IN THE SUPREME COURT OF PAKISTAN
(Original Jurisdiction)

Present
Mr. Justice Jawwad S. Khawaja
Mr. Justice Khilji Arif Hussain

Constitution Petition No. 59 of 2011 and CMAs Nos. 326 and 633 of 2012 and Crl. O. P. 94 of 2012 in Const. P. 59/2011.
(Petition under Article 184 (3) of the Constitution)

Muhammad Ashraf Tiwana etc. .... Petitioner(s)

Versus

Pakistan etc. ... Respondent(s)

For the Petitioner(s): Mr. Afnan Karim Kundi, ASC (in both cases)
Assisted by Barrister Momin Ali Khan (Advocate)

In Const. P. 59/2011:

For respondents-1&3: Mr. Anwar Mansoor Khan, Sr. ASC
Mr. Naveed Akhtar, S.O. Finance Division

For respondents-2,5&6: Mr. Muhammad Akram Sheikh, Sr. ASC assisted by
Barrister Sajeel Sheryar and
Ch. Hasan Murtaza Mann (Advocates)

For respondent-4: Mr. Salman Akram Raja, ASC assisted by
Malik Ghulam Sabir Advocate
Mr. Sameer Khose Advocate
Ms. Aneesa Agha Advocate
Malik Ahsan Mehmood Advocate
Ms. Zainab Qureshi Advocate

In Crl. O.P.94/12:

For respondent-1: Mr. Anwar Mansoor Khan, Sr. ASC

For respondent-2: Mr. Muhammad Akram Sheikh, Sr. ASC

Amicus Curiae: Nemo

For SECP: Mr. Muzaffar Ahmed Mirza, Dir. Litigation.

Date of Hearing: 09.04.2013

J U D G M E N T

Jawwad S. Khawaja, J. This is a petition filed under Article 184(3) of the Constitution. The Petitioner is a former employee of the respondent No. 2, viz. Securities and Exchange Commission of Pakistan (SECP / Commission). The other respondents in the case are the Federation through the Secretary, Finance Division (Respondent No.1), the Chairman, Securities and Exchange Policy Board (Respondent No.3), Muhammad Ali Ghulam Muhammad, Chairman SECP (Respondent No.4), Tahir Mehmood, Commissioner

(Company Law Division) SECP (Respondent No.5) and Bushra Aslam, Director Human Resource Department, SECP (Respondent No.6). The respondents (other than respondent No. 3) were represented by their respective learned counsel.

2. The petition was decided by means of a short order announced on 12.4.2013 in the following terms:-

> "*This petition has raised important questions of public importance relating to the enforcement of fundamental rights guaranteed in Chapter I of Part II of the Constitution. The salient aspect of this petition relates to the functioning and governance structure of the Securities and Exchange Commission of Pakistan (SECP) which is the apex regulator inter alia, of the corporate sector and the capital markets of the country.*
>
> *2. Over the course of several days, we have heard and noted in detail, the submissions of learned counsel representing the parties. For reasons to be recorded we hold, declare and direct as under:-*
>
> *3. That:-*
>
> *(a) the selection and appointment of respondent No. 4 namely, Muhammad Ali Ghulam Muhammad as Commissioner and Chairman SECP does not meet the requirements of the Securities and Exchange Commission of Pakistan Act 1997 (the Act);*
>
> *(b) as a consequence, the notification No. SRO 21 (KE)/2011 dated 24th December 2010 appointing Mr. Muhammad Ali Ghulam Muhammad as Commissioner and Chairman SECP is set aside;*
>
> *(c) the Federal Government shall, without delay, make appointments to statutory positions in SECP which meet the requirements of the Act including Sections 5, 6 and 7 thereof, in a credible, rigourous, transparent and open manner, through a selection and appointment process undertaken with due diligence and deliberation which manifestly and demonstrably ensures that the appointees meet the requirements of law as enunciated by precedent, including mutatis mutandis, the principles of law determined in the case of Muhammad Yasin vs. Federation of Pakistan (PLD 2012 SC 132);*
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> *(d) the insertion of section 5(5) in the Act through the Finance Act 2003 was violative of the Constitution and in particular Article 73 thereof;*
>
> *(e) Clause 3(1) of Chapter 11 of the SECP Service Rules (HR Handbook), which allow for termination simpliciter (without cause) of employees of SECP, is ultra vires the Constitution and inter alia, the Act;*
>
> *(f) the above Clause must be replaced appropriately by provisions ensuring due process and adherence, inter alia to Articles 9, 10A, 14, 18 and 25 of the*

Constitution and which are consistent with the provisions of the Act ensuring independent and objective decision making without fear or favour, required of an independent regulator;

(g) the prayer in the petition for striking down the order dated 13.6.2011 terminating the employment of the petitioner is disallowed as not pressed, but without prejudice to his rights/remedies, if any, before a competent forum in accordance with law;

(h) respondent No.1 (Federation) and respondent No.2 (SECP) shall bear the costs of the petitioner.

4. A copy of this Order shall be sent to each member of the Securities and Exchange Policy Board for action deemed appropriate by said Board in relation to the governance structure and decision making policies of SECP as per requirements of the Act and for consideration on issues of policy-making highlighted by the present petition and for the effective performance of the Board's functions under the Act, particularly section 21 thereof. The Board having, inter alia, the duty to "oversee the performance of [SECP] to the extent that the purposes of the [SECP] Act are achieved", shall look into this petition and documents placed on file and after making such further inquiries as may be deemed appropriate by it, submit within 45 days, a report as to the performance of the SECP.

5. A copy of this Order shall be sent to the Secretary, Ministry of Finance to enable the Federal Government to remain compliant with the law and legal principles enunciated by this Court, in terms of Article 189 of the Constitution. The Secretary (Finance) shall also look into this petition and documents placed on file (including those filed by the Ministry itself) to examine wrongdoings/shortcomings, if any, within the Ministry and the decision-making processes of the Federal Government under the Act. A report in this respect shall be submitted in Court within 45 days".

3. We give below, the reasons in support of the aforesaid short order.

4. SECP has been established under the Securities and Exchange Commission of Pakistan Act, 1997 (the 'Act'). The powers and functions of the SECP are elaborated in the Act. The purpose of the Act as recorded in its preamble is "*to provide for the establishment of the Securities and Exchange Commission of Pakistan for the beneficial regulation of the capital markets, superintendence and control of corporate entities and for matters connected therewith and incidental thereto".* The SECP administers a number of statutes including the Companies Ordinance, 1984, the Insurance Ordinance 2000, the Securities and Exchange Commission of Pakistan Act 1997, the Central Depositories Act, 1997 and the Securities and Exchange

Ordinance 1969. In addition to administering these and other statutes, the SECP is responsible for enforcing subordinate legislation comprised of rules framed in exercise of rule making powers mentioned in the statutes. Here we may add that in the performance of its functions, the SECP has from time to time issued a number of regulations, guidelines, orders, directives and policies. It is not necessary to enumerate all of these. However, a list of some such regulations etc. has been given in annex 'A' to the petition.

5. The SECP as such is amongst the most important regulatory authorities directly impacting the economic life of the citizens of Pakistan. It may also be noted that amongst the various functions and powers of SECP which have been mentioned in section 20 of the Act, there are a number of functions which relate directly to the economic well-being of the people of Pakistan. By way of illustration only, it may be mentioned that in section 20(6), the SECP has been specifically ordered and mandated *inter alia, "to maintain the confidence of investors in the securities markets by ensuring adequate protection for such investors"*. The Securities and Exchange Ordinance, 1969 which, as noted above, is also administered by SECP deals with the capital markets in Pakistan. By virtue of that statute too, the SECP is required "*to provide for the protection of investors*" (Preamble). It is worth noting that the market capitalization just through the stock exchanges in Pakistan is in excess of Rs.4,000,000,000,000/- (rupees four trillion). The investments made in unlisted companies (private or public) and in other sectors such as insurance etc., regulated by SECP, is in addition to and may even be in excess of the said figure. Millions of Pakistani citizens and institutions and quite a few foreign investors and their investments are directly affected by the quality of regulation of companies, securities markets and the statutes/rules etc. administered by SECP.

6. It is in the context of the above circumstances that it can be stated that the SECP is the apex regulator in the economic sector in Pakistan. Its activities including aspects of its governance and functioning are clearly questions of public importance. These questions relate directly to the effective enforcement of fundamental rights guaranteed by the Constitution. In *Muhammad Yasin vs. Federation of Pakistan (PLD 2012 SC 132),* we had held

that our Constitution "*contains a whole range of Articles which have a direct nexus with good economic governance and fundamental rights. At the very beginning in Article 3 there is, for instance, an oft-forgotten but eloquently stated directive: "The State shall ensure the elimination of all forms of exploitation and the gradual fulfillment of the fundamental principle, from each according to his ability to each according to his work". Then there is Article 4 which guarantees the protection of law, not just for life and liberty, but also for the body and property of citizens. Furthermore, there is a whole range of fundamental rights, such as the right to life (Article 9), the universal and non-derogable right to a life of dignity (Article 14), the right to engage in business (Article 18) and to hold and acquire property (Article 23), and the right to be governed equally and in accordance with law (Article 25) which have clear economic ramifications. When these articles are read together, we cannot escape the conclusion that the Constitution envisages a political dispensation where good economic governance is a right of the people of Pakistan which they cannot be deprived of.*" We had also held that *"there is an ever-greater nexus between the proper and independent functioning of regulatory bodies and the economic life of the nation and its citizens."* It is a self evident fact that persons making investments in and through the capital markets of the country will either be attracted to the capital markets or shy away from such markets depending upon the trust and confidence which they have in such markets and this in turn depends upon the rigour and quality of the regulator. Moreover, investments made by the people, being property, are required to be protected through enforcement of the fundamental rights enumerated in the extract from the case of *Muhammad Yasin supra.*

7. Despite our asking, we were not informed of the number of investors making investments through the capital markets in Pakistan nor were we given figures which would show that the number of investors has increased or decreased during the past few years. Some figures which have come on record indicate that the number of companies listed on the stock exchanges in Pakistan has declined over the past few years. The importance of SECP in the economic well-being of the country and of the people of Pakistan and the direct relevance of the SECP in relation to fundamental rights guaranteed by the Constitution ought to be obvious from the very nature and extent of the statutes and activities regulated by the SECP. However, much was made by learned counsel for the

respondents by way of argument that no questions of public importance relating to enforcement of fundamental rights arose in this petition. As such it was argued that the petition is not maintainable in terms of Article 184(3) of the Constitution. We, therefore, firstly take up and address the arguments made on this score by learned counsel representing the respondents.

