT & Telecom Division could be considered against the post of Member (Commercial Affairs) as per rules and procedure in the matter. The selection process of the posts of Member (Commercial Affairs) and Member (Legal & Regulations) can be completed within a period of one month during which the posts will be advertised and thereafter the Selection Committee will finalize appointment of two new Member of PTA.”** (emphasis supplied)

- d. On 27-7-2012 Establishment Division, without paying much heed to the contents of the Summary put up by the Cabinet Division (parent Division in this case), put up the following Note before the Prime Minister i.e., (the Competent Authority):

**“13. It is, therefore, proposed that Mr. Farooq Ahmed Awan be transferred and posted as Member in PTA against a vacancy recently occurred due to expiry of tenure of Dr. Muhammad Yaseen on 23-07-2012, under section 10 of the Civil Servants Act, 1973 in his own pay and scale.**

**14. On the appointment of the third Member of PTA, the composition of Pakistan Telecommunication Authority as given in the law shall be complete and the Prime Minister may kindly**

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<sup>8</sup> Mr. Taimur Azmat Osman

<sup>9</sup> the only document in the volley of correspondence that has been marked “CONFIDENTIAL”

<sup>10</sup> Nargis Sethi

**consider appointing any one of the Members of PTA as its Chairman.”**

- e. On 28-7-2012 the Prime Minister’s Secretariat, Islamabad issued a Letter<sup>11</sup> wherein the Prime Minister approved the appointment of Respondent no.5 as a Member and also as a Chairman on the same day through a single order of approval. The Letter reads as follows:

**“Subject: POSTING AS MEMBER, PAKISTAN TELECOMMUNICATION AUTHORITY (PTA).”**

**15. The Prime Minister has been pleased to approve the proposal at para 13 of the summary.**

**16. The Prime Minister has further been pleased to approve the appointment of Mr. Farooq Ahmed Awan as Chairman PTA following his assumption of the charge as Member in PTA in his own pay and scale.”**

- f. Thereafter on 28-7-2012 Establishment Division issued Notification<sup>12</sup> of appointment, through transfer, of Respondent no.5 as a Member, PTA under section 10 of the Civil Servants Act, 1973 in the following manner:

**“Mr. Farooq Ahmed Awan, a BS-21 officer of Pakistan Administrative Service, presently posted as Acting Secretary, Information Technology & Telecommunication Division is transferred and posted as Member, Pakistan Telecommunication Authority (PTA), under Section 10 of the Civil Servants Act, 1973, in his own pay and scale with immediate effect and until further orders.”**

- g. And vide Notification<sup>13</sup> dated 31-7-2012 the Establishment Division duly notified that Respondent no.5 was appointed as a Chairman, PTA, in the following manner:

**“Mr. Farooq Ahmed Awan, a BS-21 officer of Pakistan Administrative Service, presently posted as Member, Pakistan Telecommunication Authority (PTA), in appointed as Chairman PTA, in his own pay and scale, with immediate effect and until further orders.**

29. It is well settled that the entire process of recruitment leading to appointment to a “public office” can be judicially reviewed under article 199(1)(b)(ii) of the Constitution. The process has to pass the test of law, which includes the settled principles of due process, openness, fairness, participation and transparency. Appointment to a “public office” is a public

<sup>11</sup> No. 2448/PSPM/2012

<sup>12</sup> No.1/79/2012-E-6.

<sup>13</sup> No.1/79/2012-E-6.

trust reposed by the people of Pakistan in the Competent Authority. It is a key institutional decision and marks the future progress, growth and development of the public institution, which is to be manned by the prospective incumbent to the said public office. This trusteeship in the hands of the Competent Authority (the Executive) cannot be discharged in whimsical, temperamental, partial and preferential manner. The recruitment process must be above board, devoid of even the slightest taint of favouritism. The Court is under an obligation to judicially review the integrity of the selection process to a public office. *Jawad S. Khawaja J. speaking for the Supreme Court of Pakistan in Muhammad Yasin v. Federation of Pakistan through Secretary, Establishment Division, Islamabad and others, (PLD 2012 S.C. 132) held:*

“22. ...Vital autonomous institutions such as OGRA can function ‘*effectively and efficiently*’ only if their autonomy is respected. This is the letter as well as the spirit of the law. **Such autonomy is only possible when appointments to key positions in these regulators are made in a demonstrably transparent manner**; that is, by ensuring the implementation of the checks which the Ordinance lays down for such appointments. (*emphasis supplied*)

23. .... A.R. Kamal, one of Pakistan’s renowned development economists has similarly highlighted the importance of effective checks, cautioning against the danger of compromising the autonomy of regulatory institutions. **He warns:** “since there is a cycle where the regulatory agencies over time degenerate into protecting the organizations which they are supposed to regulate, checks and balances must be put in place so that persons in responsible positions in these bodies are not corrupted.” **He further emphasis that** “regulatory authorities ..... must be given autonomy so that their decision gain credibility; and checks and balances should be so formulated that they cannot indulge in corrupt practices.” The legislature has taken stock of these concerns and made a number of provisions noted above for such “checks and balances”. One such provision viz. the appointment process, is the key subject of discussion in this opinion.

