

Form No: HCJD/C-121.

JUDGEMENT SHEET

IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

W.P. No. 3220 of 2016

Waseem Riaz, etc.

Vs

Ministry of Capital Administration and Development (CADD), etc.

DATE OF HEARING: 06-12-2017.

PETITIONERS BY: Mr Muhammad Aftab Alam Rana
Advocate.

RESPONDENTS BY: Ch. Shafiaq ur Rehman and Arshad
Mahmood Advocates.
Mr Israr ul Haq, Assistant Attorney General.
Mr Muhammad Asif Channa, AD PEPA.

ATHAR MINALLAH, J.- The petitioners have invoked the jurisdiction of this Court under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 (hereinafter referred to as the "**Constitution**") seeking a direction to the respondents for regularization and implementation of Notification, dated 08-02-2013, issued by the Capital Administration and Development Division. The

said notification was issued pursuant to recommendations made by the Sub Committee of the Cabinet in its meeting held on 13-12-2012. The petitioners have also assailed summary, dated 31-05-2016 and its approval, dated 29-07-2016 and 13-08-2016.

2. The facts, in brief, are that some of the petitioners were appointed on daily wage basis in Basic Scales 16 and 17 as lecturers while others as JLT in BPS-16. The appointments were made in various educational institutions under the control of the Federal Directorate of Education i.e. the respondent No. 2. Pursuant to the policy approved by the Federal Cabinet in 2008 the Sub Committee of the Cabinet on regularization of contract/daily wages recommended the petitioners for regularization. Consequently Notification, dated 08-02-2013, was issued by the Capital Administration and Development Division in respect of regularization of the petitioners subject to availability of posts. The Secretary, Capital Administration and Development Division sent a summary, dated 31-05-2016, to the Prime Minister of Pakistan recommending that vacant posts in BS-16 and 17 may be filled through the Federal Public Service Commission (hereinafter referred to as the "**Commission**"). It was proposed that the Commission after carrying out scrutiny of the daily wagers may recommend the eligible candidates for being appointed on regular basis. The Finance Division

Division forwarded the summary to the Prime Minister on 29-07-2017 and the latter approved the proposals contained therein on 13-08-2016. The petitioners are, therefore, seeking implementation of Notification, dated 08-02-2013. They have also assailed summary, dated 31-05-2016 and the approval granted by the Prime Minister on 13-08-2016.

3. The learned counsel for the petitioners has contended that; a vested right has accrued in favour of the petitioners since they stand regularized vide Notification, dated 08-02-2013; vested rights have accrued in their favour which cannot be taken back; the petitioners have served since a long time and, therefore, denial of the right to be regularized in service tantamounts to exploitation and, therefore, it is in violation of Article 3 of the Constitution; several other similarly placed employees have already been regularized in service and, therefore, refusal on part of the respondents to implement Notification, dated 08-02-2013, tantamount to violation of their fundamental rights guaranteed under Article 25 of the Constitution; the summary, dated 31-05-2016, was based on malafide; public functionaries are under an obligation to act fairly and honestly; the impugned action and refusal to give effect to Notification, dated 08-02-2013 is in violation of vested rights.

4. The learned Assistant Attorney General, on the other hand, has argued that; this Court vide judgment, dated 01-11-2017, rendered in W.P. No. 2117/2016, re: "Ms Shagufta Hashmat, etc. v. Federation of Pakistan, through Secretary Cabinet Div. etc." has already held that regularization amounts to initial appointment of a civil servant and that it cannot be made otherwise than as provided under the Civil Servant Act, 1973 (hereinafter referred to as the "**Act of 1973**") and the Civil Servants (Appointment, Promotion and Transfer) Rules, 1973 (hereinafter referred to as the "**APT Rules**"); the petitioners were appointed on daily wage basis without selection through a transparent competitive process; the initial appointments are void and, therefore, no super structure can be built thereon; the Notification, dated 08-02-2013 is ultra vires the Act of 1973 and , therefore, it does not create any right in favour of the petitioners.

5. The learned counsel for the petitioners and the learned Assistant Attorney General have been heard and the record perused with their able assistance.

6. It is an admitted position that the petitioners were appointed on daily wage basis without observing the principles of transparency. Moreover, the petitioners were not appointed against permanent posts. It is also admitted that

the petitioners are in pay scales 16 or 17 and vide Notification, dated 08-02-2013, it was purportedly declared that they had been conditionally regularized in service i.e. subject to availability of posts. The said notification was issued pursuant to recommendations made by the Sub Committee of Cabinet on regularization. However, the petitioners have not been regularized as yet and at this stage they do not enjoy the status of civil servants under the Act of 1973. In case Notification, dated 08-02-2013, is implemented the petitioners will attain the status of civil servants. The regularization of the petitioners will inevitably tantamount to initial appointment of civil servants under the Act of 1973 read with the APT Rules. The questions which have emerged for consideration of this Court in the instant petition are as follows:

- a) The status of Sub Committee of the Cabinet on regularization in the context of the Act of 1973 and the APT Rules?
- b) The legality of Notification, dated 08-02-2013, in the context of the Act of 1973 read with the APT Rules; and lastly,
- c) Whether rights have accrued in faovur of the petitioners to be appointed as civil servants on regular basis against permanent posts?

d) What is the effect of direct appointment on daily wage basis without observing the principles of transparency?

