JUDGEMENT SHEET

IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

WRIT PETITION No. 1561 OF 2023

Usama Khilji
vs.
Federation of Pakistan and others

PETITIONER BY:	Mr. Asad Ladha, Advocate
RESPONDENTS BY:	Mr. Munawar Iqbal Duggal, Mr. Rashid Hafeez, Additional Attorney Generals and Mr. Fahad Khan Tareen, Assistant Attorney General. Mr. Salman Mansoor Siddiqui and Mr. Swim Raja, Advocates for Respondent No.3. Barrister Qasim Wadud and Mr. Wasi Ullah Khan, Advocates for Respondent No.4 Mr. Asif Mehmood, Section Officer, Cabinet Division Islamabad
DATES OF HEARING:	24.05.2023, 05.03.2024, 17.12.2024, 28.01.2025 and 20.08.2025.

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BABAR SATTAR, J.- The petitioner has impugned an advertisement dated 29.03.2023 **("Impugned Advertisement")** announcing a vacancy for the office of Member (Administration) in Pakistan Telecommunication Authority **("PTA")** and inviting applications from candidates who satisfied the qualification, experience and age criteria mentioned in the Impugned Advertisement. The petitioner further sought a declaration that the post of Member (Administration) was in contravention of provisions of Pakistan Telecommunication Re-Organization Act, 1996 **("Telecom Act")** and Pakistan Telecommunication Authority's Chairman and Member (Appointment and Qualifications) Rules, 2013 **("PTA**

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Appointment Rules") and sought that the Federal Government be restrained from filling the position of Member (Administration) PTA on the basis of the Impugned Advertisement.

2. This Court admitted the petition for hearing on 11.05.2023 and directed the Federal Government not to proceed further with the process of recruitment pursuant to the Impugned Advertisement till the next date of hearing. The Federal Government then filed an application seeking vacation of the injunctive order dated 11.05.2023. After hearing such application, this Court by order dated 24.05.2023 held the following:

> *"The injunctive order dated 11.05.2023 is recalled to the extent that the Cabinet Division may proceed with the process of soliciting or processing applications pursuant to the advertisement that has been impugned in this petition. But any appointment made pursuant to such process will be subject to the outcome of this petition and the determination of whether there exists rational basis for the Federal Government to prescribe disparate eligibility criteria for the posts of Member PTA."*

3. The hearing of the matter continued over several sessions. During the hearing conducted on 05.03.2024, the Court framed the following questions to be addressed by the Federal Government:

1. *Whether the approval for summary by the Cabinet in itself qualifies as amendment to the PTA Appointment Rules, which are to be prescribed pursuant to powers delegated by the legislature under a statute? And what is the relevant date, as a matter of law, which is regarded as the date of which rules as amended entered into force?*
2. *Whether the Rules prescribed pursuant to a summary approved by the Federal Cabinet can regularize any*

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recruitment process that has been undertaken pursuant to the summary but prior to the amendment in the PTA Appointment Rules, where the Act specifically provides that increase in the number of members can be ordered by the Federal Government, by prescribing rules for such purpose?

3. *Whether a recruitment process, which was initiated/undertaken at the time when the PTA Appointment Rules did not provide for the post for which such process had been undertaken, can be subsequently legalized by creating such post and would such process fall foul of the principles of transparency and legality that must be abided by while undertaking recruitment for a public post?*

4. The Court was also informed that during the pendency of the petition, Major General (R) Hafeez Ur Rehman was appointed as Member (Administration) and subsequently as Chairman PTA. While the Court in its order dated 24.05.2023, had already noted that any appointment made pursuant to the Impugned Advertisement would remain subject to the outcome of the petition, it exercised its authority in terms of Order I Rule 10 of the Code of Civil Procedure, 1908 **("CPC")** to implead Major General (R) Hafeez Ur Rehman, Chairman and Member (Administration) PTA, as respondent No.4, being a necessary party to afford him the right to defend his appointment pursuant to the Impugned Advertisement.

Arguments of the Parties

5. The learned counsel for the petitioner stated that pursuant to Section 3 of the Telecom Act, three posts for members stood created within PTA. And the proviso to Section 3(2) of the Telecom Act stated that further posts could be created by the Federal Government. He stated that the Cabinet had not created any additional post and the announcement of the induction of a new member was also in breach of the PTA

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Appointment Rules, which did not envisage the position of Member (Administration). He submitted that the announcement was therefore ultra vires the provisions of the Telecom Act and the PTA Appointment Rules. The learned counsel for the petitioner stated that the advertisement for the appointment of Member (Administration) PTA was issued on 28.03.2023. At the said time the PTA Appointment Rules did not provide for the post of Member (Administration). He stated that subsequently the PTA Appointment Rules were amended and notified in the gazette on 04.05.2023. However, under the Impugned Advertisement, the closing date for submission of applications was a period of fifteen days. Thus, at the time when the advertisement was published and within the window for filing of applications, no post for Member (Administration) existed in the PTA Appointment Rules. He stated that in the reply filed by the Federal Government, it had appended summaries initiated by various divisions of the Federal Government. The summary initiated by the Cabinet Division highlighted that under Section 3(2) of the Telecom Act, the Federal Government can increase the number of members of PTA by prescribing Rules. He stated that the summary also highlighted the fact that the power of administration was vested in the Chairman of the Authority under Section 3(8) of the Telecom Act, and the creation of the post of Member (Administration) would therefore create a conflict re the exercise of administrative powers of the Authority and would need clarification. He stated that the summary also recognized that by increasing the number of members to an even number (i.e. 4), there would arise a conflict with regard to decisions taken by PTA, as decisions had to be rendered by

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majority vote and with an even number of members comprising PTA, decisions could not be made in case the votes were tied. He stated that despite the mention of these issues, no amendments had been made in the Telecom Act. He stated that while amendments were made in the PTA Appointment Rules, they were made after the Impugned Advertisement was issued. He further stated that the maximum age for application for a post of Member PTA was 57 years. But as per the Impugned Advertisement the maximum age permitted for application for the post of Member (Administration) was 61 years, which reflected that the post was being created to accommodate a predetermined candidate to be appointed to such post. After the matter was brought before this Court, a further amendment in the PTA Appointment Rules was made on 24.05.2023, whereby the minimum age for the remaining Members of PTA had also been enhanced from 57 years to 61 years. He further stated that the position of Member (Technical) was advertised in January 2023. However, without filling such position, the post of Member (Administration) was created in breach of the PTA Appointment Rules and was then filled during the pendency of the instant case, and the newly appointed Member (Administration) was then also appointed as Chairman PTA. The learned counsel for the petitioner stated that in ***Barrister Sardar Muhammad Ali vs. Federation of Pakistan and others*** **(2013 PLC (C.S.) 625)** the Lahore High Court had held that the appointment of a member of PTA was a matter separate from the appointment of any one of the members as Chairman. And a transparent process had to be followed while appointing Chairman from amongst the members as well. He stated that respondent No.4 was appointed

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as Member during the pendency of the petition and on the very same day he was also appointed Chairman. There was no process followed while appointing him as Chairman PTA and on such ground too, the appointment of respondent No.4 as Chairman PTA was liable to be set-side.

6. The contention of the learned counsel for the petitioner remained that the creation of the post of Member (Administration) was in conflict with the requirements of Section 3(8) and 3(9) of the Telecom Act, and that the Impugned Advertisement was issued and recruitment pursuant to it, was undertaken prior to the enactment of amendments in the PTA Appointment Rules, as the amendments were notified on 04.05.2023, by which date the Selection Committee had already interviewed the shortlisted candidates and made its recommendations to the Federal Government. And that the creation of the post of Member (Administration) and it being filled with undue haste suffered from mala fide in law; at the time that such post was created, the existing post of Member (Technical) was vacant, which remained vacant while this new post was created and respondent No.4 was appointed to it. The argument of mala fide in law was rooted in the fact pattern emphasized by the learned counsel for the petitioner, who argued that the creation of the post and the criteria prescribed for appointment of respondent No.4 to the post of Member (Administration) and subsequently Chairman PTA was driven by the object of appointing a pre-identified individual and the timing of the recruitment as well as the criteria for the post were tailored to accommodate such individual, as was subsequently borne out by the appointment of the respondent No.4. He

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submitted that the credentials of respondent No.4 themselves established that the criteria, as modified for the post of Member (Administration) in comparison to the criteria prescribed for the posts of other members in the PTA Appointment Rules, was driven by the object of appointing the incumbent to the post of Member (Administration) and then Chairman PTA, as he did not meet the pre-existing criteria for members prescribed in PTA Appointment Rules being over age and not possessing a Master's degree in the relevant field.

7. Learned Additional Attorney General raised objections with regard to the maintainability of the petition. He submitted that the petitioner was not an aggrieved person for purposes of Article 199(1)(a) of the Constitution and could not seek the issuance of a writ of mandamus, prohibition or quo warranto. He submitted that the petition was filed on the basis that the creation of the post of Member (Administration) in the PTA had not been approved by the Federal Government in terms of Section 3(2) of the Telecom Act. And further, that the PTA Appointment Rules had not been amended to provide for the post of Member (Administration). He stated that both of these contentions were factually incorrect. The Cabinet Division initiated a summary for the creation of the post of Member (Administration) on 17.03.2023, and the decision in that regard was taken on 21.03.2023, and the post of Member (Administration) was created with the approval of the Federal Government. He further stated that a summary for amendment to the PTA Appointment Rules was initiated on 24.03.2023, and rule 4(1) of the PTA Appointment Rules was amended to provide for the qualifications and experience required for the office of

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Member (Administration). He stated that such summary seeking consequential amendment in the PTA Appointment Rules was also approved on 25.03.2023. He stated that the Rules were subsequently notified in the gazette on 04.05.2023, which then provided for the post of Member (Administration), and the maximum age for applicants eligible for such post was 61 years. The learned Additional Attorney General further submitted that pursuant to Section 3(3) of the Telecom Act, the only qualification prescribed for the Chairman was that he was to be appointed from amongst the members. As the current Chairman PTA was appointed as Member (Administration) a day before a summary for his appointment as Chairman was approved, he met the qualification and could be appointed by the Prime Minister to the post of Chairman PTA. He stated that the Prime Minister, initially in his capacity as the member-in-charge of the Cabinet Division, approved the name of Major General (R) Hafeez Ur Rehman as the most suitable candidate to be Member (Administration), and subsequently approved his name as Chairman PTA in his capacity as the Prime Minister. The learned Additional Attorney General further submitted that the Court could not take into account events subsequent to the filing of the petition as that would be tantamount to taking suo motu cognizance of matters not raised in the writ petition. And the exercise of such jurisdiction was now expressly barred in view of section 199(1A) of the Constitution introduced by virtue of the 26th Constitutional Amendment. He submitted that while the Impugned Advertisement was published at a time when the amendment to the PTA Appointment Rules for purposes of creation of the post of Member (Administration) PTA had not

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been notified, approval for such amendment had been granted by the Federal Government along with the approval for the Impugned Advertisement. Consequently, there was substantial compliance with the requirements of law when the Impugned Advertisement was published and the recruitment process to fill the post of Member (Administration) was commenced after seeking approval from the Prime Minister and the Cabinet, which post was eventually filled by the appointment of respondent No.4.

8. The learned Additional Attorney General took some time to seek instructions as to the process followed by the Federal Government while appointing respondent No.4, who was initially appointed as Member (Administration) PTA, as Chairman PTA. And after seeking instructions, he informed the Court that there was no record of any formal process available with the Federal Government and that no such process was needed as it was within the discretion of the Prime Minister to select any one of the members of PTA to serve as Chairman PTA. And in appointing the newly appointed Member (Administration) as Chairman PTA, no illegality was committed.

9. Learned counsel for PTA reiterated the arguments made by the learned Additional Attorney General on behalf of the Federal Government. He relied on the reply filed by PTA as well as the various notifications issued, to argue that respondent No.4 was appointed as Member (Administration) and then Chairman PTA, in compliance with the requirements of the Telecom Act.

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10. Learned counsel representing respondent No.4 submitted that there was no illegality in the appointment of respondent No.4 as Member (Administration) and Chairman PTA. Respondent No.4 applied for the post of Member (Administration) pursuant to the Impugned Advertisement. He was shortlisted for satisfying the eligibility criteria mentioned in the Impugned Advertisement and prescribed in the PTA Appointment Rules, as amended. He was subsequently interviewed by a selection committee appointed pursuant to Schedule II of the PTA Appointment Rules, and was among the panel of individuals recommended by the Selection Committee to the Federal Government. The Federal Government then selected him for appointment to the post of Member (Administration) and subsequently to the post of Chairman PTA. Learned counsel for respondent No.4, however, vociferously objected to the maintainability of the petition. He submitted that the petitioner was not an aggrieved person for purposes of Article 199(1) of the Constitution. The writ was not a writ of quo warranto, as the prayer sought a declaration that the Impugned Advertisement be declared ultra vires the Telecom Act and the PTA Appointment Rules. The petitioner had not challenged the appointment of respondent No.4 as Member (Administration) or Chairman PTA, which appointments were made after the filing of the petition. Being a subsequent event not directly challenged by the petitioner through an amendment of the petition or through the filing of a fresh petition, such subsequent event could not be taken cognizance of by the court in its constitutional jurisdiction, in view of Article 199(1A) of the Constitution. He submitted that doing so would be akin to exercising suo motu jurisdiction and

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would fall foul of the principle of separation of powers and the principle that the court must not overreach its constitutional mandate. In support of such proposition he relied on various judgments of the Supreme Court holding that the High Court was not vested with suo motu jurisdiction and that in granting relief the Court ought to restrict itself to the prayer sought by the petitioner.

11. On 20-08-2025 the matter was reserved for judgment and all parties were invited to file written submissions by 08-09-2025, if they so wished. Written submissions were then filed on behalf of the petitioner and respondent No.4, which form part of the record.

Maintainability of the Petition

12. There are at least three subsets to the maintainability challenge brought forth in the instant petition. The first relates to the petitioner not being an aggrieved person, for purposes of Article 199(1)(a) of the Constitution. A connected challenge is that the petitioner has not directly challenged the appointment of respondent No.4, which being an event subsequent to the filing of the petition ought not to be looked at by this Court for purposes of the adjudication of the case brought before the Court. And the third aspect of the maintainability challenge is that any relief granted that affects the appointment of respondent No.4 would be tantamount to the exercise of suo motu jurisdiction barred by Article 199(1A) of the Constitution.

13. The first question to be addressed is whether or not the petitioner is an aggrieved person for purposes of Article 199(1)(a) of the Constitution, and whether or not he has any

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other adequate remedy. It is only if the petitioner meets the two-fold conditions that the court can assume jurisdiction to delve into the matter. This Court will then consider the scope of Article 199(1A) of the Constitution and whether such a clarificatory amendment brings any change to the scope of jurisdiction of the High Court under Article 199 of the Constitution, as was settled prior to the promulgation of the 26th Constitutional Amendment. This question needs to be considered in juxtaposition with the scope of the authority of the High Court to mold relief in view of the case presented and argued before the Court and to grant ancillary relief where the justice of the case so demands, provided that granting such relief causes no prejudice to any party.

14. In order to qualify as an aggrieved person, the petitioner must have a personal right that he seeks to enforce, and the Federal Government must be burdened with the corresponding duty that it is obliged to discharge under the Constitution and the law. This Court will consider the credentials of the petitioner together with the right he claims. The second and the corresponding part of this inquiry is to look at the duty imposed by law on the Federal Government vis-a-vis the composition of PTA and how the public office of a member of PTA is to be filled.

15. The petitioner's case, in a nutshell, is that as a user of telecommunication services that are regulated by PTA, he has a right to be provided telecommunication services regulated by a statutory body that is constituted in accordance with law. And in the event that members comprising PTA are not appointed in accordance with law, his right guaranteed by Article 25(1) of the

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Constitution to equal protection of law, read with his rights guaranteed under Articles 4, 9, 14, 19 and 19-A would stand breached. The second limb of the case is that the Federal Government is under a corresponding obligation to exercise its authority and discretion to constitute PTA in accordance with law. And where the Federal Government exercises its discretion to make an appointment to a public office or frames rules or criteria for appointment to a public office in a manner that is unfair and capricious, such action constitutes a breach of duty to the citizens for whom the public office is meant to discharge services, which breach is subject to judicial review on grounds of illegality, irrationality and procedural impropriety.