30. ...There is an obligation thus imposed on the Executive to make appointments based on a **process which is manifestly and demonstrably fair even if the law may not expressly impose such duty**. (*emphasis supplied*)

35. ...The Court will, however, **be duty bound to examine the integrity of the selection process...** (*emphasis supplied*)

36. To test the validity of the appointment process in this case, it would be useful to adopt a test based on the following considerations:

- (a) whether an objective selection procedure was prescribed;
- (b) if such a selection procedure was made, did it have a reasonable nexus with the object of the whole exercise, i.e. selection of the sort of candidate envisaged in section 3 of the Ordinance;
- (c) **if such a reasonable selection procedure was indeed prescribed, was it adopted and followed with rigour, objectivity, transparency and due diligence to ensure obedience to the law...** (*emphasis supplied*)

Reliance is also placed on *Pakistan Tobacco Board and another v. Tahir Raza and others*, (2007 SCMR 97) and *Sindh High Court Bar Association, through Honorary Secretary v. Federation of Pakistan through Ministry of Law and Justice, Islamabad and 4 others*, (PLD 2009 Karachi 408).

30. Before carrying out a judicial audit of the appointment process of Respondent no.5, it is important to first take stock of the relevant law and procedure dealing with the appointment of a Member and the Chairman of PTA and the manner in which business is conducted between Divisions of the Federal Government under the Rules of Business, 1973.

31. Section 3 of the Act provides that the Authority consists of three members who are to be appointed by the Federal Government for a statutory tenure of four years. One of the Members is required to be a professional telecommunication engineer and the other a financial expert. No qualifications including the choice of discipline or the nature of expertise has been prescribed for the third Member under the Act. In 2006, through an amendment<sup>14</sup> in the Act it was provided that the Federal Government may increase the number of Members of the Authority and prescribe the qualifications and mode of appointment of the Members. No such qualification or mode of appointment

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<sup>14</sup> Act No.II of 2006 dated 1-3-2006.

under the Act has so far been prescribed. Learned Counsel for the Respondents has submitted that formulation of the rules is currently under consideration.<sup>15</sup>

32. Federal Government has been defined under section 2(fa) of the Act to mean the Ministry of Information Technology and Telecommunication Division unless specified otherwise through an amendment in the Rules of Business, 1973 (“Rules”). The following amendments<sup>16</sup> were brought about in the Rules through insertion of item No.53 under the “Distribution of Business under the Cabinet Division” in Schedule-II of the Rules, placing PTA under the administrative control of the Cabinet Division, Cabinet Secretariat, Government of Pakistan.

*In the year 2003*<sup>17</sup>:

**53. Pakistan Telecommunication Authority (PTA)**

*In the year 2010*<sup>18</sup>:

**53. Administrative control of the National Electric Power Regulatory Authority (NEPRA), Pakistan Telecommunication Authority (PTA), Frequency Allocation Board (FAB), Oil and Gas Regulatory Authority (OGRA), Public Procurement Regulatory Authority (PPRA), Intellectual Property Organization of Pakistan (IPO – Pakistan) and Capital Development Authority (CDA).**

33. The Federal Government for the purposes of the Act is, therefore, the Cabinet Division enjoying administrative control over PTA, amongst other regulators, since 2003. Section 4 provides the functions of the Authority, which is to regulate the telecom sector in Pakistan, in general, and the establishment, operation and maintenance of telecommunication systems and telecommunication services in Pakistan, in particular. Under section 5, the Authority enjoys the power to, *inter alia*, issue licenses for any telecommunication system and telecommunication services. Section 6 mandates that PTA shall, *inter alia*, have the responsibility to ensure that fair competition is maintained in the telecommunication services and the interests of users of telecommunication services are duly safeguarded and

<sup>15</sup> Separate reports filed on behalf of respondents No. 3 and 5 in W. P. No.29005/2012.

<sup>16</sup> Inserted vide SRO 434(I)/2003 dated 20-5-2003 and SRO 226(I)/ 2010 dated 2-4-2010.

<sup>17</sup> Notification No.434(I)/2003 dated 20-5-2003.

<sup>18</sup> SRO 226(I)/2010 dated 2-4-2010.

protected by making decisions that are prompt, non-discriminatory, equitable, consistent and transparent.

34. Prior to the insertion of the Proviso to section 3(2) of the Act in the year 2006<sup>19</sup> authorizing the Federal Government to prescribe qualifications and mode of appointment of Members, the Establishment Division had issued an Office Memorandum<sup>20</sup> dated 6-2-2003 duly approved by the Prime Minister on the basis of a summary initiated by the Cabinet Division constituting a SELECTION COMMITTEE for appointment of Chairman/Members of PTA and others. Similarly, the Cabinet Division enjoying administrative control over PTA had laid down PROCEDURE FOR APPOINTMENT OF CHAIRMEN AND MEMBERS IN REGULATORY AUTHORITIES.<sup>21</sup> Both these documents stand admitted by the learned Deputy Attorney General. It has also been acknowledged vide Note<sup>22</sup> dated 9-1-2013 of the Cabinet Secretariat, placed on the record by Respondents no.3 & 5. Under the said Procedure the appointment to the post of Member is subject to advertisement in the Press followed by interview by the Selection Committee. A panel of three names is to be recommended by the Selection Committee for final approval of one name by the competent authority on the basis of the recommendations of the Establishment Division and the Selection Committee. Admittedly, earlier appointments of Members of PTA have been on the basis of the aforesaid Procedure. Strikingly, the above Procedure has not been followed in the present appointment and Respondent no.5, riding high on the horse of favouritism, effortlessly landed as Chairman PTA behind closed doors and at the exclusion of any other more deserving candidate in the world, not to mention, the untapped potential in our own country.

35. The participatory recruitment process, through open public advertisement, to fill public sector posts has been time and again mandated by the Supreme Court of Pakistan. Reliance is also placed with advantage on Munawar Khan v. Niaz Muhammad and 7 others, (1993 SCMR 1287),

<sup>19</sup> Act No.II of 2006 dated 1-3-2006.