A – MAINTAINABILITY.

8. We may start by referring to Civil Misc. Appeal No. 99 of 2011. When the present petition was filed, the Office raised an objection to the maintainability of the petition on the ground that it did not raise any issues of public importance affecting fundamental rights guaranteed under Chapter 1 Part II of the Constitution. This office order was challenged by the petitioner through the said Civil Misc. Apeal No. 99 of 2011. On 23.8.2011, after hearing learned counsel for the petitioner, a Bench of this Court opined *"that in the instant case question of violation of fundamental rights relating to the general public in respect of their rights and obligations is involved as the SECP is responsible to regulate the entire capital markets, NBFC, the whole Insurance Industries etc. which according to the learned counsel deals with about 58 thousands companies …"*. The objection raised by the office was thus over ruled. The petition was registered and notice was issued to the respondents. However, since the aforesaid order was passed on an office objection and the respondents were not present, at the time, we will address the objections to maintainability which have been urged before us on behalf of the respondents.

9. Learned counsel for the respondent No. 4 drew the attention of the Court to an unconnected petition filed by Muhammad Ashfaq Ahmed bearing Civil Misc. Appeal No. 191 of 2012 in Const. P. No. Nil of 2012 titled *Muhamad Ashfaq Ahmed vs. Ali Arshad Hakeem* wherein an objection to maintainability was raised by the office similar to the objections in the present case. The aforesaid petitioner then did not pursue the matter further in this Court. Learned counsel for respondent No.4, therefore, argued that the present petition also was not maintainable. This contention is misconceived because of the material and obvious difference between the present case and the case of *Muhamad Ashfaq Ahmed vs. Ali Arshad*

Hakeem. As noted above, in the present case, a Bench of the Court after hearing the learned counsel, over ruled the office objection.

10. We also found an apparent lack of clarity and consistency in the submissions advanced on behalf of the respondents on the question of maintainability. Though learned counsel for the respondents vehemently opposed the maintainability of this petition, they did not draw a distinction between want of jurisdiction under Article 184(3) of the Constitution as opposed to the question of discretion whereby the exercise of such jurisdiction may be regulated. This Court, it may be noted, may have the jurisdiction but may still choose to regulate and decline the exercise of such jurisdiction. The jurisprudence of this Court has evolved, particularly since 1988, on this important issue. The decision to decline exercise of such jurisdiction has always been taken based on the facts and circumstances of each case. The nature of the respondents' objection, as discussed below, is based more on the propriety of exercise of jurisdiction in the light of precedent rather than the existence of jurisdiction. Bearing in mind the facts and circumstances, the nature, scope and extent of the activities regulated by SECP and also taking into account its mandate to protect a large body of investors who have invested trillions of rupees in the economy of the country, makes this a clear case in which there can be no doubt whatsoever that the governance structure of SECP and more specifically the appointment of its Chairman and Commissioners are questions of *"public importance with reference to the enforcement of fundamental rights".*

11. The mainstay of the argument of the respondents against the maintainability of the present petition, therefore, rests on the framework established by precedent to regulate the exercise of this jurisdiction. On this score, learned counsel representing the SECP and respondent Nos. 5 and 6 argued that the petition was based on malice and was nothing more than an attempt at personal aggrandizement of the petitioner with the object also, of settling personal scores because his employment as Executive Director had been terminated by SECP. Arguments of learned counsel for the SECP were also adopted by learned counsel

for respondent No.4. Formulations which were framed by learned counsel for SECP reflect the thrust of his argument as to maintainability and are reproduced as under:-

1. *Could equitable jurisdiction of this HoC be invoked at the behest of a person whose hands are stained with malice?*

2. *Could this Hon'ble Bench deviate from the settled law of this Court including full court's judgments that no action could be taken with regard to quo warranto petition filed by an individual having personal malice?*

3. *Whether a malafide complaint vitiates even the most solemn component of the same and could the doctrine of severance be applied to isolate good bad from bad faith?*

4. *Could the grain be sifted from the chaff by the apex Court while exercising jurisdiction under Article 184(3)?*

5. *Could an employment dispute and primarily a "no notice dismissal petition" be clubbed with a quo warranto relief and would such a composite petition become maintainable?*

6. *Could a sacked and disgruntled employee be elevated to be considered as a whistle blower?*

7. *Could a person having a personal malice, grouse and a score to settle become a whistle blower and could his bad faith be totally ignored by disregarding the settled jurisprudence?*

8. *Could the method of appointment of one regulator in isolation from method of appointment of most of the regulators be dealt with in isolation from the appointment of governor of state bank, judges of the superior courts notwithstanding the absence of statutory requirements?*

12. At the very outset it may be noted that the petitioner categorically stated that he would not press the petition to the extent of the prayer for striking down the order dated 13.6.2011 terminating his employment. Although it was argued on behalf of SECP that the hands of the petitioner *"are stained with malice"*, no such stain or malice was adverted to or brought on record. The mere fact that the petitioner was aggrieved also of the order dated 13.6.2011 does not in any manner amount to malice. The term "malice" as used in the law has distinct and well developed connotations as will be discussed shortly. However, the submissions on this score on behalf of SECP were unnecessarily repetitive as is evident from the formulations submitted in Court reproduced above. Formulation No. 8 framed by the learned counsel for SECP, however, itself indicates that this is a fit case in which jurisdiction under Article 184(3) of the Constitution should be exercised. In the common law tradition reflected in Article 189 of the Constitution and adhered to in our Courts, the provisions of Article 184(3) have been interpreted. Recent judgments in *Muhammad Yasin supra* and

Munir Hussain Bhatti v. Federation of Pakistan (PLD 2011 SC 407) have defined the extent and scope of Article 184(3) with reasonable clarity. The present case falls within the parameters so defined.

13. We may with advantage refer to case law in the context of objections to maintainability of constitution petitions under Article 184(3) of the Constitution. These precedents raise issues of discretion and propriety rather than the constitutionality of petitions under Article 184(3) of the Constitution. The concurring opinion of my learned brother Khilji Arif Hussain, J. in *Muhammad Azhar Siddiqui v. Federation of Pakistan* (PLD 2012 SC 774), is most helpful on the question. After surveying precedent on the question, the learned Judge highlighted three categories of cases in which this Court has found that the test of maintainability is easily met. One of these categories includes cases which *"pertain to appointments, promotions, dismissals … of key executive officials, including but not limited to ministers, senior bureaucrats and heads of regulatory bodies and statutory corporations".* He explained the reason for this, observing that *"[t]he executive, especially its upper echelons, is the first and foremost branch of the constitutional government which is entrusted with the execution of laws and framing and enforcement of policies which directly affect the citizens' rights, including Fundamental Rights".* This should be a sufficient response to the objection raised against the maintainability of the present petition which pertains, amongst other things, to the process of appointment of the Chairman of the SECP. Earlier, in *Muhammad Yasin v. Federation of Pakistan* (PLD 2012 SC 132), the Court held that *"[v]ital 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 [law] lays down for such appointments"*. This dictum applies equally to the SECP which is the apex regulator responsible for oversight, *inter alia,* of capital markets and the corporate sector.

14. We can now consider the question of the petitioner's alleged malice, which was raised on behalf of the respondents to bolster their argument against the maintainability of

the present petition. Learned counsel for SECP also made much of the *bona fides* of the petitioner. He emphatically contended that the petitioner is merely a disgruntled employee who is motivated by ill-will towards his former bosses and is attempting to abuse the process of this Court for his personal ends. He placed reliance upon some precedents which caution the Courts against entertaining petitions which smack of *mala fides*. Reliance was also placed on, *inter alia*, the following cases of the Supreme Court of India: *Bholanath Mukherjee v. R.K. Mission Centerary College* (2011)5 SCC 464, *Gurpal Singh vs. State of Punjab and Others* (2005)5 SCC 136, *Dr. B. Singh vs. Union of India and Others* (2004)3 SCC 363, *Dattaraj Nathuji Thaware v. State of Maharashtra* (2005)1 SCC 590 and *Ashok Kumar Pandey v. State of West Bengal* (AIR 2004 SC 280). Reliance was also placed on the recently decided case of this Court in *Dr. Muhammad Tahirul Qadri vs. Federation of Pakistan* (2013 SCMR 461)

15. We are in full agreement with the ratio spelt out in precedents which caution against entertaining cases which are not really in the nature of public interest litigation but only masquerade as such. This is so because the Court's jurisdiction under Article 184(3) is discretionary; if the circumstances and facts of the case so warrant, the Court refrains from exercising it on account of the evident *mala fides* of the petitioner. This principle has most recently, been elaborated in *Dr. Muhammad Tahirul Qadri vs. Federation of Pakistan* (2013 SCMR 461). However, it should be clear that such *mala fides* can only be judged on the basis of the facts of each case. In the present case, nothing has been placed on record which would indicate any *mala fide* on the part of the petitioner, or which would suggest that the petitioner is seeking to exploit the process of this Court for purely personal gain.