16. More particularly, while pointing out (i) how the creation of the office of Member (Administration) fell foul of the scheme of Sections 3(8) and 3(9) of the Telecom Act, and (ii) how the criteria advertised for such office was in conflict with the criteria prescribed for other members in the PTA Appointment Rules (as they existed at the time of publication of the Impugned Advertisement as well as at the time of appointment of respondent No.4 as Member and Chairman PTA) and was "unjustifiably discriminatory", it has been contended that the creation of the office as well as the prescription of criteria for such office were tailored to induct a pre-determined individual. The memo of the petition asserts that, *"the increase in the age limit also suggests that the respondents have already been tipped as to who the Member (Administration) is to be, and the statutory criteria have been relaxed to accommodate the said person."*

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17. There is no adequate remedy provided in law to adjudicate the assertion that the Federal Government is creating a public office and concocting eligibility criteria tailored to facilitate the induction of a pre-identified individual to such office. The question of whether the petitioner had any other adequate remedy, therefore, needs no elaborate discussion. It can be argued that this aspect of the case, where it was alleged that the statutory criteria were being tailored and relaxed to accommodate a certain person, was hypothetical at the time the petition was filed. However, this was not the only ground for the challenge brought before the court as will become obvious later in the judgment. The identity of the person appointed to the office of Member and then Chairman PTA became known during the pendency of the petition. The facts which transpired after the filing of the petition provide a sufficient basis to test the allegation that the post of Member (Administration) was designed to appoint Respondent No. 4 to it.

18. The petitioner is a digital rights expert and researcher whose columns in relation to such rights appear in Dawn. He is a member of the board of Global Network Initiative, serves on Facebook's privacy experts' group for Asia-Pacific, teaches mass communication at the National University of Sciences and Technology (NUST), conducts trainings related to cybercrime, internet regulation and digital security. And apart from his interest and expertise in internet regulations and freedoms, he is a user of telecom services regulated by PTA and his rights to liberty, privacy and dignity, and freedom of speech and information, to name a few, are dependent on the services provided by PTA. It is in these capacities that he claims to have

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a right to provision of services regulated by a statutory authority, the lawful constitution of which has a direct correlation with the services he uses, and in turn affects his rights to such services.

19. PTA has been established in terms of section 3 of the Telecom Act and comprises the members appointed by the Federal Government, in terms of section 3(2) of the Telecom Act. Section 4 lists the functions of the authority and requires PTA to *"promote and protect the interests of users of telecommunication services in Pakistan"* (section 4(1)(c)), *"promote the availability of a wide range of high-quality, efficient, cost-effective and competitive telecommunication services throughout Pakistan"* (section 4(1)(d)), *"promote rapid modernization of telecommunication systems and telecommunication services"* (section 4(1)(e)), and *"investigate and adjudicate on complaints and other claims made against licensees arising out of alleged contraventions of the provisions of this Act, the rules made and licenses issued thereunder and take action accordingly"* (Section 4(1)(f)) and *"regulate competition in the telecommunication sector and protect consumer rights"* (Section 4(1)(m)). Section 6 of the Telecom Act identifies the responsibilities of PTA. Section 6(f) requires PTA to ensure that, *"the interests of users of telecommunication services are duly safeguarded and protected."*

20. In today's digital world, life without telecom services is unthinkable. The availability and quality of telecom services are a prerequisite for the provision of basic services by the state to its citizens. The Telecom Act, as well as the Rules, Regulations

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and policies framed thereunder, mandate the provision of telecom services across Pakistan. Section 33B of the Telecom Act provides for the creation of a Universal Service Fund (USF) to ensure provision of *"access to telecommunication services to people in the under-served, un-served, rural and remote areas"*. We need not dwell any further on the need for access to telecommunication services for a citizen to lead a meaningful life in this day and age. Access to such services is regulated by PTA, and the manner in which such services are provided and how they affect other rights of citizens, including the right to data protection, are also regulated by PTA. The manner in which PTA is constituted and how it discharges its statutory duties and functions has a direct nexus with the rights of a citizen who is a user of telecommunication services. Today, the enjoyment of fundamental rights guaranteed by the Constitution, including the right to privacy, the right to practice a profession or business or trade, the right to freedom of speech and information, the right to liberty and the right to education, the foundational right to a meaningful life and liberty, can no longer be conceived in the absence of telecommunication services.

21. The Constitution guarantees the freedom of opinion and expression, which right is in *peri materia* to Article 19 of the Universal Declaration of Human Rights. The Human Rights Council of the United National General Assembly adopted a resolution on 13.07.2021 on "the promotion, protection and enjoyment of human rights on the Internet" affirming, *inter alia*, that "*the same rights that people have offline must also be protected online, in particular freedom of expression, which is applicable regardless of frontiers and through any media of one's*

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choice, in accordance with Article 19 of the Universal Declaration of Human Rights and of the International Covenant on Civil and Political Rights." Pakistan was one of the 43 states that voted in favor of this resolution when it was adopted.

22. The concept of standing for purposes of a person qualifying as an aggrieved person in terms of Article 199(1)(a) of the Constitution has evolved over time and has been liberally applied by the courts over the last three and a half decades. But let us go back to the original articulation by the Supreme Court in ***The State of Pakistan vs. Mehrajuddin*** **(PLD 1959 Supreme Court (Pak) 147)** where it was held that a person seeking a writ of mandamus must have a clear legal right to the performance by the respondent of a particular duty sought to be enforced. A user of telecom services in Pakistan has a statutory right to the performance of explicitly provided statutory functions and duties by PTA as stated above. The duties and functions are to be performed by PTA as a body corporate, which comprises of an Act, through which the individuals are appointed as members of PTA and together constitute PTA. It could be paradoxical to argue that while the enjoyment of fundamental rights guaranteed by the Constitution is contingent upon the provision of telecom services regulated by PTA, and a telecom user's right to equal protection of law in terms of Article 25(1) is contingent on the manner in which PTA exercises its statutory duties and responsibilities, a citizen who is a user of telecom services has no legal right to demand that the composition of PTA be in accordance with law and that the members comprising PTA be appointed in accordance with law. As discussed above, the concept of standing has evolved over time to ensure that

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while proxies and busybodies do not clog adjudicatory processes with frivolous actions, citizens are able to initiate proceedings to test the lawfulness of administrative action and prevent abuse of authority by the state.

23. It was observed by the UK Supreme Court in ***Walton v. Scottish Ministers*** **[2012] UK SC 44** that, *"where there are strict rules as to standing there is always the risk that no one will be in a position to bring proceedings to test the lawfulness of administrative action. It is hardly desirable that a situation should exist where because all members of the public are equally affected no one is in a position to bring proceedings: such a situation would impede the rule of law."* This observation was cited approvingly by a Division Bench of the Lahore High Court in ***Kamil Khan Mumtaz v. Government of Punjab*** **(PLD 2016 Lahore 699)** in a case involving public interest litigation. We need not consider the scope of standing in cases of public interest litigation for our present purposes. The reference to a broader scope of the concept of standing in such cases is merely an aside. In this instance, PTA is endowed with the statutory responsibility of discharging services to an individual citizen whose rights guaranteed by the law and the Constitution are contingent on the provision of such services. The individual citizen has a clear legal right to compel the Federal Government to exercise its power and discharge its duty to ensure that such statutory regulator is duly constituted and comprises members who are appointed and hold office in accordance with law. In other words, in such case the citizen meets the strict test of standing as articulated in ***Mehrajuddin*** and need not justify his credentials under the rubric of public interest litigation,

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notwithstanding that the ancillary effect of him seeking judicial review of administrative action may serve larger public interest.

24. Having established that the petitioner is seeking the enforcement of a legal right, the denial of which would qualify him as an aggrieved person, let us now turn to the corresponding duty that law imposes on the Federal Government in creating a public office, and then laying down criteria and running a recruitment process to staff it. To do so, we will start with the very concept of rule of law as it must be understood and implemented within our constitutional dispensation. Whenever an executive action taken to staff a public office is challenged by either seeking the issuance of a writ of mandamus or prohibition or by bringing a writ of quo warrant, the constitutional scheme of separation of powers on the one hand and checks and balances on the other comes into focus. It is in this larger context that the notion of the rule of law needs to be appreciated to understand the constraints it places on the Executive in the exercise of authority in relation to matters placed by the Constitution within the domain of the Executive. And further, how within the system of checks and balances that exists under our Constitution, it falls within the province of the Judiciary to test the legality of administrative action and declare such action to be void if found capricious.

25. Within the jurisprudence that has evolved in the United States, constitutional government is often referred to as *"a government of laws and not of men."* This phrase best summarizes the truism that rule of law must be distinguishable from the rule of men, for men are free to do as they please so

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long as they do not hurt others. But in a rule of law polity, men are not free to do as they please when they exercise state power. The government in a rule of law polity is a government of limited powers as it can only do what the law permits it to do. Article 4 of the Constitution, which articulates the right of individuals to be dealt with in accordance with law, summarizes this framework, whereby individuals are free to do what the law doesn't prohibit them from doing and the state can only do what the law authorizes it to do.

26. The English Philosopher John Locke had proclaimed in 1690 that, "wherever *law ends, tyranny begins"* (Second Treatise of Government; Chapter XVII; Cambridge University Press; 1988; P. 400). The notion that for a political society to be founded on stable footing the desires of men must be controlled by law is now well understood, which is why rule of law is celebrated as a system superior to rule of men. A.V. Dicey in *An Introduction to the Study of the Law of the Constitution (1885; 9th Edition; Macmillan 1945 at PP 193)* refers to at least three notions of how rule of law is understood. He wrote that *"we mean in the second place, when we speak of the "rule of law" as a characteristic of our country, not only that with us no man is above the law, but (what is a different thing) that here every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals."*

27. In ***R. vs. Secretary of State for the Home Department, Exp. Pierson*** **[1998] AC 529 at 591**, Lord Steyn noted that, *"the rule of law enforces minimum standers of*

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fairness, both substantive and procedural." Lord Tom Bingham in his book, *The Rule of Law* (Penguin Books; 2011) wrote that, *"the core of the existing principle is, I suggest, that all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made taking effect (generally) in the future and publicly administered in the courts."* While exploring ingredients of rule of law, Lord Bingham outlined eight principles comprising the concept, which are summarized as follows:

1. *The law must be accessible and so far as possible intelligible, clear and predictable.*
2. *Questions of legal right and liability should ordinarily be resolved by application of the law and not by the exercise of discretion.*
3. *The laws of the land should apply equally to all, save to the extent that objective differences justify differentiation.*
4. *Ministers and public officers at all levels must exercise the powers conferred on them in good faith, fairly, for the purpose for which the powers were conferred, without exceeding the limits of such powers and not unreasonably.*
5. *The law must afford adequate protection of fundamental human rights.*
6. *Means must be provided for resolving, without prohibitive cost or inordinate delay, bona fide civil disputes which the parties themselves are unable to resolve*.
7. *The adjudicative procedures provided by the state should be fair.*
8. *The rule of law requires compliance by the state with its obligations in international law as in national law.*

Of relevance in the context of separation of powers and whether courts indulge in adventurism when they exercise judicial review powers in relation to executive action is Lord Bingham's

observation that, *"in properly exercising judicial power to hold ministers, officials and public bodies to account, the judges usurp no authority….there are countries in the world where all judicial decisions find favour with the powers that be, but they are probably not places where any of us would wish to live."*

28. In *Online Courts and the Future of Justice (Oxford University Press; 2019; PP 21),* Professor Richard Susskind also seeks to identify the elements that constitute a working definition of rule of law in his opinion. Of the five elements identified, two are relevant for our purposes. The first such element identified by Professor Susskind is that, *"the rule of law requires that laws of land should apply equally to everyone, to public officials as much as to private persons, and to all citizens, whatever their gender, religious, racial or ethnic origin."* And the fourth element identified by him is that, *"the powers of the state are limited by law and citizens are protected by legal rights that governments are under an obligation to uphold."* The constraints that law imposes on the functioning of the Executive remains the most commented aspect of rule of law. Professor Roberto M. Unger in *Law and Modern Society (New York Free Press; 1976 at PP 176-177)* notes that, *"government power must be exercised within the constraints of rules that apply to ample categories of persons and acts, and these rules, whatever they may be, must be uniformly applied."*

29. In ***Wades and Forsyth's*** *Administrative Law*, the authors argue that one meaning of rule of law is that, *"government should be conducted within a framework of recognized rules and principles which restrict discretionary power."* It is in view of this

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understanding of rule of law that the Executive is not allowed to allocate jobs and contracts or otherwise dispense state largesse as it pleases. A constitution establishing rule of law leaves no room open for a patronage system. In the context of exercise of executive authority to make appointments to public office, there once existed a system of distributing public offices by governments in the US as a reward to party loyalists or others who had contributed to the electoral victory of the government. This system existed in contrast to a merit-based appointment system and is pejoratively remembered as the **"spoils system"**. The term is traced back to a speech made by Senator William Marcy in 1832, while defending appointments made by President Andrew Jackson where he proclaimed that, *"to the victor belong the spoils of the enemy."* The system of distributing government positions as a currency to pay off political debt owed to those who contributed to the victory of the party in office is now looked down upon everywhere as being the antithesis of a merit-based system and is characterized as cronyism, nepotism or sometimes plainly as political corruption.

30. There is no room within our constitutional scheme to argue that an elected government is mandated to appoint to public offices those whom it pleases without the need to abide by a system of substantial and procedural due process that results in the selection of the most qualified individual for the office in question. The shared understanding of the notion of rule of law across common law jurisdictions has been traced here to emphasize that making appointments to public offices that are not the products of a transparent, comparative and manifestly fair process is not a right of an elected government or a matter

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of Executive policy, but is an abdication of the required allegiance to the rule of law. Exercising judicial review to curb colorable exercise of authority in planting favorites in public offices then becomes a constitutional duty of the Judiciary, which cannot be seen as an encroachment into the domain of the Executive but a necessary function in a system of checks and balances put in place by the Constitution to prevent abuse of authority by the Executive.

31. Over the last four decades, open advertisements have been emphasized by the courts as a proxy for a fair and transparent recruitment process, providing a level playing field to all qualified and interested candidates to compete for public jobs to be staff on the basis of nothing other than merit. The underlying idea of an open advertisement is that a fair process is devised to produce the best merit-based outcomes, as opposed to devising a skewed process to rubber stamp a preconceived outcome. It has further been emphasized by the courts that a substantively and procedurally fair process is essential to uphold the fundamental rights of citizens guaranteed by the Constitution.