<sup>20</sup> Reproduced in Schedule I.

<sup>21</sup> Reproduced in Schedule II.

<sup>22</sup> No.186-M/PSPM/13 (sic) - filed as R-3/1 by respondents No. 3 and 5 with separate reports in W. P. No.29005/2012.

*Abdul Jabbar Memon and others, (Human Rights Case) (1996 SCMR 1349), Government of N.W.F.P. through Secretary, Forest Department, Peshawar and others, v. Muhammad Tufail Khan, (PLD 2004 S.C. 313), Mushtaq Ahmad Mohal and others v. The Honourable Lahore High Court, Lahore and others, (1997 SCMR 1043), Obaid Ullah and another v. Habib Ullah and others, (PLD 1997 S.C. 835) and Abdur Rashid v. Riaz ud Din and others, (1995 SCMR 999).*

36. In the past and even recently the two sitting Members were appointed according to the above open participatory process but, strangely enough, there was no public advertisement prior to appointing Respondent no.5. The requirement to reach out to the public (through public notice or advertisement) before filling public posts is an essential obligation of trusteeship to be exercised by the executive. A workable democracy must be pillared in an unwavering commitment to rule of law and due process with the vision to develop inclusive and participatory institutions, which form the bedrock and engines of growth of any progressive nation. Recruitment to a “public office” orchestrated behind closed-doors, driven by greed of nepotism, without open public participation is undemocratic and deeply injures the constitutional objectives of political, social and economic justice. It also fractures the ownership of an ordinary person in the government and gradually erodes their confidence in the State.

Selection without drawing up profile of the third Member.

37. The requirement of selection and appointment through advertisement, requires the Cabinet or Establishment Division to draw up a well-thought out profile of the Third Member. This has to be done keeping in view the functions, powers and responsibilities of the Authority under the Act as discussed above. It may be noted that Summary of the Cabinet Division dated 26-7-2012, which was somewhat hurriedly brushed aside by the Establishment Division, recommended increase in the number of Members under proviso to section 3(2) of the Act with the suggestion to have a Member (Commercial Affairs) and a Member (Legal & Regulations). Hence, it can be safely assumed that Cabinet Division would have wanted the third Member (till the such time that the number of members was

enhanced) to have a Member with either of the above disciplines or areas of expertise. It is surprising and perplexing to note that the appointment of the Third Member has been stealthy rushed through, without first drawing up the profile of such a Member. It was not considered by the Competent Authority whether Respondent no.5 was suitable for the post of Member (Commercial Affairs) or Member (Legal & Regulations) as proposed by the Cabinet Division. The entire recruitment process lacks logic and is devoid of public interest but surely appears to be galvanized by the “DESIRE” of someone unknown.

*Appointment of Chairman, PTA.*

38. After the constitution of the PTA is complete i.e., all the three Members are appointed in accordance with law, the Federal Government is to appoint the Chairman from amongst the three Members providing a pyramidic stewardship structure for running the Authority. This second tier appointment requires initiation of a fresh process but with a different set of considerations. One of the considerations is evident from section 3(8) of the Act which provides that the powers of the Authority in matters relating to its administration and staff shall be exercised by the Chairman. Other considerations or qualifications need to be drawn up by the Cabinet Division in consultation with the Establishment Division in order to develop the profile of an ideal Chairman which could best serve the interest of the Authority. This exercise is mandatory and requires to be undertaken prior to the selection of Chairman. The three Members have to undergo a fresh interview by the Selection Committee under the above mentioned Procedure unless rules under the Act (not yet framed) provide another transparent alternative. The recommendations of the Selection Committee alongwith the recommendations of the Cabinet and Establishment Divisions charting out a clear comparative evaluation of the three Members is to be placed before the Competent Authority for approval in terms of Rule 15 of the Rules of Business. Unless the Summary put up before the Competent Authority is in the above manner, the exercise of discretion would lack relevant facts resulting in abuse of discretion. Any appointment without first framing the profile of the Chairman and without carrying out a comparative evaluation

of the Members for the selection of the Chairman, will be open to the negative forces of nepotism and favouritism, as has glaringly happened in this case.

Temporary Appointment.

39. An impression has also been given to the Court that the present appointment of Respondent no.5 is temporary and will soon be regularized once the Rules under the Act are put in place. This is evident from the replies filed by the Establishment Division:

“Moreover, it is humbly submitted that appointment of Mr. Farooq Awan has been made to immediately fill the vacuum created because of the retirement of Dr. Muhammad Yasin and to save the Authority from disfunctional (sic) state of affairs. However this does not mean that option with the Government to select a person as Chairman PTA through open advertisement is excluded<sup>23</sup>.”

As well as from the separate Reports filed on behalf of Respondents no. 3 & 5 in W. P. No.29005/2012 which state as under:-

“i) that after the filing of the petition and keeping in view of this honourable Court’s judgment in case titled SHAIKH ZAYED HOSPITAL AND POST GRADUATE MEDICAL INSTITUTES through Chairman and Dean and another Vs. DR. MUHAMMAD SAEED and another reported as 2010 PLC (C.S.) 967 (Lahore High Court), the Federal Government thought it appropriate that keeping in view Proviso to Section 3(2) of Pakistan Telecom (Re-Organization) Act, 1996 (the Act), Rules for the Mode and manner of appointment of Members and Chairman of this Authority may be framed by Federal Government.