16. That the petitioner has been an employee of the respondent is not sufficient to establish his *mala fides,* as we clarified in *Muhammad Yasin's case supra.* In fact, it is only understandable that if employees and other insiders, who naturally have the most understanding of the functioning of concerned institutions, are the ones who most frequently bring the issues of public importance arising in those institutions to the notice of the constitutional Courts. Furthermore, in *Muhammad Yasin's case supra,* while relying on *Maulvi Iqbal Haider v. CDA* (PLD 2006 SC 394), we clarified that *"the contents of a petition*

under Article 184(3) ibid will override concerns arising on account of the conduct or antecedents of a petitioner." The questions which the contents of this petition have brought to light are, without doubt, matters of public importance and, as discussed above relate directly to the enforcement of fundamental rights. Therefore, concerns about the conduct or antecedents of the petitioner, if any, would stand overridden by the contents of the petition. We may also emphasize that exercise of jurisdiction under Article 184(3) *ibid* is not dependent on the existence of a petitioner. Here it may also be added that the term "malice" when used in law, has well defined connotations. Black's law dictionary clarifies that whereas in ordinary parlance malice refers to mere *"[i]ll will or wickedness of heart*", in legal contexts, it requires "[*t]he intent, without justification or excuse, to commit a wrongful act*." In *Bhagat Singh v. The Crown,* (1930 The Punjab Law Reporter 73), the Lahore High Court, relying on *Bromage v. Forsser,* clarified the distinction thus: "*Malice in common acceptation means ill-will against a person, but in its legal sense it means a wrongful act, done intentionally without just cause or excuse.*" It seems clear that if the petition is to be struck down on account of malice, there must be some evidence of a wrongful act. The only wrongful act which the petitioner is alleged to have committed is approaching this Court to seek a legal remedy. Clearly, this does not even remotely amount to malice as understood in law.

17. While holding the present petitions maintainable under Article 184(3) for the above-mentioned reasons, we would like to clarify, as we did in *M. Yasin's* case too, that that if similar cases arise in future, it is possible that the High Courts may be in a position to decide the same by applying the principles of law enunciated in this judgment, in terms of Article 189 of the Constitution. While exercising jurisdiction in the present case we are also cognizant that the petition was filed as far back as 20.7.2011. The adjudication was delayed, in part at least, by foot-dragging of respondent No. 1, considered below. In our view it would be unjust to dismiss this petition and tell the petitioner to approach the High Court and to start his quest all over again before such Court.

B - CHALLENGE TO THE APPOINTMENT OF CHAIRMAN, SECP.

18. The most important aspect of this case is the challenge leveled by the petitioner to the appointment of the Chairman (Respondent No. 4) of the SECP. It has firstly been contended that since the Chairman "*belongs to the broker community*", his appointment violates "*the spirit of Sections 16 and 17 of the Act, read with Section 35 thereof as also Sections 15A to 15E*". According to learned counsel, the appointment of a person from the broker community, particularly one who has had a direct and active personal involvement in the business of share brokerage until a short while before being appointed Chairman SECP, amounts to a "*revolving-door policy*". Elaborating on this it was contended that respondent No. 4 became Chairman of the SECP for a fixed tenure; before his appointment he was engaged in the capital markets as a broker and was likely to return to the same business after completing his tenure. Such arrangements, according to learned counsel, amounted to regulatory capture i.e. the taking over of control of a regulatory body such as SECP, by those who are meant to be regulated by such regulator. To support his contention, reference was made by learned counsel to prominent academics and research institutions, such as Marver H. Bernstein's work "*Regulating Business by Independent Commissions*" (Princeton University Press: 1955) and a recent working paper by Frederic Boehm, "*Regulatory Capture Revisited – Lesson from Economics of Corruption*" (International Centre for Corruption Research: 2007). The main thrust of the argument of learned counsel was that the SECP could not possibly retain its autonomy, independence and impartiality if its working environment was directed towards a segment of the regulated activities such as brokerage and that such inclination must be inferred on the basis that the respondent No. 4 had been in the brokerage business.

19. Although there may be some academics and research supporting the submissions of learned counsel, there may be equally prominent academics and research expressing a different or less stringent opinion. While acting as a Court, we will need to look at the law itself because the statutory provisions will be more important than any opinion formed by academics and researchers, particularly those from alien social, cultural and legal

environments. The Act, when examined, does not lend support to the argument advanced on behalf of the petitioner based on the notion of regulatory capture. Section 5 of the Act in fact, expressly mentions the *"experience and eminence in … the securities market"* as one of the possible qualifications of persons appointed as Commissioners of SECP. Section 18 of the Act gives a list of disqualifications for members of the SECP. Here too there is no bar on industry insiders. Clause 'e' of Section 18 of the Act provides against a person who *"fails to disclose any conflict of interest …"* Although this is an express provision against conflict of interest, it does imply that the law does not prohibit the appointment of a Commissioner of the SECP who may have been a person regulated by SECP prior to his appointment. If indeed the legislature had intended to exclude industry insiders from being appointed as Commissioners, it could either have disqualified such persons or stipulated a cooling off period before appointment as Commissioner SECP. The legislature has chosen not to do so. As the statute presently stands, the fact that respondent No. 4 was heading a brokerage house before his appointment as Chairman, does not by itself violate the law.

C - SCRUTINY OF SELECTION PROCESS LEADING TO THE APPOINTMENT OF RESPONDENT NO. 4;

20. The second challenge made by the petitioner to the appointments of Commissioners and Chairman SECP is far more weighty. It has by now become well settled that Courts will look into the process of appointments to public office. It is the process which can be judicially reviewed to ensure that the requirements of law have been met. In the case of *Muhammad Yasin supra,* the process of appointment to public office has been made the subject of judicial review to ensure adherence to the command of the law. This is also a requirement of good governance and has been a subject of comment from ancient times. Abu al-Hassan al-Mawardi (d. 1058 A.D), the famous scholar from Baghdad devoted a substantial portion of his 11th century treatise on constitutional law, the *al-Ahkam al Sultaniyyah*, to the qualifications for holding public office. These are universal principles of good governance and are reflected in sections 5 and 6 of the Act which lay down stringent criteria for the kind of person the Federal Government may appoint as

Commissioner / Chairman SECP. Section 5(1) of the Act specifies that a Commissioner "*shall be a person who is known for his integrity, expertise, experience and eminence in any relevant field, including the securities market, law, accountancy, economics, finance, insurance and industry*." Under the law, the federal Government has the authority to appoint the Chairman and Commissioners of SECP. The Federal Government, however, has no absolute and unbridled powers in this behalf. It is constrained by the aforesaid requirements of the Act**.** We have come a long way from the days of the whimsicality of Kings and Caesers, such as Caligula who could conceive of appointing his horse Incitatus as Consul of Rome**.** The element of subjectivity and discretion of the Government has been severely limited by the legal requirement that an appointee must be a person having integrity, expertise, eminence etc. This requirement imposes a duty on the Federal Government to put in place a process which ensures that the requirements of the law are met. As will be seen below, no attempt appears to have been made by the Federal Government to ensure compliance of sections 5 and 6 of the Act.

21. The argument adopted by learned counsel for the respondents was that the appointment of respondent No. 4 was made as per past practice and, therefore, should be considered lawful. This argument is without merit. We are not aware that any previous appointment whether of Chairman or Commissioners SECP had been challenged or had come up before a Court on grounds which have been urged before us in this matter. It was also argued that no process had been set out for such appointments in the Act. This submission is not entirely correct. It is obvious that if the requirements of section 5(1) are to be adhered to, there has to be a process which ensures that the widest possible pool of qualified candidates is available to the Federal Government. From this pool, through a transparent selection process, appointments can be made. In our judgment in the case of *Muhammad Yasin supra*, we had set out a three pronged test for appointments to public office: *"(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 [the law]; (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." A comparison of the provisions of the OGRA statute and the Act can prove useful. The relevant provision of the OGRA Ordinance, 2002 is set out in section 3(4). It stipulates "*the Chairman shall be an eminent professional of known integrity and competence with a minimum of twenty years of related experience in law, business etc …*". These stipulations are very similar to those of the Act. It should be clear from this juxtaposition that the most qualified appointee can only be identified if a process similar to the one set out in the case of *Muhammad Yasin supra* is followed.

22. We asked learned counsel for the Federation to show us the process through which the name of respondent No. 4 came up for consideration before the Federal Government. We had sought relevant information vide our order dated 13.09.2011 but this was not complied with. In our order dated 13.06.12 our direction was expressly repeated. In response, the petitioner filed CMA 2955/12 on 05.07.12, which provided only a fraction of the requisite departmental record. Therefore, on 13.09.12, we reiterated our order, but to no effect. Ultimately, on 08.11.12, the petitioner filed a contempt petition to enforce our orders seeking the relevant record. It was only after this extreme step that the Federation finally submitted some official record and documents in Court through CMA 1342/2013 on 13.03.13 and CMA 1562/2013 on 26.03.2013 filed during the course of the hearing. In CMA 1342/2013, it was also repeated that the appointment of the respondent was in line with previous practice. However, it was, for the first time added that the then Finance Secretary and Finance Minister had a meeting with respondent No.4 and *"after due consideration his name was recommended for appointment to the Prime Minister of Pakistan"*. We find this assertion in para 4 of CMA 1562/2013 to be wholly unsubstantiated by any material on record. It appears to be false and misleading. The concise statement filed on behalf of the Federation on 25.10.2011 does not make any such averment. C.M.A 2955/2012 filed on 05.07.2012, also did not make any mention of the Finance Minister and Finance Secretary's meeting with respondent No. 4 nor is there any official noting to this effect. We, therefore, find it strange that CMA No. 1562/2013 which was filed on 26.3.2013 for the first time

mentioned any process at all. The averment aforesaid is also belied by the noting on official files which preceded the appointment of respondent No. 4 as Chairman, SECP, and which has been brought on the record through CMA 2955/2012, CMA 1342/2013 and CMA 1562/2013. We may reiterate, based on the record which was provided by the Federal Government after much foot-dragging spanning more than one year, that no process, let alone a credible, fair and transparent one was adopted by the Government. We may add that, rather than recognizing the potential conflict between SECP and respondent No. 4, a common Concise Statement was filed by them. It was only at a subsequent stage that respondent No. 4 instructed separate counsel. Importantly, neither in the Concise Statement nor during the prolonged hearing of the case was any mention made, of any meetings or interview of respondent No. 4 with the Minister or Finance Secretary.

