

Form No: HCJD/C-121.

JUDGEMENT SHEET

IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

W.P. No. 08 of 2020

Sikandar Hayat Maken
Vs
Federation of Pakistan, etc.

DATE OF HEARING: 06-08-2020.

PETITIONERS BY: M/s Abdul Rahim Bhatti, Shoaib Shaheen, Azid Nafees, Natalya Kamal, Shireen Imran, Mudassir Khalid Abbasi, Imran Shaukat Rao, Misbah Ullah Khan, Tahir Mahmood, Neeli Khan, Adnan Haider Randhawa, Aziz Ul Haq Nishtar, Faheem Raza and Hamid Azim Laghari, Advocates for the petitioners, in their respective petitions.

RESPONDENTS BY: Mr Amir Rehman, Addl. Attorney General.
Mr Saeed Ahmed Zaidi, Advocate for the respondents.
Mr Saqlain Haider Awan, Assistant Attorney General.
Mr Tauseef Inayat, Assistant Director, M/O Energy.
Mr Awais Manzoor Samra, Addl. Secretary, M/s M. Jahanzeb and Mr Salman Mufi, Joint Secretaries, Establishment Division.

ATHAR MINALLAH, CJ.- Through this consolidated judgment, we will decide the petitions listed in "**Annexure-A**", attached thereto.

2. The petitioners in all these petitions are civil servants. They had joined their respective occupational groups after they were appointed on the basis of a competitive selection process. They were initially appointed in BS-17 and thereafter, from time to time, promoted to higher grades. Some petitioners are in BS-19 while others in BS-20. The petitioners were eligible to be considered for promotion to the next higher grade and, therefore, their respective service dossiers and other documents were forwarded by the Establishment Division so that the record could be placed before the Central Selection Board [hereinafter referred to as the "**Board**"]. The Board, after deliberation in each case, recommended supersession of the petitioners and consequently their cases were sent to the competent authority, i.e. the Prime Minister, for consideration of the recommendations. The Prime Minister, after satisfying himself regarding the reasons recorded by the Board, gave his approval and consequently the petitioners stood superseded. The petitioners have, therefore, challenged their supersession by invoking the constitutional jurisdiction of this Court under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 [hereinafter referred to as the "**Constitution**"].

3. It would be beneficial for the adjudication of these petitions to refer to some other relevant facts and

provisions of law. Pursuant to clause (a) of Article 240 of the Constitution, the Majlis-e-Shoora (Parliament) has enacted the Civil Servants Act 1973 [hereinafter referred to as the "**Act of 1973**"] with the object to regulate the appointment of persons to, and their terms and conditions in, the Service of Pakistan.

The Act of 1973:

4. Clause (b) of section 2 of the Act of 1973 has defined the expression "civil servant". Sub section (1) of section 9 provides that a civil servant, possessing such minimum qualifications as may be prescribed, shall be eligible for promotion to a higher post, for the time being reserved under the rules for departmental promotion in the service or cadre to which he/she belongs. The proviso has drawn a distinction between posts and has provided that such posts will be filled in accordance with the manner and subject to such conditions as may be prescribed in this regard. Sub section (2) of section 9 provides that a post referred to in sub section (1) may either be a selection or a non-selection post to which promotion shall be made as may be prescribed. Promotion to a selection post is based on 'merit' and in case of a non-selection post the criterion is 'seniority-cum-fitness'. Sub section 3 has made promotion to the posts of BS 20 and BS 21 subject to recommendations made by the Board headed by the

Chairman of the Public Service Commission [hereinafter referred to as the "**Commission**"]. Section 25 provides that the President, in this behalf may make such rules as appear to the latter to be necessary or expedient for carrying out the purposes of the Act of 1973. The President, pursuant to the said powers, has authorized the Prime Minister to make the rules vide notification dated 27.02.1998 and a copy thereof is attached herewith as "**Annexure-B**". In exercise of powers conferred under the Act of 1973 the President has made the Civil Servants (Appointment, Promotion and Transfer) Rules, 1973 [hereinafter referred to as the "Rules of 1973"].

Rules of 1973:

5. Rule 2 defines various expressions. "Selection Board" has been defined as meaning a Board constituted by the Federal Government for the purpose of selection for promotion or transfer to the posts in BS-19 to BS-21 and equivalent and consisting of such persons as may be appointed by the government from time to time. Rule 3 describes the different modes of making appointments against posts. One of the modes is by promotion in accordance with Part-II of the rules *ibid*. Rule 7, *inter-alia*, provides that promotion to posts in BS-19 to BS-21 and equivalent shall be made on the recommendations of the Selection Board. Rule 7-A provides that the competent

authority may approve the promotion of an officer from the date when the recommendation of the Board is made. Rule 8 provides that only such persons who possess the prescribed qualifications and conditions for promotion shall be considered by the Central Selection Board. Rule 8-A prescribes that completion of minimum length of service, attending training or passing departmental examinations, as may be prescribed from time to time, are mandatory for being considered. It may be noted, therefore, that to be considered for promotion is a right, unless the civil servant fails to fulfill the required qualifications or to meet the prescribed conditions. Promotion is not one of the terms and conditions and thus does not give rise to the accrual of a right. From 1982 till 05.12.2019, the terms and conditions for promotion were prescribed by the competent authority through policies issued from time to time. However, after the judgment rendered by the august Supreme Court in the case titled '*Federation of Pakistan through Secretary Establishment Division and others v. Dr Muhammad Arif and others*' [2017 SCMR 969] the competent authority had constituted a Special Task Force to recommend reforms in the civil service, inter alia, with the object to comply with the principles and law laid down by the apex Court. Later the competent authority, in the light of the recommendations made by the Task Force, and in exercise of powers conferred under the Act of 1973 read with notification, dated 27.02.1998, made the Civil

Servants Promotion (BPS-18 to BPS-21) Rules, 2019 [hereinafter referred to as the "**Rules of 2019**"].

Rules of 2019:

6. Rule 2 defines various expressions. The expressions 'deferment', 'promotion' and 'supersession' have been defined in clauses (h), (m) and (o) of rule 2 respectively. Rule 2(i) defines the expression 'service dossier' as meaning the detailed record and information with regard to an officer. Rule 3 describes, inter-alia, the composition of the Board. Rule 6 has prescribed the eligibility criteria for consideration for promotion and the minimum criteria has been set out in clauses (a) to (f) thereof. Rule 7 (a) to (k) describe the conditions for deferment. The conditions for supersession have been set forth in rule 8. The quantification criterion/formula regarding Performance Evaluation Report [hereinafter referred to as the "**PER**"], Training Evaluation Reports [hereinafter referred to as the "**TER**"] and evaluation by the Board has been described in Rule 18 and it is reproduced as follows:

"18. Quantification of PERs, training evaluation reports and CSB, DSB and DPC evaluation.—(1) For the purpose of consideration by the CSB, DSB and DPC, the PERs

shall be quantified in accordance with the formula as set out in Schedule III.

(2) For the purposes of promotion to BPS-18, the PERs shall have the weightage of hundred percent.

(3) For the purposes of promotion to the posts in BPS-19, BPS-20 and BPS-21, the following quantification method shall be followed namely:—

- (a) PERs in respect of two preceding BPS or the last fifteen years whichever is more shall be quantified. If the service of an officer in present and previous BPS is less than fifteen years then the deficiency shall be met by taking into account the PERs of next lower BPS, which shall be bracketed with the PERs of preceding BPS. Quantification of PERs relating to present and previous BPS will have a ratio of 60%:40%;
- (b) the marks mentioned in column (3) of the table below shall be allocated for quantification of PERs, training evaluation report and CSB and DSB evaluation as mentioned in column (2) of the Table namely:-

TABLE

S. No.	Factor	Marks
(1)	(2)	(3)
1.	Quantification of PERs	40%
2.	Training Evaluation Reports (TERs)	30%
3.	valuation by CSB and DSB	30%
4.	Total	100%

- (C) the objective assessment form as set out in Schedule-IV to these rules shall be placed before the CSB and DSB along with panel proforma of every officer for objective evaluation. The CSB and DSB shall assess each officer on the panel on the basis of parameters and attributes as given in the respective objective assessment form for promotion;
- (d) the, CSB or DSB, as the case may be, shall apply its collective judgment to determine the fitness for promotion to selection posts as per

parameters given in the objective assessment form and shall award marks to an officer and place him in category A, B or C in accordance with the classification given in the following Table, namely:-

TABLE

Category	Marks
(1)	(2)
A	21 to 30
B	11 to 20
C	01 to 10

- (e) in such cases whereby a civil servant was not required to undergo mandatory training, weightage of PERs shall be 50% and marks out of 50% shall be awarded by the CSB and DSB; and
- (f) in case, a civil servant has been appointed in the cadre in the present scale, his/her PERs of the present scale shall be given the total weightage assigned to the PERs in the Table under clause (b)."