7. In order to answer these questions it would be beneficial to examine the background relating to various policies formulated by the Federal Government relating to regularization of contract employees and the provisions of the Act of 1973 and the APT Rules. These aspects have been examined in detail by this Court vide judgment, dated 01-11-2017, rendered in W.P. No. 2117/2016, re: "Ms Shagufta Hashmat, etc. v. Federation of Pakistan, through Secretary Cabinet Div. etc." The relevant paras are, therefore, reproduced as follows:

**RELEVANT FACTS OF THE
REGULARIZATION POLICIES:**

04-06-2008.

8. A summary was sent for the approval of the Federal Cabinet, titled "**Regularization of BS-1 to BS-15 contract employees**".

26-08-2008.

9. The Cabinet approved the above summary.

29-08-2008.

10. Office Memorandum, dated 29-08-2008, was issued pursuant to approval granted by the Federal Cabinet. The salient features of the approved regularization policy are;

- a) Employees working on contract basis in pay scale BS-01 to BS-15 in the Federal Ministries/Divisions/Attached Departments/Subordinate offices/ Autonomous/ Semi Autonomous Bodies/ Corporations and appointed up to 03-06-2008 were entitled to be regularized.
- b) The decision of the Cabinet extended to the contract employees appointed in the Federally Administered Tribal Areas.
- c) Eligibility Criteria.
 - i) *Employees working on contract basis against BS-1 to BS-15 and appointed prior to the decision of the Cabinet, dated 04-06-2008 i.e. up to 03-06-2008 were eligible.*
 - ii) *Employees working against tenure posts, project posts, or on daily wage basis or those who were paid from the contingent or defense budget were declared ineligible for regularization.*

d) The date for regularization of all contract employees, after completing all formalities, was prescribed as 01-07-2008.

e) The seniority of regularized contract employees was to take effect from the date of their regularization i.e. 01-07-2008.

f) Age relaxation.

Age relaxation was to be given by the competent authority as per existing rules.

g) Provincial quota was to be adhered to as far as possible.

h) Qualifications.

Qualifications prescribed for the post were to be strictly followed and in case a contract employee did not meet the required qualifications for the post then he could be regularized against a lower post for which he possessed the requisite qualifications.

i) A Cabinet Sub Committee under the chairmanship of the then Minister of Labour and Man Power was constituted for ensuring regularization of the eligible contract

employees in accordance with the approved regularization policy.

29-06-2011.

11. The Cabinet Sub Committee proposed altogether different terms and conditions/criteria through a summary sent to the Prime Minister. The proposed policy/criteria was as follows:

1. Contract employees who have completed one year of satisfactory service be regularized.
2. Daily Wage workers employed for 89 days (one spell) and having completed three spells of their service shall be regularized in conformity with the order of the apex Court.
3. The cases of contract employees of BPS-16 and above may be submitted to the Committee for regularization of their services through the Cabinet decision instead of the FPSC.

It was also proposed in the summary that the regularization will take effect from 29-06-2011, pending the approval of the Cabinet. Nothing has been placed on record to show that the above proposed policy was placed for approval before the

Federal Cabinet, nor is such a decision on record. The learned Addl. Attorney General, during the course of arguments, made a statement on behalf of the Federal Government that the above proposed policy was neither placed before nor approved by the Federal Cabinet.

30-06-2011.

12. The above proposed policy was approved by the Prime Minister of the Islamic Republic of Pakistan.

11-09-2014.

13. This Court, vide judgment dated 11-09-2014 rendered in W.P. No. 965/2013 and several other connected petitions, declared the policy of regularization as illegal and void.

10-09-2014.

14. The petitions which were pending before this Court, relating to grievances in respect of regularization, were disposed of through a consent order. The Secretary Cabinet Division, Government of Pakistan, was, inter-alia, directed to constitute a Committee headed by an officer not lower in rank than a Federal Secretary or a retired Hon'ble Judge of the august Supreme Court for this purpose. The order, dated 10-09-2014, passed in W.P. No. 1703/2013 and the connected

petitions, attained finality on being confirmed by the august Supreme Court.

09-04-2015.

15. Intra Court Appeals preferred against judgment, dated 11-09-2014 passed in W.P. No. 965/2013 and connected petitions, were allowed by a Division Bench of this Court pursuant to statement made on behalf of the Federal Government and issuance of Notification, dated 02-04-2015. Moreover, it was observed as follows:

"While implementing the policy irregularities may have been committed in some cases and there is no bar on the respective Departments to proceed in accordance with law on case to case basis. Regularization policy cannot be construed or implement in a manner which may extend legitimacy to illegal appointed employees. Reference in this regard may be made to paragraph 26 of the judgment of the august Supreme Court in "Syed Mubashir Raza Jaffri v. Employees Old Age Benefits Institution" (2013 SCMR 949)."

02-04-2015.

16. The Notification, dated 02-04-2015, was made an integral part of the judgment, dated 09-04-2015 passed in Intra Court Appeal No. 325/2014 etc. and the same is

reproduced as follows:

To be published in next issue of Gazette of Pakistan (Part-I)
GOVERNMENT OF PAKISTAN
CABINET SECRETARIAT
CABINET DIVISION

Islamabad, the 2nd April, 2015

NOTIFICATION

No.F.2/3/2014-Lit In pursuance of Islamabad High Court orders passed in W.Ps No.1703 and 965/2013 on 10th and 11th September, 2014, respectively and with the approval of the Prime Minister, Committee comprising of the following has been constituted in the Establishment Division:-

Composition:

- (a) Mr. Haseeb Athar
(BS-22 an Officer of Secretariat Group)
- (b) Additional Secretary-III,
Cabinet Division, Islamabad
- (c) Joint Secretary (Admn),
Establishment Division, Islamabad
- (d) Joint Secretary/Equivalent,
Law, Justice and Human Rights Division,
Islamabad.