32. In ***Munawar Khan v. Niaz Muhammad*** **(1993 SCMR 1287),** the Supreme Court held that, *"recruitments made without open advertisements were prima facie violative of fundamental right 18 and could not be countenanced."* In ***Mushtaq Ahmed Moral v. The Hon'ble Lahore High Court (1997 SCMR 1043)*** the Supreme Court held that Article 18 of the Constitution guaranteed *"the right of a citizen to compete and participate for appointment to a post in any Federal or*

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Provincial Government department, or an attached department, or autonomous bodies/corporations etc., on the basis of open competition, which right he cannot exercise unless the process of appointment is transparent, fair, just and free from any complaint as to its transparency and fairness." In ***Government of N.W.F.P vs. Muhammad Tufail Khan*** **(2004 PLC(CS) 892)** it was held that, *"the Courts are duty bound to uphold the constitutional mandate and to keep up the salutary principle of rule of law. In order to uphold these principles it has been stated time and again by the Superior Courts that all the appointments are to be made after due publicity in a transparent manner after inviting applications through Press from all those who are eligible, deserving and desirous."*

33. In ***Mr. A. R. Azar, Deputy Chief Engineer v. The Federation of Pakistan*** **(PLD 1958 Lahore 185),** the President, who was the rule-making authority, had allowed extension to a railway employee which was not in accordance with the applicable rules. It was argued that as the President was the rule-making authority, his order ought to be treated as an order amending the contrary rule. The submission did not impress the High Court. This case was cited approvingly by the Supreme Court in Pakistan ***Tobacco Board v. Tahir Raza (2007 SCMR 97)***, and it was observed that, "*the discretion of even the highest state functionary is circumscribed by law and as against their whims or liking, compulsion or expediency, it is the will of the legislature which is to prevail."*

34. In ***Muhammad Yasin v. Federation of Pakistan***, **(PLD 2012 SC 132)** the Supreme Court dealt with the challenge to

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the appointment of Chairman OGRA. While identifying PTA along with OGRA amongst important regulatory bodies, it was held that such regulators have by law *"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."* While considering the *"efficacy and statutory legitimacy of the appointment process"* it was emphasized that, *"the appointment is not dependent upon the unfettered whim and discretion of the government of the day or the political executive."* The Supreme Court emphasized the imperative of appointing individuals within regulators in a transparent manner: *"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…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 to appointments to important positions therein… 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 so long as the Executive makes a manifest and demonstrable effort to comply with and remain within the legal limits which circumscribe its power."* In providing guidance to the manner in which judicial review is to be exercised in relation to Executive appointments it was held that, *"there is an obligation thus imposed on the Executive to make*

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appointments based on a process which is manifestly and demonstrably fair, even if the law may not expressly impose such duty… 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 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 provisions of the law." The Supreme Court further enumerated the ingredients of a selection process that would pass constitutional muster. It identified three ingredients of a selection process that would pass the constitutional test in the following terms: *"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…; c. if such a reasonable selection procedure was indeed prescribed, was it adopted and followed with rigor, objectivity, transparency and due diligence to ensure obedience to the law."* While dealing with the Federation's reliance on separation of powers as a means to defend a non-transparent appointment, the Supreme Court held that, *"while we must respect the separation of powers, equally so we cannot let it become a murky smokescreen to hide practices which are nepotistic or which do not achieve the objective of appointing a candidate having the credentials prescribed by the legislature."*

35. In ***Barrister Sardar Muhammad Ali v. Federation of Pakistan*** **(PLD 2013 Lahore 343)**, which judgment was subsequently cited favorably by the Supreme Court in ***Muhammad Ashraf Tiwana v. Pakistan*** **(2013 SCMR 1159)**, a challenge was brought before the Lahore High Court to the

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appointment of Chairman PTA. The Court held that, "*the recruitment process must be above board, devoid of even the slightest taint of favoritism. The court is under an obligation to judicially review the integrity of the selection process to a public office.*"

36. Reiterating the principles laid down in ***Muhammad Yasin***, it was held by the Supreme Court in ***Muhammad Ashraf Tiwana v. Pakistan*** **(2013 SCMR 1159)** that, "*we have come a long way from the days of the whimsicality of kings and Caesars, such as Caligula who could conceive of appointing his horse Incitatus as Consul of Rome. The element of subjectivity and discretion of the government has been severely limited by the legal requirement that an appointee must be a person having integrity, expertise, eminence, etc.*" In ***Farooq Ahmed v. Secretary Balochistan Provincial Assembly*** **(2024 PLC(CS) 1437)**, it was held that, "*it is essential that all appointments in the public sector are based on the process that is palpably and tangibly fair and within the parameters of its applicable rules. The appointment made in a non-transparent manner and in violation of the law offends the fundamental rights of the general public and the citizens under Articles 4, 9, 25, and 27 of the Constitution.*"

37. Most recently in ***Ayaz v. Mustafa Saeed*** **(2025 SCMR 216)**, it was held by the Supreme Court that, "*the wrong selection of "blue-eyed" candidates, based on nepotism, favoritism, or external pressures, leads to chaos and turmoil in the civil service structure, creating unrest and discontent among civil servants with serious repercussions… The utmost compelling*

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advantage of transparency in recruitment is that it essentially ratifies and disseminates public confidence in the impartiality of the process and authenticates that the appointments are not manipulated or a sham. A transparent recruiting process should be marked by unambiguity, uprightness, trustworthiness, and evenhandedness. Honesty and integrity are the best means to magnetize talented individuals suited for the job, and an open-minded selection process should be based on objective criteria free from any extraneous considerations, while providing every candidate with a fair and equal opportunity to compete." While reiterating the law in ***Chief Secretary Punjab v. Abdul Raoof Dasti*** **(2006 SCMR 1876)** the Supreme Court held that, *"we must keep in mind that not selecting the best as public servants is a gross breach of the public trust and an offence against the public who has the right to be served by the best.* And explaining the link between appointment in public offices and legitimacy of a representative government, the Supreme Court observed that, *"appointments which disregard merit perpetuate bad governance, and drain the public exchequer, such appointments also erode the credibility of the Commission and the Government."* While highlighting that in exercising judicial review of whimsical use of powers the test of proportionality is applicable, the Supreme Court held that, *"the courts may overturn the exercise of discretionary powers if no judicious nexus is shown between the objective sought to be achieved and the means used to that end."*

38. The aforementioned judgments have been cited here to emphasize that it is settled within our administrative law jurisprudence that regulatory bodies discharge functions and

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duties that affect the fundamental rights of the citizens, who have been recognized by the Supreme Court to have a right to seek the appointment of qualified individuals to such public offices. It is also settled that the government and the highest office holders within the Executive have no unbridled discretion to make appointments as they please. The appointment to a public office must be made by adopting an objective selection process that ensures that the appointment in question is manifestly and palpably fair. Where this is not done, the Federal Government is liable not only for breach of the relevant statutory provisions, but also acts in breach of Articles 4, 9, 18, 25 and 27 of the Constitution. In the instant matter, the petitioner, as a person aggrieved by the initiation of a process to appoint a pre-identified individual to the office of Member (Administration), has invited the Court to scrutinize the administrative actions of the Federal Government and issue an appropriate writ to restrain the Federal Government from making an appointment that suffers from mala fide in law and direct it to act in accordance with law. The petitioner, therefore, satisfies the test of having a legal right in relation to which the Federal Government has a corresponding duty, which it is alleged has not been discharged in accordance with law.

39. Let us now turn to the second limb of the maintainability challenge that on the one hand the petitioner has not impugned the appointment of respondent No.4 as Member (Administration) and Chairman of PTA, since such appointment was made after the institution of the instant petition, and on the other this Court cannot grant any relief that is not explicitly sought in the prayer made by the petitioner. This limb of the maintainability challenge

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is as misconceived as the first one dealt with above. The first point that emerges from a plain reading of Article 199(1A) of the Constitution are the words "*for removal of doub*t". They manifest that the provision is clarificatory in nature and has not been enacted as a means to expand or contract the jurisdiction vested in the High Courts under Article 199 read with Article 175(2) of the Constitution. The second aspect to note is that the clarification is with regard to making orders, giving directions or making declarations in relation to a jurisdiction that has never been vested in the High Court i.e. suo motu jurisdiction or a case where the High Court acts on its own without an application before it. In order for the High Court to exercise jurisdiction for purposes of Article 199(1) of the Constitution, there must be brought before it an "application" by an aggrieved person or any person, as the case may be, depending on the nature of the right and remedy in question. All that Article 199(1A) clarifies is that the High Court does not have, and has never had, suo motu jurisdiction akin to that vested in the Supreme Court under Article 184(3) of the Constitution. And further, while exercising the jurisdiction vested in it, it must make orders issuing declarations or giving directions only in relation to the case brought before it by virtue of the contents of the application that trigger the exercise of its jurisdiction.

40. Neither Article 199(1) nor Article 199(1A) mentions the prayer clause. Article 199(1A) does not tie the hands of the High Court or force it into behaving like a hapless bystander where a case brought before the Court through an application filed by a person results in unveiling illegalities on the part of public functionaries. There is no doubt that the legal profession

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revolves around interpretation of words and advocacy can sometimes be seen as wordsmithing. But the argument that Article 199(1A) requires that even where relevant facts have been brought before the High Court in a case establishing a right and demanding a remedy, merely because the pleadings are deficient in any manner or not comprehensive enough or do not appropriately seek a certain remedy, despite the manifestation of illegality by a person performing functions on behalf of the State, the Constitutional Court must morph into an apathetic spectator, is untenable. The suggestion that Article 199(1A) of the Constitution has had a transformative effect on the jurisdiction vested in the High Court cannot be regarded as anything more than pernicious nonsense. Accepting such view would make a mockery of the Constitution and the role of the Judiciary as the machinery put in place by the Constitution to uphold the rule of law, enforce fundamental rights and ensure that the Executive remains bound by the constraints imposed by the law and the Constitution. In interpreting Article 199(1A) of the Constitution, the question before the court is not whether judicial restraint is to be preferred over judicial activism, but whether the newly introduced clarificatory provision is to be understood as the legislative will to induce judicial impotence and disable constitutional courts from delivering justice as required in view of the facts of the case being adjudicated.

41. The Constitution and the law, in order to be deemed legitimate instruments issuing commands, must wield the moral authority that they claim. And no law can claim moral authority if the outcome of its enforcement produces real-life consequences that are patently unfair and unjust. Professor Susskind in *Online*

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Courts and the Future of Justice, already referred to above, argues that, "*for any judicial decision to be substantively just, it is necessary but not sufficient that it upholds the law. We should also insist that our justice system delivers outcomes that are themselves just.*" While the Constitution is an unfolding narrative that must adapt to changing times, its interpretation cannot be guided by regressive desires of those wielding power in the name of the state. Pakistan, if it is governed by the Constitution, must remain a rule of law polity where the Judiciary is empowered to deliver just outcomes. A system where courts are ineffective and unable to address the illegalities laid bare during the proceedings of a case may be suited for a hybrid mish-mash of expediency stitched together by the doctrine of necessity. But such system can never be the guarantor of fundamental rights in a rule of law polity. These are not novel arguments, just as Article 199(1A) of the Constitution is not a provision either vesting or taking away from the High Courts the jurisdiction that vests in them.

42. In order to understand the import of Article 199(1A) of the Constitution, the distinction between the jurisdiction and judicial powers of a court must be borne in mind. Article 175(2) of the Constitution states that '*[n]o court shall have any jurisdiction save as is or may be conferred on it by the Constitution or by or under any law*'. All courts are endowed with such jurisdiction as is vested in them by the Constitution and law. The distinction between jurisdiction and judicial powers finds mention in Justice Fazal Karim's *Judicial Review of Public Actions* (2nd ed.; Vol-I, at page 540) in the following terms:

> "***Distinction between 'Judicial power' and 'Jurisdiction'***

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> *In the context of a written constitution, particularly in the study of constitutional interpretation, it is important to understand the distinction, and the relationship, between 'judicial power' and 'jurisdiction'. 'Jurisdiction' expresses the concept of the particular res or subject-matter over which the judicial power is to be exercised and the manner of its exercise. Jurisdiction is, therefore, the right to adjudicate concerning a particular subject-matter in a given case, as also the authority to exercise in a particular manner the judicial power vested in the court. In short, jurisdiction denotes the authority for the courts to exercise judicial power. "Without jurisdiction the court cannot proceed at all in any cause. When jurisdiction ceases to exist the court cannot proceed to pronounce judgment (on the merits) and the only function remaining to the court is that of announcing the fact and dismissing the cause…."*
>
> *This is one of the first constitutional principles, it is stated in the Constitution of Pakistan, Article 175, clause (2), as follows:*
>
> *"(2) No court shall have any jurisdiction save as is or may be conferred on it by the Constitution or by or under any law"*
>
> *This provision constitutionalizes the basic principle that for Judges to exercise "Judicial Power", a Court must have jurisdiction – the authority to hear and decide a case. The jurisdiction of courts is not created or defined by Judges, but by the Constitution and laws made under it."*

43. 'Jurisdiction' and 'judicial power' are distinct concepts and the exercise of judicial power is contingent upon the vesting of jurisdiction in a court. The consequence of exercising judicial power in a matter in relation to which law does not vest jurisdiction in a court is that such exercise and the outcome it produces is of no legal effect. The Supreme Court observed in in ***S. M. Waseem Ashraf v. Federation of Pakistan*** (**2013 SCMR 338**) that, *"it is settled law that any forum or court, which, if lacks jurisdiction adjudicates and decides a matter, such decision etc. shall be void and of no legal effect*." Where

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jurisdiction is conferred on a court and is rightly assumed, the manner of exercise of judicial power is regulated by principles of law and equity that are well settled. The manner of exercise of judicial power does not leave the court bereft of jurisdiction merely because various courses of action were open to the court and it chose one and not another in exercise of its discretion. There are some exceptions to this general rule. The obvious ones being exercise of judicial power in a manner that results in adjudication of a matter that does not fall within its jurisdiction in the first place or has the effect of undermining due process rights of the contesting parties.

44. It is settled that in adjudicating a matter in relation to which the court has jurisdiction, a constitutional court doesn't just have the power to 'meet the ends of justice' but is endowed with a constitutional duty to do so. Such judicial power also flows from Section 151 of the Code of Civil Procedure, 1908 ("**CPC**"), which allows the Court to make '*such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.*' It was held in ***Hussain Bakhsh v. Settlement Commissioner*** **(PLD 1970 SC 1)** that where the right of a civil nature is sought to be enforced by having recourse to writ jurisdiction, provisions of CPC are applicable. Similarly, Section 561-A of the Code of Criminal Procedure, 1898 ("**CrPC**"), confers the High Courts with the power to '*make such order as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice*', with respect to criminal matters.

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45. The original jurisdiction of the High Court is enumerated in Article 199 of the Constitution, which lays down the tests upon satisfaction of which the Court may take cognizance of a matter. The manner in which the equitable nature of this extraordinary constitutional jurisdiction is to be conceived was enunciated by the Lahore High Court in ***Malik Ghulam Mustafa Khar and others v. Pakistan and others*** (**PLD 1988 Lahore 49**) as follows: *"Article 199 of the Constitution casts an obligation on the High Court to act in aid of law, protecting the rights of the citizens within the frame work of the Constitution against the infringement of law and Constitution by the executive Authorities, strike a rational compromise and a fair balance between the rights of the citizens and the action of the State functionaries, claimed to be in the larger interest of Society. This power is conferred on the High Court under the Constitution and is to be exercised subject to constitutional limitations. The interpretation of the Constitution thus, belongs to the superior Courts and it is for them to determine the true meaning and the scope of the constitutional provisions.'*

46. In ***Brig. Muhammad Bashir v. Abdul Karim and others*** (**PLD 2004 SC 271**), the Supreme Court while affirming ***Malik Ghulam Mustafa Khar*** went on to hold with regard to Article 199 that:

> *"The Article is intended to enable the High Court to control executive action so as to bring it in conformity with the law. Whenever the executive acts in violation of the law, an appropriate order can be granted which will relieve the citizen of the effects of illegal action. It is an omnibus Article under which relief can be granted to the citizens of the country against infringement of any provision of law or of the Constitution. If the citizens of this country are deprived of the*

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guarantee given to them under the Constitution, illegally or, not in accordance with law, then Article 199 can always be invoked for redress…It is to be noted that "paramount consideration in exercise of Constitutional jurisdiction is to foster justice and right a wrong". (Rehmatullah v. Hameeda Begum 1986 SCMR 1561, Raunaq Ali v. Chief Settlement Commissioner PLD 1973 SC 236). There is no cavil with the proposition that "so long as statutory bodies and executive authorities act without fraud and bona fide within the powers conferred on them by the Statute the judiciary cannot interfere with them. There is ample power vested in the High Court to issue directions to an executive authority when such an authority is not exercising its power bona fide for the purpose contemplated by the law or is influenced by extraneous and irrelevant considerations. Where a statutory functionary acts mala fide or in a partial, unjust and oppressive manner, the High Court in the exercise of its writ jurisdiction has ample power to grant relief to the aggrieved party". (East and West Steamship Co. v. Pakistan PLD 1958 SC (Pak.) 41). In our considered view, technicalities cannot prevent High Court from exercising its Constitutional jurisdiction and affording relief which otherwise respondent is found entitled to receive."

47. It is in the above context that Article 199(1A) is to be interpreted. For convenience Article 199(1) and (1A) are reproduced below:

***199. Jurisdiction of High Court**––(1) Subject to the Constitution, a High Court may, if it is satisfied that no other adequate remedy is provided by law,—*

*(a) **on the application of any aggrieved party**, make an **order**—*

*(i) **directing** a person performing, within the territorial jurisdiction of the Court, functions in connection with the affairs of the Federation, a Province or a local authority, to refrain from doing anything he is not permitted by law to do, or to do anything he is required by law to do; or*

*(ii) **declaring** that any act done or proceeding taken within the territorial jurisdiction of the Court by a person performing functions in connection with the affairs of the Federation, a Province or a local authority has been done or taken without lawful authority and is of no legal effect; or*

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*(b) **on the application of any person**, make an order—*

*(i) **directing** that a person in custody within the territorial jurisdiction of the Court be brought before it so that the Court may satisfy itself that he is not being held in custody without lawful authority or in an unlawful manner; or*

*(ii) **requiring** a person within the territorial jurisdiction of the Court holding or purporting to hold a public office to show under what authority of law he claims to hold that office; or*

*(c) **on the application of any aggrieved person**, **make an order giving such directions to any person or authority**, including any Government exercising any power or performing any function in, or in relation to, any territory within the jurisdiction of that Court **as may be appropriate for the enforcement of any of the Fundamental Rights conferred by Chapter 1 of Part II**.*

*(1A) **For removal of doubt**, the High Court shall not **make an order** or give a direction or make a declaration **on its own** or in the nature of **suo motu exercise of jurisdiction** **beyond the contents of any application filed under clause (1)**.*
(Emphasis provided)

48. The High Court, while exercising jurisdiction under Article 199 of the Constitution, in making an order issues directions or declarations with regard to the legality of actions impugned before it. In view of the nature of the cause of action brought before it and the order passed by the High Court to 'right a wrong', the jurisdiction assumed is sometimes characterized in terms of the original understanding of the prerogative writs issued in the United Kingdom. But as a constitutional matter, for our purposes nothing turns on the provenance or origin of the writ jurisdiction. Whether the Court issues a positive direction referred to as mandamus, or a negative direction (requiring a person to refrain from doing something) referred to as prohibition, or a declaration that an act or instrument is of no legal effect often understood as certiorari, or a direction requiring a public office holder to establish that he holds such office lawfully, the historical

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understanding and scope of the prerogative writs does not control the exercise of jurisdiction under Article 199.