Schedule-IV of rule 18 (3)(c) is attached herewith as **"Annexure-C"**.

The Board:

7. As already noted above, in the case of the petitions in hand, the competent authority had constituted the Board vide notification dated 14-01-2020, a copy whereof is attached herewith as **"Annexure-D"**. It is obvious from its composition that it includes a large number of civil servants who have reached the highest echelon of the civil service i.e. BS 22. It included the highest ranking civil servants from each province i.e. the Chief Secretaries and the respective Inspector Generals of Police. The appointments against such highest ranking posts in the provinces are made by the Prime Minister in consultation with the chief executives of the respective provinces. It would definitely not be unreasonable to presume that endeavour would always be made to select the most competent and well reputed civil servants to be posted against such responsible and challenging posts. The Board, therefore, consisted of highest ranking civil servants who are presumed to be competent and well reputed. The Board also included highest ranking civil servants holding responsible positions in the Federal Government. The respective departments were represented by high ranking officials who gave detailed

briefings to the Board regarding each civil servant. Besides the civil servants, the Board also included two chosen representatives of the people as observers. The complete service record of each civil servant was placed before the Board. The composition of the Board in the case of the petitioners was so expansive that it had virtually ousted the probability of one or even a few members influencing the others. The evaluation was made by the most senior peers who have reached the highest ranking posts. Their collective subjective evaluation and judgment, based on careful consideration of the service records, reports and/or information cannot be brushed aside lightly or ignored, unless arbitrariness, mala fide or malice can demonstrably be shown to float on the surface of the record. The expansive composition of the Board definitely lends credibility and solemnity to its proceedings and a heavy onus would be required to be discharged by a candidate to establish otherwise. The collective judgment of this large assemblage of civil servants, presumed to be well reputed, is a shield and an effective antidote against arbitrariness or unfair treatment of the candidates. Lack of trust in such an expansively constituted high powered forum or to doubt the fairness of its proceedings on mere vague assertions would not be justified nor reasonable. Moreover, the proceedings relating to the Board were only one component of the process of promotions. The second stage was equally important i.e. when the record along with the

recommendations was placed before the competent authority, the Prime Minister. As would be discussed later, the role of the Prime Minister is not ministerial nor perfunctory. The latter is expected to apply his mind and conduct such inquiries as deemed appropriate so as to satisfy himself regarding the fairness and validity of the proceedings and recommendations of the Board. This adds to and fortifies the credibility and sanctity of the proceedings before the Board. There is, therefore, a presumption of regularity, fairness and good faith attached to the proceedings and recommendations' of the Board which can only be rebutted if convincingly established otherwise. Arbitrariness, unfairness or mala fide must be apparent and float on the surface of the record so as to cast doubt or discredit the validity of the proceedings. The nature of the functions performed by the Board and the status or object of its proceedings are similar to the functions of the Judicial Commission established for considering and recommending elevations and confirmation of superior court judges. In each High Court similar forums have been established for the purpose of promotions in the District judiciary. Likewise, the Promotion Boards constituted by the respective branches of the Armed Forces also have the same role and functions. The fundamental concept and principle is the same; collective evaluation by senior most wise peers on the basis of record, inquiries and information, in order to select

the most suitable candidate to fill a post. The peers are the best judges to evaluate candidates for filling a post because they have the requisite experience and knowledge regarding the requirements of the particular post.

The process in the case of the petitioners:

8. The petitioners, along with other civil servants, were considered by the Board in its meetings which were held in January, 2020. The Board, after considering and deliberating each case and the respective service records, made its recommendations. The details of the recommendations are highlighted in **"Annexure-E"** attached hereto. It is to be noted that 155 eligible civil servants were considered for promotion to the post of BS-21. 59 were found fit for promotion while 24 were recommended to be superseded. 66 civil servants were not found eligible and, therefore, their cases were deferred. In the case of 06 officers, the Board was of the opinion that their performance was required to be observed for a specified period before they could be considered again. Likewise, in the case of civil servants who were considered for promotion to the post of BS-20, 126 out of 294 were recommended for promotion, 132 were deferred on the ground of being ineligible and, in the case of 18, the Board was of the opinion that their performance was required to be further observed. 18 were recommended for

supersession. The petitioners were amongst those who were recommended to be superseded. The recommendations were placed before the Prime Minister who, after satisfying himself regarding the authenticity thereof gave approval in the case of the petitioners.

9. With the consent of the learned counsels for the petitioners, six questions were framed vide order dated 27.04.2020, and they were as follows;

i. Whether the ***Rules of 2019 were*** in conformity with the principles and law enunciated by the august Supreme Court in various judgments, particularly in the case of '*Federation of Pakistan through Secretary Establishment Division and others v. Dr Muhammad Arif and others*' [2017 SCMR 969].

ii. If the answer to the above question was in the negative, then what would be the fate of proceedings which had led to supersession being affirmed by the Prime Minister?

iii. The validity and status of thirty (30) marks assigned to the Board?

iv. Whether in the case of the petitioners the recommendations were based on irrelevant considerations, extraneous reasons and thus malafide in law and facts.

v. Whether the petitioners have been treated differently, giving rise to a breach of the fundamental right guaranteed under Article 25 of the Constitution of the Islamic Republic of Pakistan, 1973.

vi. Whether the Board had acted fairly by exercising discretion in accordance with the settled principles.

Petitioners' argument:

10. Arguments on behalf of the petitioners were led by Mr Abdur Rahim Bhatti, learned ASC. The other learned counsels were also individually heard and some have placed on record elaborate written arguments along with copies of judgments. The gist of the arguments advanced on behalf of the petitioners is;

a) The Rules of 2019 are ultra vires of Articles 240 and 260 of the Constitution and the law

laid down by the august Supreme Court in the cases of "Dr Muhammad Arif and others" supra, "Tariq Aziz ud Din and others; in re: human rights case nos. 8340, 9504-G, 13936-G, 13635-P and 14306-G to 143309-G of 2009, decided on 28th April, 2010 [2010 SCMR 1301], "Orya Maqbool Abbasi v. Federation of Pakistan through Secretary Establishment Division and others" [2014 SCMR 817], "Secretary Establishment Division, Govt. of Pakistan v. Aftab Ahmed Manika and others" [2015 SCMR 1006], "Mrs Irum Adnan and others v. Federation of Pakistan and others" [2012 PLC (CS) 1355], "Liaqat Ali Chughtai v. Federation of Pakistan through Secretary, Railways and 6 others" [PLD 2013 Lah. 413], "Muhammad Zafeer Abbasi, Deputy Secretary, Ministry of Kashmir Affairs and Northern Areas and Safron, Govt. of Pakistan, Pak Secretariat, Islamabad v. Govt. of Pakistan through its Secretary, Establishment Division (Cabinet Secretariat, Cabinet Block, Constitution Avenue, Islamabad and 4 others" [2003 PLC (CS) 503], "Syed Ijaz Hussain v.

Federation of Pakistan and others” [2017 PLC (CS) 115].

b) Reliance could not have been placed by the Board on such material which contained adverse information unless the affected civil servant had been confronted and given a reasonable opportunity to explain his/her stance. The Board could only have considered tenable and cogent material and the evaluation recorded in PERs and TERs could not have been disregarded; the Rules of 2019 are liable to be struck down because they have been framed in breach of the law laid down by the august Supreme Court; the Rules of 2019 do not provide for a structured objective criteria; personal knowledge and opinion of the Board members cannot influence the evaluation.

c) Reasons recorded by the Board for recommending supersession are based on personal knowledge, perceptions and opinions of the members of the Board; the Board was not authorized to consider any information other than PERs and TERs and the service dossier; reports submitted by

various intelligence agencies cannot be relied upon unless the civil servant has been confronted therewith and an opportunity is afforded to him to give an explanation; the failure to disclose the material which adversely affects the evaluation if not disclosed is a violation of the fundamental rights guaranteed under Article 10-A of the Constitution.

d) The objective criteria described in Schedule-IV of the Rules of 2019 is not in consonance with the principles and law laid down by the apex Court because it gives an opportunity to the members of the Board to form personal opinions, particularly regarding integrity; opinions formed on the basis of personal knowledge are arbitrary and illegal; the objective criteria described in Schedule-IV is not different than the one which was previously struck down by the august Supreme Court; it is obvious from the reasoning recorded by the Board in each case relating to the petitioners, that the members had formed opinions on the basis of hearsay, gossip etc., rather than placing reliance on credible documents

placed in the service dossier; the competent authority could not have altered the qualification formula to the disadvantage of the petitioners; the latter were eligible and, therefore, they ought to have been considered on the basis of the promotion policy which was in then field prior to making of the Rules of 2019; the Rules of 2019 had materially altered the evaluation from PERs and TERs by giving preference to the discretion of the members of the Board; the President had not delegated the power to make rules to the Prime Minister; the assessment/evaluation made by the Board was whimsical and the exercise entirely based on pick and choose in an arbitrary manner.