Terms of Reference of the Committee:

- i. The Committee shall examine the cases for regularization of Contract/Contingent/Daily Wages employees which are under adjudication in various Judicial For a and have been referred to the Federal Government for consideration/Disposal as per guidelines issued vide O.M. No.10/30/2008-R.II dated 29th August, 2008.
- ii. The prescribed qualification for each post shall be adhered to;
- iii. The Committee shall pass speaking orders in each case after giving an opportunity of hearing to the employees and the respective employers.
- iv. In the event that the Committee comes to the conclusion that there has been discrimination in implementing the policy, the decision shall be communicated to the Secretary, Cabinet Division who shall ensure its implementation without delay.
- v. The Committee shall consider all the petitions deemed to be pending before the Federal Government by treating them as representations.
- vi. The Committee shall identify all such cases in which the employees are eligible under the policy guidelines vide O.M. No.10/30/2008-R.II dated 29th August, 2008 and shall refer them to the respective employers for appropriate action.
- vii. The committee shall also decide the cases referred to by the employers where material irregularities/illegalities are identified by the employer and referred to the Committee on case to case basis.

2. Establishment Division will be the Secretariat of the Committee and will provide Secretariat assistance to the Committee.

(Hafiz Shahzad Masood)
Section Officer (Lit/Coord)

02-06-2016.

17. The judgment of this Court, dated 11-09-2014 whereby the Intra Court Appeals were allowed and consequently the judgment, dated 11-09-2014, passed in W.P. No. 965/2013 etc. was set aside attained finality having

been up held by the august Supreme Court in the following terms:

- a. That the process of regularization in terms of the Judgment dated 09.4.2015 of the learned Division Bench of Islamabad High Court may be conducted by the competent authority in accordance with the law without being influenced by any extraneous considerations or directions.
- b. After the process is completed, if any, individual has any grievance either for not being regularized or, if any, other person is regularized illegally or with illegal consequences, such individuals may seek their remedies available to them in accordance with law.

It is, therefore, obvious that the regularization policy, the details whereof were described in Office Memorandum, dated 29-08-2008, read with Notification, dated 02-04-2015 attained finality.

11-05-2017.

18. The Federal Cabinet in its meeting held on 12-04-2017 approved yet another policy and details thereof are

contained in office Memorandum, dated 11-05-2017 (hereinafter referred to as the "**New Policy**"), which is reproduced as follows:

GOVERNMENT OF PAKISTAN CABINET SECRETARIAT ESTABLISHMENT DIVISION *****	
No F.53/1/2008-SP	Islamabad, the 11 th May, 2017
<u>OFFICE MEMORANDUM</u>	
Subject:-	<u>Amendment in the Recruitment Policy/Mechanism to</u> <u>Ensure Merit Based Recruitment in the Ministries/</u> <u>Divisions/Sub-ordinate Offices/ Autonomous/ Semi-</u> <u>Autonomous Bodies/Corporations/ Companies /</u> <u>Authorities</u>
<p>The undersigned is directed to state that the Federal Cabinet in its meeting held on 12th April, 2017 has accorded approval of the subject amendment to be inserted as para 1(e) in the Recruitment Policy/Mechanism issued vide this Division's O.M.No.531/2008-SP dated 16th January, 2015 as under:-</p>	
<p>"1(e) Appointment on Regular Basis of Contract/Contingent Paid/Daily Wage/Project Employees</p>	
<p>For the purpose of appointment on regular basis of Contract/ Contingent Paid/Daily Wage/Project employees the following criteria shall be observed:-</p>	
(i)	All Contract/Contingent Paid/Daily Wage/Project employees who have rendered a minimum of one year of service, in continuity, as on 1-1-2017 (hereinafter referred to as eligible employees) may apply for appointment on regular basis in the manner prescribed hereinafter provided that the condition of continuity shall not be applicable in case of person(s) employed on daily wages who have completed at least 365 days service.
(ii)	For initial appointment to posts in BS-16 and above, the employees shall apply direct to FPSC against relevant/suitable vacancies as and when arising for which they are eligible.
(iii)	For initial appointment to posts in BS-1 to BS-15, the eligible employees may apply as per criteria given vide this Division's O.M.No.53/1/2008-SP dated 16-1-2015 and 3-3-2015 shall be adopted.
(iv)	The eligible employees shall be awarded extra marks in interview at the rate of one (01) mark for each year of service rendered upto a maximum of five (05) marks, on the recommendations of the respective selection authorities.
(v)	The period served as contract/contingent paid/daily wage/ project employee, shall be excluded for the purpose of determination of upper age limit in addition to relaxation of upper age limit as per existing rules.
Contd. ..p/2	

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- (vi) Qualifications prescribed for a post shall be strictly followed. In case, a person does not possess the prescribed qualifications/experience for the post he/she is applying for, he/she shall not be considered for the same.
- (vii) The employee must be in good mental and bodily health and free from any physical defect likely to interfere with the discharge of his duties unless appointed against disability quota.
- (viii) The advantage of para 1(e) is a one-time dispensation for all contract/ contingent paid/ daily wage/ project employees for their eligibility to regular employment.

2. This Division's O.M. of even number dated 16th January, 2015 is modified to the above extent. All Ministries/Divisions are requested to take further action accordingly.