49. The Constitution does not refer to the historical names of prerogative writs, and the scope of such writs as understood within common law does not regulate the exercise of jurisdiction by the High Courts under Article 199 of the Constitution. The language used by our written Constitution itself prescribes with clarity the ingredients of the test that must be satisfied by a person filing an application before the High Court, before the Court can assume jurisdiction to hear the grievance brought forth through such application. This was clarified in ***Abdul Shakoor v. Abdul Latif*** **(PLD 1966 (W.P.) Lahore 187)** in relation to the Constitution of 1962 where it was noted that, "*Article 98 of the Constitution omits all references to ancient prerogative writs issued by the Court of Queen's Bench in England, namely writs of habeas corpus, mandamus, prohibition, quo warranto and certiorari. Therefore, for the purpose of any relief claimable under Article 98 of the Constitution, it is scarcely necessary to ask for relief with reference to any specified writ known to common law. Learned counsel for the contesting respondent did not contend that upon the facts alleged in the writ petition no relief under Article 98 was possible. His contention simply was that relief was not claimed in appropriate terms. As pointed out already whether any relief is claimed or not must be judged from a reading of the petition as a whole*."

50. Where an aggrieved person brings an application before the High Court, seeking a remedy for a wrong done to him/her in relation to which he/she has no adequate remedy, the nature of

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order passed by the High Court to remedy a wrong established before it is not dependent on the claimant's articulation of the relief sought. Once an applicant pleads certain facts that make out a case that the person has been wronged, it falls within the domain of the High Court to determine the nature of the order to be passed (i.e. whether it will take the form of a declaration or a direction or both) to right the wrong and dispense justice in relation to the facts of the case. The sole test here is that the relief must have a logical nexus with the facts of the case to do justice in order to address the grievance brought before the Court.

51. To understand the clarificatory nature of Article 199(1A) of the Constitution, we must take note of at least three ancillary matters briefly touched upon above in this judgment. One, that the manner of use of language can be vague or imprecise, which sometimes makes language an imprecise medium of communication. Thus, notwithstanding inadequate use of language in an application, where a legal assertion is made that bears out, the manner of articulation of the relief sought by the applicant is of no consequence. This aspect of formal justice has been dealt in our jurisprudence with the courts emphasizing that technicalities cannot be allowed to obstruct the dispensation of justice. Further, the High Court does not just have the power, but also the duty to mould relief to meet the ends of justice so long as the relief has a logical nexus with the lis.

52. It was observed in ***Pakistan v. Khondkar Ali Afzal*** **(PLD 1960 SC (Pak.) 1)** that, "*it is of the very essence of judicial proceedings that the relief to be granted should follow as a legal result from the right alleged and found. The error in the*

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proceedings is therefore fundamental where the relief granted is different from the one prayed and flows not from the right alleged but from a right which has not been pleaded and as to which the Court has never heard the parties." This observation has sometimes been mistaken as laying down a principle that in granting relief the Court is bound by the prayer clause. In ***Imtiaz Ahmad v. Ghulam Ali (PLD 1963 SC 382)*** it was observed by Justice B.Z. Kaikaus in his minority opinion that, "*the proper place of procedure in any system of administration of justice is to help and not to thwart the grant to the people of their rights. All technicalities have to be avoided unless it be essential to comply with them on grounds of public policy. The English system of o administration of justice on which our own is based may be to certain extent technical but we are not to take from that system its defects. Any system, which by giving effect to the form and not to the substance defeats substantive rights, is defective to that extent*."

53. Kaikaus J's constructive approach to procedural law has prevailed. His approach to technicalities was subsequently etched into the jurisprudence laid down by the Supreme Court. It was held in ***Saiyyid Abul A'la Maudoodi v. The Government of West Pakistan (PLD 1964 SC 673)*** that, "*I also find no difficulty in granting relief because of any defect, in the form of the prayer in the petition. The prayer as framed in the petition is sufficiently wide and, in any event, the Court is not powerless to grant the relief that the justice of the cause requires to the same extent as if it had been asked for*." In ***Salahuddin v. Frontier Sugar Mills & Distillery Ltd. (PLD 1975 SC 244)*** *it was emphasized that the High Court was dutybound to grant relief*

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where it was lawfully due. The Supreme Court noted that, "the appellants had invoked the extraordinary jurisdiction of the High Court, and it mattered little whether the relief claimed by them fell under one clause or the other of the relevant provision of the Constitution. To deny relief to the citizen on such a hyper-technical ground would, in our view, amount to a negation of the beneficial jurisdiction conferred by the Constitution on the High Court in the larger public interest."

54. The limitations on the jurisdiction of the High Courts, now clarified by Article 199(1A) of the Constitution have remained in place for long. It is possibly in view of Article 10-A of the Constitution (which also codified the right to due process and fair trial applied by the courts for long as a subset of the right to natural justice), that Parliament felt the need to clarify that the High Court can only adjudicate a case brought before it by an aggrieved person, and in doing so pass any order or direction or issue a declaration that has a nexus with the lis that forms the subject-matter of the application. This is a requirement of fairness and due process. As the High Court is not vested with suo motu jurisdiction, it must also not pass an order or direction or issue a declaration in relation to a case it has not heard, which the parties before it have not had an opportunity to answer.

55. In ***Tariq Transport Company v. Sargodha-Bhera Bus Service*** (**PLD 1958 SC 437**), when deliberating on the jurisdiction of the High Courts under Article 170 of the Constitution of Pakistan, 1956 ("**1956 Constitution**"), a three-member bench of the Supreme Court held as follows:

> *"Even if the contention that Article 170 confers on the High Court a jurisdiction 'wider' than the writ jurisdiction is for*

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argument's sake assumed to be correct, without deciding the point, it does not follow' that power to move suo motu is given under the said Article. The normal procedure is to move a Court by a petition, or a complaint or a plaint and in cases where power to act suo motu is given it is specifically conferred as in S. 115, Civil Procedure Code, and S. 435, Criminal Procedure Code. I can see no ground for thinking that the intention of the Constitution was to empower the High Courts to send for the records of any of the proceedings before any executive or quasi-judicial authority and satisfy themselves that every department of the Government is functioning satisfactorily."

56. In ***Shahnaz Begum v. The Hon'ble Judges of the High Court of Sind and Baluchistan*** (**PLD 1971 SC 667**), while addressing the jurisdiction of the High Courts under Article 98 of the Constitution of the Islamic Republic of Pakistan, 1962 ("**1962 Constitution**"), a five-member bench of the Supreme Court that, "*under this Constitution, a High Court has been given the power of judicial review of executive actions by Article 98 in certain specified circumstances but even in such a case the High Court cannot move suo motu for, it is specifically provided in each of the sub clauses (a), (b) and (c) of clause (2) of Article 98 that only "on the application of an aggrieved party or of any person," the High Court may make the orders or issue the directions therein specified. It is clear, therefore, that under Article 98, there is no scope for any suo motu action by the High Court.*"

57. More recent pronouncements have only clarified this longstanding understanding of the High Court's constitutional jurisdiction. In ***Dr. Imran Khattak and another v. Ms. Sofia Waqar Khattak and others*** (**2014 SCMR 122**), a three-member bench of the Supreme Court noted that:

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> "*It thus follows that the framers of the Constitution of 1962 and those of 1973, inasmuch as it can be gathered from the words used in Article 98 of the former and Article 199 of the latter, never intended to confer suo motu jurisdiction on a High Court. Had they intended, they would have conferred it in clear terms as the framers of the Code of Civil Procedure under its provision contained in section 115 have conferred it on the High Court and the District Judge and the framers of the Code of Criminal Procedure under its provisions contained in sections 439 and 439-A have conferred it on the High Court and the Sessions Judge respectively. Article 175(2) of the Constitution leaves no ambiguity by providing that "no Court shall have jurisdiction, save as is or may be conferred on it by the Constitution or by or under any law". We would be offending the very words used in the Article by reading exercise of Suo Motu jurisdiction in it which cannot be read even if we stretch them to any extreme.*"

58. In ***Mir Irfan Bashir v. The Deputy Commissioner*** (**PLD 2021 SC 571**), the Supreme Court reiterated the pre-requisites for the exercise of power under Article 199(1) of the Constitution, which are *in pari materia* with the conditions now stipulated in Article 199(1A):

> *"After hearing the learned counsel for the parties, we at the very outset wish to point out that there must exist a dispute before the High Court before it exercises judicial power. 'On the application of an aggrieved party' is an essential pre-requisite to invoke the constitutional jurisdiction of the High Court under Article 199 of the Constitution. There must be an application and an applicant to invoke the jurisdiction of judicial review as the High Court does not enjoy suo motu jurisdiction under Article 199."*

59. In ***Sadiq Poultry (Pvt.) Ltd. v. Government of Khyber Pakhtunkhwa*** (**PLD 2023 SC 236**), a two-member bench of the Supreme Court held that, "*it is settled law that the High Court does not have suo motu jurisdiction under Article 199 of the Constitution of the Islamic Republic of Pakistan (the*

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"Constitution") as compared to this Court which has been conferred exclusive jurisdiction in the matter by the Constitution in terms of Article 184(3)" In ***Hafsa Habib Qureshi v. Amir Hamza*** (**PLD 2024 SC 780**), the Supreme Court reiterated that, *"prior to exercising judicial power under Article 199 of the Constitution, there must be an existing dispute before the High Court, which must be brought to its attention by an aggrieved person*." Likewise in ***Abdullah Jumani v. Province of Sindh*** (**2024 SCMR 1258**), the Supreme Court held that, *"it is a settled exposition and ratification of law that the High Court does not possess any suo motu jurisdiction under Article 199 of the Constitution."*

60. The afore-mentioned precedents (some of which have been emphatically relied upon by the learned Additional Attorney General as well as the learned counsel for Respondent No. 4), enumerated the constitutional jurisdiction of the High Courts prior to the promulgation of Article 199(1A) of the Constitution. This body of law only confirms that Article 199(1A) is clarificatory in nature, textualizing the scope of jurisdiction vested in the High Court under Article 199(1) of the Constitution as had already been held by the Supreme Court, not just under the Constitution of 1973, but also under all its predecessor Constitutions that remained in force in Pakistan.

61. In construing High Courts judicial powers, particularly in the post-26th Constitutional Amendment context, it would be absurd to assume that Parliament sought to establish a legal system in which constitutional courts (that exist as the remedial mechanism for enforcement of fundamental rights and act as a restraint on the illegal exercise of state power) must remain

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shackled by the words used in the prayer clause of an application. And while counsel representing contesting parties in our adversarial system of litigation appear and make extensive legal submissions in support of the case brought before the Court, such submissions can have no bearing on the Court's understanding of the real contest between the parties or the construction of the relief sought.

62. The manner in which a constitutional Court tailors the relief that is to be afforded to remedy the injury or wrong established before it involves some discretion. This 'soft discretion' is different from the 'hard discretion' enjoyed by policy-makers, as judges must always decide cases guided by law and legal principles. The manner of exercise of such discretion may vary depending on the judge hearing the case. But the existence of discretion and the manner of its exercise do not leave a judicial decision bereft of jurisdiction so long as the court answers the case brought before it and doesn't cause prejudice to the contesting parties before it by affording them an opportunity to dispute the facts alleged in the application filed by an aggrieved person and contest the legal grounds. The Supreme Court noted in ***Mir Irfan Bashir*** that:

> "*While exercising judicial review, there comes a point when the decision rests on judicial subjectivity; which is not the personal view of a judge but his judicial approach. One judge may accord greater significance to the need for change, while the other may accord greater significance to the need for certainty and status quo. Both types of judges act within the zone of law; neither invalidates the decision of another branch of the Government unless it deviates from law and is unconstitutional. Activist judges (or judicial activism) are less influenced by considerations of security, preserving the status quo, and the institutional constraints. On the other hand, self-restrained*

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judges (or judicial restraint) give significant weight to security, preserving the status quo and the institutional constraints. Both judicial activism and judicial self-restraint operate within the bounds of judicial legitimacy."

63. One of the manifestations of exercise of discretion by the Court is the manner in which it moulds relief to dispense justice in the facts and circumstances of a case. In ***Samar Gul v. Central Government*** (**PLD 1986 SC 35**), the Supreme Court held that "*it is well-settled that a Court is empowered to grant such relief as the justice of the case may demand and for purposes of determining the relief asked for, the whole of the plaint must be looked into, so that the substance rather than the form should be examined*." In view of the facts of the case, the Supreme Court observed that the parties to the suit had knowledge of the '*real nature of the suit*', and there was therefore no substance in the respondents' argument that the plaintiff was disentitled from seeking the redemption of the mortgage as he had not prayed for the same.

64. In ***Dr. Mrs. Nasim Qureshi v. Deputy Administrator Evacuee Trust Property*** **(1987 CLC 213 [Karachi])**, the Sindh High Court held that, "*mere omission on the part of the petitioner to make a specific prayer in the prayer clause could not disentitle him to the relief if otherwise he is entitled to it on the facts and circumstances of the case*." In ***Hitachi Limited v. Rupali Polyester*** **(1998 SCMR 1618)** the Supreme Court held, while relying on ***Zulfiqar Ali Babu v. Government of Punjab*** ***(PLD 1997 SC 11)*** that, "*while granting relief the Court can dispense with the technicalities and may mould the relief according to the requirement, if the dictates of justice so demand*." In ***Javaid Iqbal v. Abdul Aziz*** **(PLD 2006 SC 66)**, while relying on ***Mir***

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Mazar v. Azim **(PLD 1993 SC 332)** it was emphasized by the Supreme Court that, "*rules of procedure are meant to advance justice and to preserve rights of litigants and they are not meant to entrap them into a blind corner so as to frustrate the purpose of law and justice*."

65. In ***Sadiq Poultry*** the Supreme Court, while deprecating the High Court's overstepping of its jurisdictional limits, observed that "*the learned High Court could only pass appropriate and lawful orders on matters which have a direct nexus with the lis before it and could not overstep or digress therefrom*." While in negative language, the test reiterated by the Supreme Court was that the order passed must "*have a direct nexus with the lis*" before the High Court. It is only when a High Court while hearing a case goes on to decide a matter that has no direct nexus with the case brought before it by a person under Article 199(1) of the Constitution, that it can be seen as transgressing the jurisdiction vested in it. As, in such case, the manner of exercise of judicial power is tantamount to assumption of suo motu jurisdiction with the High Court deciding a matter not connected to or arising out of the *lis* brought before it.

66. In ***Sharaf Faridi v. The Federation of Islamic Republic of Pakistan*** (**PLD 1989 Karachi 404**), subsequently affirmed by the Supreme Court in ***Government of Sindh vs. Sharaf Faridi*** (**PLD 1994 SC 105)**, a full bench of the Sindh High Court held that "*a Court having jurisdiction to adjudicate upon a matter, has the power to mould a relief according to the circumstances of the case, if dictates of justice so demand even if such a relief has not been expressly claimed provided the relief to be given is within*

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the compass of the jurisdiction of the Court." In ***Fecto Belarus Tractors Ltd. v. Federation of Pakistan*** **(PLD 2006 Karachi 479**), the Court observed that in the exercise of judicial review, "*the dominant prevailing view is that the Court can mould the relief and allow the same though it is not prayed for, as the Courts are not merely slaves of the technicalities but are the Courts of justice and, therefore, the relief can be molded in a way which serves the purpose of justice.*"

67. In ***Mirza Muhammad Arif and others v. Chief Engineer*** (**PLD 2009 Lahore 489**), while moulding relief for the effective adjudication of the dispute before it, the Lahore High Court held that "*the constitutional jurisdiction of the Court is meant to promote substantial justice. Any steps taken by a party during the proceedings must not be allowed to circumvent the process of the Court or its finding or else judicial determination of live controversies shall be rendered to be of academic value only.*" Likewise, in ***Ali Riaz Kirmani v. Election Tribunal, Punjab Bar Council*** (**2019 CLC Lahore 340**), the Lahore High Court clarified that while deciding a constitutional petition the Court was empowered to grant an '*effective or ancillary relief, even if not prayed for*'.