23. A perusal of the above noted CMAs shows that the manner of the appointment of respondent No. 4 is somewhat like this: On 25.10.2010, a noting was made recording that the term of the then Chairman, Mr. Salman Ali Shaikh was to expire on 29.11.2010. A proposal was recorded for consideration by the competent authority to the effect that the Chairman may be "*reappointed as Commissioner w.e.f 30.11.2010 and assigned the charge of Chairman SECP for second consecutive term from the same date with the approval of Prime Minister (through summary for the Prime Minister.)*" On 16.11.2010 , a Joint Secretary of the Finance Ministry noted that he had discussed the matter with the Finance Secretary and the two would discuss it again on 22.11.2010. On 06.12.2011, almost a week after the expiry of the term of Mr. Salman Ali Shaikh, the Finance Secretary directed that the draft summary containing the proposal for the reappointment of Mr. Shaikh may be formally put up before him. On 09.12.2011, the Finance Secretary put up the file before the Finance Minister, seeking his approval, so that the summary may be put up before the Prime Minister. That day onwards, the noting goes mysteriously silent and when the next noting appears on file on 07.01.11, it is found that the "*decision [has been] taken on another pile [of applications]"*.

24. The Summaries submitted to us do give some idea of what went on in this silent month. While the Summary proposing Mr. Salman Ali Shaikh's re-appointment was still in

place, on 21.12.2010, the Finance Secretary, moved another summary to the Prime Minister where he stated that: "*the Government has made efforts to find suitable candidates and after due consideration, the following persons have been identified to fill these positions: (i) Mr. Muhammad Ali Ghulam Muhammad, (ii) Mr. Ashraf M. Hayat, (iii) Mr. Imtiaz Haider, (iv) Mr. Etrat Rizvi, (v) Ms. Nasreen Rashid... It is [also] recommended that Mr. Muhammad Ali Ghulam Muhammad may be appointed as the Chairman of the Commission with immediate effect."* (Finance Division No. 3(1) -Inv-II /2004-2926 /F/FS/10). The CVs of these five persons were also attached with the Summary. Two days later, on 23.12.2010, the Principal Secretary informed the Finance Secretary that "*[t]he Prime Minister has been pleased to approve the proposals."* And the next day, on 24.12.2010, a notification was issued whereby the respondent Mr. Muhammad Ali Ghulam Muhammad was appointed both as Commissioner and as Chairman. Interestingly, all the other persons mentioned in the Finance Division's summary dated 21.12.10, whose appointments the Prime Minister had been "*pleased to approve*", never got any such notification of appointment. Later, through another Summary dated 09.06.11, the Finance Division withdrew the names of two of these previously approved persons. Instead, "*a new search was undertaken*" and it was "*considered appropriate to consult the newly appointed Chairman*" on this matter. As a result, two other names were added, who went on to be notified as Commissioners.

25. When we pointed out to Mr. Anwar Mansoor Khan these odd circumstances glaringly evident from the record he could not give any satisfactory explanation in response. When we enquired from him about what the "*effort*s" mentioned in Summary dated 21.12.2010 really were, or how the "*search"* mentioned in Summary dated 09.06.11 was undertaken, he was at a loss to give any details although he had ample opportunity for this purpose. Since learned counsel was unable to explain the matter, we have had to fathom the circumstances from the various CMAs filed before us containing official notings. From these, it is clear that the Federal Government has not been adhering to any legally acceptable procedure for making appointments of Commissioners and Chairmen of SECP nor has it cared to ensure adherence to the provisions of the Act relating to appointments.

Instead, the names of potential applicants have been emerging from all sorts of questionable quarters; sometimes CVs were volunteered by enthusiasts; at other times, CVs were forwarded to the Finance Division from politically active quarters (the Deputy Speaker, National Assembly, for instance); and at yet other times, nominations were sought by the Finance Division from influential figures (Governor of the Punjab, for instance). Such practices cannot be condoned, being arbitrary and unsuited to the selection in a fair and transparent manner, of persons envisioned in sections 5 and 6 of the Act. Furthermore, the Federal Government has so far thought it proper, and in fact necessary, to consult the Chairman in the matter of appointment of other commissioners. The office of the Chairman, it seems, has had a considerable say in the matter despite the express provisions of section 5 of the Act which requires the Federal Government to make a selection based on the criteria set out therein. It should be clear that these practices are highly arbitrary, subjective and improper. Indeed, the standards of diligence and objectivity observed here fall well short of the minimum standards required by Section 5, and elaborately identified in precedents of this Court, including *Muhammad Yasin's case*.

26. Mr. Salman Akram Raja ASC representing respondent No. 4 acknowledged that the legal principles enunciated in the case of *Muhammad Yasin supra* constituted a major step towards objective standards of selection of public servants and of good governance. He, however, submitted that respondent No. 4 could not be faulted for his appointment which had been made by the Federal Government. Secondly, he also argued that the appointment of the respondent had been made prior to the judgment rendered in the case of *Muhammad Yasin supra*. On this basis it was submitted that the respondent's appointment as Commissioner and Chairman SECP may not be set aside and he be allowed to complete his tenure. We, however, note that apart from the serious short-comings in the appointment process, no attempt whatsoever was made by the respondents even after the filing of this petition and the judgment dated 25.11.2011 in *Muhammad Yasin's case* to rectify such short-comings. Since the appointment of respondent No. 4 does not meet legal requirements, it would not be fair or proper to condone / overlook the legal short-comings and thereby allow

the respondent to continue in office. The arguments of learned counsel urging us not to strike down the respondent's appointment have been further considered in a later part of this opinion.

27. It must be understood that the statute has vested the power of appointment in the Federal Government, not the SECP or its Chairman. The Federal Government cannot abdicate its duty and delegate this function to the SECP or its Chairman because it is well-settled that a statutory delegate cannot sub-delegate his powers. The very structure of the SECP as envisioned in the Act can be seen as requiring independent decision making by the Government in respect of each appointment of Commissioners and Chairman. If the Chairman is to be given the role of consultee, it would taint the process of selection, firstly, because by doing so the Federal Government will be seen as abdicating its statutory duty and in effect outsourcing its own obligation and secondly, by according a special status to the Chairman in the matter of selecting the constituents of SECP. Furthermore, giving the Chairman so much power, in the matter of appointment of other Commissioners would not be in line with the independent, collegiate and deliberative relationship which is meant to exist amongst all Commissioners, including the Chairman. From a reading of the statute, it seems clear that the Chairman is only as much of a statutory and tenured office-holder as the other Commissioners. The object of having at least five Commissioners and the requirement that such Commissioners be appointed by the Federal Government is meant to ensure that each Commissioner is appointed independently so that he can perform his functions in accordance with law without being beholden to the Chairman for his appointment.

28. Furthermore, in view of the requirements of Section 5, there is a need to devise a proper mechanism for targeting and attracting a pool of qualified potential appointees. Randomly entertaining CVs, with or without the backing of political patrons, or seeking nominations from arbitrarily selected consultees do not meet this requirement. The requirement can be achieved through a number of different means, be it by open advertisement, or through the auspices of talent scouts who have the needed expertise and

who ensure confidentiality to applicants or through any other sufficiently transparent and inclusive process. The details of the mechanism are not our concern at present; these may be worked out by the Federal Government and recorded in the report which we have sought from the Government. What is clear, however, is that the process that went into the impugned appointment clearly does not meet the requirement of the law and the appointment has, therefore, been set aside and struck down.

29. We have also carefully gone through the record placed before us. Apart from the circumstances, noted above, which show that no attempt whatsoever was made to attract the pool of potential talent having the requisite statutory qualifications, we have been unable to find any exercise or effort whatsoever for determining if indeed respondent No. 4 was a person known for his integrity or if he had the requisite expertise, experience or eminence. It may well be that he may have these qualifications; equally, it may be that he does not possess these attributes. What is missing is due diligence or a fair and demonstrably transparent selection process. In the notings on official files, as observed above, a wholly haphazard and un-structured culture of contacts, recommendations or *sifarish* appears to have pervaded the corridors of Government in the matter of appointment of Commissioners. In this respect some names as noted above, were floated by random individuals such as the Secretary Finance and the Governor Punjab based on no apparent process and based on no apparent reason. When this glaring omission was pointed out to learned counsel representing the Federation and it was mentioned that individuals, political or otherwise, even when well intentioned, could not be treated as arbiters of integrity, expertise, experience and eminence of recommendees, learned counsel was unable to give any satisfactory response. He merely repeated his submission that the respondent's appointment was made as per past practice.

30. It is obvious to us that such lack of process has irretrievably undermined the selection and appointment of the respondent as Chairman. This itself is a serious flaw in the selection and appointment process. The only documents attached to the summaries were self generated CVs of these persons. Once again there is nothing at all on the record and

there was no submission made by learned counsel for the respondents which would show that any inquiry let alone due diligence was undertaken to ascertain the correctness or otherwise of the contents of the CVs. So much so, even the most cursory exercise to verify such contents from any source mentioned in the CVs, was not attempted by the Government. In the absence of such due diligence, we are clear that it would be impossible to ascertain objectively the qualifications of recommendees in the Summary as to integrity, expertise, experience and eminence etc. as required by section 5(1) of the Act.

