

IN THE SUPREME COURT OF PAKISTAN
(Original Jurisdiction)

PRESENT:

MR. JUSTICE IFTIKHAR MUHAMMAD CHAUDHRY, C.J

MR. JUSTICE IJAZ AHMED CHAUDHRY

MR. JUSTICE GULZAR AHMED

CONSTITUTION PETITION NO. 30 OF 2013

Khawaja Muhammad Asif

.... Petitioner

Versus

Federation of Pakistan & others

.... Respondents

AND

CMAs NO. 2991 & 3015 OF 2013 IN CONST. PETITION NO. 23 OF 2013

(Appointments, postings and transfers made by the Caretaker Government)

A/W

CIVIL MISC. APPLICATION NO. 3331 OF 2013

(Application of Mr. Sikandar Ahmed Rai, Acting Secretary W&P)

CIVIL MISC. APPLICATION NO. 3343 OF 2013

(Application of Mr. Sanaullah Shah, M.D. ENAR)

CIVIL MISC. APPLICATION NO. 3354 OF 2013

(Application of Rana Asad Amin, Advisor Finance Division)

CIVIL MISC. APPLICATION NO. 3355 OF 2013

(Application of Mr. Muhammad Amir Malik, Member I.T)

CIVIL MISC. APPLICATION NO. 3356 OF 2013

(Application of Kamran Ali, Member Legal/MP-I)

CIVIL MISC. APPLICATION NO. 3373 OF 2013

(Application of Dr. Fayyaz Ahmed Ranja, D.G. Pakistan Manpower)

CIVIL MISC. APPLICATION NO. 3375 OF 2013

(Application of Mr. Tariq Mehmood Pirzada, MD PHA)

CIVIL MISC. APPLICATION NO. 3376 OF 2013

(Application of Mr. Tariq Shafi Chak, E.D. NAVTTC)

CIVIL MISC. APPLICATION NO. 3377 OF 2013

(Application of Mr. Farooq Sultan Khattak, Director CDA)

CIVIL MISC. APPLICATION NO. 3378 OF 2013

(Application of Mr. Rizwan Mumtaz Ali, Chairman NFC)

CIVIL MISC. APPLICATION NO. 3379 OF 2013

(Application of Mr. Asad Ahmed Jaspal, Director Training PTV)

CIVIL MISC. APPLICATION NO. 3380 OF 2013

(Application of Mr. Zafar Iqbal Bangash, Producer PTV)

CIVIL MISC. APPLICATION NO. 3382 OF 2013

(Application of Mr. Wasim Muhammad Khan, Chairman NTC)

CIVIL MISC. APPLICATION NO. 3383 OF 2013

(Application of Mr. Abid Javed Akbar, CE, TDA)

CIVIL MISC. APPLICATION NO. 3385 OF 2013

(Application of Mr. Asif Ghafoor, Addl. Secy. National Heritage)

CIVIL MISC. APPLICATION NO. 3396 OF 2013

(Application of Mr. Muhammad Altaf Bawan, D.G. HRM (NAB))

CIVIL MISC. APPLICATION NO. 3397 OF 2013

(Application of Mr. Tahir Alam Khan, DIG (Security))

CIVIL MISC. APPLICATION NO. 3403 OF 2013

(Application of Syed Khalid Ali Raza Gardezi, J.S. M/o Finance)

CIVIL MISC. APPLICATION NO. 3404 OF 2013

(Application of Mr. Umar Ali, J.S. State & Frontier Region Div.)

CIVIL MISC. APPLICATION NO. 3405 OF 2013

(Application of Dr. Imran Zeb Khan, Chief Commissioner Afghan Refugees)

CIVIL MISC. APPLICATION NO. 3406 OF 2013

(Application of Mr. Amjad Nazir, Secretary States and Frontier Region Div.)

CIVIL MISC. APPLICATION NO. 3407 OF 2013

(Application of Mr. Waheed ur Rehman Khattak, Addl. SP (Saddar))

CIVIL MISC. APPLICATION NO. 3408 OF 2013

(Application of Mr. Muhammad Khalid Khattak, DIG (HQ) Ibd)

CIVIL MISC. APPLICATION NO. 3409 OF 2013

(Application of Mr. Sabih Hussain, SP (HQ), Ibd)

CIVIL MISC. APPLICATION NO. 3410 OF 2013

(Application of Mr. Muhammad Ahsan Raja, Chairman PM Insp. Commission)

CIVIL MISC. APPLICATION NO. 3438 OF 2013

(Application of Mr. Abdur Rashid, Director, DRAP)

CIVIL MISC. APPLICATION NO. 3451 OF 2013

(Application of Mr. Mumtaz Khan, Member IRSA)

CIVIL MISC. APPLICATION NO. 3467 OF 2013

(Application of Mr. Viqar Rasheed Khan, Chairman NTC)

