IN THE SUPREME COURT OF PAKISTAN
(Original Jurisdiction)

Present:
Mr. Justice Mian Shakirullah Jan
Mr. Justice Jawwad S. Khawaja
Mr. Justice Khilji Arif Hussain

Const. Petition No. 42 of 2011
(Constitutional Petition under Article 184 (3) of Constitution of Islamic Republic of Pakistan)

Muhammad Yasin. … Petitioner

VERSUS

Federation of Pakistan thr. Secretary, Establishment Division, Islamabad etc. … Respondents

For the petitioner: Mian Abdur Raoof, ASC

For the Federation-2&4: Mr. Dil Muhammad Khan Alizai, DAG
Mr. M.S. Khattak, AOR
Ejaz Mehdi, Dy. Secretary, Cabinet.

For the respondents-1&3: N.R.

For the respondent-5: Mr. Muhammad Akram Sheikh, Sr. ASC
Mr. Mehmood A. Sheikh, AOR

Date of hearing: 03.10.2010 & **04.10.2011.**

JUDGMENT

Jawwad S. Khawaja, J. The issue arising in this case relates to the appointment of Mr. Tauqir Sadiq (respondent No.5) to the office of Chairman of the Oil & Gas Regulatory Authority ("OGRA"). The petitioner Mr. Yasin is an employee of OGRA. It is his case that the respondent does not possess the necessary credentials for holding the office of Chairman, OGRA. On this basis, the petitioner prays *inter alia,* that we declare the appointment of the respondent as illegal by setting aside the notification dated 22.7.2009 whereby the respondent was appointed in office. For reasons which appear below in some detail, we have accepted this petition and have *inter alia,* granted the said two prayers. The petitioner has also leveled allegations that the respondent has caused a loss of Rs.52 billion to OGRA and thus the nation, during his stewardship of the organization. In the conclusion to this opinion we have commented on these allegations and passed orders in respect of the same.

2. To facilitate understanding of the questions which arise before us, we have organized our reasons in sequentially arranged parts. In the first part, the brief facts and

history relating to the respondent's appointment are laid down and the contentions advanced on behalf of both sides have been summarized. In the second part, the respondent's objection to the maintainability of this petition under Article 184 (3) of the Constitution has been examined and the reasons for exercise of jurisdiction and judicial review have been stated. The third part of the opinion deals with the grounds of judicial reviews in this case and the scope of such review. Next, the relevant details of the issue before us relating to the respondent's appointment have been analyzed with the help of rules and established jurisprudence. The fifth and final part of the opinion elaborates the conclusions that flow from our discussion.

BRIEF REVIEW OF LAW, FACTS AND HISTORY

3. OGRA is a statutory body corporate established under the Oil & Gas Regulatory Authority Ordinance, 2002 (the "Ordinance"). The Ordinance sets out, in the first recital in its preamble, the primary object of setting up OGRA. It aims to *"foster competition, increase private investment and ownership in the midstream and downstream petroleum industry, protect the public interest while respecting individual rights and provide effective and efficient regulation …"*. Section 3 of the Ordinance which establishes OGRA stipulates that the said authority *"shall be independent in the performance of its functions"*. These material provisions of the Ordinance - independence guaranteed by statute, coupled with the objective of protecting the public interest and efficient regulation are of particular significance in the adjudication of this petition as will become evident shortly. In terms of regulatory autonomy, OGRA is just one amongst a number of regulatory authorities which have been created in Pakistan during the past few decades to ensure good governance in important (mainly economic) sectors of the country. These include the National Electric Power Regulatory Authority ("NEPRA"), Pakistan Telecommunication Authority ("PTA"), Pakistan Electric Media Regulatory Authority ("PEMRA"), Securities and Exchange Commission of Pakistan ("SECP") and Competition Commission of Pakistan ("CCP"). These bodies have explicitly been made autonomous to ensure that they remain free from political or other interference and thus remain focused on the objectives of their parent statutes.

4. On 6.9.2008, the post of Chairman OGRA fell vacant as a result of the retirement of the erstwhile incumbent who had completed the maximum permissible two terms in office. Thereafter a process for the recruitment of Chairman was commenced. No reason appears from the record as to why this process was not initiated and completed well before the occurrence of the vacancy. It took an inordinately long time spreading over ten months to make the appointment. This was done vide Notification dated 22.7.20009. The efficacy and statutory legitimacy of the appointment process is the central issue in this case, and has been elaborated in a later section of this opinion. For the present it will suffice to bear in mind that the appointment is not dependent upon the unfettered whim and discretion of the government of the day or the political executive. In fact, the legislature has laid down stringent criteria in this regard. Section 3 (4) of the Ordinance stipulates that *"the Chairman shall be an eminent professional of known integrity and competence with a minimum of 20 years of related experience …"*. This statutory language significantly constrains the executive authority in making the appointment of Chairman, OGRA. The nature and effect of these constraints has also been considered later in this opinion, in the context of this petition.

5. At this point, it is appropriate to set out some relevant particulars of the present petition. It is the petitioner's contention *inter alia,* that the process whereby the respondent was appointed Chairman, OGRA was non-transparent, partial and nepotistic. According to the petitioner, the entire exercise was meant to grant an extraordinary favour to the respondent who is stated to be a close relative (brother in law) of a leading politician from a key political party in government. Learned counsel representing the petitioner has urged that the Court should exercise its jurisdiction in the matter to ensure that the top position in a leading regulatory institution of the Country does not become a gift made on considerations of political patronage and in violation of merit. The requirements of the Ordinance emphasizing merit, experience, integrity and competence for such appointment have also been strongly emphasized.

6. The respondent does not deny his relationship with the leading political figure mentioned by the petitioner but states that such relationship does not, by itself, constitute a disqualification for his appointment to the office. This may be so, but significant failings in the process of appointment (considered below) suggest that the petitioner's submission

may not be without substance. It has further been contended that the respondent fulfills the stringent objective criteria for appointment as Chairman, OGRA, as set out in section 3 (4) of the Ordinance. The respondent also challenges the maintainability of this petition under Article 184(3). Three contentions have been raised in this regard: firstly, that the question relating to the removal of the respondent is pending before a constitutional forum namely, the Federal Public Service Commission and as such is already *sub judice*. Secondly, it has been urged that the petition has been filed *mala fide* inasmuch as the petitioner himself was a contender for the office of Chairman, OGRA and thus invocation of the Court's jurisdiction by him is tainted with malice and personal motivation rather than a genuine public interest and lastly; that the petitioner had availed his constitutional remedy in the High Court under Article 199 and having failed, must be denied the right to petition this Court under Article 184 (3) *ibid.*

GROUNDS FOR EXERCISE OF ORIGINAL JURISDICTION.

7. Having stated the contention between the parties briefly, we can now examine the key issues that arise in this case. Firstly, we take up the respondent's legal objections to the maintainability of this petition under Article 184(3) of the Constitution. The first of these objections is based on the premise that in Writ Petition No.139 of 2011 in the Islamabad High Court and then ICA No. 08 of 2011, the petitioner had already invoked the jurisdiction of the Islamabad High Court and failed. The respondent contends that the High Court's judgment dismissing the petitioner's Intra Court Appeal (ICA No.08 of 2011) has thus attained finality as the petitioner chose not to challenge the same through appeal under Article 185(3) of the Constitution. Consequently, it was urged, the present petition is barred as *res judicata,* constructive or actual and that the petitioner is precluded by law from agitating the same issues in the present petition before this Court. A brief examination, however, of the proceedings before the Islamabad High Court show that, for a number of reasons, this contention is not well founded.

8. The petitioner did file Writ Petition No.139 of 2011 and then ICA No. 08 of 2011 in the Islamabad High Court. Both the writ petition and the appeal were indeed dismissed by the High Court *in limine* through short orders dated 21.1.2011 and 31.1.2011 respectively.