31. We may now take a look at the Summary dated 21.12.2010. This was neither complete nor self contained as required by the law or by a common sense understanding of the purpose of a Summary. It may be noted that Rule 15(2) of the Rules of Business, 1973 made by the Federal Government under Articles 90 and 99 of the Constitution, stipulates that: *"[a] case submitted to the Prime Minister for his orders shall include a self-contained, concise and objective summary stating the relevant facts and points for decision…"* The Secretarial Instructions issued in pursuance of Rule 5(15) of the Rules of Business, 1973 for the disposal of business in the Federal Secretariat also reiterate that "*when a case/file is submitted to the Prime Minister… [i]t shall include a self-contained, concise and objective summary stating the relevant facts and points for decision.*" (Instruction 44, Annex E, Secretarial Instructions, 2005). In a series of cases, including *Makro-Habib's case* (2010 SCMR 885), *Tariq Azizuddin's case* (2010 SCMR 1301) and *Muhammad Yasin's case* (PLD 2012 SC 132), this Court has emphasized the importance of summaries as tools of governance and effective decision making. In a recent case, the Lahore High Court has also clearly articulated this by stating that the *"Rules of Business flow out of the Constitution, and are the sinews of a workable government… Rule 15(2) of the Rules requires a "self contained, concise and objective summary" to be placed before the Prime Minister… If the summaries put up before the Prime Minister lack in material particulars the discretion so exercised … remains irreparably defective." (per Justice Manoor Ali Shah,* in *Barrister Sardar Muhammad Ali v. Federation of Pakistan, W. P. No. 29005/2012).*

32. Two days after the date of the summary, on 23.12.2010, the Principal Secretary to the Prime Minister conveyed to the Finance Secretary that *"the Prime Minister has been pleased to approve both the proposals"* contained in the summary. The next day, on 24.12.2010, a notification was issued whereby the respondent Muhammad Ali Ghulam Muhammad was alone appointed both as Commissioner and Chairman. It is also worth while to note that the four other persons mentioned in the summary whose appointments had also been approved by the Prime Minister, were not notified as Commissioners despite such approval. We have no clue as to the reason for such conduct. We may also add that the Summary was prepared in violation of the express desire of the Competent Authority dated 16.03.2010 requiring that for each vacant position a panel of names be proposed. According to this noting, "*[t]he Establishment Division … [had] proposed that Finance Division may propose a panel of suitable officers having relevant qualification and experience for the post of Commissioner, SECP. Further, they should send such panels for all the vacant positions".* It was also mentioned that the *"Prime Minister has approved the above recommendations of the Establishment Division."* The Summary dated 21.12.2010 which resulted in the appointment of the respondent as Chairman was made in violation of the express direction of the Prime Minister who was the competent appointing authority.

33. When we inquired from Mr. Anwar Mansoor Khan learned counsel for the Federation about the above matters, he failed to provide any satisfactory answer. Certain notifications and notings on official files were placed on record after a lot of foot-dragging and unjustified delay of more than one year. These notings confirmed our impression that the selection of the respondent was done in a highly, arbitrary, subjective and improper manner which was inherently unsuited for establishing the credentials/qualifications for Commissioners of SECP as set out in section 5(1) *ibid.* Once again, to defend such a slipshod and non-transparent manner of selection, the only argument proffered on behalf of the Federation was that this had been the past practice. This does not provide justification for continuing with the flawed selection even after the present petition was filed on 20.07.2011 raising valid objections to the appointment of respondent No. 4 and even after the

parameters of selection and appointment to public office had been set out in the case of *Muhammad Yasin supra.*

34. We also asked learned counsel for the Federation to explain the reason as to why only one out of the five persons approved by the Prime Minister was appointed and the others despite approval were not notified. He did not give any explanation for this unusual and whimsical action. We also asked him to state as to how it was that two legally distinct appointments i.e. the appointment of respondent No. 4 as Commissioner and his appointment as Chairman SECP were notified through the same notification. This question was raised in view of the provisions of section 6 of the Act which stipulate that *"the federal Government shall appoint one of the Commissioners to be the Chairman [SECP] …".* It is obvious from this statutory provision that the appointments (as Commissioner and Chairman) have to be sequential. Firstly, Commissioners have to be appointed. It is only thereafter that the federal Government after another exercise undertaken by it objectively and transparently, is to appoint one of the Commissioners to be the Chairman of the SECP. This exercise can be undertaken after the appointment of the statutory minimum number of Commissioners for the obvious reason that the most competent and qualified amongst them be appointed as Chairman. From the notification dated 24.12.2010, it is abundantly clear that the law as set out in section 6 *ibid* was not adhered to while making the appointment of the respondent as Chairman. The sheer arbitrariness and failure to adhere to the law, renders the appointment unlawful and also mars the fairness of the selection process.

35. As a result, we felt it necessary to direct the Finance Secretary to examine wrongdoings/shortcomings, if any, within the Ministry and the decision-making processes of the Federal Government under the Act. We may also observe that the noting file submitted before us is full of cross-marks; and there are distinct ruptures in the sequence of events that comes out of it. It is quite possible that the file has been tampered with. The Finance Secretary may also inquire into and comment on this in the report sought from him.

36. Near the very end of the oral arguments, learned counsel for respondent No. 4 argued that even if the Court were to strike down the respondent's appointment as violative of Section 5 of the Act, such an order should be given prospective effect. In effect, his argument amounted to the submission that even though the appointment was made in

violation of the law, it should be left untouched; And instead, the Court should restrict itself to laying down guidelines for how the Federal Government should make such appointments in the future. Alternatively, he seemed to be seeking a grace period until which fresh appointments may be made; and contended that until such time, the present appointee may be allowed to continue. In support of this argument, he sought to place reliance on *Al-Jehad Trust's case* (PLD 1996 SC 324) which pertained to the appointment of judges of the superior courts and the recent judgment of this Court in *Sh. Riaz ul Haq and others v. Federation of Pakistan* (Constitution Petitions Nos. 53/2007 & 83/2012), pertaining to appointments to services tribunals. Reliance was also placed on a large number of foreign precedents which, for the present, we need not consider at any length because of the law and precedent in our own jurisdiction which provides adequate guidance in the matter before us.

37. We do not find any force in the above argument for a number of reasons. Firstly, if such a submission were to be fruitfully pressed, it is the appointing authority, the Federation, which should have sought the same. Had the Federation contended, forcefully and from the very beginning of this case, that its appointment procedure was based upon an interpretation of the law which was honest and plausible even if incorrect, the Court might have been inclined to consider such a submission. But the fact of the matter is that over the course of proceedings spanning more than two years, and down to the very last day of his oral arguments, learned counsel for the Federation never took this plea. Instead, he chose to defend the appointment itself. Beyond this reason, there are also substantive grounds on account of which we are unable to accept this plea advanced by counsel for respondent No. 4.

38. The cases which the learned counsel referred to are both clearly distinguishable. In the *Al-Jehad Trust* case, the Executive had been acting upon an interpretation of the articles of the Constitution pertaining to judicial appointments, particularly the term "consultation" therein, which was flawed yet plausible. That interpretation was, for the first time ever, challenged by the petitioners and consequently struck down by the Court. It was on account

of this factor that the Court found it appropriate to take a less stringent view of the matter and gave its judgment prospective effect only. In *Sh. Riaz ul Haq's* case, the petitioners challenged the constitutional validity of a range of statutory provisions and rules pertaining to structural features of the service tribunals in the country, including Ss. 3(1), 3(3), 3(3)(b), 3(4), 3(7) of the Service Tribunal Act, 1973, Rule 2 of the Service Tribunals (Qualifications of Members) Rules, 1974, Rule 1 of the Federal Service Tribunal (Chairman and Members) Rules, 1983 and S. 3(3)(b) of the Sindh Service Tribunals Act, 1973, S. 3(3)(b) of the KPK Service Tribunal Act, 1974 and S. 3(3)(b) of the Balochistan Service Tribunals Act, 1974. The Court held these legal provisions to be in derogation of Article 2A read with Article 175, which, *inter alia,* secure the independence of the Judicature. The Court directed that new legislation be made within a period of 30 days in conformity with constitutional directives, until which time the impugned laws were allowed to continue in force. And since these laws continued to have effect, appointments made thereunder also continued to have effect.

39. In the present case, we have not been called upon to engage in any novel question of constitutional or statutory interpretation. The constitutional principles involved have been clear since long. At least since *Abdul Jabbar Memon and others, (Human Rights Case) (1996 SCMR 1349),* this Court, and in fact all courts in the country, have been emphasizing the need to do away with arbitrariness and capriciousness in the matter of appointments to public offices. Furthermore, Section 5 of the Act lays down specific criteria for appointment which the Federation obviously had the obligation to satisfy. If there was ever any doubt in the matter, it should have been dispelled by our judgment in *Muhammad Yasin's case supra* announced in November, 2011. Since, even in the wake of that judgment, the Federation did not avail the opportunity of rectifying appointments which it had earlier made without following the necessary process, it is hard to see how it can now be granted any leniency in the matter. Furthermore, unlike in *Sh. Riaz ul Haq's* case, we have not struck down any provision of the SECP Act, nor directed the framing of any new laws. We are only examining the acts of the Executive in the light of the law which has been duly enacted and is in force. This law had to adhered to and obeyed; but the Federation failed to do so.

C - INSUFFICIENT NUMBERS OF COMMISSIONERS.