68. In ***Masal Khan v. Shah Tarina*** (**2012 CLC Peshawar 206**), the Peshawar High Court noted that, "*the prayer clause of plaint clearly shows that she has prayed for any other relief to which she is found entitled, in the interest of justice. So this phrase of the prayer clause clearly encompasses, required relief granted to the plaintiff. It is, by now, settled law that in the interest of justice and circumstances of the case, if the party is*

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found entitled to any relief, she may not be denied due to any formal defect in his/her pleading. In view of new dispensation of justice, duty has been cast on the courts to strive for construction of statute and appreciation of evidence which would advance cause of justice by providing relief to a party entitled thereto and to suppress mischief of denying such right on the ground of unnecessary technicalities."

69. In ***Mari Gas Company Ltd. v. Byco Petroleum Pakistan Ltd.*** **(PLD 2013 Sindh 314)**, the Sindh High Court noted that, "*the plaint must be looked into as a whole in order to determine relief that may be granted, if it is decipherable from reading the plaint. The prayer clause cannot be read in isolation, but it will be read with the case set up by the plaintiff*."

70. It is equally settled that a Court can take cognizance of events subsequent to the filing of a petition that are connected with and arising out of the *lis* brought before it. The underlying principles here too are fairness and efficiency. It is not fair to demand that a party that has brought a case before the Court, which the Court is seized of, be denied relief or be asked to amend his/her pleadings, merely because the contesting party continues to take steps in furtherance of what is found by the Court to be illegal action. In such circumstances, insisting that the aggreived party first amend the form of its application for the Court to be able to take cognizance of subsequent events would be, to state the obvious, giving precedence to form over substance. Constitutional Courts in Pakistan have never allowed such technicalities to frustrate the dispensation of justice.

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71. The most comprehensive judgment in this regard is ***Amina Begum v. Meher Ghulam Dastgir*** **(PLD 1978 SC 220)** wherein the Supreme Court explained the law as follows:

> "…*the ordinary rule is that a Court should give its decision on the facts and circumstances as they existed at the date of the institution of the suit or at the date of any subsequent amendment of the pleadings and should not take notice of events or decisions which have happened after such date. But if a cause of action not available on the date of the suit accrues during its pendency, the Court in its discretion may grant an amendment of the plaint so as to enable the plaintiff to include the fresh cause of action. Where however, the facts are not in dispute and the accrual of a cause of action subsequent to the suit is under the terms of a statute of which the Courts must take notice, a formal amendment of the plaint is unnecessary, for the Court is bound to administer the law of the land at the date when it gives its decision on a dispute.*"

The Supreme Court cited with approval dicta from ***Mills v. Green*** **((1895) 159 US 165)** wherein it was held that, "*ordinarily, the decree in a suit should accord with the rights of the parties as they stand at the date of its institution. But where it is shown that the original relief claimed has, by reason of subsequent change of circumstances, become inappropriate or that it is necessary to have the decision of the Court on the altered circumstances in order to shorten litigation or to do complete justice between the parties, it is incumbent upon a Court of justice to take notice of events which have happened since the institution of the suit and to mould its decree according to the circumstances as they stand at the time the decree is made*." The Supreme Court concluded by holding that, "*in our considered opinion a discretion is vested in this behalf in the Courts to be judicially exercised in proper cases in order to avoid multiplicity of proceedings, to shorten litigation, and to do complete justice between the parties and mould the*

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relief according to the altered circumstances in the larger interest of justice."

72. The Supreme Court reiterated this principle in ***Syed Ali Asghar v. Creative (Builders)*** **(2001 SCMR 279)** by holding that, "*the Court could take notice of the changed circumstances and subsequent events relevant for the determination of controversy between the parties*." This principle remains good law and was reaffirmed in ***Evacuee Trust Property Board v. Mst. Sakina Bibi*** **(2007 SCMR 262)** and ***Mst. Muhammadi v. Ghulam Nabi*** **(2007 SCMR 761)**.

73. In ***Mirza Muhammad Arif v. Chief Engineer*** (**PLD 2009 Lahore 489**), while moulding relief for the effective adjudication of the dispute before it the Lahore High Court held that "*the constitutional jurisdiction of the Court is meant to promote substantial justice. Any steps taken by a party during the proceedings must not be allowed to circumvent the process of the Court or its finding or else judicial determination of live controversies shall be rendered to be of academic value only.*" In ***Mian Rafat Mehmood v. Director General Lahore Development Authority*** (**2016 CLC Lahore 408**), the Lahore High Court noted that, "*generally relief cannot be granted in favour of any party beyond the scope of prayer clause, however, it is equally true that the jurisdiction of this Court to look into the subsequent events, in particular those which surfaced during pendency of a lis before it and has direct nexus with the subject of the pending lis, cannot be abridged while following the principle that relief cannot be granted beyond the prayer clause.*" It was explained in ***Haji Zahoor-ud-Din v. Khalid Latif*** (**2016 MLD**

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Lahore 1623) that the purpose of conferring this power on the Court is to "*avoid multiplicity of proceedings, to shorten the litigation and above all to do complete justice between the parties.*"

74. In ***Ayyan Ali v. Federation of Pakistan*** (**2017 PCr.LJ Sindh 920**), the Sindh High Court held that "*the law has always preferred a matter not to be defeated by technicalities but decided on merits*." It went on to state that the Court "*must do complete justice in [its] constitutional jurisdiction where often the might of the State is pitted against the individual.* ***In such situation is the Court supposed to close its eyes and ears to this matter and wash its hands of the matter as opposed to doing complete justice under its discretionary constitutional jurisdiction?***'. Similarly, the Sindh High Court held in ***KESC Labour Union v. Federation of Pakistan*** (**2023 CLD Sindh 718**), that the Court may take cognizance of subsequent events during the pendency of the lis, '*in order to do complete justice*', so long as it does not '*chang[e] the complexion of the proceedings*', or involve inquiries into disputed questions of fact.

75. To reiterate, the scope or manner of exercise of the original jurisdiction of the High Court under Article 199 of the Constitution has not changed following the insertion of Article 199(1A). The provision only clarifies what has long been established by case law: the High Court is not vested with suo motu jurisdiction and must not exercise its judicial power in a manner that results in deciding a case that has no direct nexus with the *lis* brought before it by an applicant. But moulding relief to dispense substantial justice or taking cognizance of events

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subsequent to the filing of an application, that are connected with the *lis* before the Court and in relation to which contesting parties have the opportunity to make submissions before it, does not equate to exercise of suo motu jurisdiction.

76. Article 199(1A) of the Constitution clarifies that the High Court may not make an order "*on its own…beyond the contents of any application filed",* as it is such exercise of judicial power that would qualify as the Court acting on its own in relation to a case not brought before it and in transgression of its jurisdiction. Article 199(1A) does not refer to the 'prayer clause' of the application or state that High Court may not make an order beyond what is sought by the prayer clause. The reference to the '*contents of the application*' reaffirms the obligation for the Court to reasonably, sensibly and holistically appreciate the entire body of the application to understand the nature of the dispute it has been called upon to adjudicate. The legislative intent behind enacting Article 199(1A) of the Constitution was not to castrate the constitutional machinery for enforcement of fundamental rights. If anything, the reference to the contents of the application has clarified that in granting relief, the High Court is not hostage to the wording of the prayer clause, as mistakenly held in some precedents pre-dating Article 199(1A).

77. Nothing in Article 199(1A) prevents the High Court from moulding relief in view of the facts of the case to dispense substantive justice and remedy the injury being caused. It is thus that the objections to the maintainability of the petition or to this Court's ability to take note of events subsequent to the filing of the petition are misconceived. The case made out in the

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application being adjudicated by this Court was that the Federal Government had illegally initiated a recruitment process to hire Member (Administration) for PTA in breach of the Telecom Act and the PTA Appointment Rules. And that the Impugned Advertisement has been designed to accommodate a pre-identified individual, and the eligibility criteria for such post had been tailored accordingly. The parties before the court fully understood the nature of the challenge and this Court in its order dated 05.03.2024 had put the Federal Government on notice that any appointments made pursuant to the Impugned Advertisement pending adjudication of the matter by this Court would remain subject to its outcome.

78. It can therefore not be countenanced that just because Respondent No. 4 was appointed as Member (Administration) and then Chairman PTA during the pendency of the instant case, the Court must stay its hand from considering the legality of such appointments or require the petitioner to bring a fresh challenge before the Court to enable it to take stock of such developments that have a direct nexus with the *lis* pending. Requiring the petitioner to do so would serve no purpose as all parties whose actions and rights are in question are before the Court. The facts relevant to the controversy are not in dispute. The Federal Government, PTA and Respondent No. 4 have been afforded the opportunity to contest the matter and they have done so by filing detailed reports, responses and written arguments. The outcome of the controversy rests on application of law to the facts brought forth through the content of the application being adjudicated. Let us now proceed with the merits of the case.

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Relevant Facts re Appointment of Member/Chairman PTA

79. The facts germane to the question of legality of the Impugned Advertisement and the appointment made pursuant to it are serialized bellow:

I. On 25.01.2023, the Ministry of Information Technology & Telecommunication **(MoIT&T)** initiated correspondence addressed to the Cabinet Division expressing its desire for the creation of a new post of Member (Administration) of PTA in addition to the three existing posts of Member (Finance), Member (Technical) and Member (Compliance & Enforcement). The letter noted that, *"The new post must carry the technical capabilities of the telecommunication sector as well as administration capacity* ***to run the organization*** *efficiently." (emphasis provided)* The Ministry of MoIT&T did not state why the need to create a new post was felt, and noted that the new post for Member (Administration) ought to have the ability to run the organization, with the underlying assumption that Member (Administration) may also be appointed as Chairman PTA.

II. On 13.02.2023, PTA responded to the Cabinet Division's letter dated 09.02.2023 in relation to the suggestion to create the post of Member (Administration) by advising that the input of relevant stakeholder ministries be sought in view of sections 3(8) and 3(9) of the Telecom Act. On the very next day, i.e. 14.02.2023, PTA somehow felt the need to issue another letter to endorse the suggestion that certain internal functions of

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the organization could be augmented by the addition of a member in the organogram of PTA. This endorsement was at odds with PTA's restrained stance in its previous letter issued on 13.02.2023.

III. On 21.02.2023, the Cabinet Division initiated a summary for the Prime Minister for the creation of the post of Member (Administration) in PTA. The summary noted that the views of PTA had been solicited in relation to MoIT&T's proposal. The summary delineated the requisite steps and changes that were required to give effect to the proposal in the following terms:

i. *Section 3(8) of Pakistan Telecommunication (Re-Organization) Ac, 1996 provides that the powers of the Authority in the matter relating to its administration and staff of the Authority shall be exercised by the Chairman, including those mentioned in Section 10, in accordance with the regulations made by the authority pursuant to sub-section (3) of Section 10 and other relevant regulations made by the Authority from time to time (Annex-V). In case of the creation of the post of Member (Administration), there may be duplication of functions that will need to be addressed through necessary amendment*.

ii. *Section 3(9) of the Act ibid states that the decision of the authority shall, subject to sub-section (8), be taken with the concurrence of the majority of its members. Currently, the PTA has three members being an odd number, which makes the decision making possible in case of matters where there is a difference of opinion. Having a fourth member of the Authority will require changes/amendment in the Act to resolve*

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the issue. One way could be giving casting vote right to the Chairman in case of a tie of votes.

iii. *The qualification/experience of the newly proposed post would also be required to be added in the Schedule-I of the Pakistan Telecommunication Authority Chairman and Member (Appointment and Qualification) Rules, 2013, which entails amending rules*.

This summary sought the approval of the Prime Minister to place it before the Federal Cabinet and included a draft outlining the qualifications and age limit for the proposed post of Member (Administration), which was to be approved by the Federal Cabinet. This proposal containing the eligibility criteria prescribed the maximum age for the new post of Member (Administration) to be 61 years in contrast to the maximum age prescribed for existing Members in the PTA Appointment Rules i.e. 57 years.

IV. On 02.03.2023, the Establishment Division endorsed the proposal to increase the number of Members in PTA.

V. On 10.03.2023, the Finance Division, while not opposing the proposal and highlighting that the financial cost of the post would need to be borne by PTA, noted that, *"the Federal Government has imposed a number of austerity measures for the FY 2022-2023. These austerity measures include a complete ban on creation of new posts, except those required by development projects."*

VI. The Prime Minister approved the summary initiated by Cabinet Division on 15.03.2023.

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VII. The Cabinet Division then put the summary approved by the Prime Minister to the Federal Cabinet, again detailing the amendments required to be made in the Telecom Act and highlighting that the creation of the post of Member (Administration) would result in duplication of functions between Member (Administration) and Chairman PTA, which would need to be addressed by amending the provisions of the Act and that the criteria for the post of Member (Administration) would need to be added in Schedule I of the PTA Appointment Rules. This summary dated 17.03.2023 was approved by the Cabinet through circulation on 21.03.2023.

VIII. On 22.03.2023, a fresh summary was initiated, noting that before the appointment of Member (Administration), amendments in the Telecom Act and PTA Appointment Rules would be required. And as the amendment of the Telecom Act and the PTA Appointment Rules would take time, the process of amendment of the law as well as the recruitment of Member (Administration) be initiated simultaneously.

IX. The Prime Minister in his capacity as Minister-in-Charge, approved the summary on the very same day i.e. 22.03.2023, and directed that the proposed amendments in the Telecom Act and the PTA Appointment Rules as well as the process of initiating the recruitment of a new Member (Administration) be initiated simultaneously and the process of appointment be completed within a period of one month.

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X. On 24.03.2023, a new summary was initiated to be placed before the Federal Cabinet, requiring approval for initiating amendments in the Telecom Act and the PTA Appointment Rules and also approving the draft advertisement describing the criteria for appointment of Member (Administration), including that the upper age limit of eligibility to such post would be 61 years. This summary was also approved by the Federal Cabinet by circulation on the very next day i.e. 25.03.2023.

XI. On 28.03.2023, the Cabinet Division published an advertisement to fill the post of Member (Administration) PTA, describing qualifications and experience to include a candidate holding a Master's degree in Public or Business Administration/Social Sciences/ or an MS/ BS in Telecommunications or equivalent qualifications recognized by the Higher Education Commission. It mentioned a maximum age of 61 years and invited applications within a period of 15 days of publication of the advertisement. This advertisement has been impugned in the instant petition.

XII. The proposed draft rules, enacting amendments in the PTA Appointment Rules to prescribe the qualifications of Member (Administration), were notified by the Cabinet Division on 20.04.2023, i.e. at least a week after the expiry of the period for receipt of applications for the post of Member (Administration). This notification was gazetted on 04.05.2023.

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XIII. Meanwhile, a committee was constituted to make recommendations with regard to the terms and conditions of service of heads and members of regulatory authorities, under the chairmanship of Federal Minister for Economic Affairs Division. This committee held meetings on 15-03-2023 and 16-03-2023. The committee made recommendations re the maximum age for heads of authorities and members of authorities at the time of initial appointment. And for purposes of PTA, such maximum age was recommended to be 61 years. The committee also recommended that in order to give effect to its recommendations vis-a-vis PTA, amendments would need to be introduced into the Telecom Act and the PTA Appointment Rules.

XIV. While the committee constituted to recommend terms and conditions of service for heads and members of regulatory authorities concluded its meeting on 16.03.2023, a summary had already been initiated by the Cabinet Division on 21.02.2023 (mentioned above) that had recommended for approval of the Prime Minister that the maximum age for initial appointment of the new Member (Administration) be 61 years, notwithstanding that PTA Appointment Rules prescribed a maximum age limit for initial appointments for members to be 57 years.

XV. The PTA Appointment Rules as amended by notification dated 02.04.2023 and gazetted on 04.05.2023 prescribed the maximum age for appointment of Member (Administration) to be 61 years and left the

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maximum ages for the other three members as already prescribed to be 57 years.

XVI. In its order dated 24.05.2023 in the instant petition, this Court noted that the difference in the age limit prescribed for the posts of members of PTA may be discriminatory and this aspect of the matter would be considered by this Court while rendering judgment.