CIVIL MISC. APPLICATION NO. 3478 OF 2013

(Application of Dr. Shahbaz Ahmad Kureshi, Consultant, Poly Clinic)

CIVIL MISC. APPLICATION NO. 3479 OF 2013

(Application of Mr. Noor Zaman Khan, Director NACTA)

CIVIL MISC. APPLICATION NO. 3480 OF 2013

(Application of Mr. Muhammad Nadeem AGM Marketing)

CIVIL MISC. APPLICATION NO. 3481 OF 2013

(Application of Dr. Anees Kausar, M.O. Poly Clinic)

CIVIL MISC. APPLICATION NO. 3492 OF 2013

(Application of Mr. Tahir Maqsood, D.G. PITAD)

For the Petitioner

Miangul Hassan Aurangzeb, ASC
Syed Safdar Hussain, AOR assisted by
Syed Ali Shah Gilani, Advocate

On Court Notice

Mr. Irfan Qadir,
Attorney General for Pakistan
Mr. Dil Muhammad Alizai, DAG

For Estt. Division

Mr. Sher Afzal, Joint Secretary

For the applicants

(In CMA 3331/13),	Mr. Muhammad Shoaib Shaheen, ASC
(In CMA 3343/13),	Nemo
(In CMA 3354/13),	Mr. Shah Khawar, ASC
(In CMA 3355-56/13),	Sardar Muhammad Aslam, ASC
(In CMA 3373/13),	Nemo
(In CMA 3375/13),	Mr. Tariq Mehmood Pirzada, in Person
(In CMA 3376/13),	Mr. Tariq Shafi Chak, in person
(In CMA 3377/13),	Mr. Farooq Sultan Khattak, in person
(In CMA 3378/13),	Mr. Aftab Rana, ASC
(In CMA 3379-80/13),	Mr. Shahid Mehmood Khokhar, ASC
(In CMA 3382/13),	Nemo
(In CMA 3383/13),	Rai Muhammad Nawaz Kharral, ASC
(In CMA 3385/13),	Mr. Asif Ghafoor, In person
(In CMA 3396/13),	Nemo
(In CMA 3397/13),	Mr. Tahir Alam Khan, in person
(In CMA 3403/13),	Syed Khalid Ali Raza Gardezi, in peson
(In CMA 3404-3406/13),	Mr. Muhammad Akram Gondal, ASC
(In CMA 3407/13),	Nemo
(In CMA 3408/13),	Nemo
(In CMA 3409/13),	Nemo
(In CMA 3410/13),	Mr. Muhammad Ahsan Raja, in person
(In CMA 3438/13),	Nemo
(In CMA 3451/13),	Mr. Waqar Rana, ASC
(In CMA 3467/13),	Mr. Viqar Rasheed Khan, in person
(In CMA 3478 & 3481/13),	Mr. Tariq Asad, ASC
(In CMA 3479/13),	Mr. Noor Zaman, in person
(In CMA 3480/13),	Nemo
(In CMA 3492/13),	Nemo

Date of hearing: 06.06.2013

J U D G M E N T

IFTIKHAR MUHAMMAD CHAUDHRY, CJ.— This

Constitution Petition has been filed under Article 184(3) of the Constitution of the Islamic Republic of Pakistan by one of the elected Parliamentarians, namely, Khawaja Muhammad Asif, wherein he has sought the following reliefs: -

“Declare, in the circumstances aforesaid, the acts of the care-taker government in effecting the aforesaid transfers/postings/shuffling null and void, void ab initio and of no legal effect being in contravention of Constitution, constitutional conventions and law.

In the alternative, declare that the aforesaid acts of the care-taker government of passing and signing of the

orders affecting the aforesaid transfers/postings/shuffling were never, in fact, signed and/or passed and/or communicated for further necessary action.

Direct, in the circumstances aforesaid, that all the postings/transfers/shuffling be reversed and the status quo ante be reverted to, i.e. the position when the care-taker government was sworn in.

Direct the Federation/care-taker government to refrain from effecting any further appointments/transfers/shuffling during their remaining tenure."

2. As in CMAs 2991 & 3015 of 2013 in Constitution Petition No.23 of 2012 identical issues about appointments, transfers and postings, etc., were raised, therefore, a learned Bench of this Court, *vide* order dated 28.05.2013, referred the said miscellaneous applications to this Bench, to avoid overlapping of the proceedings and/or the possibility of rendering of conflicting judgments on similar issues in the event of parallel proceedings being conducted in two different benches simultaneously.