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(Attiq Hussain Khokhar)
Director General
Tel: 051-9103482

All Ministries/Divisions
Rawalpindi/Islamabad

THE ACT OF 1973 AND APT RULES:

19. The Act of 1973 regulates the appointment of a person to the service of Pakistan and their terms and conditions. The appointment of a civil servant is, therefore, governed under the provisions of the Act of 1973. The other relevant legislation for the purpose of adjudication of the instant petitions is the Civil Servants (Appointment, Promotion and Transfer) Rules, 1973 (hereinafter referred to as the "**APT Rules**"). It would be beneficial for the adjudication of these petitions to examine the scheme of the Act of 1973 and the APT Rules.

20. The Act of 1973 was enacted and notified in the official gazette on 29-09-1973. The object and purpose of the enactment is to regulate, by law, the appointment of persons to the service of Pakistan and their terms and conditions. Sub section (2) of section 1 declares that the Act of 1973 shall apply to all civil servants wherever they may be. The expression 'civil servant' is defined in section 2(b) as a person who is a member of an All-Pakistan Service or of a civil service of the Federation, or who holds a civil post in connection with the affairs of the Federation, including any such post connected with defence. However, clauses (i) to (iii) excludes from the definition of a civil servant, inter-alia, a person who is on deputation or is employed on contract or work charge basis or falls in the definition of a 'worker' or 'workman'. Section 2(a) defines 'ad hoc appointment' as meaning an appointment made otherwise than in accordance with the prescribed method of recruitment, pending recruitment. The expression "initial appointment" is defined in section 2(c) as meaning appointment made otherwise than by promotion or transfer. Likewise, 'permanent post' is defined in section 2(e) as meaning a post sanctioned without limit of time. The expression 'selection authority' has been defined as meaning the Federal Public Service Commission, a Departmental Selection Board, Departmental Promotion Committee or other authority or body on whose recommendation any appointment or promotion is made in the prescribed manner. The next relevant definition is that of

'temporary post' which means a post other than a permanent post. Section 5 provides that appointments to an All-Pakistan Service or to a civil service of the Federation or to a civil post in connection with the affairs of the Federation, including any civil post connected with defence, shall be made in the prescribed manner by the President or by a person authorized by the latter in that behalf. 'Prescribed' means prescribed by rules and, therefore, in the context of the appointment of a civil servant, the APT Rules have been made. Section 7 provides that a person appointed on probation shall, on satisfactory completion of his probation, be eligible for confirmation in a service or, as the case may be, a post as may be prescribed. Sub section (3) of section 7 provides that there shall be no confirmation against any temporary post. Sub section (5) of section 7 provides that confirmation shall take effect from the date of occurrence of permanent vacancy in that service or post or from the date of continuous officiation, in such service or post, whichever is later. Section 11 A is in respect of absorption of a civil servant, who is rendered surplus. Section 25 empowers the President or any person authorized by him or her in this behalf to make such rules as appear to be necessary or expedient for carrying out the purposes of the Act of 1973. The APT Rules were, therefore, made and notified in the exercise of powers conferred under the said provision.

21. The APT Rules were made and notified vide SRO 1498(I)/73, dated 20-10-1973, in exercise of the powers conferred under section 25 of the Act of 1973. The expressions 'appointing authority', Selection Board, Commission and Departmental Promotion Committee are defined in clauses (a), (b), (c) and (d) respectively of rule 2. Rule 3 prescribes three methods of appointment i.e. (a) by promotion, (b) by transfer, and (c) by initial appointment. Sub rule (2) of rule 3 provides that the method of appointment and the qualifications and other conditions applicable to a post shall be as laid down by the Ministry or Division concerned, in consultation with the Establishment Division. For the purposes of adjudication of the instant petitions, this Court would restrict its examination to the provisions which relate to initial appointment.

22. The provisions relating to an 'initial appointment' are contained in Part-III of the APT Rules i.e. from Rule 10 to Rule 17. Rule 10 explicitly provides that initial appointment in basic pay scale 16 and above or equivalent, except those which under the Federal Public Service Commission (Function) Rules, 1978 do not fall within the purview of the Commission, shall be made on the basis of tests and examinations to be conducted by the latter. Rule 11 provides that initial appointment to a post in basic pay scales 1 to 15 and equivalent, other than those mentioned in Rule 10 shall be made on the recommendation of the

Departmental Selection Committee after the vacancies have been advertised in newspapers. Rule 12 mandates that the candidates for initial appointment to a post must possess the prescribed educational qualifications and experience and that he or she must be within the age limit, except if otherwise provided in the rules framed for the purposes of relaxation thereof. Rule 13 makes it mandatory for a candidate to be a citizen of Pakistan, provided that the requirement may be relaxed with the approval of the Establishment Division or if such an appointment is made on 'temporary basis' against a post in the Pakistan Missions abroad. However, such relaxation cannot be accorded for a period exceeding one year at a time. Rules 14, 15 and 16 are in respect of provincial or regional quotas. Part-IV of the APT Rules is in respect of ad hoc and temporary appointments. Rule 18 prescribes the conditions and procedure in case of a post which is required to be filled through the Commission. It is the obligation of the appointing authority to immediately forward a requisition to the Commission in the prescribed form. In exceptional cases an ad hoc appointment may, however, be made for a period of six months or less in accordance with the procedure and conditions mentioned under Rule 19 and after obtaining prior clearance from the Commission. Rule 19 prescribes that if the appointing authority considers it to be in the public interest to fill a post on an urgent basis, falling within the purview of Commission, pending the nomination of a candidate by the Commission, it