However, it should be noted that the petitioner in his writ petition had set out two distinct grievances. The first was against two orders passed by the respondent as Chairman, OGRA dated 10.1.2011 and 11.1.2011 which related to the petitioner's person and had been passed in respect of his employment with OGRA. The other grievance was directed towards the ineligibility of the respondent to hold the position of Chairman, OGRA. Having gone through the judgments passed by the Islamabad High Court in the petitioner's writ petition and Intra Court Appeal, we find that neither judgment addresses the latter grievance even briefly. These are both single page judgments dealing only with the petitioner's personal grievance in respect of the orders passed by the respondent. The sole point considered and adjudicated upon by the learned Judge-in-Chambers in the High Court, was that the petitioner was aggrieved of a transfer order; it being observed that it was a routine order which had not caused any grievance to the petitioner because *"an employee cannot claim to serve at a place of his choice and the Court cannot interfere in the internal arrangements of a [government] department"*. The wider issues relating to the eligibility of the respondent to hold his office were not examined. The judgment dated 31.1.2011 passed in the petitioner's ICA No.08 of 2011 is equally short and relates exclusively to the petitioner's personal grievance relating to his service with OGRA. One possible reason for this omission could be that the petitioner, who is not a lawyer, chose to represent himself in the ICA. We, however, need not speculate on this as it is of little consequence. What is clear is that the central issues in this petition have not been considered or adjudicated upon by any Court previously and the same are being judicially examined for the first time.

9. It is correct, as pointed out by learned counsel for the respondent, that in the ordinary course the petitioner should have invoked the appellate jurisdiction of this Court under Article 185(3) of the Constitution to assail the judgments in the writ petition and in Intra Court Appeal. However, while making this submission, learned counsel for the respondent, seems to have over-looked or misunderstood the full scope of Article 184(3), which is reproduced as under:-

> *"**184(3)** Without prejudice to the provisions of Article 199, the Supreme Court shall, if it considers that a question of public importance with reference to the enforcement of any of the Fundamental Rights conferred by*

Chapter I of Part II is involved, have the power to make an order of the nature mentioned in the said Article".

It is clear from the text of this article that the Court's powers and jurisdiction are broad in scope. We have elaborated the contours of our jurisdiction in a recent judgment wherein it has been held that *"Article 184(3) ibid empowers this Court to exercise jurisdiction thereunder whenever the Court considers a matter to: (i) be of public importance and (ii) that it pertains to the enforcement of fundamental rights. The determination on both these counts is made by this Court itself keeping the facts of the case in mind".* The exercise of jurisdiction by the Supreme Court, thus is not dependent on the existence of a petitioner. We have also before us precedent where this Court has exercised jurisdiction under Article 184(3) even where a legal proceeding in respect of the same matter was pending or had been finally decided by a High Court. Reference in this behalf can be made to *Suo Motu Case No.10 of 2009,* (2010 SCMR 8845).

10. The facts of the petition at hand disclose that it concerns the validity of the appointment of the most important statutory officer in a key federal regulatory body – i.e. the Chairman of OGRA. In a case like this, the Court cannot limit its jurisdiction under Article 184(3) *ibid* in a mechanical way simply because in a proceeding before the High Court a petitioner has, either on account of ignorance of law and procedure or for want of competence, not been able to advance arguments on issues of public importance and has confined himself to his personal interest only. There is no warrant in Article 184(3) for placing such high value on ignorance or incompetence and thus restricting the ambit of an important provision of the Constitution. That would be just the sort of pedantic and narrow view of the matter from which the framers of the Constitution wished to release the apex court, when they framed Article 184(3) in such broad terms.

11. We, therefore, need to determine the maintainability of this petition not by reference solely to any proceedings before the High Court but to see if the dual test of public importance and enforcement of fundamental rights has been met in the case. Clearly, the issues arising in this case are not personal to the petitioner but have a wider public import.We will elaborate upon the public importance of this case shortly. Here, we should clarify that it is not in all such cases that this Court will proceed to exercise jurisdiction

under Article 184(3) of the Constitution. It may well be that the facts of a particular case justify refusal to exercise such jurisdiction on the ground that the High Court has fully and adequately decided a matter and such decision has attained finality. This however, is not the case before us.

12. When we analyze the facts of this case, it becomes abundantly clear that both necessary elements of Article 184(3) exist and the jurisdiction of the Court is, therefore, attracted. We are brought to this conclusion by three steps of reasoning. The **first** is to adopt a holistic view of the Constitution, and to place in context the various provisions of Part II therein relating to fundamental rights and the principles of policy. It is by now well-settled that *" the meaning of the Constitution is to be gathered from the Constitution as an integrated whole, based on reason"*. We have recently explained the reasons for adopting this approach in the case of *Munir Hussain Bhatti, Advocate and others versus Federation of Pakistan and another* (PLD 2011 SC 407) and need not state the same again.

13. When we see the Constitution in this manner, we are brought to the unavoidable conclusion that it is a part of the fundamental rights of the people of Pakistan that they be governed by a State which provides effective safeguards for their economic well-being; a State which protects *inter alia,* the belongings and assets of the State and its citizens from waste and malversation. Contrary to what some commentators seem to believe, our Constitution is not silent on issues which affect the economic life of the nation and its citizens. It contains a whole range of Articles which have a direct nexus with good economic governance and fundamental rights. At the very beginning in Article 3 there is, for instance, an oft-forgotten but eloquently stated directive: "*The State shall ensure the elimination of all forms of exploitation and the gradual fulfillment of the fundamental principle, from each according to his ability to each according to his work"*. Then there is Article 4 which guarantees the protection of law, not just for life and liberty, but also for the body and property of citizens. Furthermore, there is a whole range of fundamental rights, such as the right to life (Article 9), the universal and non-derogable right to a life of dignity (Article 14), the right to engage in business (Article 18) and to hold and acquire property (Article 23), and the right to be governed equally and in accordance with law (Article 25) which have clear economic ramifications. When these articles are read together, we cannot escape the

conclusion that the Constitution envisages a political dispensation where good economic governance is a right of the people of Pakistan which they cannot be deprived of. Articles 18, 23 and the other Articles cited above support this conclusion. In his treatise 'Judicial Review of Public Action', while interpreting these Articles, Justice Fazal Karim a former Judge of this Court and the nation's leading legal academic and author, concludes with a telling comment from which we seek guidance: "*In short, Article 18 and the rights guaranteed by it are concerned with the economic life of the nation and its citizens*." (emphasis supplied) p. 718. The direct nexus between the appointment of Chairman, OGRA and the other fundamental rights enumerated above can now be elaborated as the **second** step of our reasoning.

14. It needs to be understood that in our present context, the economic life of the nation and its citizens, is inextricably linked with the proper functioning of regulatory bodies such as OGRA. To fully appreciate this, we may take stock of some recent developments, which have deepened the connection between the proper '*effective and efficient*' functioning of regulatory bodies and the fundamental rights of citizens. In the past, particularly during the 1970's, direct State ownership and management of business enterprises was a policy objective of the Government. More recently, however, such State involvement has receded through privatization of many State owned enterprises and through entrustment of activities (which hitherto were undertaken by the State) to companies initially owned by the State but slated for disinvestment through privatization. The most relevant example of this, in the context of the present case is the creation of the Oil and Gas Development Company Ltd. It has been incorporated under the Companies Ordinance 1984, pursuant to the Oil and Gas Development Corporation (Re-organization) Ordinance 2001. In view of this increasing trend towards privatization, regulation has emerged as perhaps the single most important function of the State in the sphere of macro economics.