3. On 22.05.2013 and 04.06.2013, orders were passed and the Secretaries of the concerned Ministries/Divisions of the Federal Government were called upon to furnish details of the Government servants/employees, who were appointed, transferred, posted, etc. Relevant paras there from are reproduced hereinbelow respectively: -

Order dated 22.05.2013

"3. He has stated that the Caretaker Government has made *inter alia* following transfers and postings in the civil service, statutory bodies, autonomous or semi autonomous bodies, corporations and regulatory authorities :-

- a) *The Chairman of the National Highway Authority, Hamid Ali Khan was replaced, on 16.05.2013, by Sajjad Hussain Baloch;*
- b) *The Chairman NEPRA was replaced, on 16.05.2013, and Justice (R) Ahmad Khan Lashari has been appointed;*
- c) *The Managing Director SNGPL, Arif Hameed was replaced, on 15.05.2013, by Amin Tufail;*
- d) *The Managing Director SSGCL was replaced, on 15.03.2013, by Rahat Kamal Siddiqui;*

- e) *The Managing Director, Pakistan Mineral Development Corporation, Khalid Khokhar was replaced by Saifullah Khan;*
- f) *The Chairman, National Fertilizer, Rizwan Mumtaz Ali was removed on 09.05.2013;*
- g) *The Managing Director, Oil and Gas Development Corporation, Masood Siddiqui was removed on 06.05.2013;*
- h) *The Chairman, State Life Corporation was removed on 16.05.2013;*
- i) *The Chairman, Pakistan Tourism Development Corporation has reportedly been removed and an another appointed in his stead;*
- j) *The Chairman, Pakistan Software Export Board has been removed and in his stead Saleem Ahmed Ranjha has been appointed who is a direct inductee of Yusuf Raza Gillani the previous Prime Minister;*
- k) *The Director General, FIA who was appointed one month back is also reportedly in the process of being replaced;*
- l) *That certain employees/officers of the Pakistan Telecommunication Authority have reportedly been removed from service without following the procedure as set out under the relevant statute;*
- m) *That reportedly many other mid – level staff of such like aforesaid corporation/bodies have been shuffled/ transferred/removed”.*

7. We do allow the learned Attorney General for Pakistan to take instructions from the Government but in view of the importance of the issue involved in the petition, we direct that: -

all the appointments, transfers and postings, which have been made by the Caretaker Government, referred to hereinabove, shall stand suspended and till pendency of this petition no further appointment, transfer and posting shall be made by the Caretaker Government including the appointment of Federal Ombudsman, Tax Ombudsman and Anti-Dumping Tribunal, except the postings and transfers, which relate to day-to-day business of the government and are required to be made in the interest of State and also to watch the interest of public, strictly following the rules and regulations on the subject, and in a transparent manner.”

Order dated 04.06.2013

“2. Khawaja Muhammad Asif, petitioner, appeared in person and stated that the order dated 22.05.2013 has not been complied with in letter and spirit inasmuch as the Caretaker Government without lawful authority terminated the services of some of those officers who were already working and performing their duties in Finance Division and I.T., either as Advisors or on contract. As duly elected government is likely to take over within a day or so and

budget is likely to be prepared shortly, therefore, due to unlawful action of Caretaker Government concerned Divisions are facing a lot of difficulties. He has further stated that about more than 100 officers have been sent on deputation to different organizations from the Province of Balochistan after 22nd May, 2013 without adhering to the rules and regulations knowing well that the orders relating to the policy making cannot be passed by the Caretaker Government.

4. Since all these issues are important in nature, therefore, we direct the Secretaries, Establishment, Cabinet, Health, Water & Power, Finance Division(s) and all other concerned Departments/Corporations to file lists of the officers –

- (a) who were appointed against any post by the Caretaker Government after taking over including Chairmen etc of the Corporations whose list finds mention in the order dated 22.05.2013;
- (b) whose services were acquired on deputation from different organizations on different positions in the Departments and Corporations controlled by the Federal Government;
- (c) whose services were terminated because they were holding different positions on contract basis in all the Government Departments/Hospitals;
- (d) Whose transfers have been made contrary to the Judgment of Anita Turab's case, etc;
- (e) Deputationists brought to Federal Government Departments from the Province of Balochistan."

In response to the above orders, summary of the transfers, postings, termination of service/contract of the employees was submitted *vide* CMA No.3515/2013, which reads as under: -

STATEMENT INDICATING POSTINGS/TRANSFERS/APPOINTMENTS MADE BY THE CARETAKER GOVERNMENT

Sl. No	Group/ Service	Promotion	Directive	Ministries/ Division's Proposal	Repatriated	Add. Current Charge	Routine Postings Transfers	Contract appointments	Transfer on deputation	Total
1.	Autonomous Bodies	-	03	11	03	02	-	11	-	30
2.	Secretariat Group	31	59	18	07	-	24	-	-	139
3.	Pakistan Administrative Services	17	15	07	-	-	33	-	-	72
4.	Police	67	09	06	01	-	33	-	-	116

5.	Ex-Cadre	-	02	09	-	-	-	-	-	11
6	Misc.	-	06	-	-	-	24	-	44	74
	Total	115	94	51	11	02	114	11	44	442

4. It may be mentioned here that in the order dated 22.05.2013 it had been observed that any individual whose posting, appointment or transfer was suspended and he was aggrieved of the said order, he might come forward by making application(s), which would be dealt with after hearing him/them.