may proceed to fill it on an ad hoc basis for a period of six months or less after obtaining prior clearance of the Commission. Even in such an eventuality the post is required to be advertised. Rule 20 provides that short term vacancies in the posts falling within the purview of the Commission and vacancies occurring as a result of the creation of temporary posts for a period not exceeding six months, may be filled by the appointing authority otherwise than through the Commission on a purely temporary basis after advertising the vacancy. Rule 21 makes it mandatory that a person appointed by initial appointment, promotion or transfer, shall be on probation for a period of one year. Sub rule (2) of rule 21 empowers the competent authority to curtail the period of probation for good and sufficient reasons, to be recorded, or, if considered necessary, it may be extended for a period not exceeding one year as may be specified at the time of appointment. Sub rule (3) explicitly provides that on successful completion of the probation period, the appointing authority shall, by specific order, terminate the probation. Sub rule (4) provides that if no order is issued under sub rule (3) then on the expiry of the first year of the probation period, the period of probation shall be deemed to have been extended under sub rule(2).

23. A combined reading of the provisions of the Act of 1973 and the APT Rules shows that it is a comprehensive and self contained law governing the making of appointments

to the posts described in section 5 *ibid*. A person, therefore, can only be appointed as a civil servant in accordance with and in the manner prescribed i.e under the APT Rules. The APT Rules prescribe three distinct modes of making an appointment; by promotion, transfer or through initial appointment. After initial appointment, the civil servant remains on probation till confirmation under section 7 of the Act of 1973. For the purposes of these petitions 'initial appointment' shall be examined in detail.

24. Part III of the APT Rules covers 'initial appointment' to a post described in section 5 of the Act of 1973. The qualifications and other conditions relating to eligibility for a post are laid down by the concerned Ministry or Division in consultation with the Establishment Division. The posts have been divided into two categories; in basic pay scale 16 and above or equivalent and in basic pay scale 1 to 15 or equivalent. Appointment to the former posts are required to be filled through tests and examinations conducted by the Commission and in the case of the latter on the recommendation made by the relevant Departmental Selection Committee after the vacancies have been advertised. A candidate for any post would be eligible to be considered if he or she possesses the prescribed educational qualifications, experience and other conditions. Age limit is also a relevant factor. All the posts, whether permanent or

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temporary, have to be filled strictly in accordance with the Act of 1973 and the APT Rules.

25. For filling a post in basic pay scale 16 and above or equivalent, the appointing authority is required to send a requisition to the Commission. Only in 'exceptional' circumstances, and that too after seeking prior clearance from the Commission, may the appointing authority make an ad hoc appointment if the latter considers it in the public interest to fill the post urgently till a candidate is nominated for the initial appointment by the Commission. Such an ad hoc appointment can only be made for a period of six months. The APT Rules explicitly provide that even for making an ad hoc appointment it is mandatory to advertise the post and to observe the qualifications and other conditions prescribed in the case of making an initial appointment. A plain reading of the APT Rules as a whole shows that there is no provision which authorizes an appointing authority to make an ad hoc appointment against a post in basic pay scale 1 to 15. The APT Rules unambiguously provide that the principles of transparency, inter alia, advertising the vacant post and inviting applications from eligible candidates are mandatory for filling a post. Moreover, the nomination or recommendation by the Commission or the Departmental Selection Committee, as the case may be, are sine quo non for making an initial appointment.

**THE PRINCIPLES AND LAW RELATING TO
MAKING APPOINTMENTS:**

26. It is also pertinent to examine the precedent law and principles laid down by the august Supreme Court in relation to making appointments. In the case titled "Dr Naveeda Tufail and 72 others v. Government of Punjab and others" [2003 SCMR 291] the august Supreme Court has observed and held as follows:

"The making of recruitment on ad hoc basis with or without advertisement of the post in the normal circumstances, amounts to curtail the legitimate right of appointment of deserving persons on regular basis and is against the policy of law. The concept of ad hoc appointment against the posts in public sector is a stopgap arrangement which is not the permanent character of the civil service. It is not proper in the public sector to occupy the posts required to be filled through the method prescribed by law by making ad hoc appointments and allow the incumbents to continue in the same position beyond the terms of their employment without taking any step for

the filling the posts on regular basis. It was observed by this Court in Abdul Jabar Memon and others (1996 SCMR 1349) that there can be no justification to take keep the posts nationally vacant by making ad hoc appointments and keep the ad hoc employees hanging in the same situation for number of years with the understanding of their adjustment on permanent basis and ultimately they are informed that they are no more required. This method of appointments in the public sector by the functionaries is misuse of the authority of law as in the normal circumstances, recruitment against the posts in the Government Department, the statutory bodies and organizations should be filled within reasonable time by following the procedure provided under the law for fulfilling such posts on the basis of open merit through Public service Commission. There can be no exception to the policy of law that the ad hoc appointments should be made only in exceptional circumstances in exigencies of service and should not be allowed to prolong beyond the period for which the appointment was made and

keeping a person continuously as an ad hoc employee by extending his period of service would definitely create a legitimate expectancy in his mind for regularization."