XVII. On 29.05.2023, the Prime Minister directed on the basis of recommendations of the committee constituted to reconsider terms and conditions of service of heads and members of regulatory authorities that a summary be initiated to make amendments in the PTA Appointment Rules to increase the maximum age at the time of initial appointment for all members to 61 years. On 01.06.2023, such summary was approved by the Cabinet for enactment of amendments in the PTA Appointment Rules. On 01.06.2023, the notification for such amendment was issued, which was subsequently gazetted on 05.06.2023. Pursuant to such amendment, the maximum age for the appointment of all members of PTA was prescribed as 61 years.

XVIII. Pursuant to the advertisement dated 28.03.2023, inviting applications for the post of Member (Administration), the last date for receipt of which was 11.04.2023, 63 applications were received.

XIX. On 17.04.2023, a scrutiny committee for shortlisting applications for the post of Member (Administration) PTA was constituted, which convened a meeting on

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28.04.2023 and shortlisted 24 candidates who fulfilled the eligibility criteria mentioned in the advertisement.

XX. By notification dated 27.04.2023, a Selection Committee was constituted in terms of section 3(2) of the Telecom Act read with rule 4(4) of the PTA Appointment Rules to recommend a candidate for the post of Member (Administration). The selection committee conducted interviews on 04.05.2023. It evaluated all candidates in view of the eligibility criteria on the basis of their education qualifications, relevant experience and performance during the interview and recommended the following three candidates in order of the merit determined by the selection committee in view of the marks awarded to them.

i. Mr. Muhammad Amir Malik awarded a total of 408 marks.
ii. Mr. Saadullah Tareen awarded a total of 388.5 marks
iii. Major General (R) Hafeez Ur Rehman awarded a total of 351.5 marks.

XXI. On 11.05.2023, Muhammad Amir Malik, who was placed at the top of the merit list by the Selection Committee, wrote to Secretary Cabinet Division seeking to withdraw his application due to his continuing work at Pakistan Revenue Automation Limited (PRAL), where he was serving as Chief Executive Officer.

XXII. On 24.05.2023, the Federal Government (Cabinet Division) issued a notification appointing Major General (R) Hafeez Ur Rehman as Member (Administration). (Despite repeated reminders, no summary or reasoning

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why Major General (R) Hafeez Ur Rehman was considered fit for appointment as Member (Administration) from the panel recommended by the selection committee was provided to the Court.)

XXIII. On 25-05-2023, Major General (R) Hafeez Ur Rehman took charge of the position of the Member (Administration) PTA. On the same day i.e. 25-05-2023, the Federal Government issued a notification appointing Major General (R) Hafeez Ur Rehman as Chairman PTA. (The Court was informed that no independent process was run to select the Chairman from amongst members of PTA and there was no summary that documented reasons that prevailed with the Federal Government to appoint Major General (R) Hafeez Ur Rehman as Chairman from amongst members).

Relevant Legal Provisions

80. Before we analyze the aforementioned facts and the integrity of the selection process, let us reproduce the provisions of the Telecom Act relevant for purposes of this petition:

> ***Section 3(2)***— *The Authority shall consist of three members one of whom shall be a professional telecommunication engineer and other shall be a financial expert, to be appointed by the Federal Government for a term of four years and shall be eligible for appointment for a similar term or terms:*
>
> *Provided that the Federal Government may increase the number of members of the Authority and prescribe their qualifications and mode of appointment.*
>
> ***Section 3(3)***— *The Federal Government shall, from amongst the members appointed under sub-section (2), appoint a member to be the Chairman of the Authority.*

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Section 3(8)— *The powers of the Authority in the matters relating to its administration and the staff of the Authority shall be exercised by the Chairman, including those mentioned in section 10, in accordance with regulations made by the Authority pursuant to sub-section (3) of section 10 and other relevant regulations made by the Authority from time to time*.

Section 3(9)— *The decision of the Authority shall, subject to sub-section (8), be taken with the concurrence of the majority of its members.*

Section 2, *which defines the terms used in the telecom act, defines "prescribed" in* ***section 2(m)*** *to mean, "prescribed by rules made under this Act."*

57. Power to make rules.—(1) *For carrying out the purposes of this Act, the Federal Government may, from time to time, by notification in the official Gazette, make rules not inconsistent with this Act. (2)*

81. In exercise of the power conferred by section 57(1) of the Telecom Act, the Federal Government prescribed the PTA Appointment Rules that were notified on 19.02.2013. Rule 4 provides the following (prior to the amendment in these Rules as notified on 04.05.2023):

4. Qualifications for appointment—*(1) The educational qualifications and experience for appointment of Member (Finance), Member (Technical) and Member (Compliance and Enforcement) PTA shall be as prescribed in the Schedule-I to these rules.*

(2) Appointment of any Member shall be made by the Federal Government by one or more of the following methods, namely:—

(a) by initial appointment through advertisement;

(b) through deputation of the civil servant not below the rank of Additional Secretary (BPS-21):

Provided that in case an appointment is to be made under clause (b) of sub-rule (2) a panel of three officers will be put up for approval of the Federal Government.

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(3) In case of appointment of Member through an advertisement, the post shall be advertised in the press, in English and Urdu newspaper, inviting applications for the post of member.

(4) A Selection Committee as per Schedule-II to these rules shall conduct interview for making recommendation to the Federal Government. The Committee shall conduct interview of the shortlisted candidate and give its recommendations with reasons and justifications for approval of the Federal Government within three working days from the date of conclusion of interviews.

(5) In case an officer already in government service is appointed as Member (Finance), Member (Technical) or Member (Compliance & Enforcement) as per prescribed procedure specified in sub-rule (4) shall be appointed on deputation till the age of superannuation or expiry of the term whichever is earlier. In case he attains the age of superannuation before expiry of the term of four years, the remaining period of unexpired term shall be completed as contract appointment. In such case, he shall be entitled to the pay of the post for the entire tenure

Rule 6 in relation to the appointment of Chairman provides the following:

6. Appointment of Chairman.—*The Federal Government shall appoint a Member to be the Chairman of the Authority from amongst the Member appointed under sub-section (2) of Section 3.*

Schedule I to the PTA Appointment Rules provided the following:

SCHEDULE I

[See Rule 4(1)]

S. No.	Name of Post	Qualification & Experience	Maximum Age
1.	Member (Finance)	The applicant should be a financial expert/Chartered Accountant/ FCA/ CFA/ CPA/ CIMA from a recognized Foreign/ Local University/ Institution of high repute with fifteen years experience including at least five years at the top management level.	57 years

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2.	Member (Tech)	(a) Ph.D. in Telecom, Electronics or Electrical Engineering with major in telecommunication with fifteen years relevant experience in a responsible position in public or private sectors. OR M.Sc./M.S(Electrical/ Electronics/Telecommunications Engineering) with major in Telecommunication or in a related discipline with a minimum of eighteen years experience in a responsible position in public / private sector. The experience of working in the field of Telecommunications/ Regulatory organization will be preferred.	57 years
3.	Member (Compliance & Enforcement)	Ph.D / Professional Charter in Business /Finance/ Regulatory Economics / Administration / Corporate Management/ Telecommunications / Computer Sciences / Information Technology from Foreign/Local Institutions with 15 years experience including at least five years at the top management level. OR Master's Degree in above disciplines or ELM from a foreign or local university with 18 years relevant experience in Public / Private	57 years

82. The PTA Appointment Rules, as amended through Gazette notification dated 04-05-2023, included the expression "Member (Administration)" in Rule 4(1) of the PTA Appointment Rules. And it further amended Schedule-I to provide for the educational qualification and experience for appointment of Member (Administration), as follows:

S. No.	Name of Post	Qualification & Experience	Maximum Age
4.	Member (Administration)	Master's in Public or Business Administration/ Social Sciences/ M.S/ BSc in telecommunication or Equivalent qualification recognized by the HEC. Experience: Minimum 20 years of post-Qualification, including at least five years' senior administrative leadership experience	61 years

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		related to policy, strategy development and operational management of reputable public or private organization/ institution. In case of Bachelor i.e. BSc. Telecommunication or equivalent, the experience required would be 24 years, including 05 years in leadership position.	

83. By notification that was published in the Gazette on 05.06.2023, Schedule I of the PTA Appointment Rules was further amended and the maximum age of 57 at the time of appointment for the three original members, i.e. Member (Finance), Member (Technical) and Member (Compliance and Enforcement) was enhanced to 61, bringing it in conformity with the maximum age provided for the new post of Member (Administration).

Analysis of facts re Appointment of Member/Chairman PTA

84. The first matter to note when the aforementioned facts are considered in juxtaposition to the relevant provisions of the Telecom Act and PTA Appointment Rules is that while all summaries initiated for the consideration of the Prime Minister and the Federal Cabinet in relation to creation of the post of Member (Administration) recommended amendments to the provisions of the Telecom Act, and such recommendations were also approved by the Prime Minister and the Federal Cabinet, the provisions of the Telecom Act have not been amended. The summaries highlighted the fact that Section 3(8) of the Telecom Act provides that the authority in the matters relating to the administration and the staff of PTA shall be exercised by the Chairman. The creation of the post of Member (Administration)

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would create duplication as such member would be discharging duties that have been placed by Section 3(8) of the Telecom Act within the domain of Chairman PTA. Section 3(3) of the Telecom Act provides that the Federal Government shall appoint a person to be the Chairman from amongst the members of PTA. Thus, unless it was to be assumed that the person appointed as Member (Administration) would necessarily be appointed as Chairman PTA, the post of Member (Administration) would by design end up discharging functions which, by virtue of Section 3(8), had been assigned by the Legislature to the office of Chairman PTA. Any the assumption that Member (Administration) would necessarily and always be Chairman PTA, would contradict the legislative intent manifest in Section 3 of the Telecom Act, which vests in the Federal Government the power to select a Chairman from amongst all members of PTA.

85. The second matter requiring amendment in the Telecom Act concerned the decision-making process prescribed by Section 3(9) of the Telecom Act, which provides that PTA would render decisions with the concurrence of the majority of its members. As the number of members prior to the creation of the post of Member (Administration) was three, the decision-making mechanism posed no challenges with, three being an odd number. With the creation of the new post of Member (Administration), the total number of members rose to four, which, being an even number, would pose a problem in the event of a tie between the members: there would be no mechanism to render a decision with the concurrence of the majority as required by section 3(9) of the Telecom Act. This is why the summaries put up for consideration of the Prime

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Minister and the Federal Cabinet recommended that sections 3(8) and (9) of the Telecom Act be suitably amended for purposes of creation of the post of Member (Administration).

86. The next matter that arises in view of provisions of the Telecom Act is that the proviso to section 3(2) vests in the Federal Government the power to increase the number of members of PTA and to prescribe their qualifications and mode of appointment. The word "prescribe" is defined by section 2(m) of the Telecom Act to mean *"prescribed by rules made under this Act."* Section 57(1) of the Telecom Act vests in the Federal Government the power to make rules *"by notification in the official Gazette."* The statutory scheme makes it abundantly clear that the qualifications and mode of appointment in terms of section 3(2) of the Telecom Act are to be prescribed by rules and such prescription takes effect by virtue of notification of rules in the official Gazette. In the instant case, it is not denied that the notification for amendment of the PTA Appointment Rules to include within rule 4(1) the office of Member (Administration) and to prescribe qualifications, experience and age limit for the post of Member (Administration) within Schedule-I of the PTA Appointment Rules was published in the official Gazette on 04-05-2023. Thus, as a formal matter, the criteria for appointment of Member (Administration) was prescribed on 04.05.2023, notwithstanding that it was approved by the Federal Cabinet on 25.03.2023, by a decision rendered through circulation.

87. It is a settled principle that where law requires a thing to be done in a certain way, it must be done such or not at all. While Rule 4(1) of the PTA Appointment Rules and Schedule-I to

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such Rules provided for the office of Member (Administration) and set out the qualifications for such office, these changes were prescribed in terms of Section 57(1) of the Telecom Act by publication in the official Gazette on 04.05.2023. However, the advertisement for such post had already been published on 28.03.2023, with 11.04.2023 being the last date for receipt of applications. The selection committee constituted for interview of candidates for the post of Member (Administration) in terms of Rule 4 of the PTA Appointment Rules, had also interviewed all candidates for the post and issued its recommendations putting up a panel of three persons to the Federal Government on 04.05.2023 (i.e. the very date on which amendments to the PTA Appointment Rules to provide for the Office of Member Administration was prescribed through Gazette notification).

88. Intriguingly, the summary for the Prime Minister for proposing creation of the post of Member (Administration) was initiated on 21.02.2023, which highlighted the requirement for making amendments in the PTA Appointment Rules should the proposal be approved. This summary was approved by the Prime Minister on 15.03.2023 and accordingly a summary for creation of the post of Member (Administration) was put up before the Federal Cabinet dated 17.03.2023, which was approved through circulation by the Cabinet on 21.03.2023. As mentioned above, these summaries, while seeking approval for the creation of the post of Member (Administration) and the terms and conditions, including a maximum age limit of 61 years for the post of Member (Administration), highlighted the need for enacting amendments in the PTA Appointment Rules. After the summaries were approved, the Cabinet Division fascinatingly conceived the

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idea that the recruitment to the post of Member (Administration) must be undertaken with haste. Thus, on 22.03.2023, a summary was initiated for the Prime Minister stating that as the required amendments in the PTA Appointment Rules would require some time, *"the process of amendments in Act/Rules as well as the recruitment of Member (Administration) may be initiated simultaneously."* On the very same day i.e. 22.03.2023, the Prime Minister directed that the summaries requiring amendments in the Telecom Act be placed before the CCLC within three days, the summary requiring amendment in the PTA Appointment Rules along with the advertisement for the Post of Member (Administration) be placed before the Federal Cabinet, which approval would be sought through circulation, and the process of appointment for the post of Member Administration be completed within a period of one month. A summary dated 24.03.2023 was then prepared for the Federal Cabinet seeking placement of amendments in the Telecom Act before CCLC and seeking approval for amendment of the PTA Appointment Rules, as well as a draft advertisement for the post of Member (Administration) together with the appointment criteria, including a maximum age of 61 years, along with a decision that the appointment process be completed within one month. This summary was approved by the Federal Cabinet on 25.03.2023.

89. The latter summaries were approved by the Prime Minister and the Federal Cabinet notwithstanding prior approval of the summary dated 17.03.2023 by the Federal Cabinet on 21.03.2023, which had brought to the attention initially of the Prime Minister and subsequently of the Federal Cabinet that the creation of the post of Member (Administration) and the

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eligibility criteria for such position would require amendments in the Telecom Act and the PTA Appointment Rules. Notwithstanding the consideration of such summary and its approval, a fresh summary was approved only three days later ordering simultaneous initiation of the process of amending the Telecom Act and PTA Appointment Rules and the recruitment for the post of Member Administration. The summary itself provided that the need for a decision for such simultaneous processes was that the amendment of the Telecom Act and the PTA Appointment Rules would take time. The Prime Minister as well as the Federal Cabinet were, therefore, fully briefed that they were ordering the initiation of a process for recruitment to a post which was yet to be created by making amendment in the PTA Appointment Rules, pursuant to criteria that were yet to be prescribed in terms of Section 57(1) read with Section 2(m) and Section 3(2) of the Telecom Act. And that the creation of such post would pose problems in giving effect to Section 3(8) and (9) of the Telecom Act, requiring their suitable amendment.