15. Here we may note that it lies within the domain of the Executive to determine policy and for the Legislature to enact laws to implement such policy as long as such policy or legislation is not violative of the Constitution and the rights guaranteed thereunder. In line with the recognized constitutional principle of trichotomy of powers, therefore, it is not for this Court to go into the merits or demerits of such Government policy. However, once

the legislature entrusts regulators such as OGRA with State power, making them responsible for the governance of critical sectors of the national economy, then it should be clear that regulators incur important constitutional and legal obligations to the people of Pakistan. The Ordinance makes this connection obvious when it declares that it is meant to "*protect the public interest*", to "*[respect] individual rights*" and to "*provide effective and efficient regulation*". Therefore, on the basis of the Ordinance, the public can demand that regulators be diligent while protecting the public interest and that their functionaries meet the standards and eligibility criteria prescribed for them by law. Also, once the Legislature has laid down qualifications which senior regulatory functionaries must have, the public is entitled to invoke the jurisdiction of Courts to ensure adherence to the law. This is the larger historical context in which the Legislature has enacted a series of laws to govern the most important Federal regulatory agencies impacting the life of the people of Pakistan. This context helps the Court in interpreting relevant statutes such as the Ordinance.

16. The example of OGRA, best illustrates the public importance of the matter before us. The oil and gas trade is no small business. By a conservative estimate, its annual sales revenues exceed Rs.1,600/- billion. The mid and downstream oil and gas sectors which OGRA is meant to regulate provide a substantial part of such revenues. Since OGRA's regulatory ambit is so extensive, it will be correct to say that the proper and efficient functioning of OGRA is a matter which affects, quite literally, every person in the country. That is, everyone from the farmer who tills the earth using a diesel powered tractor to the urban slum dweller who commutes on a CNG-fitted bus from his little shanty to his work-place in some affluent housing society.

17. In addition to its regulatory domain, there is the simple fact that OGRA, like any other public sector body, is kept afloat by taxes and fees, the incidence of which falls on the meager resources of Pakistan's toiling millions. With the ratio of direct taxes to Government taxation revenues being abysmally low, the lowest in the sub-Continent, the Government has increasingly resorted to regressive indirect taxes. These taxes encroach on the already inadequate disposable incomes of the poorest segments of society. When, for instance, poor parents in a small town spend their savings traveling to a nearby town, or to buy a pair of shoes for their toddler or to put bangles on the dainty arms of their little girl

on a *chand raat*, even they are not spared. A contribution is automatically and compulsorily exacted from them and passed on to the State exchequer by levies such as Sales Tax etc. It needs to be realized that it is contributions like these, together with fees collected by OGRA in a fiduciary capacity in the name of the people of Pakistan, which pay for the salaries, up-keep and running of OGRA. Therefore, if taxes or fees are spent in violation of law it would amount to breach of Articles 3, 4 and 5 (2) of the Constitution, and would also constitute denial of the citizens' fundamental rights guaranteed by Articles 9, 14, 18, 23 and 24. These rights would also be adversely affected if *inter alia,* the Chairman or other members of OGRA are appointed though they are not eligible.

18. Similarly, it is the ordinary citizens who will be worst affected if, on account of the incompetence or lack of integrity of appointees, OGRA fails to fully exercise its powers to "*protect the public interest*" or to "*effectively and efficiently*" regulate the Oil and Gas sector. Thus, for instance, incompetent or dishonest practices for granting licenses of regulated activities can result in illegal benefits to a select coterie of licencees at the cost of the ordinary citizen. It will be seen that while enumerating the powers and functions of OGRA, the Ordinance has specifically directed that it will, amongst other things, "*safeguard the public interest … in relation to regulated activities*" [section 6 (2)] and more specifically OGRA is commanded to "*protect the interests of stakeholders including the consumers*". Section 7 (1) of the Ordinance stipulates, *inter alia,* that OGRA '*shall determine or approve tariff for regulated activities . . .*'. OGRA also has a major role assigned to it under section 8 of the Ordinance, in the matter of fixing prices of natural gas for retail consumers.

19. The petitioner has placed on record extensive material, which demonstrates the effect of decision-making (including pricing) by OGRA on the lives of the people of Pakistan. We may only refer to some figures by way of illustration, which establish this connection. Since the promulgation of the Ordinance in 2002, statistics relating to Natural Gas can be cited to highlight this point. In 2002-03 Unaccounted For Gas ("UFG") Losses were 8.19% for Sui Northern Gas Pipeline Limited ("SNGPL") and 7.57% for Sui Southern Gas Company Limited ("SSGCL"). For SNGPL, the figure of UFG Losses declined after the creation of OGRA and even in the year of the respondent's appointment, the figure was 8.05%, which was lower than the figure for pre-OGRA days. In 2009-10 the UFG Losses for

SNGPL jumped to 9.63% and in the subsequent year to 11.21%. After a decline in UFG Losses after 2002, a similar jump for SSGCL appears in the period 2009-10 and 2010-11 when such losses rose from the figure of 6.63% in 2007-08 to 9.43%. This spike in UFG Losses and sharp increase in retail prices for consumers may possibly be a result of inefficient regulation or of lack of competence and integrity of regulatory functionaries. On the other hand, it could be a result of other factors. As a bare minimum an in-depth probe is necessary to uncover the real cause for the information of the People of Pakistan who need to know why they are being burdened with such increased prices.

20. At this stage, however, the above figures have not been cited to draw any conclusion as to the competence or integrity of the respondent. The purpose here is to show that after a steady decline in UFG Losses after 2002, the steep rise therein would be reflected in the tariff, which is to be determined by OGRA under Section 7(1) of the Ordinance. The tariff necessarily impacts the price of Natural Gas fixed under section 8, payable by a consumer. Thus we see that in the years 2003-04 following the creation of OGRA, the average prescribed prices of Natural Gas were determined by OGRA at Rs.150.49 per MMBTU for SNGPL. The price for the years 2007-08 was 221.72, which jumped to Rs.289.96 per MMBTU in the years 2008-09 and further rose to Rs.309.39 in the years 2009-10 and Rs.343.63 in the following year i.e. 2010-11. A similar trend in the prescribed consumer prices for SSGCL shows that in the years 2003-04, the average price was Rs.143.62 per MMBTU. It became Rs.279.98 in 2008-09 and rose to Rs.297.40 in the years 2009-10 and then to Rs.336.82 in 2010-11. It is the People of Pakistan who have to bear the brunt of such price increases at the cost of erosion of their well-being and financial security.

21. The object of adverting to the aforesaid figures is to demonstrate that fixation of tariff and prices for retail consumers is part of the regulatory function of OGRA and has a direct connection with the economic well-being of the people of Pakistan. Any increase in consumer prices, which results from lack of competence or integrity or because of inefficient regulation would result in depriving the citizens of their fundamental rights guaranteed by Articles 9, 14, 18, 23 and 24 of the Constitution because the scales would impermissibly stand tilted against the citizens and in favour of those engaged in regulated

activities. It is, therefore, beyond doubt that, as the institution which is mandated to regulate the oil and gas trade and to determine tariffs and fix prices for consumers, OGRA's effective functioning has a direct nexus with securing the fundamental rights of the people of Pakistan.

22. **Thirdly** the obvious has to be realized by the Executive in an earnest way. Vital autonomous institutions such as OGRA can function '*effectively and efficiently*' only if their autonomy is respected. This is the letter as well as the spirit of the law. Such autonomy is only possible when appointments to key positions in these regulators are made in a demonstrably transparent manner; that is, by ensuring the implementation of the checks which the Ordinance lays down for such appointments.

23. The provisions that the Legislature has made for ensuring regulatory autonomy are a reflection of accumulated economic wisdom based on empirical study. Here we can cite just one pertinent example from contemporary literature on regulatory economics pointing to the rationale and text of the Ordinance. In her article "Effectiveness of Regulatory Structure in the Power Sector of Pakistan", Afia Malik, a research economist at the Pakistan Institute of Development Economics, Islamabad, identifies "*regulatory autonomy*" as the foremost indicator of good regulatory governance. "Regulatory autonomy" refers to the regulator's ability to resist the pressure of '*regulatory capture*' and pressures from economic and political interest groups. Amongst the key dangers to watch out for, according to the author, are "*[u]ndue interference and influence of the government*" which the author says hamper "*independent functioning, which in turn affects the consumers as well as producers*." Also, A. R. Kamal, one of Pakistan's renowned development economists has similarly highlighted the importance of effective checks, cautioning against the danger of compromising the autonomy of regulatory institutions. He warns: "*[s]ince there is a cycle where the regulatory agencies over time degenerate into protecting the organizations which they are supposed to regulate, checks and balances must be put in place so that persons in responsible positions in these bodies are not corrupted*." He further emphasises that "*regulatory authorities . . . must be given autonomy so that their decisions gain credibility; and checks and balances should be so formulated that they cannot indulge in corrupt practices*." The legislature has taken stock of these concerns and made a number of provisions noted above for such "checks and

balances". One such provision viz. the appointment process, is the key subject of discussion in this opinion.