It has been further observed as follows:

"There is no cavil to the proposition that an ad hoc employee has no right to hold the post beyond the period for which he was appointed and it is also not right for the Government to continue ad hoc appointments for number of years without undertaking the exercise of selection on regular basis in the prescribed manner. The ad hoc appointment is appointment of a duly qualified person made otherwise in accordance with prescribed method of recruitment and is made only in exceptional circumstances. This stopgap arrangement as a temporary measure for a particular period of time does not by itself confer any right on the incumbent for regular appointment or to hold it for indefinite period but at the same time if it is found that incumbent is qualified to hold the post despite his appointment being in

the nature of precarious tenure, he would carry the right to be considered for permanent appointment for considerable length of time would create an impression in the mind of the employee that he was being really considered to be retained on regular basis. "

27. In the case titled 'Mushtaq Ahmad Mohal and others v The Honourable Lahore High Court, Lahore and others' [1997 SCMR 1043] the august Supreme has held:

"We reiterate that the appointment to various posts by the Federal Government, Provincial Governments, Statutory Bodies and other Public Authorities, either initial or ad hoc or regular, without inviting applications from the public through the press, is violative of Article 18 read with Article 2A of the Constitution, which has incorporated the preamble to the Constitution as part of the same and which inter alia enjoins equality of opportunity and guarantees for creation of an egalitarian society through a new order, which objective cannot be achieved unless every citizen equally placed or situated is

treated alike and is provided equal opportunity to compete inter alia for the posts in aforesaid Government set-ups/institutions."

28. In the case titled "Syed Mubashir Raza Jaffri and others v. Employees Old Age Benefits Institutions (EOBI) through President of Board, Board of Trustees and others" [2014 SCMR 949] the august Supreme Court, after examining the precedent law, has observed and held as follows:

"All the cases discussed above reveal that the jurisdiction of this Court has been clear and consistent with regard to the manner in which appointment to public offices are to be made strictly in accordance with applicable rules and regulations, without any discrimination and in a transparent manner. Thus, it is essential that all appointments to public institutions must be based on a process that is palpably and tangibly fair and within the parameters of its applicable rules, regulations and bye-laws."

29. The august Supreme Court, in the case titled "Suo Motu Action Regarding Eligibility of Chairman and

Members of Sindh Public Service Commission etc" [2017 SCMR 637], has held as follows:

"If through a discriminatory selection process civil servants are selected and appointed it would infringe Article 27 of the Constitution which states that, "No citizen otherwise qualified for appointment in the service of Pakistan shall be discriminated against." Article 25, prescribing the equality of citizens, is another Fundamental Right which is attracted if all those who are tested and interviewed are not treated equally."

30. In the case titled "Muhammad Ashraf Tiwana and others v. Pakistan and others" [2013 SCMR 1159] the august Supreme Court has emphasized that due diligence must be exercised while making appointments and that in doing so a fair and transparent selection process ought to be adhered to. In the case titled 'Muhammad Yasin v Federation of Pakistan through Secretary, Establishment Division, Islamabad and others' [PLD 2012 S.C. 132] the august Supreme Court has observed that adherence to a credible and transparent selection process with due diligence is a pre requisite. The august Supreme Court has also emphasized that in order to ensure good governance it is inevitable to observe the highest

standards of diligence, transparency and probity in selecting a person for a post.

31. In the case titled "Asaf Fasihuddin Khan Vardag v. Government of Pakistan and others" [2014 SCMR 676] the august Supreme Court has held that a public authority possessed powers only to use them for the public good and this imposed a duty to act fairly. In relation to making an appointment the august Court has held as follows:

"It is to be noted that in the cases of Muhammad Ashraf Tiwana v. Pakistan and others (2013 SCMR 1159) and Khawaja Muhammad Asif v. Federation of Pakistan (2013 SCMR 1205) this Court in exercise of powers under Article 184(3) of the Constitution has concluded that in the public interest and also to enforce their Fundamental Rights, appointments must be made on merit, lest it should cause damage to the institutions responsible for running different affairs of the Government and also generating funds for the purpose of spending on the welfare of the citizens with a view to improve standard of their life in terms of Article 9 of the Constitution. If there is corruption and corrupt practices on

account of appointment of the concerned functionaries, including in pursuance of unlawful exercise of power or by causing loss in running of the affairs of public institutions, the citizens are bound to be affected directly or indirectly. Therefore, their Fundamental Rights under Article 9 of the Constitution are not enforced in letter and spirit.”

32. In the case titled “Chief Secretary Punjab and others v Abdul Raouf Dasti” [2006 SCMR 1876] the august Supreme Court, in relation to the appointment of a person in public service, has held as follows:

“We need to remind ourselves that choosing persons for public service was not just providing a job and the consequent livelihood to the one in need but was a sacred trust to be discharged by the ones charged with it, honestly, fairly, in a just and transparent manner and in the best interest of the public. The individuals so selected are to be paid not out of the private pockets of the ones appointing them but by the people through the public exchequer. Therefore, we

must keep it in mind that not selecting the best as public servants was a gross breach of the public trust and was an offence against the public who had right to be served by the best. It is also blatant violation of the rights of those who may be available and whose rights to the said posts are denied to them by appointing unqualified or even less qualified persons to such posts. Such a practice and conduct is highly unjust and spreads a message from ones in authority that might was right and not vice versa which message gets gradually permeated to the very gross root level leading ultimately to a society having no respect for law, justice and fair play. And it is the said evil norms which ultimately lead to anarchic and chaotic situations in the society. It is about time we suppressed such-like evils tendencies and eliminated them before the same eliminated us all."