90. The power of the Federal Government to increase the number of members of PTA and prescribe their qualifications and mode of appointment is provided in the proviso to section 3(2) of the Telecom Act. Section 57(1), also reproduced above, states that, *"the Federal Government may from time to time by notification in the official Gazette make rules not inconsistent with the Act and prescribe their qualifications and mode of appointment."* Further, the term "prescribed" has been defined to mean *"prescribed by rules made under this Act."* Consequently, in view of the clear words used by the legislature in section 57, rules prescribed in exercise of authority under

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section 57(1) take effect when they are notified in the official Gazette. It was held by the Supreme Court in ***Muhammed Suleman vs. Abdul Ghani*** **(PLD 1978 SC 190)** that, *"notifications which curtail or extend rights of the citizens, cannot be retrospective and this is all the more so in such cases when a state of things is to take place by publication of a notification which means from the date of its publication in the Gazette and not from any prior date…"* In ***Justice Qazi Faez Isa vs. the President of Pakistan*** **(PLD 2021 SC 1)**, the law laid down in ***Sagheer Ahmed vs. Province of Punjab*** **(PLD 2004 SC 261)** was reiterated, where it was held that, *"in certain cases, keeping in view the nature and object of a particular statute and to carry out the legislative intent, the provisions for the publication of a notification in the official Gazette can be treated to be mandatory in nature where rights or liabilities of other persons are involved…"*

91. In cases where creation and/or qualification of a public office to be filled through an objective and transparent recruiting process is involved and the parent statute requires that such criteria are to be described by rules, it is mandatory that such rules be framed and published before initiating a process of recruitment to fill such post. This is all the more so in cases where the statutory language itself requires that rules be notified in the official Gazette. In a rule of law polity, the purpose of publication of rules is to create legal certainty and to let the citizens know the rules of the game. Where, applications are to be invited from public at large to fill a public office, the prospective candidates must have the ability to decipher the law as published and determine the requisite qualifications for the

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public office for which applications have been invited. When the impugned advertisement was published on 28.02.2023, an interested candidate may have perused provisions of the PTA Appointment Rules only to conclude that the office of Member (Administration) does not exist and further that no qualifications for such office have been prescribed. The memo of the petition also asserts that the impugned advertisement was issued even though the office of Member (Administration) does not exist. This was because at the time when the Impugned Advertisement was published the PTA Appointment Rules had not yet been notified in the official Gazette and had consequently not taken effect. It was only once the Federal Government filed detailed comments and the relevant summaries that it emerged that a summary had been initiated to seek approval for initiation of the recruitment for the post of Member (Administration) pending amendment of the PTA Appointment Rules. In other words, recruitment for the post of Member (Administration) was kick-started on 28.03.2023 and the window for filing an application for such process closed 14 days thereafter, even though the amendment in PTA Appointment Rules catering for creation of the office of Member (Administration) and providing for the qualification of such office in terms of provisions of the Telecom Act only took effect on 04.05.2023 (when they were notified in the official Gazette in accordance with section 57(1) of the Telecom Act), by which time the period for filing applications for such post had long expired.

92. The story of the indecent haste exhibited by the Federal Government is evident from the chronology of events listed above. However, the indecent haste shown is accompanied by a

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fascinating premeditation of the criteria for the post. In more than 17 hearings conducted in the instant case, the Federal Government was unable to explain as to why it conceived the idea of creating the post of Member (Administration), especially in view of Section 3(8) of the Telecom Act, which provided that, *"the powers of the authority in the matters relating to its administration and the staff of the authority shall be exercised by the Chairman."* The other aspect of the correspondence by Ministry of MoIT&T initiating the proposal was its notion that, "*the new post must carry technical capabilities of the telecommunication sector as well as the administration capacity to run the organization effectively."* The initial proposal therefore seemed to have conceived that Member (Administration) would also be appointed Chairman PTA. Such premeditation was in conflict with Section 3(3) of the Telecom Act, which requires the Federal Government to choose the Chairman from amongst the three members through an separate and independent appointment process.

93. As will be discussed later in this judgment, it had already been clarified by the Lahore High Court in ***Barrister Sardar Muhammad Ali v. Federation of Pakistan and others*** **(PLD 2013 Lahore 343)** as well as by the Supreme Court in ***Muhammad Ashraf Tiwana v. Pakistan and others*** **(2013 SCMR 1159)** that where the head of the regulatory body is to be appointed from amongst the members of such body, the process for appointment of the chairman is a separate and independent process. The duplication of functions that would arise due to the appointment of Member (Administration) between the offices of Member (Administration) and Chairman

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PTA, as well as the problem of decision-making through majority opinion in a regulatory body comprising members in an even number, was highlighted in the summaries put to the Prime Minister as well as the Federal Cabinet, advising the Federal Government of the need to enact amendments in the Telecom Act. This was never done. Despite the passage of two years, the conflicts highlighted by such summaries in view of Section 3(8) and 3(9) of the Telecom Act remain unresolved.

94. Equally striking is the criteria prescribed for the office of Member (Administration), which was initially a part of the summaries approved by the Prime Minister and the Federal Cabinet. The criteria prescribed in Schedule-I of the PTA Appointment Rules, as reproduced above, reflects that the qualification requirements for the posts of all members were the highest possible professional qualifications in the relevant fields, such as the qualification of Chartered Accountancy for Member (Finance) and Ph.D for Member (Technical) and Member (Compliance and Enforcement) with Master's degree as an alternative qualification to be supported with higher experience. In case of the post of Member (Administration), the relevant qualification requirement in the discipline of Telecommunication was brought down to that of B.Sc. in telecommunication. This lower educational requirement stood in contrast to the qualifications prescribed for the posts of all other members.

95. The same pattern emerges in relation to the age criterion. The maximum age prescribed for the offices of all other members at the time of appointment, as mentioned in the PTA Appointment Rules, was 57 years. In the summary initiated for

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the Prime Minister seeking approval of the qualification, experience and age limit for the office of Member (Administration), the maximum age for the office of Member (Administration) was increased to 61 years. The Federal Government submitted to the Court that the increase in the maximum age for members of the regulatory authorities was a consequence of recommendations rendered by a committee headed by the Federal Minister for Economic Affairs Division, which recommended that the maximum age for members of PTA be increased to 61 years. The argument doesn't wash as this special committee held its meetings on 15.03.2023 and 16.03.2023 and rendered its recommendations accordingly. But the maximum age criterion of 61 years for the post of Member (Administration), together with the lower qualification of B.Sc. in Telecommunications, was included in the summary put up to the Prime Minister on 21.02.2023. This summary was approved by the Prime Minister on 15.03.2023, i.e. before the date on which the special committee constituted to consider the terms and conditions of members and heads of regulatory bodies had the occasion to meet and furnish its recommendations to the Federal Government.

96. Even while approving such lower educational qualification and higher age requirement for the post of Member (Administration), the Federal Government kept in place the eligibility criteria for the offices of other members as evident from the amendments to the PTA Appointment Rules gazetted on 04.05.2023. It was probably in view of the recommendations of the special committee, together with observations recorded by this Court in order dated 24.05.2023, that a fresh summary for

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the Federal Cabinet was initiated on 30.05.2023, which was approved on 01.06.2023, and changes to the age criterion applicable for the office of other members was amended through a further amendment introduced in Schedule-I to the PTA Appointment Rules, gazetted on 05.06.2023. Throughout the hearings, the Federal Government, the PTA and respondent No.4 were unable to satisfy the Court as to why the eligibility criteria for the post of Member (Administration) was proposed to be different and considerably lax in comparison to the criteria for other members as originally prescribed in the PTA Appointment Rules.

97. The data supplied by the Federal Government, as part of its comments, in relation to candidates who applied for the post of Member (Administration) complete the puzzle. Major General (R) Hafeez Ur Rehman, the current Member (Administration) and Chairman PTA, at the time of submission of his application for the post of Member (Administration) was 58 years and 6 months old. Had the age criterion prescribed for members in the PTA Appointment Rules been followed for the post of the newly created Member (Administration), he would have been ineligible to apply, having surpassed the maximum qualifying age of 57 years. Likewise, Major General (R) Hafeez Ur Rehman had a Master's in War Studies and Defense Management, but only a B.Sc. in Telecommunications. Thus, had the technical qualification requirement of PhD or Master's in Engineering/Electronics/Telecommunication been prescribed for the office of Member (Administration), Major General (R) Hafeez Ur Rehman would again not have been an eligible candidate.

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98. The educational qualifications and experience of the applicants must have had a bearing on the marks allocated to the shortlisted candidates by the Selection Committee, constituted in terms of Rule 4(4) read with Schedule-II of the PTA Appointment Rules. Among the candidates recommended by the Selection Committee, it placed Muhammad Amir Malik at the top with a grand total of 408 marks. Mr. Malik had a PhD from the London School of Economics, an MBA from the University of Southern Queensland, an MS in Computer Science and Telecommunication Engineering from ENSIMAG, France and a BS Electrical Engineering from NUST. His age at the relevant time was 48 years. The candidate placed at serial No.2 in the order of merit by the Selection Committee, Mr. Saadullah Tareen, was awarded 388.5 marks. Mr. Tareen also had a Ph.D in Telecommunications from University of Pittsburgh, USA, a Master's in Telecommunications from the same university, a Master's in Computer Science from the University of Miami, Coral Gables, U.S., and a Bachelor's in Computer System Engineering from NED University. He was 57 years old. A perusal of the credentials of the shortlisted candidates, and the three candidates recommended by the Selection Committee for appointment to the post of Member (Administration) makes it obvious that had the prescribed criteria for appointment of other members in PTA Appointment Rules been adopted for the post of Member (Administration), even with the inclusion of additional subject areas in line with the requirements of the post, the lack of a Master's qualification in the relevant field and being more than 57 years of age, Major General (R) Hafeez Ur Rehman

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would not have made the cut. The story, however, does not end here.

99. On 11.05.2023, Mr. Amir Malik, who was awarded 56.5 marks more than Major General (R) Hafeez Ur Rehman, and also had extensive private and public sector experience within the telecom industry in Pakistan, after being ranked as the top candidate for the job by the Selection Committee, wrote a letter to Secretary Cabinet Division expressing his waned interest in accepting the appointment to the post of Member (Administration). After going through a competitive process and emerging at the top in the assessment carried out by the Selection Committee, Mr. Malik sudden loss of interest in the position, citing his current engagements as CEO of PRAL as the reason, is telling. On 24.05.2023, Major General (R) Hafeez Ur Rehman was notified as Member (Administration) by the Cabinet Division. Despite repeated requests, no summary or reasoning was placed before the Court as to why the Federal Government concluded that Major General (R) Hafeez Ur Rahman was the most qualified candidate for the job, or why even after Mr. Amir Malik withdrawing his candidature for the post, Mr. Saadullah Tareen, who was placed at serial No.2 by the Selection Committee, having been given 37 more marks than Major General (R) Hafeez Ur Rehman during the assessment process, was not appointed. The record is ruefully silent as to why the last candidate on a list of three recommended candidates in the order of merit was appointed Member (Administration), and how was such decision just, fair and reasonable in view of an objective recruitment exercise carried out by the Federal Government.

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100. The recommendation of a panel of three candidates by the Selection Committee to the Federal Government was also not in line with the requirements of Rule 4 of the PTA Appointment Rules. Pursuant to Rule 4(2) of PTA Appointment Rules, an appointment to the office of member PTA can be made by one of two modes: (i) as initial appointment through advertisement, or (ii) as an appointment on deputation basis of a civil servant not below the rank of Additional Secretary. The proviso to the Rule 4(2) provides that where an appointment is being made on deputation basis, a panel of three officers will be put up for approval of the Federal Government. However, where the post is being filled on the basis of initial appointment through advertisement, the PTA Appointment Rules do not call for recommending a panel of three candidates. Rule 4(4) provides that in such case the Selection Committee after conducting an interview shall make a recommendation to the Federal Government. In the instant case, as only one post was being filled through the recruitment process, the Selection Committee ought to have recommended the name of one individual after the assessment carried out during the interview process. The PTA Appointment Rules do not seem to provide the Federal Government with any discretion to pick and choose who to appoint to the post once an assessment has been undertaken by the Selection Committee, after having conducted an interview of all candidates who qualify pursuant to the eligibility criteria prescribed in the PTA Appointment Rules.

101. The last point to note in the factual matrix is that the Federal Government appointed Major General (R) Hafeez Ur Rehman as Chairman PTA the same day that he assumed the

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office of Member (Administration) (i.e. 25.05.2023). The Federal Government has candidly admitted that no process was run by the Federal Government or the Prime Minister to determine which member amongst the serving members of PTA was to be appointed Chairman PTA pursuant to section 3(3) of the Telecom Act. It was held by the Lahore High Court in ***Barrister Sardar Muhammad***, which judgment was cited approvingly by the Supreme Court in ***Muhammad Ashraf Tiwana***, that where a Chairman is to be appointed from amongst the members of a regulatory authority, such appointment is to be treated as an independent appointed, also to be made through an objective and transparent process. The minimum requirement for such purpose would be for the Prime Minister and the Federal Government to consider the suitability of all three serving members of PTA at the relevant time to determine which of them ought to be appointed Chairman PTA. This was never done. The day after Major General (R) Hafeez Ur Rehman was appointed Member (Administration), he was notified as Chairman PTA. The picture that emerges from the facts as stated above, when read together with the requirements of the Telecom Act and PTA Appointment Rules, is that the post of Member (Administration) was created and a recruitment process was tailored with a view to appointing Major General (R) Hafeez Ur Rehman as Member (Administration) and then Chairman PTA. This was not all. The recruitment process was also bulldozed with indecent haste, as has been noted in the analysis of the facts undertaken above.

102. Having retraced the relevant facts, let us now consider case law relevant in the context of the controversy before us. In ***Barrister Sardar Muhammad***, the appointment of Chairman

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PTA was challenged. The Lahore High Court, while setting aside such appointment, observed that, "*the constitutional obligation is to ensure that persons selected to man public institutions are appointed in accordance with law without the slightest taint of impropriety... The participatory recruitment process, through open public advertisement, to fill public sector posts has been time and again mandated by the Supreme Court of Pakistan.*" The Lahore High Court emphasized that the appointment of the Chairman from amongst members was a separate and independent appointment that must also be the outcome of an objective, transparent and merit-based appointment process. In this context, it was held that, "*after the constitution of the PTA is complete i.e. all the three members are appointed in accordance with law, the Federal Government is to appoint the chairman from amongst the three members, providing a paramedic stewardship structure for running the authority. This second-tier appointment requires initiation of a fresh process but with a different set of considerations… This exercise is mandatory and requires to be undertaken prior to the selection of chairman. The three members have to undergo a fresh interview by the selection committee…*" The Lahore High Court noted that, "*Pakistan is not a kingdom but a democracy and personal desires have no place in the functioning of the government. The only rule is to follow the rule.*" In the said case, a person appointed member was subsequently appointed Chairman without any process, which the Lahore High Court characterized as a *'textbook case of non-application of mind'*. While identifying the fundamental rights in question, where an appointment to a public office is not made in accordance with law, the Lahore High

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

103. The Supreme Court in ***Muhammad Ashraf Tiwana*** endorsed dicta from ***Barrister Sardar Muhammad Ali.*** The question before the Supreme Court in the case was the appointment of Chairman of SECP who was to be appointed from amongst the commissioners of SECP. Highlighting the requirements to be followed in making two legally distinct appointments i.e. of the Commissioner and of the Chairman, the Supreme Court held that, *"firstly Commissioners have to be appointed. It is only thereafter that the Federal Government after another exercise undertaken by it objectively and transparently is to appoint one of the Commissioners to be the Chairman of SECP."*

104. In the instant matter, it is not contested that the position of Member (Administration) was created at a time when the position of Member (Technical) stood vacant, which position had been advertised almost a year back but remained to be filled. Consequently, when Respondent No.4 was appointed as Member (Administration), the office of Member Technical was vacant. The pool created by section 3(2) of the Telecom Act for purposes of appointing chairman PTA are all members of PTA. Thus, even without completing the pool from which the Chairman was to be selected, Respondent No.4 was appointed as Chairman PTA. But

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what is fatal for purposes of such appointment is that no exercise was undertaken to objectively and transparently consider which of the serving members of PTA was best suited to be Chairman.

105. As has been discussed above, ***Muhammad Yasin*** listed the constituent elements of an objective appointment process. It is noteworthy that the Telecom Act or the PTA Appointment Rules do not lay out a criteria or qualifications for the office of Chairman PTA. Rule 6 of the PTA Appointment Rules merely provides that, "*the Federal Government shall appoint a member to be the Chairman of the authority from amongst the members appointed under sub-section (2) of Section 3*". The considerations and qualifications to be borne in mind for purposes of appointing a member in the office of chairman PTA have not been prescribed. In the case law already mentioned above, it has been settled that even where no qualifications and criteria are prescribed for purposes of an appointment, the discretion vested in the appointing authority must be exercised in a structured manner, taking into account the relevant considerations for purposes of realizing the objects of the statute under which the appointment is to be made.

106. In case of appointment of Respondent No.4 as Chairman PTA, there was simply no qualifications or criteria prescribed and no process was undertaken. The minimum that the Federal Government was required to do was to create a selection committee or a subcommittee of the Cabinet to scrutinize the credentials of the members and also interview them, as is done under the PTA Appointment Rules in case of appointment of a member, to inject objectivity and transparency into the process

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of appointment of the Chairman while documenting the reasons that prevail with the Federal Government while picking one member over the others in appointing such member to the post of Chairman PTA. It is not contested that no such process was followed comparing the credentials of all members and, consequently, the appointment of respondent No.4 as Chairman PTA was in breach of section 3 of the Telecom Act and section 24-A of the General Clauses Act, 1897, read with the constitutional requirements of transparency and due process explained in ***Muhammad Ashraf Tiwana***, ***Muhammad Yasin*** and ***Barrister Sardar Muhammad Ali***.