5. It may be observed that learned Attorney General informed that Justice (R) Faqir Muhammad Khokar, Chairman Anti-Dumping Appellate Tribunal, Justice (R) Ahmed Khan Lashari, Chairman NEPRA and Justice (R) Kalash Nath Kohli, Chairman Sacked Employees' Review Board have tendered resignations, which are under process, except the resignation of Chairman Anti-Dumping Tribunal, which has already been accepted on 31.05.2013. Mr. Sher Afzal, Joint Secretary is directed that no sooner their resignations are accepted, he may inform the Court.

6. Learned counsel for the petitioner contended that under the Constitution of the Islamic Republic of Pakistan, the elected Parliamentary Government is responsible to achieve the object of good governance and in continuance of the same, it is obliged to post suitable persons being in the employment of the Government/private sector to head various departments, corporations and organizations controlled by the Government to run their result-oriented administration, as such elected Government has to fulfill the object and purpose of welfare of the citizens. The Caretaker Government, which is installed for a limited period of 2/3 months with the object of

assisting the Election Commission of Pakistan in organizing fair, free, honest and just elections, cannot be considered to be the replacement of the elected Government. As such, the Caretaker Government is debarred from making large scale transfers, postings, re-shuffling of the Government employees, having far reaching effects/impact on the administration, commercial and industrial departments/organizations, because if a person is appointed against an important position, and his performance is not found suitable or it is not in accordance with the policies of the elected Government, it would not be possible for the Government to implement its policies. He further argued that the Caretaker Government had also exceeded its authority in assigning the reasons that the appointments, postings, transfers, reshuffling, etc., have been made following the directions/observations contained in the letter dated 02.04.2013 of the Election Commission of Pakistan.

7. Learned Attorney General for Pakistan did not address arguments on the issues involved in these cases as such and only confined to making certain references to the record, e.g., CMA 2676 & 2770/2013 in Constitution Petition No.23/2012 filed pursuant to the Court's directions as well as CMA No.3514/2013, etc., filed in the case.

8. In pursuance of this Court's order dated 22.05.2013, various individuals filed applications seeking relief against their postings, transfers, etc. and such of the applicants, who were present in Court, were also afforded opportunity of hearing. Some of them did not press their applications and requests so made by them were allowed. For convenience of reference, details of the applications are reproduced hereinbelow: -

Applications dismissed in default:

S.#	CMA No.	Applicant's Name	Designation/Deptt.	Grievance/Remarks
1.	CMA.3343/13	Sanaullah Shah	M.D. ENAR, Petrotech Service Ltd.	His services were placed at the disposal of SEC vide letter dated 9.4.2013
2.	CMA.3373/13	Dr. Fayyaz Ahmad Ranjha	Director General Pakistan Manpower Institute	He was pre-mature repatriated to Province of Punjab vide Notification dated 9.5.2013
3.	CMA.3382/13	Wasi Muhammad Khan	Chairman NTC	Applicant has challenged the notification dated 30.4.2013 whereby Mr. Viqar Rasheed Khan was appointed on contract basis as Chairman NTC by ignoring him
4.	CMA.3396/13	Muhammad Altaf Bawany	D.G. (HRM,), NAB	The applicant being regular Officer of NAB was serving as Chief Instructor, NIM (formerly NIPA) on deputation and vide Notification dated 28.2.2011 he was repatriated to his parent department to join new assignment as D.G. NAB
5.	CMA.3407/13	Waheed ur Rehman Khattak	Addl. SP (Saddar)	Applicant was transferred from Punjab to Balochistan vide notification dated 16.5.2013 by ignoring the seniority as two of his colleagues were senior to him
6.	CMA.3408/13	Muhammad Khalid Khattak	D.I.G. Headquarters, Islamabad	Applicant was promoted from BS-19 to BS-20 vide Notification dated 3.4.2013 and thereafter vide notification dated 10.4.2013 he was transferred from the post of AIG (General) to DIG (HQ) and prayed that his case does not strictly fall in any kind of transfer and posting
7.	CMA.3409/13	Shabih Hussain	PSP BS-18-AC c/o ICT Police, Islamabad	The applicant was serving in KPK and Vide Notification dated 15.5.2013 his services have been placed at the disposal of Federal Government for further posting in Islamabad Police and it was a routine transfer
8.	CMA.3438/13	Dr. Abdul Rashid	Director, Pharma Licensing, Quality Assurance & Quality Control, Drug Regulatory Agency of Pakistan	Vide Notification dated 21.3.2013 the applicant has been transferred from the post of Director Pharma Licensing Quality Assurance & Quality Control to the post of Deputy Director General (Pharmacovigilance) DRAP, Islamabad
9.	CMA.3480/13	Muhammad Nadeem	Asstt. Gen. Manager Marketing	The applicant has been transferred vide Office Order dated 5.4.2013 from Zonal Head Gujranwala to AGM