24. Before concluding our discussion on the issue of maintainability of this petition we need to address the respondent's submission that the petition has been filed *mala fide*. We have found no lawful basis for this submission. Simply because the petitioner may have been a contender for the office of Chairman, OGRA, does not *per se* translate into *mala fides*. The petitioner can genuinely consider himself to be a suitable candidate for the position while simultaneously holding the view that the respondent does not meet the eligibility criteria set out in section 3 (4) of the Ordinance. Furthermore, we have already held in the case titled *Moulvi Iqbal Haider versus Capital Development Authority and others* (2006 SC 394 at 413) that the contents of a petition under Article 184 (3) *ibid* will override concerns arising on account of the conduct or antecedents of a petitioner. This approach is reflective of the sagacity of wise men such as *Maulana* Jalaluddin Rumi who have emphasized the importance of the message rather than the messenger. Learned counsel for the respondent then cited the Indian case titled *Dattaraj Nathuji Thaware v. State of Maharashtra and others* [(2005) 1 Supreme Court Cases 590] to support his plea that the petition had been filed *mala fide* and should, therefore, be dismissed. We have gone through the cited judgment and find the same to be wholly irrelevant. In that case it was determined by the Indian Supreme Court that the petitioner therein *"had resorted to blackmailing the respondents . . . and was caught red-handed accepting 'blackmailing money"*. No such circumstances arise, or were even suggested in this case. In view of this discussion, we are satisfied that this petition is not liable to dismissal on the ground of *mala fides* of the petitioner.

25. At the end of this part of our opinion, we can now summarise our three-step rationale for maintaining the present petition. Firstly, when understood correctly, a number of Articles of the Constitution make it clear that it is not silent about the economic life of the nation and the concomitant fundamental rights of its citizens; secondly, we are clear that there is an ever-greater nexus between the proper and independent functioning of regulatory bodies and the economic life of the nation and its citizens and that this nexus is fully recognized by the Legislature in its use of language employed by the Ordinance in the provisions referred to above; and finally, there can be no doubt that regulatory bodies can

function competently and independently only once their autonomy is ensured through enforcement of the legal checks upon appointments to important positions therein. When these three points are fully appreciated, it becomes clear that the validity of the process of appointment of the Chairman, OGRA is indeed a matter of public importance which has a direct linkage with the fundamental rights of the people of Pakistan, and thus warrants the exercise of jurisdiction by this Court under Article 184 (3) *supra*. It is possible, however, that if similar cases arise in future, the High Courts may be in a position to decide the same by applying the principles of law enunciated in this judgment, in terms of Article 189 of the Constitution.

SCOPE AND GROUNDS OF REVIEW

26. Having explained our reasons for maintaining this petition and exercising our power of judicial review in the case, we may now move on to the scope and the grounds of such review. The Court, and the Executive whose decisions are being reviewed are both subject to the Constitution. Therefore, as we have declared in Munir Bhatti's case *supra*, "*[i]n determining the rules which define the exercise of the power of judicial review, our foremost source is the Constitution itself …*" Article 5 (2) of the Constitution declares that "*obedience to the Constitution and law is the inviolable obligation of every citizen …*"

27. The Constitution, as noted above, is organized essentially on the principle of separation of powers between the Executive, the Legislature and the Judicature. In this scheme, to each is assigned its domain and sphere of operation. The power to make appointments in bodies such as OGRA is, by and large, the province of the Executive. Ordinarily, courts do not go into a detailed scrutiny of such matters. They defer to the Executive's discretion in the exercise of this power, if the commands of the Legislature have been complied with. However, the Court's deference, to the Executive authority will last for only as long as the Executive makes a manifest and demonstrable effort to comply with and remain within the legal limits which circumscribe its power.

28. The Executive's ability to make appointments to key positions of authority, and to dispense with the incumbents therein, needs to be examined in historical context as this will facilitate our understanding of the constitutional principle of separation of powers and

the importance of judicial review in ensuring adherence to such separation. On account of our colonial legacy and its attendant pattern of governance, this examination takes us back to the pre-independence dispensation and to the British constitutional scheme. That was a time when almost all important State functionaries including not just the Prime Minister and the Cabinet but also judges and civil servants, were appointed and removed by the British monarch in his absolute unfettered discretion. It is for this reason they were said to "hold office during the King's pleasure". While this vestige of an absolute monarchy receded in Britain on account of emerging democratic conventions, in the colonies it survived. Even after several years of independence, this practice continued, as was manifested by the imperious dissolution of the Constituent Assembly in 1954, by the representative of the British Crown.

29. Much has changed since then. Pakistan now has a democratic Constitution which provides for the government of laws and not of men. It is for this reason that in our Constitution there remain few positions where the incumbents "hold office during the pleasure" of someone else based on broad discretion. In its undiluted form this convention exists only in Article 100(2), Article 101(3) and Article 140(3) which relate to the appointments of a Governor, the Attorney General and the Advocates General respectively. Similarly, such discretionary powers donot exist in those statutes which relate to autonomous regulatory bodies like OGRA.

30. It is to be noted that even where appointments are to be made in the exercise of discretionary powers, it has become well settled that such powers are to be employed in a reasonable manner and the exercise of such powers can be judicially reviewed. In the *Corruption of Hajj Arrangements' case* (Suo Moto Case No.24 of 2010) and in the case of *Tariq Aziz-ud-Din* (2010 SCMR 1301), it has been held that appointing authorities "*cannot be allowed to exercise discretion at their whims, sweet will or in an arbitrary manner; rather, they are bound to act fairly, evenly and justly*". There is an obligation thus imposed on the Executive to make appointments based on a process which is manifestly and demonstrably fair even if the law may not expressly impose such duty. In the Hajj corruption case *supra*, the Court has again clarified this point saying that "*[b]y now, the parameters of the Court's power of judicial review of administrative or executive action or decision and the grounds on which the Court*

can interfere with the same are well settled. Indisputably, if the action or decision . . . has been arrived at by the authority misdirecting itself by adopting a wrong approach or has been influenced by irrelevant or extraneous matters, the Court would be justified in interfering with the same".

31. Much before these declarations by legislatures and courts, we find exhortations to this effect in the common sense insights to be found in diverse systems and eras in history. We thus have in the classical texts of the Greek ancients, and the writings of those such as Sheikh Saadi, wherein the deleterious consequences of nepotism and cronyism in administrative appointments have been highlighted. Amongst other sources, one finds reference to this in the "Qaboos Namah", a book that Ameer Unsur Ma'ali Kaikaus wrote in the 11th century A.D. for the instruction of princes, including his son Gilan Shah, in the art of good governance. The Ameer cautioned that when "*appointing officers to responsible positions, act carefully and grant positions only to those who are qualified for the duties entailed in that job; and also, beware that when an ignoramus who is not up to the assigned task gets appointed, he will never frankly concede his lack of ability to you; instead, to hide his lack of worth, he will boldly embark upon task after task, and make a mess of it all*". [Kaikaus, *The Book of Qaboos,* page 206-7; Tehran (1963)]. And in a similar vein, warning against the hazards of turning public offices into sinecures, he advises that "*if at all you wish to bestow favours upon someone, give him valuable gifts; do not, however, confer on him a high office for which he does not possess the requisite competence*". [Kaikaus, *The Book of Qaboos,* page 207; Tehran (1963)]. We also find mention of some very pertinent principles in this regard in Nizamul Mulk Toosi's "Siyasat Namah", also written in the 11th century, which displays an uncanny cognizance of the evils of nepotism which seem eternally to haunt the corridors of high power even in this day and age. He emphasizes that "*the ruler should make sure that he does not award public office to his cronies (merely on the basis of their friendship with him) . . . for such arrangements can give rise to many an evil*". [Toosi, *The Book of Government,* p. 120; Tehran (1994)] The modern day discourse on good governance, whether in the law or in Courts, is only an expression of these universal principles.