40. Before parting with this aspect of the case, it is necessary to comment on the statutory requirement as to the composition of SECP and the failure of the Government to fulfill its statutory obligation and to ensure proper constitution of SECP in accordance with law. In section 5 of the Act it has been mandated that *"the Commission shall consist of such number of Commissioners, including the Chairman, appointed by the Federal Government as may be fixed by the federal Government but such number shall not be less than five and more than seven".* The minimum number of Commissioners by law could not be stated with greater clarity. Even this Court had clarified in its judgment in C.P No. 447/2001 and 448/2001 that the SECP was not properly constituted because the minimum number of Commissioners had not been appointed. Learned counsel for the petitioner placed on record a table, reproduced below, which shows that barring a period of four years the constitution of the Commission was incomplete during the previous 15 years, as the minimum of five Commissioners had not been appointed. The respondents have not denied the veracity of this table which reflects a patent illegality and a flippant attitude towards statutory requirements. In fact, in the Concise Statement filed on behalf of Respondent Nos. 2, 4, 5 & 6, it is admitted that "*the number of Commissioners in [SECP] has been less than five since 2003."* A half-hearted attempt was also made to justify this on the ground that *"there is no requirement of minimum quorum in the Act or Regulations."* When these submissions are juxtaposed with Section 5 of the SECP Act, we cannot help but notice the disregard for the law on the part of the respondents in the crucial matter of the very composition of SECP:

NUMBER OF APPOINTED SECP COMMISSIONERS

Serial	Dates		Number of Commissioners
	From	To	
1.	01/01/1999	01/03/2000	4
2.	01/03/2000	30/03/2000	3
3.	30/03/2000	27/07/2000	4
4.	27/07/2000	29/09/2001	5
5.	29/09/2001	10/10/2001	4
6.	10/10/2001	26/07/2002	5
7.	26/07/2002	31/07/2002	4
8.	31/07/2002	29/03/2003	5

9.	29/03/2003	19/08/2003	4
10.	19/08/2003	31/12/2003	5
11.	31/12/2003	18/10/2004	4
12.	18/10/2004	30/07/2005	5
13.	30/07/2005	11/11/2005	4
14.	11/11/2005	12/01/2006	3
15.	12/01/2006	24/07/2006	4
16.	24/07/2006	26/11/2007	3
17.	26/11/2007	17/07/2008	4
18.	17/07/2008	11/01/2009	3
19.	11/01/2009	21/03/2009	2
20.	21/03/2009	30/04/2010	3
21.	30/04/2010	07/09/2010	2
22.	07/09/2010	26/11/2010	3
23.	26/11/2010	29/11/2010	2
24.	29/11/2010	24/12/2010	1
25.	24/12/2010	24/08/2011	2
26.	24/08/2011	17/08/2012	4
27.	17/08/2012	Till date	5

D - INSERTION OF SAVING CLAUSE THROUGH A MONEY BILL.

41. An attempt appears to have been made by the Federal Government to rectify this anomaly. Through the Finance Act, 2003, sub-section (5) was added to section 5 of the Act which states that: "*[n]o act or proceeding of the Commission shall be invalid by reason only of the existence of a vacancy in, or defect in the constitution of the Commission.*" The petitioner has rightly challenged the insertion of this clause through a money bill. Article 73(2) of the Constitution defines the scope of a money bill. The impugned amendment does not even remotely fall in that scope. In the case of *Sindh High Court Bar Association v. Federation of Pakistan* (PLD 2009 SC 879, 1112-3), the Court clarified the narrow scope of Articles 73 stating that: "*all substantial legislation is made by an Act of Parliament, that is to say, the passing of the relevant Bill by the two houses of Parliament as defined in Article 50 of the Constitution. On the other hand, a Finance Act, in general, is concerned with fiscal matters…*" As a result, an amendment made to the Supreme Court (Number of Judges) Act, 1997, through the Finance Act 2008, was declared unconstitutional and, because of the peculiar circumstances of that case, referred back to Parliament. In *Mir Muhammad Idris v. Federation of Pakistan* (PLD 2011 SC 213), the Court struck down the reappointment of the Chairman, President and other members of the Board of National Bank of Pakistan, which had been made through a

money bill, since it did not fall within the scope of Articles 73 and 75. The insertion of Section 5(5) in the Act, through Finance Act 2003, is no different. It has, therefore, been struck down being unconstitutional. We may clarify that, at present, we are concerned only with the *vires* of Section 5(5) and not with the legal effect of such a "saving clause" if it were, to begin with, validly enacted.

E - CHALLENGE TO THE POWER TO TERMINATE WITHOUT CAUSE.

42. In the petition filed by him, the petitioner challenged the termination of his service on the ground that it was arbitrary and had been made without giving any reason. The petitioner also challenged the legality of the termination simpliciter clause contained in the employment policy (HR Handbook) of SECP. The order dated 13.06.2011 terminating the employment of the petitioner does not provide any reason for the termination but states simply *"please be informed that your services/appointment as Executive Director have been terminated with immediate effect i.e. June 13, 2011 under sub-clause (b) of clause 3(1) of Chapter 11 of the [SECP's] HR Hand Book, 2007 by the competent authority."* The HR Handbook contains the employment policy of SECP which the petitioner consented to as a part of his employment contract. Clause 3(1) of Chapter 11 of the HR Handbook, which we may refer to as the "termination *simpliciter* clause", states that *"[a]fter confirmation, the appointment/services can be terminated by either party without assigning any reason thereto* …". This wording suggests that clause 3(1) *ibid* is sourced in section 8(2) of the Act discussed below. It may, at this point, be noted that at the time the petitioner received this notice, he was working as an Executive Director, which is the highest level of employment in the SECP after the Commissioners. The Executive Director was responsible for performing functions which enabled SECP to fulfill its obligations under the Act, considering that SECP is meant to perform its functions independently. Presumably, other employees of the SECP, including those at the highest levels, are also working under similar contracts. The personal aspect of the petitioner's case need not to be commented upon because the petitioner did not press his individual claim and has opted to pursue his personal remedies in any appropriate forum available under law. There are, however, at least two important

institutional aspects of the case which were strongly urged on behalf of the petitioner and which we find necessary to address.

43. During the course of the hearing we drew the attention of the counsel for respondents Nos. 2 and 6 to the fact that the termination order had been signed by Bushra Aslam Respondent No. 6 who is Director Human Resource and is, in effect, junior to the petitioner in the SECP's employee hierarchy. Since the order purports to have been made at the behest of the *"competent authority",* we inquired as to who the competent authority was. We never received a satisfactory answer to this question. One thing however is certain from the facts on record and the contents of the HR Handbook; the "competent authority" referred to in the termination order is some person or body other than the SECP, as per definitions given in clause 2 of the HR Handbook. This fact has great relevance in the present context as will become apparent shortly.

44. Nothing has been placed on record, nor was any submission made on behalf of SECP as to who had directed the termination of the petitioner's employment, how this had been done and why. Likewise nothing has been stated as to the necessity or desirability of such termination with immediate effect. We, however, need not depend on the respondents to tell us who the "competent authority" is in matters of employment or termination of services of employees. The Act itself provides ample guidance in respect of such matters. According to sub-section (1) of Section 8 of the Act *"the Commission may, from time to time, employ persons to be employees of the Commission who shall … hold their employment on such terms and conditions as may be determined by the Commission with the approval of the Board"*. Sub-section (2) of section 8 then stipulates that *"the employees of the Commission shall hold office during the pleasure of the Commission"*. The authorization for appointing as well as firing employees of the Commission has thus been conferred by the law on the SECP itself. The question as to whether this authorization can be further sub-delegated and secondly, if it is a matter falling within the ambit of section 10 of the Act, which provides for delegation of "powers" and "functions", of SECP is examined below.

45. At this stage, we find it useful to refer to some other provisions of the HR Handbook. Clause 2(d) thereof defines the term Commission to mean the SECP established under the Act. The term "competent authority" is separately defined in clause 2(f) of the HR Handbook as SECP or any other authority to which SECP delegates its power. As will be evident from the discussion below, the reference in the termination order dated 13.6.2011 to the "competent authority" is not a reference to the SECP. Had it been the SECP the relevant decision ought to have been placed on record to show that the SECP had indeed met as a collegiate body and deliberated collectively on the matter in order to arrive at its decision to terminate the employment of the petitioner. This in fact is not the case pleaded on behalf of SECP. Moreover, it is unfortunate that despite our questioning of learned counsel for SECP and despite our directives to the Director and the Director General of the legal department of SECP to place on record the relevant minutes/resolution of SECP, this was not done. It is apparent from the provisions of section 8 of the Act *ibid* that the termination of services of an employee (even if a literal, unbridled and limitless meaning is given to the words "pleasure of the Commission"), that such power is meant to confer on SECP a discretion which can be exercised by SECP alone and by none else.

46. A "competent authority", whatever or whoever this may be, or a person such as Bushra Aslam (respondent No. 6) can at best perform the ministerial function of conveying/implementing the decision of SECP: Such person or even a Commissioner or Chairman cannot possibly know what the pleasure of SECP is, let alone decide, on behalf of the SECP, as to what its pleasure would or should be. It is well settled in our jurisprudence that a discretionary authorization conferred on a person or body by statute, cannot be delegated. It has repeatedly been held by our Constitutional Courts that the exercise of such discretionary function is in the nature of entrustment and the statutory functionary who is entrusted with exercising his judgment, acts as a fiduciary. Apart from the fact that such fiduciary is obliged to exercise discretionary decision-making functions himself, it is also a necessary concomitant of such fiduciary performance of duties, that the same are exercised in good faith for furtherance of the objectives of the statute. The extent and scope of section

10 of the Act relating to delegation of the "powers and functions" of the SECP is examined below. However, it will be noted that section 8 *ibid* and similar provisions are repeated in various laws in Pakistan and have been the focus of attention in precedent. In some statutes such as the Trusts Act there are express provisions (Section 47) which codify such principles. Even laws relating to companies, which are administered by SECP itself are based on express or implied precepts highlighting the non-delegable nature of discretionary/fiduciary decision-making functions of bodies corporate and their directors/governing boards. Such bodies include corporate entities such as SECP where collective deliberation is required for decision-making.