- e) The fundamental rights of the petitioners guaranteed under Article 25 of the Constitution were violated because other similarly placed eligible civil servants were treated differently; the objective criteria and the manner in which it was applied by the Board is discriminatory, non-

transparent and in breach of the principles of fairness.

- f) A competitive analysis of all eligible civil servants will establish that the petitioners have been treated differently; the Board had exercised discretion in an arbitrary, unstructured and whimsical manner; by giving preference to the evaluation of the Board over the PERs and TERs renders the entire process illegal and without lawful authority; in individual cases, recommendations were made for extraneous and irrelevant considerations; mala fide both in law and facts; minor observations recorded in TERs could not have been relied upon;
- g) The evaluation was made on the basis of vague and ambiguous information rather than adopting an objective criteria confined to the service dossier; the adverse recommendations were made without interviewing the petitioners and denying them the right of a fair trial.

h) The discretion exercised by the Board was contrary to the settled principles; the petitions are maintainable because the question of "**fitness**" is not justiciable before the learned Federal Service Tribunal in the light of section 4(1) of the Federal Service Tribunal Act, 1973 [hereinafter referred to as the "**FST Act of 1973**"]; the recommendations which led to supersession of the petitioners were in violation of the fundamental rights guaranteed under Article 14 of the Constitution.

Response of the Federation:

11. Chaudhry Amir Rehman, Additional Attorney General, has pleaded the case on behalf of the Federation. He has also submitted written arguments along with the case law he has relied upon. They have been placed on record. A summary of his arguments is as follows;

- I. Pursuant to the judgment rendered by a learned Division Bench of this Court in the case titled "The Secretary Establishment Division, Government of Pakistan v. Dr Muhammad Arif and others" [2018 PLC (C.S.) 907] and that of the august Supreme Court in the case titled '*Federation of Pakistan through Secretary Establishment Division and others v. Dr Muhammad Arif and others*' [2017 SCMR 969] the Federal Government constituted a Task Force to propose reforms relating to the civil service, particularly to give effect to the aforementioned judgments; in the light of the proposals by the Task Force and after extensive deliberations, the Rules of 2019 were made by the competent authority;
- II. in order to remove any vagueness or ambiguity, a well thought objective criteria

was prescribed keeping in view the law laid down by the apex Court; the objective criteria prescribed under the Rules of 2019 and Schedule-IV attached thereto is primarily based on tangible material i.e. dossier/documentary evidence;

- III. the composition of the Board was increased and more than two dozen officers in BS-22 were included; the Chief Secretaries and Inspector Generals of Police of respective provinces were included as members of the Board; the petitioners have not alleged bias or mala fide against the members of the Board nor has any document been placed on record in this regard; the Board, after considering the record placed before it, had thoroughly discussed each case and thereafter made recommendations; the functions of the Board and decisions taken by the competent authority, i.e. the Prime Minister, are of a nature that do not require affording a hearing to each individual; the august Supreme Court in the case "Secretary Establishment Division, Govt. of Pakistan, Islamabad v. Aftab Ahmed Manika and others " [2015 SCMR 1006] has

laid down the law and has determined the scope of functions of a Board;

- IV. the dossier, inter-alia, includes reports received from various sources, PERs, TERs, a brief submitted by the parent Department of the civil servant etc;
- V. the sanctity of the proceedings of the Board and its integrity and validity cannot be doubted unless it can be demonstrably shown otherwise;
- VI. the post in BS-21 is one of the highest in the bureaucratic set up of the civil service and the requirements required for consideration are distinct; over the past several decades the accuracy and reliability of the PERs has remained problematic; PERs have generally been found to contain exaggerated opinions; as part of the reforms of the civil service, the Rules of 2019 have been made and duly notified so as to ensure fairness and eliminate arbitrariness; Rules of 2019 have been framed in exercise of powers conferred under the Act of 1973 and the learned counsels for the petitioners have not been

able to raise a valid ground for challenging its vires; the rules have been made keeping in view the law laid down by the apex Court and are in consonance therewith; the subjective evaluation made by the Board, on the basis of objective criteria prescribed under the Rules of 2019, is not justiciable nor open to be substituted.

7. The learned counsels for the petitioners and the learned Additional Attorney General have been heard and the record perused with their able assistance.

Opinion of the Court:

12. The petitioners are civil servants and they were eligible to be considered for promotion. The Board was constituted and its recommendations were placed before the competent authority i.e. the Prime Minister. The latter was empowered to adopt such mode of enquiry as deemed appropriate by him in order to satisfy himself regarding the recommendations of the Board and the reasoning recorded in each case. The Prime Minister affirmed the recommendations and, consequently, the petitioners stood superseded. The petitioners have challenged their supersession. They have raised several grounds but in essence the main grievance is regarding the subjective

evaluation of the Board and marks assigned by the latter, which have been allocated under the quantification formula described in the Table of rule 18(3)(b) of the Rules of 2019. Thirty marks have been allocated for evaluation of the Board in accordance with the objective assessment form. It was obvious from the arguments advanced by the learned counsels, that the petitioners assert that PERs and TERs must take preference over evaluation by the Board because that is how they interpret the judgments of the superior courts, which will be discussed later. It is their case that promotion was denied to them because the Board had breached the principles and law laid down by the august Supreme Court in various judgments. It has been argued on behalf of the petitioners that the Board had exercised its discretion arbitrarily and that they were treated unfairly. They further assert that the Board had dealt with their cases in an arbitrary and whimsical manner by forming opinions on the basis of personal information. They have agitated that the proceedings of the Board were not fair and that it was the latter's obligation to have confronted them with any adverse material which had been relied upon for formulating the recommendations. It is noted that none of the petitioners have raised objections regarding the second and final stage of the promotion process i.e. review and approval by the Prime Minister. The emphasis of the learned counsels was regarding the proceedings by the Board. Their challenge to the vires of

the Rules of 2019 was rather feeble. It has been argued that the subjective evaluation of the Board was not based on an objective criteria. Before we advert to the precedent law, it would be beneficial to discuss some crucial principles which are relevant for the purpose of judicial review of the actions of the respondents from whom the petitioners are aggrieved.

The scheme of the Constitution; Separation of powers:

13. It is noted that appreciation of the scheme of the Constitution is important because the scope of judicial review has a nexus therewith. The Constitution of Pakistan is based on the foundation of trichotomy of powers between three distinct branches i.e. the Legislature, Executive and Judiciary. It has been held by the august Supreme Court in the case titled "*Dosani Travels Pvt. Ltd. and others v. Messrs Travels Shop (Pvt.) Ltd. and others*" [PLD 2014 SC 1] that one of the seminal principles of the Constitution of the Islamic Republic of Pakistan is the concept of trichotomy of powers between the three organs. This principle underpins the rationale that framing of a government policy is to be undertaken by the Executive which is in a better position to decide such matters on account of its mandate, experience, wisdom and sagacity. The Judiciary, on the other hand, is entrusted with the task of interpreting the law and to play

the role of an arbiter in cases of disputes between the individuals, inter se, and between individuals and the State. It has been emphasized that the Judiciary neither has sword nor power over the purse. In the case titled "*Syed Yousaf Raza Gillani, Prime Minister of Pakistan v. Assistant Registrar, Supreme Court of Pakistan and another*" [PLD 2012 SC 466] the apex Court has eloquently stressed that the constitutional order is founded on the fundamental instruction that each organ must give effect to and act in accordance with the Constitution; the Constitution has laid down limits for each organ and they are required to remain within the prescribed limits. In the case titled "*Brig. (Retd.) Imtiaz Ahmad v. Government of Pakistan through Secretary, Interior Division, Islamabad and 2 others*" [1994 SCMR 2142], the august Supreme Court has emphasized that the power vested under Article 199 of the Constitution is a great weapon in the hands of judges, but the latter must observe the constitutional limits set in the parliamentary system under the principle of trichotomy of powers. The august Supreme Court, in the case titled "*Messrs Elahi Cotton Mills Ltd. and others v. Federation of Pakistan through Secretary Ministry of Finance, Islamabad and 6 others*" [PLD 1997 SC 582], has cautioned against unnecessary intrusions by the courts in matters that fall within the domain of the other organs. In the case titled "*Messrs Power Construction Corporation of China Ltd. through Authorized Representative v. Pakistan*