32. In the present case involving the respondent's appointment as Chairman OGRA, the law has travelled a great distance from the times of an absolute monarch or the time when the people of Pakistan were subject to colonial rule. Instead, it has come closer to the ethos

of responsible governance, which was envisioned in the sage and ever-lasting wisdom adverted to above. Thus, we now have the express stipulation in the Ordinance which requires, firstly, that OGRA "*shall be independent in the performance of its functions*" and that "*the Chairman shall be an eminent professional of known integrity and competence . . .*". These provisions in the Ordinance expressly limit the authority of the political executive or the government of the day, thereby ensuring that the crucial position of Chairman, OGRA, does not end up becoming a cushy sinecure and an anti-people drain on public resources, for want of competence, integrity or efficient regulation.

33. Learned counsel for the respondent, however, emphatically argued that the appointment of the respondent was not subject to judicial review because it fell within the exclusive domain of the Executive to choose and appoint the Chairman, OGRA. This argument, if accepted, would negate the aforesaid provisions of the Ordinance and the principles enunciated in the case law referred to above. The Ordinance does not state that the Federal Government may "in its absolute and unfettered discretion" appoint a Chairman. Quite to the contrary, the legislature has specified measurable objective criteria which must be adhered to in making this appointment. It is equally clear that if the criteria prescribed by law are not met, any appointment made would be violative of the law and would, therefore, necessarily be subject to judicial review.

34. Learned counsel for the respondent then contended that it was not for the Court to order removal of the respondent from office because such removal could only be brought about through the Federal Public Service Commission which is a Constitutional body and has been given exclusive authority in such matter. This contention is misconceived. Section 3 (11) of the Ordinance does stipulate that the "*Federal Government may remove a member from his office if, on an inquiry by the Federal Public Service Commission, he is found unable to perform the functions of his office due to mental or physical disability or to have committed misconduct*". However, the issue arising in the present case does not entail removal of the respondent from office. What we are concerned with is the appointment itself. If the appointment was made without ensuring compliance with the provisions of the Ordinance, the said appointment would be subject to judicial review and would, therefore, be set-aside for that reason.

35. We are cognizant that the principles of law enunciated by us with regard to these matters are, inevitably, going to have wider legal ramifications. It is for this reason that we find it necessary to clarify the parameters of our review of the validity of the respondent's appointment in some detail. The Court will not engage in any exhaustive or full-fledged assessment of the merits of the appointee nor will it seek to substitute its own opinion for that of the Executive. The Court will, however, be duty bound to examine the integrity of the selection process and to see if it was such as would ensure compliance with the provisions of section 3 (4) of the Ordinance.

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

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

These steps will inform our adjudication in this case. In judicially reviewing the respondent's appointment, we need to balance our power of judicial review with the imperative of allowing the Executive the latitude granted to it by the law and the Constitution. However, while we must respect the separation of powers, equally so we cannot let it become a murky smoke-screen to hide practices which are nepotistic or which do not achieve the objective of appointing a candidate having the credentials prescribed by the Legislature. If we shut our eyes to such practices, we would be guilty of ignoring, *inter alia,* Article 5 (2) of the Constitution and of abdicating the judicial function.

37. In determining the scope of our review, we can also benefit from the reasoning in a recent judgment of the Indian Supreme Court which found itself confronted with a similar legal problem. In *Centre for PIL and another v. Union of India and another*, (2011 INDLAW SC 141) decided in March this year, the validity of the appointment of the Chairman of the Committee for Vigilance against Corruption (CVC), an independent statutory body created to fight corruption, was challenged. The Court noted that the CVC was clearly

envisaged by the Legislature to be independent of the Executive. The Court stressed that "*the independence and impartiality of the institution like CVC which has to be maintained and preserved in the larger interest of the rule of law… [t]he HPC has to look at the record and take into consideration whether the candidate would or would not be able to function as a Central Vigilance Commissioner*". (Ibid., para 33) And it went on to clarify the difference between judicial review and merit review which is very relevant for the case in hand. Judicial review, it held, was "*to examine the integrity of the decision making process…*" (Ibid., para 44)

SCRUTINY OF THE APPOINTMENT PROCESS OF OGRA CHAIRMAN.

38. With the above principles in mind, we now proceed to examine the process which was followed in the impugned appointment of the respondent as Chairman, OGRA. This scrutiny, appropriately, must start with reference to the Ordinance itself. As noted earlier, section 3(4) prescribes the eligibility criteria with clarity in the following words:

> "**(4).** *The Chairman shall be an <u>eminent professional of known integrity and competence</u> with a minimum of twenty years of related experience in law, business, engineering, finance, accounting, economics, petroleum, technology, public administration or management".* (underlining is ours)

The Legislature, by providing such merit-based criteria, has made its intention abundantly clear as to the sort of person who should occupy the position of Chairman, OGRA. The Ordinance has, in categorical terms eliminated considerations based on nepotism, favouritism or personal whims and fancies and has, thereby, circumscribed the Executive's discretion in the appointment of Chairman, OGRA. The Executive must abide by and obey the command of the Legislature. If it fails to do so, the Court will be obliged to step in and ensure such obedience.

39. Following on the aforesaid statutory requirement, it would be necessary to scrutinize the selection process and to see firstly, if there was sufficient publicity to ensure that eligible and interested candidates became aware that a vacancy in the position had occurred for which they could apply. This appears to have been done. An advertisement was issued in the local and international media seeking applications for the vacant position. The advertisement was in line with section 3 (4) *ibid.* The applicants for the post were required to be possessed of credentials which were described in the following terms:

> "*1. Highly qualified, preferably Postgraduate, from an internationally recognized Institution. Competent professional of known integrity, with a minimum of 20 years experience related to Law, Business, Engineering, Finance, Accounting, Economics, Petroleum, Technology, Public Administration or Management.*
> 2. *Knowledge of corporate restructuring, privatization and Investment planning.*
> 3. *Track record of senior level policy and strategy formulation.*
> 4. *Professional experience of public utility sector regulation*".

40. The eligibility criteria were thus well defined and capable of objective determination. In all 88 applications for the position were received in the first attempt at selection. It appears from the record that only 15 applicants fulfilled the eligibility criteria and they were short-listed for interview before the Selection Committee. Upto this stage in the selection process the values of objectivity, transparency and due application of mind seem to have been applied although the basis for short-listing does not appear from the available record. The first unsavory whiff of wrongdoing then surfaced. The respondent along with four others who had already been found not to fulfill the eligibility criteria, were included in the short list of candidates who were called for interview. There is nothing to show as to how, when and by whom these five ineligible persons were selected for inclusion in the short-list. We do, however, find some attempt to support this decision in a note for the Principal Secretary to the Prime Minister dated 16.1.2009, prepared by the Acting Cabinet Secretary. The note contains specious reasoning to justify the addition of the five ineligible applicants (including the respondent) in the aforesaid short-list. It suggests that when the short list of 15 eligible candidates had been approved by the Prime Minister, 3 out of these 15, no longer seemed to be interested in the position. Therefore, the five candidates, who had already been found ineligible were, according to the note, called for interview "*[i]n order to ensure adequate number of candidates for wider choice*". We are unable to see the logic of this, particularly when there already were 12 eligible contenders in the field from whom only one had to be selected. We are left in no doubt that the selection process became tainted when the respondent and other ineligible candidates were included in the short list along with the eligible candidates. This taint was doubly aggravated by the fact that there is nothing on the record to suggest even remotely that there was any objective basis or benchmark for selecting these five ineligible candidates out of the 73 other

applicants who did not fulfill the eligibility criteria in the first place. In the circumstances we can only infer that the selection of the respondent along with four others was motivated by considerations other than merit.