				(Marketing) Lahore
10.	CMA.3492/13	Tahir Maqsood	Additional Secretary (awaiting posting)	The applicant was serving as Senior Joint Secretary and his services have been placed at the disposal of Estt. Division vide Notification dated 10.5.2013

Applications dismissed where alternate remedy was availed:

<u>S.#</u>	<u>CMA..</u>	<u>Applicant's Name</u>	<u>Designation/Deptt.</u>	<u>Remarks</u>
1.	CMA.3383/2013	Abid Javed Akbar	C.E. Trade Development Authority	Rai Nawaz Kharral, learned counsel stated that the applicant has already approached to the Islamabad High Court for redressal of his grievance regarding termination of his contract. Dismissed.
2.	CMA.3478/13	Dr. Shahbaz Ahmad Kureshi	Consultant Physician (Cardiology) in Polyclinic Islamabad	Mr. Husnain Ibrahim Kazmi, learned counsel for the caveator (Dr. Nasir Moin) has filed CMA No. 3491/13 and stated that the applicant's Writ Petition No.1999/2013 has already been dismissed on 13.5.2013 and no CPLA has been filed before this Court against the said order and contrary to it the applicant opted to approach the Service Tribunal where the matter is pending. When it was brought into the notice of the learned counsel for the applicant he stated that he may be allowed to withdraw this CMA. Dismissed as Withdrawn.
3.	CMA 3481/13	Dr. Anis Kausar	Medical Officer, FG Polyclinic Islamabad	Mr. Tariq Asad learned counsel for the applicant is not in attendance. This application is identical to CMA 3478 which we have already dismissed.

				This application is also dismissed.
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Application dismissed on the ground that appointment/transfer was made in routine:

1.	CMA No.3479/2013	Noor Zaman Khan	Director NACTA, Islamabad	Applicant was serving as Senior Government Pleader in KPK and he has been transferred as Director NACTA, Islamabad and now has reported back to his parent department. Plea of the applicant is that his spouse is working in Islamabad, therefore, he was brought on deputation. Since the applicant has been reverted back to his parent department in routine, no interference is called for in the instant proceedings. Dismissed.
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Applications which were not entertained:

1.	CMA No.3375/2013	Muhammad Tariq Mehmood Pirzada	M.D. PHA	Applicant appeared and stated that he has been transferred on completion of tenure period, does not press this petition. Dismissed as not pressed.
2.	CMA No.3377/13	Farooq Sultan Khattak	Director CDA, Islamabad	Applicant states that he has been sent back to his parent department, therefore, does not press this CMA. Dismissed as not pressed.
3.	CMA No.3378/2013	Rizwan Mumtaz Ali	Chairman NFC	Mr. Aftab Alam Rana, learned counsel for the applicant has no instructions because he could not answer to our queries. Dismissed accordingly.
4.	CMA No.3379/2013	Asad Ahmed Jaspal	Dir. Training Academy PTV	Mr. Shahid Mehmood Khokhar, learned counsel for the applicant states that applicant is in the employment of PTV Corporation and he is aggrieved from his transfer on the verbal orders of the Acting Manager. As the applicant is in the employment of a Corporation, therefore no indulgence can be shown in the instant proceedings. Dismissed.
5.	CMA No.3380/2013	Zafar Iqbal Bangash	Producer, PTV	Mr. Shahid Mehmood Khokhar, learned counsel for the applicant states that applicant is in the employment of PTV Corporation and he is aggrieved from his transfer

				on the verbal orders of the Acting Manager. As the applicant is in the employment of a Corporation, therefore no indulgence can be shown in the instant proceedings. Dismissed.
6.	CMA No.3397/13	Tahir Alam Khan	DIG Security	Mr. Tahir Alam Khan, applicant appeared and stated that his case pertains to actualisation, therefore, he does not want to press this application. Dismissed as not pressed.
7.	CMA No.3403/13	Syed Khalid Ali Raza Gardezi	J.S. M/o Finance GoP	Syed Khalid Ali Raza Gardezi, applicant appeared and stated that he has been sent back to his parent department, therefore, does not press this petition. Dismissed as not pressed.
8.	CMA No.3404/2013	Umar Ali	J.S. States & Frontier Regions Division	Mr. Muhammad Akram Gondal, learned counsel stated that the applicants have been promoted on merits, therefore, he does not press these applications Dismissed as not pressed.
9.	CMA No.3405/2013	Dr. Imran Zeb Khan	Chief Commissioner Afghan Refugees, Ibd.	
10.	CMA No.3406/2013	Amjad Nazir	Secretary, States & Frontier Regions Division	