In this regard, the Prime Minister of Pakistan after seeking the opinion of Law Ministry directed the Cabinet division to frame rules under S.3(2) read with S.57(1) of the Act and then proceeds in accordance with Rules. Once rules are framed under proviso to Section 3(2) read with Section 57 of the Act; the appointments of PTA Members and Chairman shall be made/regularized strictly in accordance with the said rules.”<sup>24</sup>

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<sup>23</sup> Last para of the comments filed by respondents No. 2 and 4 in the titled petition.

<sup>24</sup> Para 2(i) of the reports filed by respondents No. 3 and 5.

40. The above also shows that the impugned appointment was to “immediately fill a vacuum” and as soon as the rules are framed under the Act fresh appointment will be made. First, so called “vacuum” created does not make the institution dysfunctional as section 3(10) of the Act provides for such an eventuality. Second, there is no provision for making *ad hoc* or temporary appointments to the post of Member, PTA under the Act or in the Procedure being followed since 2003. Therefore, appointment of Respondent no.5 even on this score is without lawful authority.

Conduct of business under Rules of Business, 1973.

41. Article 99 (3) of the Constitution provides that the business of Federal Government shall be allocated and transacted in accordance with the Rules of Business. Rule 2(iii) of the Rules of Business, 1973 (“Rules”) defines “Business” to mean all work done by the Federal Government, while Rule 2(vi) defines “Division” to mean a self contained administrative unit responsible for the conduct of business of the Federal Government in a distinct and specified sphere. Rule 3(3) provides that business of government shall be distributed amongst Divisions in the manner indicated in Schedule II. Item 53 (referred to above) of Schedule-II of the Rules entrusts the Cabinet Division with the administrative control of PTA since 2003. Cabinet Division falls under the Cabinet Secretariat (Ministry) and is headed by the Prime Minister. Rule 8 provides that Divisions will consult amongst themselves and Rule 8(2) provides that in case there is a difference of opinion between Divisions (especially within Divisions of the Cabinet Secretariat) the final views of all the Divisions shall be placed before the Minister in Charge, who in this case is the Prime Minister. Rule 8(3) provides that when a case is referred from one Division to another for consultation all relevant facts and the point necessitating the reference shall be clearly brought out. The reference should be complete in all respects to eliminate avoidable back references on the same issues. Similarly, replies given by the Divisions should also be complete in all respects and cover all the points raised by the referring Divisions. Rule 11(c) makes it mandatory for any Division to consult with Establishment Division if it deals with appointments to posts in BS-20 or above. Rule 15(2) provides that where a

case is submitted to the Prime Minister for order it shall include self-contained, concise and objective summary stating the relevant facts and the points for decision prepared on the same lines as those prescribed in the rules for a summary for the Cabinet.

42. The process adopted in the present case falls short of the above procedure. Summary put up by the Cabinet Division dated 26-7-2012 was not agreed upon by the Establishment Division, infact, it was practically bypassed vide Note put up by the Establishment Division dated 27-7-2012. Under the Rules, these conflicting opinions should have been placed before the Competent Authority, who after weighing the view points of both the Divisions should have exercised its discretion. This was not done and is not visible from order dated 28-7-2012 of the Prime Minister approving the appointment of Respondent no.5 as Member and as Chairman through the same order. The record also reveals that inspite of the fact that Cabinet Division enjoys administrative control over PTA under the Rules, the Establishment Division, as a consultee department, has overshadowed and monopolized the appointment of Respondent no.5, leaving the concerns and recommendations of the Cabinet Division un-redressed.

43. Adherence to the rule of law, in general, and to the Rules of Business, in particular, in conducting its business determines the quality of governance of the government in power. Rules of Business flow out of the Constitution, and are the sinews of a workable government. Besides providing a departmental organogram of a workable democracy, these Rules are a fine weave of democratic principles including: participatory engagement, written and reasoned dialogue, divergence of opinion, open and transparent deliberations, etc. These Rules of Business besides providing a procedural manual for the Federal Government to conduct its business also act as constraints on governmental power. Madison wrote the following in the *Federalist* number 51;

“If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must

first enable the government to control the governed; *and in the next place oblige it to control itself.*"<sup>25</sup>

44. The best control is to follow the law. The discretion to be exercised by the Prime Minister i.e., Competent Authority is largely dependent on the quality of Summary placed before him. It is for this reason that Rule 15(2) of the Rules requires a "self contained, concise and objective summary" to be placed before the Prime Minister. The objective Summary under Rule 15 to be placed before the Prime Minister should have disclosed all the relevant facts including the bypassing of the Office Memorandum of the Establishment Division dated 6-2-2003; Procedure formulated by the Cabinet Division; lack of public advertisement; bypassing of interview; handpicked selection of Respondent no.5; disregard of the divergent views of the two Divisions and the monopolizing role of Establishment Division. If the summaries put up before the Prime Minister lack in material particulars the discretion so exercised by the Competent Authority on the basis of the summaries remains irreparably defective. This Court while discussing the scope of Rules of Business, 1973 has already held in *Shaikh Zayed Hospital and Post Graduate Medical Institutes through Chairman and Dean and another v. Dr. Muhammad Saeed and another*, (2010 PLC (C.S.) 967) in the following manner:

"30. The quality of discretion exercised by the Prime Minister is fundamentally dependant on the quality of the "summary" put up before the said authority by the concerned Division. Therefore, the "summary preparation process" is an intrinsic and integral part of the final discretion exercised by the Prime Minister. The decision of the Prime Minister cannot be judicially reviewed in isolation. This exercise would be deficient and cosmetic unless and until the "summary preparation process" is also judicially reviewed. Failure of discretion at any stage of the "summary preparation process" will result in the collapse of the entire discretionary edifice including the final order. Therefore, when we judicially review the impugned order passed by the competent authority we are also judicially reviewing the entire appointment process.