33. In the case titled "Government of N.W.F.P through Secretary Forest Department, Peshawar and others v Muhammad Tufail Khan" [PLD 2004 Supreme Court 313] the august Supreme Court reiterated the law expounded in the earlier judgments titled "Munawar Khan v. Niaz Muhammad"

[1993 SCMR 1287], "Mushtaq Ahmed Mohal v. Lahore High Court" [1997 SCMR 1043], "Obaidullah v. Habibullah" [PLD 1997 S.C. 835] and "Abdul Rashid v. Riazuddin" [1995 SCMR 999] by observing as follows:

"The Courts are duty bound to uphold the Constitutional mandate and to keep up the salutary principle of rule of law. In order to uphold these principles it has been stated time and again by the superior Courts that all the appointments are to be made after due publicity in a transparent manner after inviting applications through Press from all those who are eligible, deserving and desirous."

34. The principles and law laid down by the august Supreme Court in the above judgments may, therefore, be summarized as follows:

(i) The posts in government departments and statutory organizations ought to be filled within reasonable time by following the procedure prescribed under the relevant law.

(ii) If a person is qualified to hold a post and fulfills all other conditions prescribed under the law, then a right may accrue to be considered

for permanent appointment if the temporary appointment of the latter has continued for a considerable length of time and the conduct of the employer has created an impression in the mind of such a person that he may be retained on a regular basis.

(iii) Appointments of any nature, whether initial or ad hoc, permanent or temporary, if made in violation of the principles of competitive transparency, inter alia, without inviting applications from the public, is in violation of the Constitution and, therefore, void.

(iv) Appointment to a post in the public sector made in a non transparent and discriminatory manner offends the fundamental rights guaranteed under Articles 25 and 27 of the Constitution.

(v) Selecting a qualified, eligible and most deserving person is a sacred trust which is to be discharged honestly and fairly in a just and transparent manner and in the best interest of the public.

**HISTORY OF VARIOUS POLICIES
REGARDING REGULARIZATION:**

35. The Federal Government had approved a policy regarding regularization and the details thereof were described in the Office Memorandum dated 29-08-2008 (hereinafter referred to as the "**First Regularization Policy**"). The said policy covered only such contract employees who were appointed up to 03-06-2008. The policy explicitly excluded employees working against tenure posts, project posts, on daily wage basis or who were paid out of a contingent or defence budget. The contract employees in pay scale 16 and above or equivalent were also excluded. The First Regularization Policy had taken into consideration all the relevant factors in the context of the Act of 1973 and the APT Rules. Factors such as age relaxation, provincial quota, prescribed qualifications etc were in consonance with the APT Rules. The Cabinet Sub Committee was to oversee the implementation of the policy and could not have substituted the Departmental Selection Committee nor perform its functions under Rule 11 of the APT Rules. The august Supreme Court vide judgment, dated 02-06-2016, passed in *Civil Appeal No. 1119 of 2015, CMA No. 513 of 2016 in Civil Appeal No. 1119 of 2015, Civil Appeals No. 1120 to 1126 of 2015, Civil Petitions No. 2925 & 3386 of 2015 and 467 of 2016* upheld the judgment dated 09-04-2015 rendered by a Division Bench of this Court in ICA No. 325/2014 and,

therefore, the Notification, dated 02-04-2015, stood affirmed. As a consequence the First Regularization Policy was endorsed to the exclusion of any other policy.

36. The learned counsels appearing on behalf of the petitioners have heavily relied on the purported policy which was forwarded by the Cabinet Sub Committee vide summary, dated 29-06-2011, and approved by the Prime Minister on 30-06-2011 (hereinafter referred to as the "**Committees Policy**"). It was explicitly mentioned in the summary that the proposals shall be subject to approval by the Federal Cabinet. However, there is nothing on record to show that the Cabinet at a later stage had given its approval. The Committees Policy, therefore, cannot be termed as a policy of the Federal Government in the light of the law laid down by the august Supreme Court in the case titled "Messrs Mustafa Impex, Karachi and others v The Government of Pakistan through Secretary Finance and others" [PLD 2016 SC 808]. Moreover, the terms of the purported policy were in violation of the Act of 1973 and the APT Rules. Admittedly, the APT Rules were not amended to bring them in conformity with the Committees Policy. The APT Rules, having the status of delegated legislation, could neither be bypassed nor made redundant through a policy. The Committees Policy was, therefore, illegal and without legal effect.

37. This Court has been informed that recently the Cabinet has approved a fresh policy regarding regularization of contract employees. The details of the said policy have been described in Office Memorandum dated 11-05-2017 (hereinafter referred to as the "**New Policy**"). The policy covers all contract, contingent paid, daily wage and project employees who have rendered a minimum of one year service as on 01-01-2017. A plain reading of the New Policy shows that it is not in conflict with the APT Rules. In any case, while implementing the New Policy the appointing authority shall ensure that the provisions of the Act of 1973 and the APT Rules are not violated in the case of making appointments to the posts described in section 5 *ibid*.

38. It is, therefore, obvious from the above, that the First Regularization Policy and the New Policy have not been found inconsistent with the Act of 1973 or the APT Rules. The Committees Policy, being in violation of the Act of 1973 and the APT Rules, and not being a policy of the Federal Government, was invalid, illegal and void. However, the period between the First Regularization Policy and the New Policy cannot be left void. The New Policy has extended the benefit of regularization to categories which had been excluded in the First Regularization Policy, such as contingent paid, daily wage or contract employees. The New Policy, therefore, has to be given a purposive interpretation by holding that it would extend to the eligible categories during

the period between the First Regularization Policy and the New Policy.