47. In the present proceedings, while we do not wish to record conclusions about the impugned termination order, we do consider it necessary to note that the hiring and firing of employees, particularly those who assist SECP in the performance of its decision making function, is a highly significant matter involving personal judgment of the Commissioners and Chairman constituting the SECP. It is a statutory authorization which has been conferred by the legislature on SECP through section 8 *ibid* and cannot be further sub-delegated. As noted above, the legislature in clear terms has required decisions by a deliberative and collegiate body, and not by individuals who purport to be delegates or who may personally be members of SECP as a body corporate. Clause 1 of Chapter 2 of the HR Handbook acknowledges this principle, but also adds that for a certain "*class of employees*" SECP may delegate its power of hiring to "*the Chairman or any of the Commissioners or a committee or any officer authorized to be the appointing authority.*" This provision in the HR Handbook is not in accordance with the law, as has been explained above. The SECP may for the purpose, of facilitating itself, constitute committees of its functionaries or even engage the services of outside recruiting agencies to identify and short-list candidates for hiring. However, such functionaries and "head-hunters" cannot actually hire a person because this is an authorization vested in SECP by the Act and not in such functionaries or recruiters. Likewise is the case of firing/termination and disciplinary action as per section 8(2) of the Act. A Committee or functionary of SECP may be delegated

the function of fact finding etc. or even to make a recommendation for dismissal of an employee, based on an inquiry, but section 8(2) *ibid* does not envision any person or authority (other than SECP) as a "competent authority" for the purpose of terminating the employment of an employee of SECP.

48 The misconception about who the "competent authority" in the matter of hiring and firing is, may also arise out of a lack of proper appreciation for the scope of section 10 of the Act. This provision expressly allows the Commission to delegate some of its "*powers and functions"* to *"one or more Commissioners or any officers of the Commission.*" What, it may be asked, are these powers and functions which fall within the ambit of section 10 and are, therefore, capable of sub-delegation? The Act itself provides a clear answer. The, "*powers and functions of the Commission*", which Section 10 refers to, are those which are expressly listed in Part VI, particularly in Section 20 of the Act. The words "function" and "powers" which have been used in section 10 have to be given meaning in accordance with the Act. For this we can look at Part VI of the Act which is titled "Powers and Functions". Section 20 also bears the heading "Powers and Functions of the Commission". Sub-section (1) of section 20 stipulates that "*[t]he Commission shall have all such powers as may be necessary to perform its duties and functions under this Act*". Section 20(4) lists the duties of the SECP by stipulating that it shall be responsible for the performance of the functions enumerated therein. Nowhere in this copious list of 23 items do we find any mention of "*hiring and firing of employees*". This can hardly be attributed to a careless omission. That the framers of the Act chose to deal with this matter in a separate section of the statute makes it clear they intended to distinguish between, on the one hand, powers and functions of the SECP which are listed in Section 20 and are, by virtue of Section 10, delegable, subject to limitations and, on the other hand, the authorization to hire and fire employees (section 8) granted to the SECP which, as discussed above, constitutes the non-delegable discretionary authority of the SECP involving the individual input, consideration, evaluation and judgment of each Commissioner and Chairman. In other words, a holistic reading of the Act and Section 10 shows that it does not provide cover for delegation of this core function of hiring and firing

of employees; the SECP itself as a collegiate body must take decisions on it. In addition, the general principles applicable to construction of instruments and texts relating to delegation of authority can appropriately be applied to Section 10 read with section 20 of the Act. Accordingly such texts are to be strictly construed and no delegation of authority is to be assumed or inferred if it is not expressly provided for or which may be required by necessary implication.

49. Here it is helpful to reemphasize the general principle of our law that all statutory authority is fiduciary in nature; it is vested in the functionary or body specified in the statute and is therefore, as a rule non-delegable. The maxim *delegatus not potest delegare* sums it up: the delegate cannot further sub-delegate. A leading authority on administrative law, states the rule thus: "*It is a well-known principle of law that when a power has been confided to a person in circumstances indicating that trust is being placed in his individual judgment and discretion, he must exercise that power personally unless he has been expressly empowered to delegate it to another.*" (DeSmith, S.A. Judicial Review of Administrative Action, p. 263, 3rd Ed. London: 1973). In his treatise on constitutional law, relying on *Vine v. National Stock Labour Board* [(1956) 3 All ER 939], Justice (r.) Fazal Karim, a former Judge of this Court and a leading legal scholar and academic summarizes the position thus: "*In deciding whether a person has the implied power to delegate, one has to consider the nature of duty and the character of the delegating person… [T]here are powers which, though administrative in nature, cannot normally be delegated. For example, power of appointment to an office, and disciplinary powers, such as non-entitlement to pay, suspensions or dismissals cannot be delegated.*" (Justice (r.) Fazal Karim, Judicial Review of Public Actions, Vol I, p. 399, Karachi: 2006). The Act is structured in accordance with this general statement of the law. Section 10 *ibid* has to be read in juxtaposition with sections 8 and 20 of the Act as has been explained above.

50. We can only conclude that, under the Act the hiring and firing of employees is a decision which the SECP alone can take and that too through a collective and deliberative exercise. There is a conclusive indicator of this in section 8(2) of the Act. The term "pleasure of the Commission" and its limitations have been discussed above. However, even if the

term is taken to mean a literal, absolute and unconstrained ability to fire an employee, it will be evident that the "pleasure" has to be the pleasure of SECP. No delegate of SECP can possibly know what the "pleasure" of SECP (the collegiate body) is. The deliberative process itself envisions a consultation between at least five Commissioners and is essential for the purpose of expressing the will and pleasure of the Commission. This would also necessarily ensure that the "pleasure" is reasoned to advance the objects of the Act and is not despotic.

51. That the interpretation of the Act given above represents the correct construction of the Act even according to SECP, is borne out from specific decisions taken by SECP in relation to delegation of its "powers and functions". The first of these decisions is recorded in the notification of the SECP dated 18.10.2005 bearing No. SRO. 1061(I)/2005. This notification has been issued "in exercise of powers conferred by section 10 of [the Act] read with section 20(4)(o) thereof". The Commission has chosen to delegate such of its "powers and functions" to its Commissioners and other officers as have been specified in this notification. The notification is spread over 47 printed pages and contains a long list of the powers and functions of SECP which have been delegated to its Commissioners, Executive Directors and other officers. The notification shows recognition on the part of SECP that the authorization which has been given in section 10 of the Act has a direct and immediate nexus with section 20(4) of the Act. This nexus has been considered in fair detail above. Its significance is that in this long list setting out in detail the powers and functions of SECP which have been delegated to its Commissioners and Officers, no mention has been made of hiring and firing of employees of SECP.

F - VIRES OF THE SERVICE RULES.

52. The petitioner has also challenged the very legality of the termination *simpliciter* clause as it exists in the HR Handbook. We propose to examine this claim in some detail. In this regard, reference may once again be made to Section 8(1) which authorizes the Commission to hire employees "*on such terms and conditions as may be determined".* Section 42 of the Act stipulates that the employees of the Commission shall be *"deemed to be public*

servants within the meaning of section 21 of the Pakistan Penal Code", but they shall not be *"deemed to be in the service of Pakistan or … be regarded or treated as civil servant[s]".* Section 8(2) as noted above states that "*employees of the Commission shall hold office during the pleasure of the Commission…*" A disjointed reading of these provisions appears to have been invoked by the respondents as a possible justification for the SECP's no-cause termination policy. To repel this contention, it is necessary to construe the Act holistically, and to bear in mind the general principles of our law.

53. Firstly, some attention needs to be paid to Section 22(5) of the SECP Act which states that "*[s]ubject to the compliance of the provisions of sub-section (3), section 24A of the General Clauses Act, 1897 shall apply to any order made or direction given under this Act."* Section 24A of the General Clauses Act, 1897, obliges every person exercising powers conferred by a statute, to act "*reasonably, fairly, justly and for the advancement of the purpose of the enactment*." It also stipulates that the person making any order under the power conferred by any enactment shall, so far as necessary or appropriate, *"give reasons for making the order".* Therefore, an unreasoned order of termination (without cause) such as that urged by the respondents under the impugned clause of the HR Handbook, would be violative of section 22(5) of the Act read with section 24A of the General Clauses Act. The effect of Section 24A came under discussion in a series of precedents. In *Government of Pakistan v. Farheen Rashid* (2011 SCMR 1), also a service matter, the Court reiterated that "*[a]fter addition of section 24A in the General Clauses Act, it is the duty and obligation of public functionaries to decide the cases of their subordinates after application of mind with cogent reasons within reasonable time as law [already] laid down by this Court."*

54. Secondly, the termination simpliciter clause seems to have been made under the highly unrealistic impression that for creating an independent and effective SECP, it is sufficient to provide the five to seven Commissioners any sort of employment protections, while all others working for the SECP, including those who assist in the performance of decision making and law enforcement functions, remain open to termination at any time, and for any reason or even without any reason. Were that so, even absurdities such as:

"*You're doing excellent work, diligently but I don't think you should be working so diligently*" or "*I had a dream last night*…" or "*You're not obedient to me and do not give the legal opinions desired by me*" would be considered legitimate. Such a draconian employment policy cannot possibly foster an independent and lawful institutional environment. If employees do not have safeguards against arbitrary or mindless termination, they would, to retain their jobs, be inclined towards toeing the line of the SECP or even the Commissioner under whose administrative control, an employee may be working. As a result, employees would lose the independence necessary for the effective functioning of SECP as a regulatory body. The Commissioners are, by law, required to be persons of unquestioned "*integrity, expertise, experience and eminence"*; yet, it has been thought fit to further bolster their integrity and independence by providing them security of tenure. The employees of the Commission, it should be borne in mind may not necessarily be as strong-willed or free from fear and temptation by disposition. They stand in need of a strictly law-abiding institutional environment, if they are to withstand the temptations and intimidations that public servants often encounter. Since the petitioner has chosen not to press his personal claim in this case, we do not intend to record any definitive finding about the circumstances in which his services were terminated. Suffice it to say that the facts available on record suggest that his termination and indeed the disbanding of the whole Law Division, may have been connected with a streak of independent thinking. Be that as it may, we do not find it necessary or appropriate to definitively determine the causes of the petitioner's termination in these proceedings. It is a matter which the Policy Board may look into, in the report which it is due to submit, in accordance with our short order.