43. The above Rules and the afore-mentioned Office Memorandum were not adhered to in this case. Appointment or selection without any guideline or criteria for selection is a recipe for disaster. Recruitment process that is unguided and unstructured, can be easily high-jacked by the influential and strong of the society thereby depriving the right person the opportunity to hold the post. Such a loose structure of

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<sup>25</sup> Stephen Breyer - *Making Our Democracy Work- a Judge's view*. p-82

selection process allows corruption, nepotism and jobbery to make its way into the system thereby crippling the foundation of the institution.”

45. Another dimension is the manner of initiation of the recruitment process which stands besmeared with the scourge of dictation and non-application of mind by the concerned Divisions. Cabinet Division is under a constitutional obligation under the Rules of Business to supervise and oversee the affairs of PTA which is under its administrative control and in spite of Summary dated 20-7-2012 put up by the Cabinet Division to appoint Mr. Khawar Siddique Khokhar as acting Chairman, the Establishment Division practically ignoring the said Summary issued Letter marked “Confidential” dated 24-7-2012 which states that ‘IT HAS BEEN **DESIRED** THAT FAROOQ AHMED AWAN MAY BE CONSIDERED FOR APPOINTMENT AS MEMBER PTA.’ First, the need assessment for any such appointment had to be initiated by the Cabinet Division enjoying administrative control over PTA under the Act<sup>26</sup>, as well as, the Rules of Business. The overzealous efficiency of the Establishment Division in appointing Respondent no.5 is driven and dictated by the DESIRE of some unknown high up. This alone immeasurably mars the appointment process besides offending the democratic manner of conducting of business under the Rules. Pakistan is not a kingdom but a democracy and personal desires have no place in the functioning of the government. The only rule is to follow the rule. Second, without prejudice to the above, if for the sake of argument, it is accepted that Letter dated 24-7-2012 simply suggested a name to be considered for the post of Member, PTA, then it had to be considered alongwith other competing candidates, for which the post had to be publically advertised. To be considered for appointment as Member, PTA does not mean to be appointed as Member and then Chairman, PTA without due process. This is a text-book case of non-application of mind and exercise of discretion based on irrelevant facts by the Competent Authority in violation of the Rules of Business.

46. The state of affairs also reflect poorly on the lack of succession planning done by the Cabinet and Establishment Divisions. They should

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<sup>26</sup> Section 2(fa).

have been vigilant enough to do their homework well in time so that the post of Member/Chairman PTA would not go unfilled when the vacancy occurred. The record sadly reveals that the Divisions in-charge had thrown caution to the winds. This stuporous insensitivity does not augur well for the future.

47. A country is known by the quality of its public institutions. Developing sound and strong public institutions is a constitutional obligation with its foundations pillared in democracy, equality, tolerance, social, economic and political justice. Institutional design and the configuration of its governance must be sensitive to the Fundamental Rights of the people and its vision aligned with the Principles of Policy. These broad principles translated into institutional literature require the public institution to be open, equitable, accessible, transparent, rule-based, participatory and inclusive. Public institutions are trustees of the people of Pakistan and work for the advancement of public interest. Persons who man these public institutions must invariably be selected from the public through a broad-based, publically accessible selection system. Such institutions are also referred to as ‘inclusive institutions’ as opposed to ‘extractive institutions.’ “To be inclusive, economic institutions must feature secure private property, an unbiased system of law, and a provision of public services that provides a level playing field in which people can exchange and contract.”<sup>27</sup> Institutions opposed to the properties of an inclusive institution are called extractive institutions - “extractive because such institutions are designed to extract incomes and wealth from one subset of society to benefit a different subset.”<sup>28</sup> In this background the importance of remedy of *quo warranto*, in a modern constitutional democracy, cannot be underestimated.

Section 10 of CSA.

48. In response to the Summary put up by the Cabinet Division dated 26-7-2012 recommending increase in the number of Members and then their appointment according to the procedure discussed above, the Establishment

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<sup>27</sup> See Daron Acemoglu & James A. Robinson- “*Why Nations Fail - the origins of power, prosperity and poverty*” by- Crown Business- 2012. Pp. 74, 75.

<sup>28</sup> Ibid. P 76.

Division, side-tracking the issues recommended Respondent no.5 for appointment as Member, PTA, knowing fully well that there has been no advertisement or interview conducted by the Selection Committee (a procedure put in place by the Federal Government). Establishment Division, the apex headhunter for the Federal Government ignored a very important fact that Respondent no.5 was sitting on Board of PTCL as Chairman when Letter dated 24-7-2012 was issued by the said Division. The importance of section 3(4) of the Act providing a disqualification for a prospective Member having a potential conflict of interest was not considered. However, as if to add some modicum of legality to the process, the Establishment Division placed reliance on section 10 of the Civil Servants Act, 1973 (“CSA”) to provide the justification for the appointment of Respondent no.5 as Member and Chairman, PTA under the Act.