Water and Power Development Authority through Chairman WAPDA and 2 others" [PLD 2017 SC 83], the august Supreme Court has observed that the courts, in exercise of their powers, ordinarily avoid to interfere with public policy decisions and, rather, exercise judicial restraint. It is, therefore, obvious that on the touchstone of the division of powers between the three organs, exercising judicial restraint in matters which fall within the exclusive domain of the Executive and for which the latter is answerable to the people of Pakistan is a foundational principle. This respect by one branch for the other is an essential characteristic of our constitutional scheme. However, while the division between the three branches of the State ought to be respected, the Constitution simultaneously contemplates checks and balances. The judiciary exercises the power of judicial review in order to determine whether actions taken by the Executive are consistent with the Constitution and the law. Questionable actions of the Executive, which involve abuse of discretion or based on unfairness and arbitrariness, are exposed to judicial scrutiny and amenable to the jurisdiction of judicial review under Article 199 of the Constitution. Nonetheless, great caution has to be exercised so as to ensure that the scheme of the Constitution i.e. the doctrine of separation of powers, is respected and is not unnecessarily disturbed by encroaching into the domain of the other branches.

14. In order to adjudicate upon the questions raised in these petitions, it would be beneficial to examine the organizational structure and characteristics of the Executive branch of the State. This is important so as to appreciate the distinction drawn by the legislature between various posts and the corresponding requirements for each in the context of evaluation made by the Board.

The Executive and significance of 'selection posts'.

15. The Executive branch enforces the laws legislated by the Majlis-e-Shoora (Parliament) and formulates the policies of the State. The Prime Minister is the Chief Executive of the country and leads the executive branch. The Prime Minister and members of the Federal Cabinet constitute the Federal Government and are the chosen representatives of the people. Policies are formulated by the elected representatives for and on behalf of the State. They are answerable to the people of Pakistan for their performance and discharge of the constitutional functions assigned to the Executive branch under the Constitution. They are, therefore, the elected component of the Executive. In formulation of policies and execution thereof, they are assisted by another equally important component i.e. the bureaucracy, which includes the civil servants. This category constitutes the permanent, technical and

professional part of the Executive branch. The success of the chosen representatives and their performance is essentially premised on the quality, efficiency and competence of the civil bureaucracy. The competence, professionalism and integrity of civil servants thus becomes one of the most important factors for the Executive branch of the State in order to fulfill its obligations effectively under the Constitution. The effective governance of the country depends on the quality of the civil servants. They are expected to be politically neutral and to perform their functions professionally because they are responsible to run the day to day administration of the State. Their quality, efficiency, competence and integrity as members of a permanent bureaucracy becomes crucial. The selection of a civil servant for a particular post thus becomes pivotal for the governance of the State.

16. Promotion to a post is one of the modes prescribed for appointment. The posts are broadly divided into two categories; 'selection' and 'non selection' posts. The basis for promotion to posts in these two categories is distinct; 'seniority cum fitness' in the case of non selection posts while 'merit' is the criteria for a selection post. The selection posts are in BS 19 to BS 21. The expertise and attributes required for each post are also distinct and corresponds with the nature of obligations and functions

related to a particular post. Perusal of policies formulated from time to time shows that attributes and relevant factors required to be taken into consideration for the purposes of evaluation are not the same for the different posts. The BS 19 post has been characterized as the first in the hierarchy that introduces an element of supervision and the officer is expected to contribute towards policy making. The BS 20 post has been described as the 'middle management post' requiring variety and width of experience. The post in BS 21 has been described as the 'highest echelons of policy making'. In order to be promoted to a BS 21 post, an officer is expected to possess exceptional qualities e.g. analytical mind, depth of vision and potential to hold a post in the top management. Each post, therefore, requires distinct qualities and characteristics. BS 19 to BS 21 are selection posts and promotion is on the basis of 'merit', as already noted. Merit means 'the quality of being particularly good or worthy, specially so as to deserve praise'. It has a higher threshold than 'seniority -cum-fitness', which is the prescribed criteria for promotion to a non selection post. 'Merit' is relatable to excellence, eminence and worthiness. The Board, in the case of promotion to a post in BS 20 or BS 21, as the case may be, makes a subjective evaluation having regard to the requirements of the particular post for which a candidate is being considered. The evaluation of PERs may be an important factor but cannot be treated

as exclusive. It is important to note that it appears from the material placed on the record, that accuracy of the recorded evaluation in PERs has always remained a challenge for the policy framers. This has been unambiguously acknowledged and the relevant portion from the promotion policy of 1985 is reproduced as follows;

"The other noticeable trend is towards "inflated" reporting. To some extent this problem was always around by higher eligibility thresholds fixed for selection posts have added to the pressure on reporting/countersigning officers to be overly generous in their assessments. This trend has touched such proportions that the majority of assessments may well be closer to objectivity if reduced by one rung. In other words, most of the average officers are being graded as 'good' and the good as 'very good'. This acts to the disadvantage of the genuinely outstanding officers. Statistically, the latter should comprise around 3 to 5 percent whereas many Divisions now boast of 30 or 40 percent officers in the 'very good' category if their reports are to be believed."

17. It appears that the framers of the policies formulated from time to time have consistently strived to ensure that the effect of the inaccuracies or exaggeration by the reporting officers could be balanced by including other relevant factors in the process of evaluation. It is interesting to note that in the PER form 'integrity' can be graded in one of the four categories mentioned in the column. An officer who has been graded as 'B' or 'C' for integrity may yet get an overall assessment of 'very good'. We are afraid that 'integrity' can either be reported in affirmative or negative. It has been unequivocally stated in almost every policy that, though PERs are to be given due importance, they are not the sole criteria for promotion to a selection post. Moreover, evaluation recorded in PERs is in relation to performance of an officer relating to a particular post and not the one for which subsequently the latter may be considered for promotion. The requirements and attributes could be different. The competent authority may take numerous factors into consideration while formulating a policy for promotion with the object of enhancing the efficiency and performance of the civil servants. Can a Court interfere in the policy making domain by curtailing the freedom of the competent authority or to dictate what factors should or should not be considered? We are afraid that the answer to this proposition is an emphatic 'No'. The authority, competent to formulate the policy of promotion, is the best judge

because it has a better understanding of the nature of the job and the requirements related to a particular post.

Is there a vested right in claiming promotion or to be considered under particular rules which prescribe the qualifications and other criteria?

18. Clause (a) of Article 240 of the Constitution states that in the case of the services of the Federation, posts in connection with the affairs of the Federation and All Pakistan Services shall be determined by or under an Act of the Majlis-e-Shoora (Parliament). As noted above, in this regard the Act of 1973 has been promulgated and the Rules of 1973 have been framed there under. A combined reading shows that a distinction has been drawn between 'eligibility' and 'fitness'. This distinction is crucial and has been elaborated by the august Supreme Court in the case titled "Mian Abdul Malik v. Dr. Sabir Zameer Siddiqui and 4 others" [1991 SCMR 1129]. The relevant portion is reproduced as follows:

"The question of eligibility relates primarily to the terms and conditions of service and their applicability to the civil servant concerned. Fitness introduces an element of subjective evaluation on the basis of objective criteria where substitution of or an opinion of the competent authority is not possible by

that of a Tribunal or a Court. It is in this background that the question of fitness or suitability for promotion has always been considered to be exclusively within the jurisdiction of the competent authority not shared by the Court or Tribunal exercising supervisory jurisdiction in respect of eligibility and qualification.”