39. It is obvious from the above that an appointment of a civil servant can only be valid if it is made strictly in accordance with the provisions of the Act of 1973 read with the APT Rules. Moreover, no right could be claimed by a person who has been appointed on contract basis or in any other mode without observing the principles of transparency. The Sub Committee of Cabinet on regularization was constituted for the purposes of general supervision relating to implementation of the Policy approved by the Federal Government. No document is available on record to show that the Sub Committee of Cabinet on regularization was empowered or vested with the jurisdiction to scrutinize each individual case and to grant approval. Furthermore, there also nothing on record to even remotely indicate that the Sub Committee of the Cabinet was vested with jurisdiction to grant approvals regarding regularization and that the same had a binding effect or could have superseded or over ruled statutory provisions. It is settled law that if a subordinate legislation is in conflict with the parent statute i.e. the primary legislation then it is void and ultra vires. Likewise, through a policy a valid subordinate legislation can neither be made redundant nor superseded let alone a statute enacted by the legislature. A primary legislation, therefore, prevails over subordinate legislation

and no policy can be made in conflict therewith. Policies which are in violation of fundamental rights guaranteed under the Constitution or affect the interests of the public at large are void and, therefore, open to be challenged. Reliance is placed on case of "Watan Party and another v. Federation of Pakistan and others" [PLD 2013 S.C. 167].

40. The provisions of the Act of 1973 and the APT Rules have been discussed in detail. A civil servant, therefore, can only be appointed against a permanent post in the manner provided under the relevant law and after following the mandatory requirements which have been prescribed under the Act of 1973 and APT Rules. The Cabinet Sub Committee was not vested with power or jurisdiction nor could have substituted the role of the Commission under the Act of 1973 and the APT Rules in the context of appointments made in pay scales 16 and 17. The approval regarding regularization of the petitioners purportedly granted by the Sub Committee of Cabinet in its meeting held on 13-12-2012 was ultra vires the Act of 1973 and the APT Rules. Likewise, the Capital Administration and Development Division was not vested with power or jurisdiction to regularize the petitioners by superseding or overriding the statutory provisions of the Act of 1973 and the APT Rules.

41. The upshot of the above discussion is that regularization of the petitioners would infact amount to their

appointment as civil servants. Such mode of appointment is not provided under the Act of 1973 read with the APT Rules. The Federal Government through a policy cannot render an Act of the Majlis-e-Shoora (Parliament) or subordinate legislation made thereunder as redundant. If a policy is in conflict with a primary or subordinate legislation then to that extent it would be ultra vires. The learned counsel for the petitioners has laid great stress on an unreported order, dated 08-11-2016, passed by three Honourable Judges of the august Supreme Court in Crl. O.P. No. 82/2016 in Constitutional Petition No. 58/2011, titled "Ms Safia Bano v. Haseeb Athar and others." The said order was passed in the light of the statement made by the Deputy Attorney General recorded in order, dated 11-10-2011 whereby Constitutional Petition No. 58/2011 was disposed of. Moreover, a Bench consisting of three Honourable Judges of the august Supreme Court vide order, dated 08-01-2018, passed in Civil Petitions No. 4504 to 4576, 4588 and 4589 of 2017 titled "Workers Welfare Board, KPK v. Nematullah, etc. " has held and observed as follows:

"Having heard the learned counsel for the parties, we find that contractual employees have no right to be regularized until there is a law provided to that effect and we are not confronted with any such legal proposition."

The above enunciation of law which is later in time and has been rendered by a Bench consisting of three Honourable judges of the august Supreme Court is binding. In the instant case the law which governs the appointment of a person as a civil servant is the Act of 1973 read with the APT Rules. Neither the Act of 1973 nor the APT Rules were amended in order to give effect to the policy of regularization. Moreover, the initial appointments of the petitioners on daily wage basis were made in violation of the principles of transparency and thus void. There is no force in the argument that since other similarly placed persons have been regularized, therefore, the petitioners cannot be treated differently. It is settled law that an illegality cannot be made a ground for discrimination nor would give rise to rights being accrued in favour of the petitioners. Reliance is placed on cases titled "Khalid Saeed v. Shamim Rizvan and others" [2003 SCMR 1505] and "Mst. Mukhtar Begum and others v. Ala-ud-Din and others" [1999 SCMR 914]. The petitioners are seeking their appointment as civil servants under the Act of 1973 read with the APT Rules. As noted above, this Court has not found the New Policy i.e. the policy recently approved by the Federal Cabinet to be in conflict with the Act of 1973 read with the APT Rules. The petitioners are admittedly in pay scales 16 and above. They shall be at liberty to apply directly to the Federal Public Service Commission, strictly in accordance with clause (iii) of the New Policy i.e. OM dated 11-05-2017.

42. It is noted that the petitioners may be professionally competent but they were appointed in violation of the principles of transparency. Such appointments encourage favoritism and nepotism by providing an opportunity to recruit undeserving persons who not only become a burden on the exchequer but also violates the fundamental rights of the general public. In this case the petitioners belong to the noble profession of teaching and, therefore, the real stakeholders are those students who will be taught by them. The fundamental rights and future of the students cannot be jeopardized by compromising the principles of transparency. The best of the best have to be selected through a transparent competitive process in order to safeguard the interests of the students who are the future of this nation. This Court while exercising constitutional jurisdiction cannot condone lack of transparency and then allow the illegality to perpetrate.

43. The instant petition is without merit. However, it is disposed of in terms of the above observations.

(ATHAR MINALLAH)
JUDGE

Announced in open Court, on 6th March, 2018.

JUDGE

Approved for reporting