49. Section 10 falls under Chapter-II of CSA titled “Terms and Conditions of Service of a Civil Servant” and deals with one of the terms and conditions of service namely: POSTING AND TRANSFER. The section simply provides that a civil servant is liable to serve anywhere in or outside Pakistan and can be posted anywhere under the Federal Government or a corporation or a body set up by the Government. First, PTA is not an organization established by the executive order of the Government but has been established by the legislature. Second, section 10 only casts an obligation on a civil servant that he can be transferred to any post, it does not entitle the Federal Government or the civil servant to appoint or to be appointed, as the case may be, to any post through transfer without qualifying the requirements of the said post under the law. This is also evident from the reading of Rules 7 and 8 of the Civil Servants (Appointment, Promotion and Transfer) Rules, 1973. These Rules provide that promotions and transfers to posts in BS-2 to 18 and BS-19 to 21 and equivalent shall be made on the recommendations of the appropriate Departmental Promotion Committee or Selection Boards, respectively. Hence, section 10 is subject to the requirement of the post in question. Similarly, the post of Member and Chairman, PTA could not be filled through a mere transfer order without following an open and transparent procedure of appointment as discussed above. Invoking section 10 of CSA

for the appointment of Respondent no.5 to the post of Member and Chairman, PTA appears to be a colourable exercise of power. It is also unclear how Respondent no.5 was handpicked from the pool of civil bureaucracy without a proper broad-based search on the basis of an objective criteria. This pre-ordained selection of Respondent no.5, besides being illegal, carries a ring of favouritism.

50. It is made clear that the appointment of Respondent no.5 “in his own pay and scale” has no special significance. It neither adds value or justify appointment under section 10 of CSA nor absolves Respondent no.5 from the rigours of the provision dealing with conflict of interest discussed hereunder.

*Conflict of Interest.*

51. Section 3(4) of the Act provides that a person to be considered for appointment as a Member, PTA must not even have a hint of conflict between his private interest and the interest of the institution (public interest). The sub-section provides as follows:

“Section 3(4): A member of the Authority shall not have any direct or indirect financial interest in, or have business connection with any person, any establishment or firm which renders telecommunication services in Pakistan or abroad or supplies telecommunication equipment to any telecommunication sector in Pakistan or abroad.

*Explanation* ---For the purpose of this sub-section, any involvement of the spouse or blood relation of any member of the Authority with any telecommunication establishment or firm shall be considered as a direct financial interest or connection of the member with such establishment or firm.”

The above sub-section provides that a Member of PTA should not have any business connection with any person, which renders telecommunication services in Pakistan or abroad. The “Explanation” to the said sub-section brings under its fold even the involvement of a spouse or blood relation of any Member with any telecommunication establishment. This statutory precondition for a Member to be unbiased, insular, unconnected and impartial actually defines the character of the public institution. Fundamental to any effective regulatory institution is its fierce and unflinching independence, neutrality and detachment from the players it is set out to regulate. Effective

and neutral umpirage by the regulator provides fair competition and a level playing field in the market. It is only with this backbone of independence can PTA successfully watch the interests of users of telecommunication services by making decisions that are prompt, non-discriminatory, equitable, consistent and transparent.<sup>29</sup>

52. The 2003 OECD<sup>30</sup> Guidelines for Managing Conflict of Interest in the Public Service provide as follows:

“Serving the public interest is the fundamental mission of governments and public institutions. Citizens expect individual public officials to perform their duties with integrity, in a fair and unbiased way. Governments are increasingly expected to ensure that public officials do not allow their private interests and affiliations to compromise official decision-making and public management. In an increasingly demanding society, inadequately managed conflicts of interest on the part of public officials have the potential to weaken citizen’s trust in public institutions.

Conflict of interest arises when public officials have to make decisions at work that may affect their private interests.... Governments have for many years been aware of the dangers of personal bias in public decision making. But in the past these concerns focused on traditional sources of influence, such as gifts or hospitality offered to public officials, and personal or family relationships. Increased co-operation with the private sector in recent years has made the whole issue more complex, multiplying the opportunities for conflicts of interest, such as:

- A public official having private business interests in the form of partnerships, shareholdings, board memberships, investments, government contracts, etc.
- A public official having affiliations with other organizations (*e.g.* a senior public official sits on the board of a non-profit organization that receives funding from the official’s agency).
- A public official leaving to work for a regulated private company or a chief executive taking up a key position in a government agency with a commercial relationship with his/her former company.

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<sup>29</sup> Section 6 of the Act.

<sup>30</sup> ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT

The *OECD Guidelines* set four core principles for public officials to follow in dealing with conflict-of-interest situations in order to maintain trust in public institutions: serving the public interest; supporting transparency; promoting individual responsibility; and creating an organisational culture that does not tolerate conflict of interest.”

53. In a “conflict of interest” case what needs to be seen is whether the Member, PTA, has any direct or indirect financial interest or business connection with any person, any establishment or firm which renders telecommunication services in Pakistan or abroad or supplies telecommunication equipment to any telecommunication sector in Pakistan or abroad. The actual influence of the interest on the decision-making of the Member is not relevant. The concept is akin to “automatic disqualification for bias” and is rooted in perception and appearance rather than the actual influence based on empirical data on the decision making of the regulator. In *Pinochet Case*<sup>31</sup> Lord Browne-Wilkinson held:

“First, it may be applied literally: if a judge is in fact a party to the litigation or has a financial or proprietary interest in its outcome then he is indeed sitting as a judge in his own cause...and that...is sufficient to cause his automatic disqualification. The second application of the principle is where a judge is not a party to the suit and does not have a financial interest in its outcome, but in some other way his conduct or behavior may give rise to a suspicion that he is not impartial, for example because of his friendship with a party. This second type of a case is not strictly speaking an application of the principle that a man must be a judge in his own cause, since the judge will not normally be himself benefitting, but providing a benefit to another by failing to be impartial.”