9. It is to be observed that the other learned Bench of this Court, while hearing Constitution Petitions No.23/2013 on 09.05.2013 was, *prima facie*, of the opinion that notification of the Election Commission dated 02.04.2013 did not provide any valid justification, much less a compelling reason, so as to justify the transfers, postings, etc., in question. The contents of notification of the ECP are reproduced hereinbelow: -

“ELECTION COMMISSION OF PAKISTAN
NOTIFICATION

Islamabad the 2nd April, 2013

No.F.8(12)/2012-Cord(1)- WHEREAS it is expedient to ensure that all those who are in the service of Pakistan perform their duties to serve public interest and assist the

Election Commission of Pakistan in the conduct of General Elections 2013 fairly, justly, honestly and in accordance with law;

AND WHEREAS it is also expedient to take pre-emptive steps so that no employee in the service of Pakistan should try to influence the election process in any manner to favour any particular political party or a candidate;

NOW THEREFORE, in exercise of the powers conferred upon it under Article 218(3) of the Constitution read with sections 103(c) and 104 of the Representation of the People Act 1976, the directions dated 08.06.2012 of the Supreme Court of Pakistan in Workers' Party Pakistan's case and all other powers enabling it in that behalf, the Election Commission of Pakistan is pleased to direct the Federal and Provincial Caretaker Governments to:

- (i) Shuffle/transfer all Federal and Provincial Secretaries. However, if the caretaker government considers that a federal or provincial secretary need not be transferred/shuffled, it may refrain from doing so and intimate the same to the Election Commission.
- (ii) Assess whether the Chairpersons / Chief Executives of all autonomous and semi-autonomous and/or state owned bodies, IG Police, CCPOs, City Commissioners, DCOs, DPOs, SHOs, patwaris and EDOs are independent individuals and transfer those who do not meet this criteria.

2. Clauses (iii) and (iv) of this Commission's Notification No.8(12)/2012-Cord(1) dated 26th March, 2013 are hereby withdrawn. This directive shall not apply to specific transfers made under the directions of the Election Commission.

By Order of the Election Commission of Pakistan.

Sd/-
(Syed Sher Afgan)
Acting Secretary"

10. A perusal of the above notification suggests that it was issued by the ECP under Article 218(3) of the Constitution read with sections 103(c) and 104 of the Representation of the People Act, 1976 and the directions dated 08.06.2012 of this Court issued in Worker's

Party Pakistan v. Federation of Pakistan (PLD 2012 SC 681) and all other powers enabling it in that behalf, directing the Federal and Provincial Caretaker Governments to transfer/shuffle all Federal and Provincial Secretaries. However, if the Caretaker Government considered that a Federal or Provincial Secretary need not be transferred/shuffled, it would refrain from doing so and intimate the same to the ECP. We tend to agree with the learned counsel for the petitioner that under the notification noted hereinabove; the Caretaker Government had been authorized not to transfer/shuffle any Government servant, if it considered that it was not expedient to do so. But, at any rate, no powers were given to requisition the services of the employees on deputation or make fresh appointments against the available vacancies, or make proforma promotions of officials of all grades in autonomous and semi-autonomous bodies, corporations, regulatory authorities, statutory bodies, government controlled corporations, etc.

11. It is to be seen that the Caretaker Cabinet/Prime Minister were installed in the Federation and Provinces in the month of March, 2013 after dissolution of the National and the Provincial Assemblies on completion of their respective terms provided under Article 224(1) & (1A) of the Constitution, which read as under: -

224. Time of election and bye-election.— (1) A general election to the National Assembly or a Provincial Assembly shall be held within a period of sixty days immediately following the day on which the term of the Assembly is due to expire, unless the Assembly has been sooner dissolved, and the results of the election shall be declared not later than fourteen days before that day.

(1A) On dissolution of the Assembly on completion of its term, or in case it is dissolved under Article 58 or Article 112, the President, or the Governor, as the case may be, shall appoint a caretaker Cabinet:

Provided that the care-taker Prime Minister shall be appointed by the President in consultation with the Prime Minister and the Leader of the Opposition in the outgoing National Assembly, and a care-taker Chief Minister shall be appointed by the Governor in consultation with the Chief Minister and the Leader of the Opposition in the outgoing Provincial Assembly:

Provided further that if the Prime Minister or a Chief Minister and their respective Leader of the Opposition do not agree on any person to be appointed as a care-taker Prime Minister or the care-taker Chief Minister, as the case may be, the provisions of Article 224A shall be followed :

Provided also that the Members of the Federal and Provincial care-taker Cabinets shall be appointed on the advice of the care-taker Prime Minister or the care-taker Chief Minister, as the case may be.

12. As in instant case the Caretaker Prime Minister could not be appointed in terms of Article 224(1A) of the Constitution for want of consensus between the former elected Prime Minister and the Leader of the House, therefore, the provisions of Article 224A of the Constitution were invoked, and ultimately on account of inability of the Committee constituted under Article 224A(1) & (2) to decide the matter, the names of the nominees were referred to the Election Commission of Pakistan for finalizing the name of the caretaker Prime Minister within two days, thus, as a result of deliberations by the ECP, Caretaker Prime Minister was appointed in accordance with the provisions of Articles 224(1A) and 224A(1) & (2) of the Constitution.