19. The above passage was affirmed and cited with approval in the case titled “Muhammad Anis and others v. Abdul Haseeb and others” [PLD 1994 S.C. 539]. In the case of ‘Muhammad Anis and others’ supra the august Supreme Court has observed that the question of fitness is a subjective evaluation on the basis of objective criteria and the same falls outside the jurisdiction of the tribunal or a court. These principles were further affirmed and elaborated in the case titled “Dr. Ahmed Salman Waris, Assistant Professor Services Hospital, Lahore v. Dr. Naeem Akhtar and 5 others” [PLD 1997 S.C. 382

20. It was urged before the august Supreme Court in the case titled “Muhammad Umar Malik and others v. Federal Service Tribunal and others” [PLD 1987 S.C. 172] that the rules for promotion could not have been changed or altered so that they have the effect of adversely

prejudicing those who had already become eligible. The august Supreme Court, placing reliance on the earlier judgments, observed that there was no vested right in promotion or the rules which determine eligibility criteria for promotion. Reliance is further placed on the case titled "The Central Board of Revenue, Government of Pakistan v. Mr Asad Ahmad Khan" [PLD 1960 S.C. (PAK.) 81] wherein it has been held that the Government has every right to make rules to raise the efficiency of services and that if no vested right is denied to a party then there is no jurisdiction to interfere by means of a writ. In the case titled "Abid Hussain Sherazi v. Secretary M/O Industries and Production, Government of Pakistan, Islamabad" [2005 SCMR 1742] it has been observed that it is a well settled law that promotion is neither a vested right nor could it be claimed with retrospective effect. The apex Court affirmed the law laid down in the case titled "Muhammad Yousaf v. Chairman, Railway Board/Secretary" [1999 SCMR 1559] that regarding claiming promotion or proforma promotion, what the civil servant may claim under the law was that the latter should be considered when the cases for promotion are taken up. It was emphasized that a civil servant could not call upon a Tribunal to direct the department to fill the promotion post forthwith or on a particular date nor to keep it vacant or under consideration. In the case titled "Muhammad Iqbal and others v. Executive District Officer (Revenue),

Lodhran and another” [2007 SCMR 682] the apex Court has observed that the question of promotion rests within the jurisdiction of the competent authority, which would not be ordinarily interfered with by a court of law except when the competent authority has acted in violation of law, in excess of jurisdiction, without jurisdiction or in colorable exercise of powers conferred on the latter. The exercise of jurisdiction by a High Court under Article 199 of the Constitution will only be justified in the aforementioned eventualities. In the case titled “Dr. Muhammad Hussain v. Principal, Ayub Medical College and another” [PLD 2003 S.C. 143] the august Supreme Court repelled the contention that an amendment could not be made in the relevant regulations/rules by the competent authority, having the effect of adversely affecting the rights of the petitioner. It was held that the Government was competent to enhance, alter or amend the prescribed qualifications for a particular post, which could not be objected to nor be kept unchanged to safeguard the interests of a particular civil servant. The passage from the case titled “Government of N.W.F.P. v. Muzaffar Iqbal” [1990 SCMR 1321] was quoted with approval and the same is reproduced as follows:

“No one can claim a vested right in promotion or in the terms and conditions for promotion to a higher

post. The Government has the right to enhance the qualifications and the standards for recruitment and promotion in order to maintain efficiency in service. Except for the post which the civil servant happens to hold, he cannot claim vested right in other higher tiers in the hierarchy."

21. The law laid down by the august Supreme Court in the case titled "Muhammad Insha Ullah v. Chief Conservator of Forests (P & E), Punjab" [PLD 1988 S.C. 155] was also reaffirmed to the effect that, in the absence of impairment of a vested right, it would be within the exclusive competence of the competent authority to determine the terms and conditions of service. Moreover, it has been observed in the said judgment that it cannot be said that a rule which grants weightage to academic qualifications against experience is unreasonable and harsh. The august Supreme Court, therefore, held that it was within the competence of the competent authority to prescribe requisite qualifications for a particular post, as may be conducive for the maintenance of proper discipline and efficiency. In the case titled "Muhammad Ishaque and others v. Government of Punjab, through Chief Secretary and others" [2005 SCMR 980] the stance before the apex

Court was that the competent authority had no power to change the rules detrimental to the interests of a civil servant. The august Supreme Court, placing reliance on the earlier judgments, affirmed the ratio enunciated therein that promotion was not a vested right and that the Government was always competent to enhance educational qualifications for the purpose of promotion and that civil servants could not claim that the promotion should be regularized according to the rules prevailing to their service. In the case titled "Government of Khyber Pakhtunkhwa through Chief Secretary, Peshawar and others v. Hayat Hussain and others" [2016 SCMR 1021] it was held that the Government is entitled to make rules in the interest of expediency of service and to remove anomalies in service rules. It has been emphasized that the Government is competent to determine the eligibility criteria for promotion and that such a prerogative is essentially an administrative matter, falling within the exclusive domain and policy decision making of the Government, and that interference therewith by the courts is not warranted. It has been affirmed that no vested right of a civil servant is involved in the matter of promotion or the rules determining their eligibility or fitness, and the High Court has no jurisdiction to strike down such rules through issuance of a writ under Article 199 of the Constitution. The august Supreme Court was not impressed with the argument that the rules could not be

changed having the effect of adversely affecting civil servants. Moreover, the proposition that rules of promotion determining eligibility criteria for promotion was not a vested right, was affirmed. Determination of eligibility and policy making decisions fall within the exclusive domain and power of the Government and the same cannot be interfered with. In the case titled "Government of N.W.F.P., Health and Social Welfare Department through its Secretary v. Dr Sheikh Muzaffar Iqbal and others" [1990 SCMR 1321] the august Supreme Court has unambiguously observed that a civil servant could claim no vested right nor could a change in recruitment rules of the higher post be claimed to operate retrospectively. It was further held that no one can claim a vested right in promotion or in the terms and conditions for promotion to a higher post. The right of the Government to enhance the qualifications and the standards for recruitment and promotion, in order to maintain efficiency in service, was affirmed. The august Supreme Court has held that it is a well established law that the rules applicable and the conditions required to be satisfied on the date of appointment are to be taken into consideration and not what were the requirements at an earlier date. Reiterating the law propounded in the case of 'Mr Asad Ahmed Khan' *supra* the august Supreme Court in the case titled "Dr. Alyas Qadeer Tahir v. Secretary M/O Education (now M/O CADD), Islamabad and others" [2014

SCMR 997] has elaborated the reasons for the absence of a vested right relating to the rules which prescribe qualifications or criteria for promotion to the next higher scale. The august Supreme Court held that such rules could be changed because it is the prerogative of the Government, except when it can be shown that they are either person specific or based on mala fide.

Is the evaluation made by the Board justiciable? if so then to what extent.

22. The august Supreme Court, in the case titled "Rana Muhammad Sarwar v. Government of Punjab through Services, General Administration and Information Department and another" [1990 SCMR 999], has held and observed that actions taken against civil servants with regard to their employment can be challenged on the ground of mala fide in law or mala fide in fact. Mala fide in law has been described as an act which involves authority exercised by a person not competent to do so, or a breach of mandatory procedural requirements, or when the action is bereft of jurisdiction. On the other hand, mala fide in fact has been held to cover cases when personal bias, grudge or vindictiveness is the promoting force for action. It has been observed that public power is not entrusted or reposed in a public functionary so that it is exercised for achieving personal ends, like unjust enrichment, vindictiveness or revenge. The case titled "Shaukat Javed

Farooqi, Under Secretary Civil Secretariat, Lahore v. District and Sessions Judge, Lahore and another” [1999 SCMR 2141] related to adverse remarks recorded by the countersigning officer in the annual confidential report. The august Supreme Court observed that the process of forming an opinion by the reporting or countersigning officer involves several factors. The basis for forming of an opinion could be very extensive, depending on one's own observations, the general reputation and such other material that may have been brought to the notice of the officers. The latter cannot be asked to produce the material on which an opinion may have been formed. It was contended in the case titled “Mehtar Khan Meo v. High Court of Sindh” [2007 SCMR 632] that, during the relevant period, the countersigning officer who had recorded adverse remarks was not acting as the authority competent to countersign. The impugned adverse report in that case was regarding the integrity of a judicial officer. It was observed by the august Supreme Court that opinions in most of the cases are subjective, as integrity is a trait of mind which is neither visible nor tangible. Such opinions are formed on different basis because the reputation of an officer, whether good or bad, cannot be kept secret as it travels swiftly. It is obvious from the observations that it was considered justified for an opinion to be formed on the basis of thorough enquiry from officers who had the opportunity of knowing the character and

work of the officer e.g. the latter's colleagues etc. The facts of the case relating to the judgment reported as "Muhammad Yahya Khan Kulachi v. Registrar, Lahore High Court, Lahore" [2011 SCMR 1381] were that adverse remarks had been recorded by the countersigning officer. The august Supreme Court referred to an earlier judgment reported as "Shabbir Hussain v. Registrar, Lahore High Court" [PLD 2004 S.C. 191] wherein it was observed;

"The position that emerges from the judgment is that an impartial and unambiguous evaluation based on credible information, personal observation and reports of the Inspection Judges falls within the ambit of an objective evaluation. In other words, an evaluation can be termed as objective if it is unambiguous, impartial, unbiased, result of careful consideration and is based on credible information, personal observation of the Reporting Officer or the Countersigning Officer and reports of the Inspection Judges and it is not necessary that it must be based on tangible material like complaints in writing, resolutions of Bar Associations, transfer applications and assets etc. The adverse remarks with regard to integrity of an officer are made on the basis of his reputation and if the same are required to

be supported with tangible material and instances of corruption then there will be no difference between an A.C.R. and an enquiry report under the Efficiency and Discipline Rules.”