According to De Smith’s *Judicial Review*, “Lord Brown-Wilkinson in the above passage appears to confine the rule of automatic disqualification to cases of financial or proprietary interest alone, but it was unanimously held [*in Pinochet case*] that, despite the fact that interest in this case was not pecuniary or proprietary - since the Law Lord would have had nothing

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<sup>31</sup> *Pinochet (No.2)* [2000] 1 A.C. 119 at 132-133

financially to gain by the decision- automatic disqualifications extends...to the promotion of a cause.<sup>32</sup>” Therefore, a perceived or apparent conflict of interest can exist where it could be perceived, or appears, that a public official’s private interests could improperly influence the performance of their duties- whether or not this is in fact the case.

54. In the present case Respondent no.5 sat on the Board of PTCL as a Chairman from 6<sup>th</sup> January, 2012 till 28<sup>th</sup> July, 2012. It was during this period that first Note dated 24-7-2012 was put up by the Establishment Division proposing the name of Respondent no.5. Finally, approval of the Prime Minister was sought on another Note put up by the Establishment Division dated 27-7-2012 when Respondent no.5 was still performing his functions as a Chairman of PTCL. The stepping down of Respondent no.5 as Chairman PTCL and his appointment as Member and Chairman PTA has a striking and somewhat dubious synchronicity i.e., both the actions took place on 28<sup>th</sup> July, 2012. The time spent by Respondent no. 5 on the Board of PTCL, which spreads over several months, cloaks him in a fiduciary bond with PTCL besides making him privy to the strategic vision and future financial planning of the said company. This relationship and linkage of Respondent no.5 with PTCL constitutes “business connection” and more importantly a perception of business connection. It is, therefore, highly unethical and distasteful besides being irregular and illegal that Respondent no.5, the day he stepped down as Chairman PTCL, was appointed as Chairman of the apex regulatory authority in the telecom sector.

55. The role of the regulator is that of a gamekeeper, it is to watch the lawful interests of the telecommunication service providers, as well as, the consumers and ensure a level playing field for fair competition to flourish. The appointment of Respondent no. 5, with the above background, appears to be *ex-facie* discriminatory, to the interests of the users of telecommunication services, as well as, telecommunication service providers other than PTCL and its subsidiary. The role of a regulator cannot be a poacher turned gamekeeper. The independence of the regulator further weakens when the record reveals that Respondent no.5 being a serving civil

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<sup>32</sup> De Smith’s Judicial Review – para 10-024, 6<sup>th</sup> Ed.

servant accepted a hefty sum of US\$ 8,000 as Chairman's fee for attending Board meetings during his stay at PTCL. A fact, which has not been controverted, by the learned counsel representing the said respondent. Even if none of the above factors can empirically establish actual influence on the independence and insularity of Respondent no.5, these facts certainly besmirch and pierce the perception of independence, which is all that needs to be protected. The antecedents of the Members of a regulator need not be above board but must also appear to be above board. Surprisingly and sadly, this important aspect of the service record of Respondent no.5 was not even touched upon by both the concerned Divisions, especially Establishment Division, which is an apex human resource wing of the government and champions in selecting the best persons for public positions.

56. The submission by learned DAG that Respondent no.5 was holding the post of Chairman, PTCL as *ex-officio* and had resigned before being appointed as Member is hardly convincing. The concept of "conflict of interest" is person specific and it matters little if Respondent no.5 headed the Board Meetings at PTCL as Chairman wearing the hat of an *ex-officio* nominee. The resignation of Respondent no.5 has been on the same day when he was appointed as Member/Chairman, PTA. The "business connection" nurtured over several months does not wear off in a day. Infact, no cooling-off period has been prescribed under the law.

57. Another dimension of the conflict of interest is that Federal Government, undisputedly, has majority shareholding in PTCL, therefore, appointment of a nominee of the Federal Government (civil servant) as Chairman of PTA amounts to direct or indirect financial interest of the Federal Government through Respondent no.5 in the matter. Being an employee of the Federal Government, he is likely to watch out for or be amenable to the interests of the Federal Government and its telecommunication service provider in the market.

58. The "conflict of interest" provision is also a statutory safeguard against any possibility of a "Regulatory Capture." The two concepts are intertwined. "Regulatory capture occurs when a regulatory agency, created to act in the public interest, instead advances the commercial or special

concerns of interest groups that dominate the industry or sector it is charged with regulating. Regulatory capture is a form of government failure.<sup>33</sup> ‘Capture occurs when some special interest, typically an industry group, persuades government actors to exercise the coercive power of the state in ways that are not in the “public interest.” That is, the interests of the industry group diverge from the public interest and the government chooses the former over the latter.’<sup>34</sup> The fiduciary relationship of Respondent no.5 with the telecommunication provider i.e., PTCL, besides being a civil servant, representing the Government of Pakistan, that holds more than 70% shares in PTCL, is offensive to section 3(4) of the Act and passes for regulatory capture or the perception of it.

59. One of the prime responsibilities of PTA as a regulator is to ensure that fair competition in the telecommunication sector is maintained.<sup>35</sup> Conflict of interest blunts the independence and fiat of the Regulator and the fear of regulatory capture shatters the confidence of the market which is grounded in fair competition. The independence of the regulator, the disqualification on the ground of conflict of interest, fair and meritorious appointments to public office are measures to ensure that PTA shields against regulatory capture and provides a level playing field in the telecom sector.

60. Due process under article 4, freedom to carry out a lawful trade or business under article 18 by maintaining fair competition and the right against discrimination under article 25 of the Constitution collectively provide the requisite constitutional underpinning to maintain level playing field, in all public sectors, at all times.