107. It was held by a Division Bench of Lahore High Court in ***Sheikh Zayed Hospital and Post Graduate Medical Institutes v. Dr. Muhammad Saeed*** **(2010 PLC(CS) 967),** where the appointment of Chairman and Dean of an autonomous Health Institute was under challenge that, *"the quality of discretion exercised by the Prime Minister is fundamentally dependent on the quality of the summary put up by the said authority by the concerned division… Failure of discretion at any stage of the summary preparation process will result in the collapse of the entire discretionary edifice including the final order. Therefore, when we judicially review the impugned order passed by the competent authority, we are also judicially reviewing the entire appointment process."*

108. The emphasis on the summary preparing stage of an appointment process in accordance with the Rules of Business, 1973, was then reiterated by the Lahore High Court in ***Barrister Sardar Muhammad Ali***. It was held that the Rules of Business,

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"are a fine weave of democratic principles including: participatory engagement, written and reasoned dialogue, divergence of opinion, open and transparent deliberations etc. These Rules of Business…also act as constraints on governmental power…If the summaries put up before the Prime Minister lack in material particulars, the discretion so exercised by the competent authority on the basis of the summaries remains irreparably defective." While highlighting the need for "*a self-contained, concise and objective summary*" flowing from the Rules of Business, the Supreme Court in ***Muhammad Ashraf Tiwana*** endorsed the opinion of the Lahore High Court in ***Barrister Sardar Muhammad Ali***.

109. While undertaking an analysis of the relevant facts above, we have noted in significant detail how the initial summary prepared for the Prime Minister for creation of the office of Member (Administration) dated 22.02.2023 contained the qualifications and age limit for the proposed post. This summary, together with the summary ultimately approved by the Federal Cabinet, clearly provided that provisions of the Telecom Act as well as provisions of PTA Appointment Rules would need to be amended and the qualifications and criteria for appointment of Member (Administration) would need to be prescribed before such appointment could be made. The summary for the Prime Minister proposed an age limit for the post of Member (Administration) of 61 years, which was in clear conflict with the prescribed age for other members reflected in Schedule I of the PTA Appointment Rules, being 57 years. This discrepancy was not identified in the summary and no explanation was provided therein as to why the maximum age for appointment of Member

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(Administration) should be four years higher than the maximum age prescribed for the posts of other members.

110. As has been discussed above, the Federal Government's argument that the age of 61 was prescribed in view of recommendations of the Special Committee headed by Mr. Ayaz Sadiq, the then Minister for Economic Affairs Division, does not square with the facts. If the Prime Minister had constituted a Special Committee to consider the desirable maximum age of members and heads of regulatory authorities, then the approval of the maximum age for the office of Member (Administration) ought to have been a consequence of the recommendations of the Ayaz Sadiq Special Committee. But this did not happen. The Prime Minister approved a summary prescribing the maximum age of 61 for the office of Member (Administration) on 22.02.2023, whereas the Ayaaz Sadiq Special Committee rendered its recommendations on 16.03.2023. The qualification and maximum age for the office of Member (Administration) was prescribed by amending the PTA Appointment Rules that were notified on 04.05.2023. The discrepancy between the maximum age for Member (Administration) and the maximum age for all other members was also noted by this court in its order dated 24.05.2023. Based on the recommendations of the Ayaaz Sadiq Special Committee, the PTA Appointment Rules were once again amended to bring the maximum age for all other members in line with the newly set maximum age for the post of Member (Administration), which amendment was notified on 05.06.2023.

111. It is evident from the summary preparation and approval process for the post of Member (Administration) that the same

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was besmirched by exceptionalism, if not nepotism or cronyism. The summary for creation of such post was prepared and was approved by the Prime Minister and the Federal Cabinet in full view of the fact that the age criterion for all other members, as already prescribed in the PTA Appointment Rules, was different from that being approved for the post of Member (Administration). The other relevant fact that emerges from the summary preparation process is that the initial summaries for the Prime Minister as well as the Federal Cabinet clearly flagged the need to amend provisions of the Telecom Act, as well as provisions of the PTA Appointment Rules, prior to creating and filling the post of Member (Administration). However, fresh summaries were initiated and approved by the Prime Minister and the Federal Cabinet seeking permission to initiate the process of recruitment for the post of Member (Administration), without first amending the PTA Appointment Rules and the Telecom Act, ostensibly in the interest of time. The latter summaries do not state the emergency that required the newly created post of Member (Administration) to be filled with indecent haste.

112. These summaries also did not record the fact that prescription of the qualifications for the post of a Member is a prerequisite in terms of section 3(2) of the Telecom Act, and initiating a recruitment process without prior prescription of such post and its qualifications in PTA Appointment Rules would irreparably mar such recruitment process. Once again, the second set of summaries reflect that an exceptionalism was sought to be created to fill the post of Member (Administration) in terms of its timing, for which special permission was sought

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from the Prime Minister and the Federal Cabinet. The permission sought reflects a fatal flaw in the summary preparation process, which essentially requested the Prime Minister and the Federal Cabinet to grant permission to run a recruitment process in a manner contrary to section 3(2) of the Telecom Act read with provisions of the PTA Appointment Rules. The summaries were therefore seeking the approval of an illegal recruitment process, which approval was unfortunately granted by the Prime Minister and subsequently by the Federal Cabinet.

Mala Fide in Law

113. The proposition before us is whether the Impugned Advertisement suffers from malice in law, as its issuance is an action taken in disregard of provisions of the Telecom Act and the PTA Appointment Rules, for the collateral purpose of producing a preordained outcome of appointing Respondent No. 4 as Member (Administration) and Chairman PTA. Let us consider the concept of malice in law in the first instance and then consider whether the rule making power delegated by the Legislature to the Executive can be employed for the object of creating a public office and appointing a predetermined individual to such office.

114. ***Black's Law Dictionary*** (Ninth Edition) defines "implied malice" as "*malice inferred from a person's conduct. Also termed constructive malice; legal malice; malice in law*." It was held in ***Zafar-ul-Ahsan v. The Republic of Pakistan*** **(PLD 1960 SC 113)** that, "*where the proceedings are taken mala fide and the statute is used merely as a cloak to cover an act which in fact is not taken though it purports to have been taken under the*

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statute, the order will not, in accordance with a long line of decisions in England and in this sub-continent, be treated as an order under the statute."

115. In ***Abdul Rauf and others v. Abdul Hamid Khan*** **(PLD 1965 SC 671),** the Supreme Court explained that, "*a mala fide act is by its nature an act without jurisdiction. No Legislature when it grants power to take action or pass an order contemplates a mala fide exercise of power. A mala fide order is a fraud on the statute. It may be explained that a mala fide order means one which is passed not for the purpose contemplated by the enactment granted the power to pass the order, but for some other collateral or ulterior purposes.*"

116. In ***The Federation of Pakistan through the Secretary, Establishment Division, Government of Pakistan, Rawalpindi v. Saeed Ahmad Khan and others*** **(PLD 1974 SC 151)** the Supreme Court drew a distinction between mala fide in fact and mala fide in fact while noting that, "*mala fides literally means 'in bad faith'. Action taken in bad faith is usually action taken maliciously in fact, that is to say, in which the person taking the action does so out of personal motives either to hurt the person against whom the action is taken or to benefit oneself. Action taken in colourable exercise of powers, that is to say, for collateral purposes not authorised by the law under which the action is taken or action taken in fraud of the law are also mala fide*." And the trigger test for the court to assume jurisdiction to consider the allegation was laid down as follows: "*In order to establish a case of mala fides, some such specific allegation is necessary and it must be supported by*

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some prima facie proof to justify the Court to call upon the other side to produce evidence in its possession."

117. ***Said Zaman Khan v. Federation of Pakistan*** **(2017 SCMR 1249)** includes a detailed exploration of the law that has evolved re the doctrines of mala fide in fact and mala fide in law. After a review of precedents and definitions, the Supreme Court observed that, "*all persons purporting to act under a law are presumed to be aware of it. Hence, where an action taken is so unreasonable, improbable or blatantly illegal that it ceases to be an action countenanced or contemplated by the law under which it is purportedly taken malice will be implied and act would be deemed to suffer from malice in law or constructive malice. Strict proof of bad faith or collateral propose in such cases may not be required*."

118. The law enumerated in ***Said Zaman Khan*** was reiterated in ***Qazi Faez Isa v. President of Pakistan*** ***(PLD 2021 SC 1)*** and it was held that actions, "*that are manifestly illegal or so anomalous that they lack nexus with the law apart from the generally recognised category of actions driven by a foul personal motive described here as malice in fact, there is another category of reckless action in disregard of the law termed as mala fide in law. The first type of mala fide is attributed to a person whereas the second is levelled against the impugned action. While the former is concerned with a collateral purpose or an evil intention to hurt someone under the pretence of a legal action, the latter deals with actions…*"

119. In ***Tariq Aziz-ud-Din v. Federation*** **(2010 SCMR 1301)** while emphasizing the obligation to exercise discretion in

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a reasonable manner guided by relevant reasons, it was held that, "*it is the duty and obligation of the competent authority to consider the merit of all the eligible candidates while putting them in juxtaposition to find out the meritorious amongst them…*" In ***Baz Muhammad Kakar v.. Federation of Pakistan*** **(PLD 2012 SC 870**) the Supreme Court held that, "*the legislature cannot promulgate laws which are person/ class specific as such legislation instead of promoting the administration of justice causes injustice in the society amongst the citizens, who are being governed under the Constitution*."

120. In ***Syed Mehmood Akhtar Naqvi v. Federation*** ***(PLD 2013 SC 195)*** while reiterating the law laid down in **Tariq Aziz-ud-Din** it was emphasized that, "*even where there are no explicit rules governing the appointment process, and appointments are to be made in the exercise of discretionary powers, such discretion must be employed in a structured and reasonable manner and in the public interest. Appointing authorities cannot be allowed to exercise discretion at their whims, or in an arbitrary manner; rather they are bound to act fairly, evenly and justly and their exercise of power is judicially reviewable*".

121. In ***Abdul Sattar Jatoi v. Chief Minister Sindh*** **(2022 SCMR 550)** the Supreme Court held that, "*this Court in the case of Secretary Agriculture, Government of the Punjab, Lahore v. Muhammad Akram (2018 SCMR 349) has specifically held that the creation of a specific post for the benefit of one specific civil servant was illegal.*" Likewise, the Islamabad High Court in ***Saira Rubab Nasir v. Federation*** **(2023 PLC (C.S.) 103**

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Islamabad), while considering the legality of Appointment of Members (Council and Board) Rules, 2021 enacted under the Pakistan Medical Commission Act, 2020, struck down a rule for being "*ultra vires and against the concept and wisdom referred in Constitution and law*" as it was "*person specific which is contrary to the parent statute and principle of fairness*".

122. The relevant principles of law, when applied to the facts of the instant case, lead to the unequivocal conclusion that the entire decision-making process that led to the creation of the post of Member (Administration) and the recruitment process leading to the appointment of Respondent No.4 to such post and subsequently to the post of Chairman PTA, was utterly devoid of integrity. In issuing a writ under Article 199(1)(a) of the Constitution, while exercising judicial review in relation to an executive action, the court limits itself to scrutinizing the integrity of the decision-making process. And where such process is tainted with illegality, irrationality or procedural impropriety, the court must issue an appropriate direction and/or declaration setting aside the impugned action and holding that any steps taken pursuant to it are bad in law and of no legal effect.

123. In the instant matter, the Impugned Advertisement as approved by the Prime Minister and the Federal Cabinet was *ultra vires* Section 3 of the Telecom Act and the PTA Appointment Rules, and was consequently illegal and of no legal effect. The summaries initiated seeking approval for creation of the post of Member (Administration) while specifying educational and age criteria in contrast to the educational and age criteria for

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the posts of other members as prescribed in the PTA Appointment Rules suffered from malice in law. The decisions rendered by the Prime Minister and the Federal Cabinet to approve such summaries and subsequently to approve a summary to dispense with the requirement to first amend the Telecom Act and the PTA Appointment Rules and subsequently initiate a process of recruitment for the post of Member (Administration) also suffered from mala fide in law.

124. The recruitment process initiated to fill the post of Member (Administration) prior to amendment of PTA Appointment Rules to provide for the creation of the post and its qualifications, which amended Rules were notified in the Gazette on 04.05.2023, suffered from illegality and procedural impropriety. The qualifications approved for the post of Member (Administration) with the minimum educational qualification of B.Sc. in the relevant discipline and the maximum age requirement of 61 years, in contrast to the educational and age criteria for other members, were person specific qualifications designed to appoint a pre-ordained individual to the post of Member (Administration) and subsequently Chairman PTA.

125. The entire process of creation of the post of Member (Administration), prescription of qualifications and criteria for such post and the manner in which the recruitment process was carried out lacked integrity and suffered from mala fide in law. The recommendation by the Selection Committee of a panel of three individuals for the appointment to the post of Member (Administration) was not in conformance with the requirements of Rule 4(4) of the PTA Appointment Rules, which required that only one candidate be so recommended. The decision of the

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Federal Government to pick the candidate listed at the bottom of penal recommended by the Selection Committee on the basis of merit was devoid of any reasoning or objective basis and fell afoul the obligation of the Federal Government under Section 24A of the General Clauses Act, 1897, to act in a just, fair and reasonable manner. Similarly, the appointment of Respondent No.4 as Chairman PTA, after being appointed as Member (Administration), without any objective or transparent process and without the Federal Government recording any reasons as to why he was so selected from amongst the members of PTA, was illegal, irrational and unsustainable in the eyes of law.

126. For the aforementioned reasons, the petition is **allowed.** In view of the Court's declaration that (i) the Impugned Advertisement was ultra vires Section 3 of the Telecom Act and the PTA Appointment Rules, at the time when the advertisement was published, and (ii) the other declarations issued and finding rendered above, including, inter alia, that the recruitment process lacked integrity and suffered from malafide in law, the subsequent steps taken by the Federal Government in filling the post of Member (Administration) pursuant to the Impugned Advertisement are not sustainable in the eyes of law and are of no legal effect. The entire edifice of processes and decisions built on an illegal foundation must crumble upon such illegal foundation. As the Impugned Advertisement and the process of recruitment undertaken thereunder suffered from malice in law, all subsequent decisions in pursuit of such process, including the appointment of Respondent No.4 as Member (Administration) and Chairman PTA, are illegal, *ultra vires* the law and of no legal effect.

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127. As a consequence of this judgment, it is declared that the creation of the post of Member (Administration) is ultra vires section 3 of the Telecom Act and has been created for extraneous reasons as opposed to realizing the objects of the Telecom Act. While such post may be created by the Federal Government after taking into account considerations relevant to realize the objects of the Telecom Act, such action can only be undertaken while introducing appropriate amendments in section 3(8) and (9) of the Telecom Act, as also noted in the summaries for creation of such post put up before the Prime Minister and the Federal Cabinet. As the creation of the post and prescription of qualifications of such post to accommodate Respondent No.4 has been declared to suffer from malafide in law, such post shall be deemed not to exist and the amendments introduced in the PTA Appointment Rules for such purpose are declared to be *ultra vires* Articles 4, 10-A, 18 and 25 of the Constitution and section 3 and 57 of the Telecom Act.

128. As the entire process of appointment of Respondent No. 4 as Member (Administration) and as Chairman PTA has been found to suffer from malice in law being the product of an unconstitutional and illegal recruitment process, he shall cease to hold such appointments and shall immediately relinquish charge for such offices. The senior-most serving member PTA will temporarily assume the charge of the office of Chairman PTA, till such time that the Federal Government appoints a regular Chairman in accordance with the requirements of Section 3 of the Telecom Act, read with provisions of the PTA Appointment Rules, while following an objective and transparent process for appointing Chairman PTA as laid down in ***Muhammad Ashraf***

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Tiwana and ***Barrister Sardar Muhammad Ali.*** Further, the Federal Government shall amend the PTA Appointment Rules to lay down the qualifications, criteria and process for appointment of Chairman PTA, in accordance with the principles enumerated in ***Muhammad Yasin***, ***Muhammad Ashraf Tiwana*** and ***Barrister Sardar Muhammad Ali***.

129. Let a copy of this judgment be sent to Secretary Cabinet and the Members PTA for compliance.

(BABAR SATTAR)
JUDGE

This judgment is being signed and released on **16.09.2025.**

(BABAR SATTAR)
JUDGE

Approved for reporting

Saeed.

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