23. The case titled “Muhammad Ashraf Sangri v. Federation of Pakistan and others” [2014 SCMR 157] related to marks awarded by members of the Committee which had interviewed the petitioner. The august Supreme Court held that interference would have been justified if any mala fide, or bias, or error of judgment had been found floating on the surface of the record, otherwise the opinion formed by members regarding the question of ‘fitness’ of a candidate for a regular post was a subjective matter and could only have been assessed by the functionaries who were entrusted with the responsibility. The purpose of referring to judgments relating to the evaluation of reporting, or countersigning officers, or a committee that interviews candidates, was to show that the august Supreme Court in such eventualities had accepted the formation of opinions on inquiries made from relevant persons or other sources. It was recognized that opinion regarding integrity and general reputation could be formed on the basis of credible information and the existence of tangible material was not necessary.

Moreover, the officer who had formed the opinion cannot be asked to show the material relied upon.

24. The examination of the precedent law will be incomplete if the cases of "Tariq Aziz ud Din and others, HRC cases" [2010 SCMR 1301], "Orya Maqbool Abbasi v. Federation of Pakistan through Secretary Establishment Division and others" [2014 SCMR 817] Secretary Establishment Division, Govt. of Pakistan V. Aftab Ahmed Manika and others" [2015 SCMR 1006]: and "*Federation of Pakistan through Secretary Establishment Division and others v. Dr Muhammad Arif and others*" [2017 SCMR 969] are not discussed.

a) 'Tariq Aziz ud Din and others supra:

The promotions challenged in this case were from the post of BS-21 to BS-22. The necessary facts were that the Establishment Division had not placed before the competent authority the cases of all the eligible civil servants. The august Supreme Court had concluded that the manner in which the promotions had been dealt with made it obvious that it was a classic example of pick and choose, because many eligible candidates had been ignored. It was observed that the competent authority had not been properly assisted. The process of promotions was

found to have been carried out in breach of the manner prescribed under the Rules of Business, 1973. Moreover, no criteria had been prescribed for considering all those civil servants who had become eligible for promotion to the highest post of BS-22, thus raising questions in the context of Article 25 of the Constitution. Arbitrariness, lack of transparency, violation of law and abuse of discretion were, therefore, obvious and floating on the surface of the record. The august Supreme Court had concluded that the manner in which the cases had been processed was in violation of the constitutionally guaranteed rights and whimsical. It was in this background that the august Supreme Court had observed that it had no hesitation in concluding that selection was not made on merit. The august Supreme Court thus allowed the petitions and directed the competent authority to conduct the proceedings afresh, after considering all the similarly placed eligible officers.

b) 'Orya Maqbool Abbasi' supra:

The facts in this case related to promotions of civil servants from BS-20 to BS-21. The august Supreme Court held that the process was conducted in violation of the Act of 1973 and the Rules of 1973. After examining the record, it appeared to the

august Supreme Court that the unusual manner in which posts had been created was not in consonance with exercising authority bonafidely and, that too, for germane considerations. Exercise of powers in a colorable manner was found to be floating on the surface of the record. The objective criteria lacked transparency and the formula for the awarding of fifteen (15) marks by the Board had been left unstructured and completely at the discretion of the Board. The reasons for deferment of the petitioner in that case were also found to be arbitrary and discriminatory, rather, it was acknowledged that earlier the petitioner had been wronged. It appeared to the august Supreme Court that vacancies were created in order to favour junior civil servants in derogation of the rights of those who were senior. The findings, in the facts and circumstances of the case, were whimsical actions in violation of the applicable policy. A written statement submitted on behalf of the Secretary, Establishment Division had acknowledged arbitrariness and whimsical exercise of discretion. The Government had virtually admitted that neither the proceedings nor discretion exercised by the competent authority were bonafide and in accordance with law. The august Supreme Court, therefore, directed the Government to undertake the exercise afresh, after prescribing

objective criteria for promotion. Mala fide in fact as well as in law was found to be obvious.

c) "Secretary Establishment Division, Govt. of Pakistan v. Aftab Ahmed Manika and others" [2015 SCMR 1006]:

In this case the Board had recommended eligible civil servants for promotion from BS-20 to BS-21. The recommendations to the extent of some of the officers were not approved by the competent authority i.e. the Prime Minister and, consequently, the latter returned the cases to the Board for consideration afresh. It was pleaded on behalf of the Government that material in the form of reports of intelligence agencies had been placed before the competent authority and, on the basis thereof, definite opinion regarding integrity and reputation of the candidates had been formed. The argument that reports of intelligence agencies could not have been considered did not impress the apex Court. It was also disputed whether material was actually placed before the competent authority. It was held that this being a question of fact was not justiciable because it was not possible for the Court to embark upon a probe in this regard. In response to the argument that intelligence reports could not be taken into consideration, the august Supreme Court observed and held as follows;

"Whether the reports of the Intelligence Agencies would be material and, if so, the weight that they deserve are matters within the powers of the Board. Similarly, the competent Authority also in its discretion may take into consideration any information while considering the recommendations of the Board. This power, however, is to be exercised sparingly and as mentioned in the Esta Code in exceptional circumstances."

d) Case of 'Dr Muhammad Arif and others' supra:

The process of promotions in this case was carried out as per the revised objective assessment form vide Office Memorandum, dated 10-02-2014. The distinguishable feature of the revised policy was to give the Board the power to override the entire service record of a candidate. Out of 15 marks allocated for the Board, 5 were for 'integrity'. In order to avoid supersession it was essential for candidates to obtain at least 3 marks out of 5. These five marks were entirely at the discretion of the Board and could be awarded solely on the basis of personal opinions of its members. The Board, therefore, could recommend the suppression of a candidate solely on the basis of unstructured exercise of discretion while awarding the five marks and that too, on the basis of personal opinions. This

overriding effect meant giving exclusive unbridled power to the Board to decide the fate of a candidate. The members of the Board, on the basis of personal opinions regarding integrity, could supersede a civil servant in disregard to the latter's service dossier. The apex Court observed that instead of providing any evaluation structure, the evaluation had been left open for the Board to choose either to rely on the service dossier as source material or to evaluate an officer solely on the basis of personal knowledge/opinions of its members. This had created an unfair anomalous situation. It was in this context that the august Supreme Court had held the entire process to be flawed and unfair for 'want of a well thought out structured objective criteria, and lacking in due process. The evaluation of members of the Board based on their personal knowledge had an overriding effect over the service dossier of a civil servant. The august Supreme Court thus directed the Federation to withdraw the overriding effect of the five marks reserved for 'integrity' by removing the focus from the service dossier to the personal knowledge of members of the Board. The Government was directed to bring more objectivity in the criteria for excellence and comparative merit by defining it further so that more specific detailed

and well thought reasons for promotion of an officer could be ensured.

25. It would also be pertinent to refer to an unreported judgment of the august Supreme Court, dated 27.06.2012, passed in Civil Petition No. 1178 of 2011, titled "Athar Hussain Khan Sial, Joint Secretary, Ministry of Interior, Islamabad v. The Government of Pakistan through Federal Secretary, Establishment Division, Islamabad and another" and the relevant portion is reproduced as follows:

"The petitioner has been awarded 5 marks out of the available 15 marks by the CSB, which is the only bone of contention. The said marks are awarded on the basis of a subjective assessment by the CSB, which assessment could not be substituted by the learned High Court while exercising jurisdiction under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973, especially in the absence of *mala fide* as has been held by way of the impugned judgment to which no exception can be taken. This petition being without merit is, therefore, dismissed and leave declined."

Conclusion:

26. Promotion to a post is one of the modes of appointment under the Act of 1973 read with the Rules of 1973. In the case in hand, candidates were considered by the Board for promotion to posts in BS-20 or BS-21, as the case may be. These two posts fall in the category described as 'selection posts, for which the prescribed criteria is "merit" and not mere "seniority-cum-fitness" as is the case for 'non selection posts'. The threshold of required attributes for promotion to a selection post is thus higher. The job description and requirements relatable to each post are also distinct as has been discussed earlier.