41. Having arrived at this conclusion we can now make a brief note as to the Selection Committee constituted by the Prime Minister to conduct interviews of the short-listed candidates. The Committee was to be headed by a Minister and was to include *"one expert in the relevant field"* as a co-opted member. "Relevant field" in the context of section 3 (4) *ibid* and the advertisement reproduced above, could only have reference to the fields of *"law, business, engineering, finance, accounting, economics, petroleum, technology, public administration or management"* i.e. the fields enumerated in section 3 (4) *ibid.* The presence of the co-opted expert obviously was meant to ensure that the Selection Committee could receive competent expert inputs in evaluating a candidate's ability, experience and qualifications in his own field. For reasons appearing later in this opinion, the importance of the co-opted expert will be highlighted in terms of the soundness and integrity of the selection process. For the present, it is sufficient to note that although the 17 short-listed candidates (12 eligible and 5 not eligible) belonged to different disciplines, only one 'expert', namely Mr. Shaukat Hayat Durrani, was co-opted for interviewing all of them. The record does not show the area of expertise of Mr. Durrani, but a quick search on the internet by a Court researcher shows that he is a civil servant having served a stint as Additional Secretary, Ministry of Petroleum & Natural Resources and also has worked as a Director on the Boards of two public sector oil and two gas companies. He thus appears to have some expertise in the Oil & Gas sector. He does not seem to have any known expertise in the field of law. Despite having no such expertise, he sat on the Committee which interviewed, amongst others, the respondent whose purported area of expertise was the law. Thereafter, the Committee stated that it "*unanimously found the following three candidates suitable for the post of Chairman, OGRA"*:-

(i) Mr. Ejaz Ahmed Qureshi statedly having *"rich experience in administration, policy making and management"*.

(ii) Mr. Rashid Farooq having *"Masters in Energy and 34 years experience in the field of Oil and Gas"*.

(iii) Mr. Tauqir Sadiq [respondent No.5] statedly having *"20 years experience in the field of Law"*.

42. We can conclude from this that since the Committee had not co-opted any expert in the field of law, in relation to the respondent, it cannot be said to have been properly constituted and, therefore, did not possess the ability to evaluate the respondent. Its Constitution also fell short of and violated the instructions contained in the Prime Minister's directive. This deficiency has further undermined the integrity of the selection process. Even otherwise, since the Committee was uninformed by any expert inputs in the relevant field, its opinion about the respondent's credentials in the field of law would have little credibility for the Prime Minister, who had specifically required an expert in such field to participate in and help him in the appointment process. The final call in relation to the appointment of Chairman, OGRA, was to be made by the Prime Minster himself. On 3.02.2009, the Prime Minster's Acting Principal Secretary noted that the Prime Minister would like to interview the three proposed candidates. On 12.02.2009, after the Prime Minister had conducted the interviews, he directed that "*a fresh panel having required qualification and experience may be proposed*". It is implicit in this decision that the respondent whom he interviewed, did not have the requisite qualification and experience. OGRA was thus saved, momentarily though, from having the respondent as its Chairman.

43. The position of Chairman OGRA was then re-advertised. This time around a total of 92 applications were received. Out of these, 23 candidates were short-listed and called before the Selection Committee for interview. The respondent, despite his earlier failure at the interview stage was nonetheless inexplicably included in this list of 23 candidates. On 20.6.2009, 16 of these candidates were interviewed; the remaining 7, seemingly having lost interest. The Selection Committee approved a panel of 4 candidates who were then interviewed by the Prime Minister. It is surprising that the respondent was also included in this panel even though, as noted above, he had previously been interviewed by the Prime Minister but had been rejected. Furthermore, the inclusion of his name in the panel of interviewees is particularly surprising since the Prime Minister's directive made it clear that he wanted a fresh panel from which to make a selection. It is important at this stage to note that the summary prepared for the Prime Minister made no mention of this very important fact – the fact of the respondent's rejection in the earlier round of interviews.

44. We also cannot help noticing that other relevant information such as non-inclusion of an "*expert in the relevant field*", necessary for enabling the Prime Minister to arrive at an informed decision was not included in the summary. In *Suo Motu Case No.10 of 2009,* (2010 SCMR 885), we have commented on the significance of a proper summary to ensure informed decision-making. It is essential for Government servants entrusted with the responsibility of assisting in decision-making and governance to provide necessary information to the final decision maker who in this case was the Prime Minister. Not disclosing crucial information relating to the Selection Committee or the respondent in the summary presented to the Prime Minister has further detracted from the integrity of the selection process and has subverted the same.

45. There are no minutes or notes to show the deliberations of the members of the Selection Committee which may suggest the basis or objective criteria for selecting the four names from amongst the 17 who were actually interviewed. However, it is evident from the record that all the short-listed candidates were interviewed on the same day. We do not have any indication as to the time spent on each interview, but since all 17 interviewees were statedly interviewed on 20.6.2009, we can safely assume that not even 30 minutes were spent with each candidate. In these circumstances, it is difficult to see how the candidates who had submitted lengthy CVs, and were being considered for appointment to a major public office, could have been interviewed in any effective or meaningful way.

46. We may reiterate that we are presently engaged in examining the effectiveness of the selection process with the object of applying the test to determine if the process was (i) objective (ii) had reasonable nexus with the object and (iii) was followed with rigour, objectivity, transparency and due diligence. In this context, for the purpose of evaluating the interview process we have some observations to make. Firstly, it is clear that since there was no suitability evaluation or other test involved, the interviews formed the primary, indeed sole basis of selection. Moreover, the only material available before the interviewing panel was a candidate's self generated CV coupled with unverified testimonials. To make an assessment as to the rigour etc. of an interview for a Government position, we have an existing benchmark in the case of candidates seeking CSS appointments for relatively junior and lesser paid positions in BS-16 and BS-17. Those candidates who qualify in the highly

competitive written CSS examination, are then evaluated in a number of sessions spread over a course of three days. Considering that the process now being examined by us was aimed at selecting the Chairman of one of the most important regulatory agencies in the country, one would expect equal if not greater diligence. In reality, the process adopted was, as described above, deficient and was not designed to achieve the objective of the law. Clearly it does not pass the test outlined above.

47. We can now advert to the interviews purportedly conducted by the Selection Committee. It is apparent from the record that they served no real purpose. There was merely an appearance of due process but, in reality, there was no rigour or due diligence discernable at all. The interviews had no clear nexus with judging the objective criteria required by the Ordinance and by the advertisement for the post i.e. determining (i) if the candidate was highly qualified (ii) whether he was a person of known competence (iii) if he was of known integrity. We make this observation based on the record and while remaining cognizant that the power of appointment is vested in the Executive.

48. The most damning piece of evidence which assails the integrity of the selection process is the fact that in two full rounds of short-listing, and in all four interviews which the respondent statedly went through, no one seems to have noted the false nature of his claim that he possessed a Masters (LL.M) degree in Law from a reputable international Institution. This was stated on the very first page of his exhaustive CV covering nine pages. Even a five minute quick search on the internet is enough to get to the bottom of the curious case of the American 'University' in London ("AUL"), whose graduate the respondent claims to be.