55. It must be stated that in a civilized dispensation which is rule based and is aimed at good governance, such whimsicality cannot be countenanced. Such autocratic practices may be in consonance with the legacy of our colonial past wherein the prevalent monarchical disposition subjected senior state functionaries, even judges, to holding office at the monarch's pleasure. But, as we noted in *Muhammad Yasin's* case, our law has come a long way from those days. It does not allow for dismissal of "*public servants*" in such an

imperious and arbitrary manner. There is another important reason why this cannot be done. We have repeatedly held that all functionaries of the state, be they Civil Servants or senior echelons of corporate/statutory bodies such as SECP are above all, fiduciaries of the people. As such they can only exercise their powers in good faith in the public interest and not on the basis of personal likes or dislikes or on the basis of whims and fancies. Thus, the power to terminate implies within it that it is not the power of a despot, tyrant, *seth* or *wadera*, but the power of a trustee and fiduciary in the service of the people. A *seth*, in the unbridled *laissez faire* world of private business could perhaps terminate the services of an employee on the ground that the employee is too honest, upright and law-abiding for the success of the business or that he does not defer to the *seth's* opinion. Such attitude and thinking have no place in a statutory public body such as SECP, which only exercises delegated authority under section 8 *ibid* when it *"from time to time employ(s) persons to be employees of the [SECP]"*. It is essential that officials taking decisions in the SECP or enforcing rules, regulations and policies are not left at the whims of a capricious and unreasoned SECP. It is also important to bear in mind that the powers vested in the Commissioners/Chairman SECP are institutional and not personal. These powers whether express or implied can only be exercised in furtherance of the objects for which SECP has been established.

56. To sum up the discussion in this part, when we read the Act in the light of principles elaborated repeatedly in our precedents, it becomes clear that the SECP cannot simply be terminating the services of its employees at its whims and pleasure, without having recourse to valid reasons. It can only terminate an employment when it has reasons to do so which are fair and just and advance the purposes of the Act. Both law and public policy require this. This is why, in our short order, we declared Clause 3(1) of Chapter 11 of the SECP Service Rules (HR Handbook), which allows for termination simpliciter (without cause) of employees of SECP, as ultra vires the Constitution and inter alia, the Act. We had also directed that the above clause be replaced appropriately by provisions ensuring due process and adherence, *inter alia* to Articles 9, 10A, 14, 18 and 25 of the Constitution and

which are consistent with the provisions of the Act ensuring independent and objective decision making without fear or favour, as required of an independent regulator.

G - A STRING OF UNFINISHED INQUIRIES.

57. Before parting with this judgment, we may mention one more aspect of this petition. The petitioner has placed on record a number of documents to support his claim that the SECP and its Chairman/Commissioners failed to discharge their legal duty to pursue several high-profile inquiries, despite the opinion of relevant commissioners and certain highly-placed officers performing important executive and even judicial or quasi judicial functions such as (in the case of the petitioner) rendering legal opinions on matters of criminal or civil prosecutions. The documents placed on file pertain, primarily, to five inquiries though it was submitted on behalf of the petitioner that there were other matters also which needed looking into.

58. Firstly, there is the matter of an inquiry against Azgard Nine Ltd (ANL) for creating misleading appearance of active trading and doing wash sales. According to the documents placed on record, the SECP ordered an investigation against ANL in 2007. A fully detailed final investigation report, also placed on record, was submitted to the then Chairman in April 2009. A few days later, the term of the then Chairman expired and a new Chairman came in. He sought an opinion on the matter from the Legal Department, which, in a "*preliminary opinion*" dated 28.05.2009, "*formulated on the basis of a factual summary provided by SMD*", concluded that "*[a] strong case [is] made out for filing criminal prosecution under Section 24 read with Section 25 of the Ordinance… [and] the Commission … is duty bound to proceed with filing a complaint before the competent court of jurisdiction.*" Later, in an opinion dated 17.02.2010, the Commissioner (Legal) asserted that "*every effort has been made to bury [this] investigation…*" and that "*a brilliant effort made by the officers of the Commission"* had been brought to naught. Counsel for SECP admitted that no further action or proceedings on the basis of the aforesaid opinions had been taken. (C.M.A No. 4238/2011 and C.M.A No. 655/2013).

59. Secondly, there is the case of Hala Enterprises Limited (Hala). In a memorandum dated 17.02.2010, the Commissioner (Legal) had brought on record his opinion that the previous Chairman "*influenced the Enforcement Depart [sic] to change its recommendations for not filing the criminal prosecution,"* ostensibly because he had remained a Director of Hala from 1993 to 1996, the period in which the offense being inquired into allegedly took place. (C.M.A No. 4238/ 2011)

60. Thirdly, there is the case of Beema Pakistan Limited (BPL). Documents placed on record bring out the allegation, which a fact-finding committee accepted, that the inquiry into the affairs of BPL could not reach its conclusion because of the act or omission of a specifically named SECP official, who received a cheque for Rupees 1.5 million from the Chairman of BPL. (C.M.A No. 4238/2011)

61. Fourthly, there is the case of Chenab Limited, Pakistan (CHBL). Documents placed on record show that between 11.03.2010 and 2.04.2010, the share price of CHBL almost trebled. This happened to be the period in which some holders of cumulative preference shares – mostly financial institutions - were due to convert their preference shares into ordinary shares. Because of the ramped up price, they had to value CHBL shares at a much higher rate and suffered a massive loss. Upon their complaint, the SECP appointed investigation officers on 3.05.2010 to probe into the matter. The Inquiry Report dated 08.08.2010, also placed on record, concluded that "*[b]ased on the detailed analysis and review of the documents, information received during the course of investigation and statements, it has been observed that there is a violation of [various] security laws… [and appropriate legal] action may be initiated against the relevant officers, directors, of CHBL, CSL and AKD, Muhammad Irfan Maqbool and Sohail Badar…"* In its Inter-Office Memorandum dated 11.10.2010, the Legal Department, concluded that "*there is enough evidence on record to initiate prosecution…motive is also clear and the beneficiaries of the fraudulent practice are also clearly established… [and] <u>their links established through evidence are undeniable…</u>*" (C.M.A No. 655/2013, Part II)

62. Finally, there is the matter of Trakker Private Limited (TPL) and TPL Trakker (Pvt) Limited (TTPL). The two companies agreed to a Scheme of Arrangement pursuant to which

they filed a joint petition in the Sindh High Court which was granted on 07.05.2009. Thereafter, TTPP moved for public listing. The SECP refused, on the ground that TTPL's valuation included "goodwill" which, under Rule 8 of the Companies (Issue of Capital) Rules, 1996, could not be counted towards its valuation. TTPL's case was thus turned down. In Interoffice Memorandums dated 4.01.2010 and 09.06.2010, the Legal Department recorded its reasons for taking the position that goodwill may not be counted towards a company's valuation for the purpose of listing. It has been alleged the 1996 rules were subsequently amended only to favour TTPL. (C.M.A No. 633/2012 and C.M.A 1374/2013).

63. During the proceedings of the case, Ms. Shazia Baig, a serving officer of the SECP made a request for being impleaded as a party. She claimed to have conducted a range of enquiries for the SECP into the affairs of the securities market and alleged that she was being subjected to undue disciplinary proceedings on account of her diligent investigative efforts. During the oral arguments, however, realizing the narrow scope of the present proceedings, learned counsel representing her withdrew her application for becoming a party. Nonetheless, through C.M.A No 654/2013 two "preliminary inquiries" dated 31.10.2011 and 14.11.2011 have been brought on the record, which trace, in some detail, certain trading patterns observed in the shares of SSGC and SNGPL around September-October 2011. These trading patterns would have alerted a diligent and independent regulator to probe the matter further to find out if there had been any actionable wrong-doing. These preliminary inquiries, we have been told, were never pursued any further.

64 Adjudication on the guilt or innocence of any of the parties named in these inquiries is beyond the scope of the present proceedings. We would, however be remiss in our duty of enforcing the fundamental rights of the people of Pakistan, if we ignored the material brought on the record. Most of the documents placed on file are official documents of the Commission, not mere press reports or mere allegations. The veracity of the documents has not been disputed. The material now before us does give rise to serious concerns about whether and to what extent the SECP has been discharging its statutory duties as the apex regulator of the securities sector. Therefore, in our short order, we felt constrained to direct

the Securities and Exchange Policy Board to look into this petition and documents placed on file and after making such further inquiries as may be deemed appropriate by it, submit within 45 days, a report as to the performance of the SECP. The Policy Board, it may be noted, is a body created by Section 12 of the SECP Act. It has been given important duties of oversight under the Act and in particular, section 21 thereof.

65 The foregoing are our reasons in support of the short order passed by us on 12.4.2013. We wish to add that issues of appointments to senior positions in public bodies, which have been highlighted in this petition and in other cases which have come up before us, have under-scored the need for a transparent, inclusive and demonstrably fair process for the selection of persons to be appointed to such senior positions. The Federal Government may consider the necessity of putting in place independent mechanisms and of framing open, fair and transparent processes so that the objectives for which public bodies are established can be efficiently achieved and at the same time the pernicious culture of arbitrariness, favouritism and nepotism is eliminated. A copy of this reasoning may be sent to the office of the competent appointing authority and the Law Ministry.

Judge

Judge

Islamabad, the

Announced on 12.4.2013.

A. Rehman

APPROVED FOR REPORTING.