28. The precedent law highlighted above and the principles and law enunciated therein governs the scope of judicial review while exercising jurisdiction under Article 199 of the Constitution. There is a clear distinction between "eligibility" and "fitness". The question of eligibility relates to the terms and conditions of service and, thus, grievance becomes amenable to the jurisdiction of the Federal Service Tribunal. "Fitness" on the other hand involves "subjective evaluation on the basis of objective criteria". The onerous task of carrying out 'subjective evaluation' has been entrusted to the Board, which is subject to approval after careful scrutiny by the competent authority i.e. the Prime Minister. Determination of

“fitness” by the competent forum or authority entails taking numerous factors into consideration and the opinion formed or subjective evaluation is not possible to be substituted by a tribunal or a court for that of its own. The question of fitness or suitability for promotion is, therefore, within the exclusive jurisdiction of the competent authority and it cannot be interfered with by a court or tribunal. The wisdom or reason for such exclusivity is based on certain foundational principles.

29. It is settled law that promotion is not a vested right. All that a civil servant can claim is to be considered for promotion when cases of similarly placed eligible civil servants are taken up. A civil servant cannot claim a right in relation to the issuance of a direction to the department to fill a post through the mode of promotion, nor that the case be taken up for consideration. It is the sole prerogative of the government and the competent authority to prescribe the qualifications and other conditions relating to the eligibility criteria. Framing of rules, regulations or policies in this regard thus becomes the sole prerogative of the competent authority and the latter may at any time amend, alter or change the prescribed qualifications, conditions and eligibility criteria for promotion. A civil servant, in this context, has no vested right nor can the exercise of this prerogative be interfered with except when exceptional circumstances

exist e.g. they are clearly person specific or mala fide is apparent and floats on the record. A civil servant cannot claim that the prescribed qualifications or eligibility criteria be applied retrospectively, nor to restrain the competent authority from changing or altering the rules, regulations or policies to his/her prejudice. No vested right is, therefore, involved in promotion to a post nor the rules determining or prescribing the qualifications and eligibility criteria.

30. In the case of 'Orya Maqbool Abbasi' supra, mala fide was found floating on the surface of the record, besides discretion having been exercised in an unstructured manner by the Board in the context of the marking of the fifteen marks allocated to it. In 'Dr Mohammad Arif and others' supra, the overriding effect of five marks allocated to the Board regarding integrity had obviously vested unbridled power and all other crucial factors prescribed for consideration, including the service dossier of a civil servant, could be rendered redundant. The fifteen marks assigned to the Board were left at the whims of its members. However, pursuant to the jurisprudence highlighted in the aforementioned judgments, the promotion policy was reviewed by the competent authority and the Rules of 2019 were framed and duly notified. The competent authority had prescribed a well thought out objective assessment criteria in the

context of the thirty marks allocated for evaluation by the Board. The discretion was structured as is evident from a plain reading of the objective assessment form set out in Schedule IV of the Rules of 2019. The flaws and illegalities highlighted by the august Supreme Court in the aforementioned judgments were removed. The learned counsels were not able to show that the form set out in Schedule IV of the Rules of 2019 was in breach of the law enunciated in the case of 'Dr Mohammad Arif and others' supra. Likewise, no valid ground was raised before us that would justify declaring the Rules of 2019 as ultra vires. Based on the objective criteria, the service dossier, reports and information placed before the Board, the members, in the case of the petitioners, had collectively evaluated each candidate 'subjectively'. A court or tribunal is neither adequately equipped nor has the relevant knowledge, experience or means to judicially scrutinize the subjective evaluation made by the Board. It cannot step into the shoes of the Board members to independently undertake the exercise of evaluation, as was suggested by the learned counsels during the course of the arguments.

31. The Rules of 2019 has prescribed the qualifications, eligibility criteria and methodology for the Board's evaluation. This falls within the exclusive domain of the competent authority and it is an administrative function. The competent authority is the best judge to

decide what factors are to be given preference and to what extent. The weightage given to a particular factor e.g. qualifications or quantum of allocation of marks to the Board, is not amenable to judicial scrutiny. These are policy matters and not justiciable by a court of law. A court cannot curtail the freedom of the competent authority to formulate policy for promotion nor limit its prerogative to prescribe qualifications, conditions, eligibility criteria and the methodology required to be adopted for the purposes of evaluation. We have been informed that the Rules of 2019 were an outcome of a rigorous reform process carried out by the government. We are afraid that we could not bring ourselves to agree to the argument that PERs and TERs ought to be given preference. If this argument is accepted then a court would be assuming the role of framing of the policy which is otherwise within the exclusive domain and is the sole prerogative of the government and the competent authority. As already noted, the accuracy and reliability of opinions recorded in the PERs has remained questionable and a challenge for the framers of the policy regarding promotion. Nonetheless, it is the exclusive prerogative of the competent authority to decide such policy matters and they are ordinarily immune from judicial scrutiny.

32. The emphasis of the learned counsels for the petitioners was mainly regarding the 'subjective

evaluation' of the Board and the reasoning recorded in each case. They have argued that the evaluation was not made on the basis of an objective criteria and that the Board had formulated recommendations on the basis of personal opinions of its members and that too, in a whimsical and arbitrary manner. Mala fide has also been pleaded. However, the assertions and allegations are vague and inexplicit. Nothing has been placed on record to even remotely support the vague assertions. We have been informed that the petitioners strongly feel that they were better than many who were cleared for promotion. The scheme of law envisages subjective evaluation to be made through collective judgment of senior peers and is not based on self assessment.

33. The Board, its composition and the nature of its functions have already been discussed in detail. The composition raises a presumption of regularity, reliability, fairness and good faith in relation to the entire exercise undertaken by the Board and the subjective evaluation made on the basis of an objective criteria. The subjective evaluation by the Board is not justiciable nor the opinion formed regarding fitness or suitability can be substituted by a court or tribunal for its own. In the light of the precedent law discussed above, the Board can form its opinion on the basis of the service dossier and other material or information placed before it. As has been held

by the apex Court in case of 'Aftab Ahmed Manika' supra, the Board and the competent authority are not barred from considering credible information, including reports obtained from the intelligence agencies. Moreover, the question or dispute as to whether or not material was actually placed before the Board and its relevance is not open to judicial scrutiny because such a probe cannot be undertaken while exercising jurisdiction under Article 199 of the Constitution, as held in the aforementioned judgment. Likewise, a court cannot undertake a roving inquiry to find out what material was considered by the Board.

34. The presumption of regularity, fairness and reliability of the proceedings and the subjective evaluation of the Board cannot be interfered with except when mala fide is demonstrably shown to float on the surface of the record. The gamut and focus of the arguments advanced at the Bar on behalf of the petitioners was essentially 'mala fide of fact' or, in other words, that the actions and proceedings of the Board were in bad faith, partial, tainted with revenge, tainted with personal vendetta and whimsical. The august Supreme Court in the case titled "*Government of West Pakistan and another v. Begum Agha: Abdul Karim Shorish Kashmiri*" [PLD 1969 SC 14] has held that mala fide must be pleaded with particularity, and once any kind of mala fide is alleged, no one should

be allowed to address proof of any other kind of mala fide, nor should any inquiry be launched merely on the basis of vague and indefinite allegations, nor should the person alleging mala fide be allowed a roving inquiry into the files of the government for the purpose of fishing out some kind of case. This was affirmed by the highest Court in the case titled "*The Federation of Pakistan through the Secretary, Establishment Division, Government of Pakistan, Rawalpindi v. Saeed Ahmed Khan and others*" [PLD 1974 SC 151]. The expression "mala fide" was interpreted as meaning "in bad faith" while "colorable" exercise of powers" was described as action taken for collateral purposes not authorized by the law under which the action is taken. It was thus held that "mala fide" is one of the most difficult things to prove and the onus is entirely upon the person alleging mala fide to establish it. It has been emphasized that this principle is based on the presumption of regularity with regard to all official acts and, until that presumption is rebutted, the action cannot be challenged merely upon a vague allegation of mala fide. A mere allegation that action has been taken wrongly is not sufficient to establish a case of mala fide nor can "mala fide" be proved on the basis of universal malice against a particular class or section of people.

35. The outcome of the exercise before the Board and the details have been discussed above. There is no reason

whatsoever for us to doubt that a large number of candidates were recommended for promotion, because they were favoured, while bad faith on the part of the Board members had led to recommending the petitioners for suppression. It is not the case of the latter that the Prime Minister was in any manner complicit. The recommendations were independently considered by the competent authority i.e. the Prime Minister and none of the petitioners have alleged mala fide or bad faith on his part. During the course of these proceedings, although the focus has been on bad faith and mala fide, nothing was brought on record to even remotely suggest "bad faith" on the part of the Board and its members. The petitioners definitely failed to rebut the presumption of regularity, fairness and good faith relating to the proceedings of the Board and the ensuing recommendations.