49. The so-called AUL, it seems, was never a University at all. In fact, for so long as it existed, it was a limited liability company incorporated in the UK trading under the name and style of AUL Graduate School of Advanced Studies Ltd. It enjoyed a few precarious but probably lucrative years of existence, during which it claimed to be an American university, based in London. It managed to stay safe from the prying gaze of the American educational regulators because its operations were not based in America and indeed had no connection with America. These operations were based in London and fell way beyond the American jurisdiction. And, for a while AUL also managed to ward off the British

authorities because although it was based in London, it was not a British university, and was not registered with any educational regulator. So in this cosy little legal limbo, it managed to shield its deceptive practices for a few years, probably attracting like-minded students from all over the world, granting them "degrees" and making good money in the process. However, in 2003 a news report appeared in the Guardian, which is a respected newspaper having wide circulation in the UK and in other countries, which brought the attention of the British authorities towards the AUL. While the education regulators themselves could not directly go against the AUL, since it was not registered with them, soon they managed to get around the technical hurdle. The AUL, it seems, did fall under the jurisdiction of the local government in Islington. A complaint was filed with the local magistrate's court in that jurisdiction. The AUL's self-styled Chancellor, Hussain Al-Zubaidi, soon pleaded guilty on behalf of the Company and was fined. In a news item appearing on the official local government website of Islington, (www.islington.gov.uk), titled *"Bogus University fined for misleading students"*, it is stated that AUL *"was fined at Highbury Corner Magistrates Courts for two offences under the Trade Descriptions Act and Business Names Act"*. The news item further discloses that *"Company director and self styled University Chancellor Dr. Hussain Al-Zubaidi pleaded guilty on behalf of the Company to both charges*". The Magistrate's Court also observed that *"the aggravating feature of this case … is that it was brought to the attention of the Company [AUL] in 2004 and as recently as yesterday 12.1.2006, the Company was without proper accreditation and was still holding itself out as a University . . ., it is a substantial deception and should be discouraged by this Court".*

50. The respondent clearly relied on, *inter alia,* his sham foreign LL.M. degree to inveigle the Selection Committee into believing that he was '*highly qualified*' in the field of Law being a '*postgraduate from an Internationally recognized Institution*'. This representation, made in the respondent's CV was swallowed unquestioningly by the Selection Committee and by every other state functionary engaged in the selection process. This itself is sufficient to show the irresponsible, flippant and outrageously non-serious manner in which the selection was conducted. It also shows utter lack of rigour, transparency and due diligence in the process and demonstrates that the appointment of the respondent has failed the three-step test outlined above. In support of this conclusion we have undertaken

an exercise of our own, not, it may be said, to substitute our opinion for that of the Executive, but to show the failings of the process employed in the selection of the respondent as Chairman, OGRA. University rankings made by credible international rating agencies have been accessed by us on the internet to determine if the Universities from which the short-listed candidates obtained their educational qualifications, are *"Internationally recognized Institutions"*. This cursory search reveals that the short-listed candidates had obtained their higher educational qualifications from a number of Universities some of which have been ranked for quality and repute, by reliable internationally recognized sources. Since the respondent claimed to have received his higher education from the American University of *[sic]* London, these sources should have been the first port of call for any person seriously concerned with finding if the respondent was in fact "*highly qualified*" and a '*post-graduate from an Internationally recognized Institution*'.

51. The table reproduced below shows for each of the 16 short-listed candidates (other than the respondent) the name of the University where the candidate received his educational qualification and degree, with its ranking (where available) and the source from which the information in relation to such Universities has been derived:

"*Table in Respect of 16 Short-Listed Candidates who Statedly Fulfilled the Eligibility Criteria and Were Interviewed on 20th June 2009*

Unless mentioned otherwise,

- *World rankings are from Times Higher Education World University Rankings, 2011-12*[1]
- *USA rankings are from US News and World Report, National University Rankings 2012*[2]
- *UK rankings are from The Guardian University Guide 2012*[3]
- *N/A means not available.*

Sr. #	***Candidate***	***Degree/University***	***Year***	***Ranking***
1	*Ejaz Ahmad Qureshi*	*MA (Political Science), Punjab University.*	*N/A*	*N/A*
2	*Ashfaq Mahmood*	*MS (Electrical Engineering), Vanderbilt University, USA.*	*1976*	*World: 70* *USA: 17*
3	*Dr. Nazir A. Hawary*	*PhD (Civil Engineering), Oklahoma State University (OSU), Stillwater, USA.*	*2000*	*World: N/A* *USA: 132*
		MSc (Civil Engineering), California State University, Long Beach, USA.	*1992*	*World: N/A* *USA: N/A* *USA (Engineering Schools): 129*
4	*Shahzad Ansar*	▪ *PhD (Management)* ▪ *MBA (Entrepreneurial Management)* ▪ *Fellow, Trinity College of Fellows*	*N/A*	*N/A (universities not given)*

[1] http://www.timeshighereducation.co.uk/world-university-rankings/2011-2012/top-400.html
[2] http://colleges.usnews.rankingsandreviews.com/best-colleges/rankings/national-universities
[3] http://www.guardian.co.uk/education/table/2011/may/17/university-league-table-2012

		▪ *MSc (Geology)*		
5	*Dr. Akhtar A. Awan*	*PhD (Economics), George Washington University, USA.*	*N/A*	*World: 135 USA: 50*
		M.Phil (Economics), George Washington University, USA.	*N/A*	*World: 135 USA: 50*
		MA & ABD (Political Economy), John Hopkins University, USA.	*N/A*	*World: 14 USA: 13*
6	*Syed Hassan Nawab*	*MBA (Finance and International Business), University of Hawaii, Manoa, USA.*	*1983*	*World: 251-275*[4] *USA: 164*
7	Dr. Engr. Basharat Hasan	PhD (Environmental Engineering), University of Newcastle, Tyne, UK.	1992	World: 146 UK: 31
		MSc (Environmental Engineering), University of Newcastle, Tyne, UK.	1988	World: 146 UK: 31
8	Ahmad Waqar	MBA (Finance), University of Bridgeport, Connecticut, USA.	1988	World: N/A USA: Tier 2[5]
		MA (English Literature), Punjab University.	1970	N/A
9	Sarfaraz Ali Sheikh	BSc (Chemical Engineering), BA (Economics)	N/A	N/A (universities not given)
10	Mohammad Abbas	MA (International Relations), University of Karachi.	N/A	N/A
		MA (Defence and Strategic Studies), Quaid-e-Azam University.	N/A	N/A
11	Rashid Farooq	MSc (Energy Engineering), University of Surrey, UK.	1984	World: 301-350[6] UK: 19
12	Saeed Ahmad Khan	MA (Public Administration), State University of New York at Albany, USA.	1989	World: 551-600 (QS)[7] USA: 138
		MSc (Zoology), Punjab University.	1974	N/A
13	Hilal A. Raza	MSc/ DIC (Petroleum Geology), Imperial College of Science and Technology, London, UK.	1970	World: 8 UK: 10 (7 in 2011)
		MSc (Geology), Punjab University.	1968	N/A
14	Hadi Hasnain	▪ MS (Management), USA. ▪ MSs (Energy Engineering), UK.	N/A	N/A (universities not given)
15	Prof. Dr. M. Umar Khan	PhD (Earth Sciences), University of South Carolina, USA.	1995	World: 501-550 (QS) USA: 111
		MSc (Earth Sciences), University of Washington, USA.	1990	World: 25 USA: 42
		M.Phil (Earth Sciences),	1986	N/A

[4] Precise ranking available only for subscribers of Times Higher Education.
[5] There are 194 universities in Tier 1 and Tier 2 is a group of universities above the 'unranked'. http://www.usnewsuniversitydirectory.com/undergraduate-colleges/national-universities.aspx?tier=2
[6] Precise ranking only available for subscribers of Times Higher Education.
[7] The QS World University Rankings is a ranking of the world's top 500 universities by Quacquarelli Symonds, a company specializing in education. QS supplied Times Higher Education rankings from 2004-2010. http://www.topuniversities.com/institution/university-south-carolina/wur

		University of Peshawar.		
		MSc (Earth Sciences), University of Peshawar	1982	N/A
16	Zafar Minhas	LL.M (Law) Nottingham Trent University, UK	N/A	World N/A UK: 67

52. The respondent's institution, namely American University of *[sic]* London, unsurprisingly does not find mention in any of the rankings and recognized lists. On behalf of the respondent there was no defence of AUL as an internationally recognized seat of higher learning. In fact learned counsel for the respondent acknowledged that an organization going by the name of International Assembly of College Business Education ("ICBAE") had revoked AUL's accreditation in 2007. This statement itself poses problems for the respondent's case. Firstly, the ICBAE is a private American body and appears to have no legal authority or official status in matters of accreditation. Secondly, ICBAE has no connection with educational regulators or institutions operating in the UK. Thirdly, accreditation by such private agency does not confer any degree-awarding status on AUL. Fourthly, learned counsel for the respondents shied away from stating as to when this fake accreditation was granted to AUL. This is relevant considering the facts uncovered by the daily Guardian, which show that AUL had no accreditation from any authority whatsoever in 2003 i.e. the year in which the respondent claims to have obtained his LLM degree from AUL.