13. Essentially, according to the settled and accepted norms/practice, the Caretaker Government (Prime Minister and Cabinet) is required to perform its functions to attend to the day-to-day matters, which are necessary to run the affairs of the State and also to watch the national interests, etc., in any eventuality in absence of an elected Government, and such Government is not authorized to

make decisions/appointments having effect on the working/policies of the future Government, which is likely to take over after the elections. Apart from providing assistance to the Election Commission in organizing free, fair, honest and just elections in the country, it is not vested with the authority to take decisions concerning the affairs of the Government, which are bound to pre-empt the scope and sphere of activity, powers and jurisdiction of an elected Government. A Caretaker Government possesses limited powers and authority particularly in view of the fact that when it is appointed, there is no National Assembly in place and thus the all important aspect of accountability is absent. Further, the exercise of complete powers by the Caretaker Government goes against the doctrine of separation of powers which is the lifeline of any vibrant democracy. As noted earlier, the absence of legislature results in lack of checks and balances. The Caretaker Government also lacks the mandate of the majority of people, which is to be acquired by elected government through the general elections. Therefore, if a Caretaker Government is allowed to exercise complete powers available to an elected Government, it may make an attempt to continue to remain in office for a longer period of time or may take such decisions which may cause problems for the future elected government.

14. As per the scheme of the Constitution, prior to the 18th Constitutional Amendment, where the President dissolved the National Assembly under Article 48(5), he shall, in his discretion, appoint caretaker Cabinet. Similarly, if the President, dissolves the National Assembly on the advice of the Prime Minister, he is required to put in place an interim set up or a temporary arrangement to ensure the

continuity of the functions of the Government to run day-to-day affairs of the State till the appointment of duly elected Government with its Cabinet after completion of the election process. Unfortunately, after the promulgation of the Constitution of 1973, during the Martial Law regime of General (R) Zia-ul-Haq in 1985, by means of the 8th Constitutional Amendment, an infamous provision, namely, Article 58(2)(b) was inserted into the Constitution, which provided that the President may dissolve the National Assembly in his discretion where, in his opinion, a situation has arisen in which the Government of the Federation cannot be carried on in accordance with the provisions of the Constitution and an appeal to the electorate is necessary. The said provision was later deleted by means of Thirteenth Constitutional Amendment in 1997. During the next Martial Law regime of General (R) Pervez Musharraf, the same was again inserted through the 17th Constitutional Amendment passed in 2003. However, after the restoration of democratic governance in the country, the new elected Government again deleted the said provision from the Constitution through the 18th Constitutional Amendment passed in 2010. It is to be noted that in exercise of the powers under the said provision, for more than one time, the National Assembly was dissolved and the elected Prime Minister/Cabinet were removed, and caretaker Prime Minister and Cabinet were appointed.

15. The object and purpose of making reference to these provisions is to highlight that the functions of the elected Government have remained under serious threats. At the same time, it is also significant to point out that despite appointment of the Caretaker Prime Minister/Cabinet, no guidelines were ever provided laying down

the parameters to be observed by the Caretaker Governments in the exercise of their powers. As far as Constitution is concerned, Article 2A envisages that State shall exercise its powers and authority through the chosen representatives of the people and a comprehensive procedure, including qualifications and the disqualifications for the persons to be elected as Members of *Majlis-e-Shoora* (Parliament) has been prescribed. Thus, it is the chosen representatives of the people who have to run the affairs of the State for a fixed term of five years. Such representatives of the people are required to ensure good governance, lay down policies, and ensure betterment of the general public through legislative and executive actions. On the contrary, a Caretaker Government as compared to an elected Government remains in office for a very limited period whose first and last concern is to ensure that fair, free, honest and just elections are held in the country. The concept of caretaker or interim Government, in absence of an elected government is in vogue in a number of countries since the ancient times. Inasmuch as, in the Constitution of some of the countries, the concept of caretaker government does not specifically find a place, yet the practice of appointing caretaker government is in vogue those countries. Such countries include India, Australia, Canada, Bangladesh, Holland, New Zealand, UK, etc. With the passage of time, all those countries have developed Constitutional conventions, on the basis of which the caretaker governments are put in place to run the affairs of the State during the interim period, i.e. till returning to power of the duly elected governments having full powers and such caretaker governments do not, in general, take any major policy decisions, including making appointments of civil servants, etc.,

particularly in the manner it has been done by the Caretaker Government that had come into existence on completion of the term of the previous Government.