36. The learned counsels for the petitioners have also questioned the "fairness" of the Board and breach of principles of due process. It is their case that the Board ought to have confronted them with the material that had adversely affected them. The proceedings before the Board are certainly not in the nature of conducting a trial. Since promotion is not a vested right, therefore, the constitutionally guaranteed right under Article 10-A would not be attracted because it is relatable to "determination of civil rights and obligations". However, a candidate has

indeed a right to be dealt with fairly. "Fairness" means to be impartial and to treat an individual without favoritism or discrimination. It is, therefore, obvious that "unfairness" or unfair treatment renders an action or proceedings "mala fide" or based on "bad faith". The argument that it is the duty of the Board to confront a candidate with material which adversely affects the formation of an opinion or may influence subjective evaluation is misconceived. If this argument is accepted then it will completely change the nature of the proceedings before the Board. It will convert the proceedings from subjectively evaluating a candidate on the basis of objective criteria to that of adjudication of a right. If this argument was to be accepted then the same principle would also apply to similar proceedings before other forums such as the Judicial Commission, Administrative Committees established in the High Courts, or the Promotion Boards set up in the respective branches of the Armed Forces. In the case of civil servants it has been made mandatory under the law to disclose reasons. "Fairness" is embedded in the presumption of regularity and, therefore, unfair proceedings or action has to be established in accordance with the principles and law enunciated by the august Supreme Court in the judgment reported as *"The Federation of Pakistan through the Secretary, Establishment Division, Government of Pakistan, Rawalpindi v. Saeed Ahmed Khan and others"*

[PLD 1974 SC 151]. There is nothing on record to even remotely suggest that the Board or the competent authority i.e. the Prime Minister had acted unfairly, impartially, or that they were biased, had a grudge and/or his actions were tainted with vindictiveness. In the case that the petitioners were in possession of sufficient material or were able to establish mala fide of law or fact then they could have approached the competent authority i.e. the Prime Minister by filing grievance representations. In such an eventuality the latter would have been empowered to review the decision and adopt any mode of enquiry as deemed appropriate in the circumstances, including obtaining information from sources described by the august Supreme Court in the case of 'Aftab Ahmed Manika and others' supra. No such material has been brought on record in support of the vague and unspecific assertions made by the petitioners in the respective memorandums of petitions, or during the course of arguments, so as to rebut the presumption of regularity and fairness attached with the proceedings of the Board. We have not been able to persuade ourselves that the Board or the Prime Minister had acted in bad faith, with mala fide, or that the petitioners were treated unfairly. We have no hesitation in declaring that the presumption of regularity and fairness could not be rebutted. With the able assistance of the learned counsels, we have also carefully perused the reasons recorded in each case. The reasons

have been recorded in support of the subjective evaluation of the Board. They cannot be subjected to judicial review. This Court, while exercising jurisdiction under Article 199 of the Constitution, cannot assume the role of an appellate court, nor can the subjective evaluation and opinions formed by the Board be substituted. The disclosures were sufficient to inform the petitioners regarding the material considered for the subjective evaluation and forming of opinions. The Board members cannot be put on trial merely on the basis of vague assertions regarding mala fide of fact.

37. Last but not the least is the principle of separation of powers on which the edifice of the Constitution stands. We, as judges, are part of the judiciary, one of the three branches of the State. We do not claim supremacy over the other branches as was observed by the august Supreme Court in the case reported as "The State v. Zia ur Rahman and others" [PLD 1973 SC 49]. The Constitution is the fundamental supreme law and it prescribes the scheme of separation of powers. Judicial power is vested in the judiciary. Governance of the State, enforcement of laws, formulation of policies and defending the sovereignty of the State are some of the onerous obligations of the Executive branch under the Constitution. The buck stops at the top and thus the Prime Minister and members of the Cabinet are responsible for the fulfillment

of the constitutional obligations entrusted to the executive. They are the chosen representatives of the people and answerable to the Majlis-e-Shoora (Parliament). It is their constitutional duty to ensure that suitable appointments are made through promotions and it is important to repose trust in them in this regard. The key to their success and their ability to meet the expectations of the people of Pakistan inevitably depends on the efficiency, competence and integrity of the permanent bureaucracy, particularly the civil servants. It would not be reasonable to presume that a Prime Minister would willingly want an incompetent and corrupt bureaucracy. The competent authority alone is the best judge for formulating policies regarding promotions. A court, through erroneous and unnecessary intrusions, could harm the ability of the competent authority to formulate dynamic, creative and innovative policies in order to enhance the efficiency of the civil service or the endeavours to ensure that civil servants who are competent, suitable and known for their integrity are appointed through promotion against "selection posts". It could also have the effect of impeding the process of weeding out those who are incompetent or for any other reason not suitable to be appointed to a higher post. Excessive intrusion in matters relating to promotion could have profound consequences for the governance of the State and the formulation of policies. Restrain in such matters is thus a rule, while intrusion an exception. An apt

quotation has been attributed to the German statesman *Otto von Bismarck*; "With bad laws and good civil servants it's possible to govern. But with bad civil servants even the best laws cannot help". Our intrusion, unless it is absolutely necessary, could directly or indirectly, protect the undeserving civil servants. The Prime Minister is the competent authority and solely responsible for the quality of civil servants promoted to the higher grade. If the people of Pakistan repose their trust then we also have to show our respect. The restraint exercised by the judicial branch in relation to the administrative functions, particularly in matters relating to appointments by promotion, is justified on the touchstone of the constitutional principle of separation of powers. It is an obligation of each organ to respect the limits prescribed by the Constitution in this regard.

38. In the light of the above discussion, we declare that the Rules of 2019 have been validly framed and have not been found to be inconsistent with the principles and law enunciated in the discussed precedent law. The Board's proceedings and its affirmation by the competent authority were impartial, unbiased, fair and a result of careful consideration and, thus, judicial interference is not warranted. The petitioners were not able to rebut the presumption of regularity and fairness attached with the proceedings and actions of the Board or the competent

authority i.e. the Prime Minister. Consequently, the constitutional petitions in hand are declared to be devoid of merit and thus accordingly **dismissed.** Likewise, petitions seeking initiation of contempt proceedings also stand **dismissed.**

(CHIEF JUSTICE)

(LUBNA SALEEM PERVEZ)
JUDGE

Announced in open Court, on 29-09-2020.

JUDGE

CHIEF JUSTICE

Approved for reporting.

ANNEXURE-A

Sr No.	CASE NO.	TITLE
1	W.P.No.08 of 2020	Sikandar Hayat Maken vs Federation of Pakistan, etc.
2	W.P.No.475 of 2020	Muhammad Umar Sheikh vs Federation of Pakistan and another
3	W.P.No.1253 of 2020	Imtiaz Ahmed Shaikh vs Federation of Pakistan, etc.
4	W.P.No.1178 of 2020	Muhammad Imtiaz vs. Federation of Pakistan, etc.
5	W.P.No.904 of 2020	Muhammad Iqbal Bhawana vs. Federation of Pakistan, etc.
6	W.P.No.758 of 2020	Ahmed Ishaque Jehangir vs. Federation of Pakistan and others
7	W.P.No.670 of 2020	Capt (R) Feroze Shah vs. Federation of Pakistan, etc.
8	W.P.No.1305 of 2020	Dr. Muhammad Naeem vs. The Federation of Pakistan, etc.
9	W.P.No.1309 of 2020	Mansoor Ul Haq Rana vs. Federation of Pakistan and others
10	W.P.No.1313 of 2020	Muhammad Farooq Khan vs. Federation of Pakistan & others
11	W.P.No.1356 of 2020	Ahmed Bakhsh Narejo vs. Federation of Pakistan, etc.
12	W.P.No.1359 of 2020	Ahmed Nasir Aziz Virk vs. Federation of Pakistan ,etc.
13	W.P.No.1429 of 2020	Imtiaz Ahmed vs. Federation of Pakistan, etc.
14	W.P. No.1828 of 2020	Dr. Sajid Hussain Arain vs Federation of Pakistan
15	W.P.No.1940 of 2020	Dr. Rafique Ahmed Soomro vs Federation of Pakistan etc.
16	Crl. Original No.68 of 2020	Capt. (R) Feroze Shah vs. Dr Ijaz Munir, etc.
17	Crl. Original No.69 of 2020	Muhammad Iqbal Bhawana vs. Dr. Ijaz Munir, etc.
18	Crl Org No.76 of 2020	Ahmad Ishaque Jehangir vs. Dr. Ijaz Munir, etc.