53. What we wish to demonstrate from this exercise is that if the briefest internet search by a junior researcher can uncover such relevant material in respect of AUL, the five member Selection Committee, and the staff assisting it, can be reasonably expected to have done the same. Surely any such Committee which exercises delegated State authority can be expected to conduct thorough due diligence and consciously apply its mind while scrutinizing the CVs of applicants. The wording of the Ordinance and advertisement cannot be treated as meaningless verbiage, or form without substance. It is obvious then, that the relevant Government functionaries and members of the Selection Committee failed in their legal obligation of making the *bona fide* and earnest attempt which would ascertain the eligibility of the respondent for the advertised position or to verify the respondent's other boastful claims contained in his CV which touts him, *inter alia,* as "*the most suitable person for the post advertised*" and "*the best authority on the subject of Regulatory, Corporate,*

financial, Service/Labour [and] Commercial laws". The respondent's job application abounds with similar claims which, unfortunately, were simply not probed by those who had been entrusted with the responsibility of finding a 'highly qualified' person of 'known competence and integrity' to fill the position of Chairman OGRA. The manner in which the selection process was undertaken shows undisputably that it was incapable of identifying and selecting suitable applicants who met the eligibility criteria given in the Ordinance and the advertisement.

54. Having dealt with the selection process we can now address another matter of concern. The petitioner has leveled very serious allegations against the respondent in his Constitution Petition and in particular paragraph 15 thereof, on the ground that the respondent indulged in corruption, illegality and favourtism etc. while he was purportedly working as Chairman, OGRA. These serious allegations *inter alia,* include showing of undue favour to persons involved in the theft of gas, giving unlawful extension in provisional licenses, making appointments in OGRA in violation of rules, regulations and law, failing to comply with the law and legally issued directives, making unlawful and unauthorized decisions favouring persons seeking relocation of CNG Stations, making unlawful decisions in favour of some Oil Companies in fixation of price, extending unlawful favours to some lawyers and flouting the ban on new CNG Stations. It was contended by learned counsel for the petitioner that during the period he remained Chairman, the respondent caused a loss in excess of Rs.52 billion to OGRA and the national exchequer directly, and thus to the people of Pakistan in whose name and on whose behalf OGRA and its functionaries operate. Having gone through the contents of the petition and paragraph 15 *supra* and the specific details given in the petition, we are of the opinion that the allegations *prima facie* are not without substance. The same, therefore, need to be investigated.

55. The detailed discussion above has highlighted the seriously flawed nature of the selection process and the manner in which it was undertaken. Also, we have touched upon the allegations of wrong doing in the preceding paragraph, for the purpose of the Orders in paragraph 57 below.

CONCLUSIONS

56. Based on the foregoing discussion, it is clear that in order to enforce the fundamental rights of the People of Pakistan, it is essential that good governance in OGRA is ensured. To achieve this objective it is crucial that 'highly qualified' persons of 'known competence and integrity' are appointed as Chairman and Members of OGRA. This can only happen if the highest and most exacting standards of diligence, transparency and probity are employed in the selection of these persons. This quite obviously has not been done. We are clear, therefore, that the selection process seriously and irretrievably undermined merit. It is such actions which potentially result in direct harm to the people of Pakistan and also contribute towards heart-burn and disillusionment amongst genuine and competent aspirants for public office. The direct impact of ignoring merit and the eligibility criteria prescribed by the Ordinance also has the potential of causing harshly adverse consequences including unjustified inflation in retail prices for consumers, thus depriving the people of Pakistan of their incomes, assets, quality of life and dignity. Among many other harmful consequences thrown up by cases such as the present one, is the unnecessary clogging of Court dockets thus reducing the Court resources available for resolution of other cases. It is clear this case would not have arisen if the selection process had been designed and implemented to ensure fulfillment of the requirements of the Ordinance. Civil servants and other holders of public office have to remain conscious that in terms of the Constitution "*it is the will of the People of Pakistan*" which has established the Constitutional Order under which they hold office. As such they are, first and foremost fiduciaries and trustees for the People of Pakistan. And, when performing the functions of their Office, they can have no interest other than the interests of the honourable People of Pakistan in whose name they hold office and from whose pockets they draw their salaries and perquisites. In these circumstances, the observations made by Ch. Ijaz Ahmed, J in the case titled *Dr.Mobashir Hussain and others vs. Federation of Pakistan and others* (PLD 2010 SC 265) are most apt wherein he also quoted the eloquently expressive verse from Saaghir Siddiqui:

جس عہد میں لُٹ جائے فقیروں کی کمائی اس عہد کے سلطان سے کچھ بھول ہوئی ہے

(PLD 2010 SC 265, 478)

We should also bear in mind the saying of Sheikh Saadi, the Persian sage, who wrote:

ای زبر دست زیر دست آزار گرم تا کی بماند ایں بازار

[Saadi, *Gulistan,* Chapter 1, page 31; Packages Ltd. Lahore, 2nd Edition (2006)]

57. Based on the foregoing discussion, we are not in any doubt that the selection process, as conducted, was inherently unsuited for identifying and coming up with a suitable person for appointment as Chairman, OGRA. Having come to this conclusion and considering the other circumstances discussed above, we make the following orders:-

(1) that the appointment of Respondent No.5 (Tauqir Sadiq) is void *ab initio;*

(2) as a consequence, the notification of his appointment dated 22.7.2009 is set aside and the position of Chairman, OGRA is declared to be vacant;

(3) the position shall be filled after adhering to a credible rigourous and transparent selection process undertaken with due diligence along the lines indicated in this opinion or along such lines as the Executive may delineate ensuring obedience to the legislative command given in the Ordinance;

(4) the salary and the value of perquisites and benefits availed by the respondent from the date of his appointment i.e. 22.7.2009 till the date of this judgment shall be recovered from him at the earliest;

(5) that the National Accountability Bureau ('NAB') shall probe into and prepare a report on the following matters:-

(a) the serious allegations enumerated in the Constitution Petition including those enumerated in paragraph 15 thereof;

(b) the conduct of state functionaries who were engaged in the process of selection of the respondent as Chairman, OGRA and their possible culpability for mal feasance, non feasance and other wrong doing;

(c) the misuse of public office and the involvement of holders of public office in corruption or corrupt practices in terms of the National Accountability Ordinance;

(6) the Chairman, NAB shall proceed in the matter with the promptness and diligence required in the matter;

(7) the report of NAB shall be submitted in Court within 45 days from today;

(8) the matter be placed before us after 45 days for such further orders as may be considered appropriate,

58. Lastly, we refer to Articles 28 and 251 of the Constitution and the imperative highlighted therein of promoting languages other than English. In order to fulfill this need, an attempt (as attached) has been made that the salient aspects of this opinion are made accessible to a wider section of those who are unable to understand the language of this opinion.

Judge

Judge

Judge

Islamabad.
A. Rehman.

Announced: _____

APPROVED FOR REPORTING.