61. Argument of Mr. Nasar Ahmed on behalf of Respondents no. 3 and 5 that the appointment of Member/Chairman of a regulatory authority is the prerogative of the Executive and being a policy matter is not justifiable. The

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<sup>33</sup> Wikipedia.org.

<sup>34</sup> M. Elizabeth Magill- Dean and Richard E.Lang Professor, Stanford Law School. – *Courts and Regulatory Capture*.

<sup>35</sup> section 6(e) of the Act.

Supreme Court of Pakistan in *Muhammad Yasin's case*<sup>36</sup> (supra) have dealt with a similar argument in the following manner:

“33. Learned Counsel for the respondent, however, emphatically argued that the appointment of the respondent was not subject to judicial review because it fell within the exclusive domain of the Executive to choose and appoint the Chairman, OGRA. This argument, if accepted, would negate the aforesaid provisions of the Ordinance and the principles enunciated in the case-law referred to above. The Ordinance does not state that the Federal Government may “in its absolute and unfettered discretion” appoint a Chairman.”

The “..Court has the duty to ensure that governmental institutions abide by the constitutional constraints on their power. And it must continue to do so.”<sup>37</sup> The argument of the learned counsel is, therefore, misconceived.

62. Appointment of Respondent no.5 as Member and Chairman PTA, for the above reasons, is in disregard of the law and public interest. Allowing Respondent no.5 to continue even for one extra day as a Member and Chairman, PTA would have been an affront to justice and fair play, laying serious threat to the level playing field and fair competition in the telecom sector besides offending the constitutional principles of democratic fairness and openness which this Court is under an oath to protect and defend, hence the Short Order.

63. For the above reasons these petitions are allowed and the appointment of Respondent no.5 (Farooq Ahmed Awan) as Member and Chairman, PTA is hereby declared to be without lawful authority as a result Notifications dated 28-7-2012 and 31-7-2012 are set aside. The post of one of the Members and of the Chairman is hereby declared to be vacant, which shall be filled by the concerned respondents in accordance with law and keeping in view the principles discussed above.

**(Syed Mansoor Ali Shah)**  
Judge

Iqbal\*

APPROVED FOR REPORTING

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<sup>36</sup> *Muhammed Yasin v. Federation of Pakistan* (PLD 2012 SC 132)

<sup>37</sup> Stephen Breyer. *Making our Democracy Work- A Judge's view*. p-82

## Schedule I

GOVERNMENT OF PAKISTAN  
CABINET SECRETARIAT  
ESTABLISHMENT DIVISION

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No.1/123/2002-E-6

Islamabad the 6<sup>th</sup> February, 2003

## OFFICE MEMORANDUM

SUBJECT: COSTITUION OF SELECTION COMMITTEE FOR APPOINTMENT OF CHAIRMAN/MEMBERS, PAKISTAN TELECOMMUNICATION AUTHORITY, PTA, NEPRA AND OGRA.

The undersigned is directed to refer to the Cabinet Division's Summary for the Prime Minister bearing U.O No.1/17/2002-TLI/RA, dated 13.12.2002 on the subject noted above and to convey approval of the competent authority to the proposed Selection Committee for National Electric Power Regulatory Authority (NEPRA), Oil and Gas Regulatory Authority (OGRA) and Pakistan Telecommunication Authority (PTA), consisting of the following:

- |       |  |                    |
|-------|--|--------------------|
| (i)   | The Adviser to the Prime Minister on Board of Investment and Privatization | Chairman           |
| (ii)  | Secretary, Cabinet Division:   | Member             |
| (iii) | Secretary, IT & Telecom Division:  | Member (for PTA)   |
| (iv)  | Secretary, M/o Petroleum and Natural Resources:                            | Member (for OGRA)  |
| (v)   | Secretary, Ministry of Water and Power:                                    | Member (for NEPRA) |
| (vi)  | Joint Secretary (Admn), Cabinet Division                                   | Secretary          |

Respective Chairman of the concerned Authority would be co-opted as Member of the Committee at the time of the selection of Members of the respective Authority.

(Muhammad Akram)  
Section Officer (E-6)  
PH: 9202651

**(Syed Mansoor Ali Shah)**  
Judge

Iqbal\*

## Schedule II

CABINET DIVISION  
(RA-I Section)

Subject: PROCEDURE FOR APPOINTMENT OF CHAIRMAN AND MEMBERS IN REGULATORY AUTHORITIES.

The Oil and Gas Regulatory (OGRA) consists of one Chairman and three Members NEPRA consists of one Chairman and four Members while PTA consists of one Chairman and two Members. The Chairman and Members of these authorities are appointed by the Federal Government under the relevant provisions of law.

2. The procedure for their appointments followed is as under:

a. Advertisement in the Press

The vacancies are advertised in the press inviting applications for the posts. Only short listed candidates are called for interview by the Selection Committee. However, in case of NEPRA, the posts of Members are not advertised and the Members (One from each Province) are appointed on the basis of recommendations of the Provincial Governments as per provisions of NEPRA Act.

b. Inter views by the Selection Committee

A Selection Committee has been constituted by the Prime Minister for selection of Chairman/Members of OGRA, NEPRA and PTA (Appendix-D). The Committee, after taking into consideration the qualifications, experience and performance during the interviews, recommends a panel of three candidates for each vacancy, in order of merit.

c. Approval of the Prime Minister.

Based on the recommendations of the Committee and comments of the Establishment Division, the appointment as approved by the Prime Minister is notified by the Establishment Division.

3. Chairman and Members of PEMRA are appointed by President of Pakistan in accordance with the provisions of PEMRA Ordinance.

**(Syed Mansoor Ali Shah)**  
Judge