16. At this stage, reference may be made to the Constitutional system of Australia. As per the scheme of the Australian Constitution, the caretaker government is expected to conduct itself in accordance with a series of conventions administered by the department of the Prime Minister and Cabinet, although there is no law compelling the caretaker government to do so. Usually, there is no separate appointment of a caretaker government and the outgoing government continues to function as caretaker government. During the 1975 Australian constitutional crisis, the then Governor-General appointed a new government with the assurance that it would immediately advise a general election, and it would operate on a caretaker basis in the meantime. The political system of Australia ensures that a Cabinet is always maintained and that caretaker governments abide by the conventions. Any flouting of the conventions by a caretaker government would immediately come to light, and could go against them in the election campaign. In this regard, a document titled "Guidance on Caretaker Conventions" has been administered by the Department of the Prime Minister and Cabinet. Section 1.2 of the Caretaker Conventions provides that a caretaker government operates until the election result clearly indicates that either the incumbent party has retained power, or in the case where there is to be a change of government, until the new government is appointed by the Governor-General. The relevant clauses of the guidelines are reproduced hereinbelow: -

"3. SIGNIFICANT APPOINTMENTS

3.1 Governments defer making significant appointments during the caretaker period. When considering the advice it would give on whether an appointment qualifies as 'significant', the agency should consider not only the importance of the position, but also whether the proposed appointment would be likely to be controversial.

3.2 If deferring the appointment is impracticable, usually for reasons associated with the proper functioning of an agency, there are several options:

- the Minister could make an acting appointment where permissible;
- the Minister could make a short term appointment until shortly after the end of the caretaker period; or
- if those options are not practicable, the Minister could consult the relevant Opposition spokesperson regarding a full term appointment."

In Canada too, "Guidelines on the Conduct of Ministers, Secretaries of State, Exempt Staff and Public Servants during an Election" have been issued which provide, *inter alia*, as under: -

GUIDELINES ON THE CONDUCT OF MINISTERS, SECRETARIES OF STATE, EXEMPT STAFF AND PUBLIC SERVANTS DURING AND ELECTION

This does not mean that government is absolutely barred from making decisions of announcements, or otherwise taking action, during an election. It can and should do so where the matter is routine and necessary for the conduct of government business, or where it is urgent and in the public interest – for example, responding to a natural disaster. In certain cases where a major decision is unavoidable during a campaign (e.g., due to an international obligation or an emergency), consultation with the Opposition may be appropriate, particularly where a major decision could be controversial or difficult for a new government to reverse.

Contracts, G&Cs and Appointment

Appointments should normally be deferred. The Prime Minister's Office must be consulted before making any commitments concerning appointments that cannot be deferred.

As far as UK is concerned, they have also issued similar guidelines in 2010. Relevant guidelines are reproduced hereinbelow: -

SECTION G Government Decisions

1. During an election campaign the Government retains its responsibility to govern and Ministers remain in charge of their Departments. Essential business must be carried on. In particular Cabinet Committees can continue to meet and consider correspondence if necessary, although in practice this may not be practical. If something requires urgent collective consideration, the Cabinet Secretariat should be consulted.

2. However, it is customary for Ministers to observe discretion in initiating any new action of a continuing or long-term character. Decisions on matters of policy, and other issues such as large and/or contentious procurement contracts, on which a new Government might be expected to want the opportunity to take a different view from the present Government should be postponed until after the Election, provided that such postponement would not be detrimental to the national interest or wasteful of public money.

SECTION H Public and Senior Civil Service Appointments

1. All appointments requiring approval by the Prime Minister, other Civil Service and public appointments likely to prove sensitive, (including those where Ministers have delegated decisions to officials or other authorities, such as appointments to certain NHS boards), should effectively be frozen until after the Election. This applies to appointments where a candidate has already accepted a written offer. The individual concerned should be told that the appointment will be subject to confirmation by the new Administration after the Election.

2. It is recognised that, should this procedure result in the cancellation (or substantial delay) of an appointment by the new Administration, the relevant Department could be vulnerable to legal action by a disappointed candidate who had already accepted a written offer. To reduce the risk of this happening, Departments might wish to:

- recommend to their Secretary of State the advisability either of delaying key stages in the process, or of consulting the Opposition (e.g. on a short-list of candidates or a single name for final selection) where an appointment is likely to take effect just before or after an election;

- issue a conditional letter of offer, making it clear that the formal offer of the appointment will need to be confirmed by a new Administration.

3. In cases where an appointment is due to end between the announcement of the Election and Election Day, and no announcement has been made concerning the new appointment, it will normally be possible for the post to be left vacant until incoming Ministers have been able to take a decision either about re-appointment of the existing appointee or the appointment of a new person. This situation is also likely to apply to any appointments made by Letters Patent, or otherwise requiring Royal approval, since it would not be appropriate to invite Her Majesty to make a conditional appointment.

4. In the case of public and Senior Civil Service appointments, Departments should delay the launch of any open competition during an election period, to give any incoming Administration the option of deciding whether to follow the existing approach.

5. In those cases where an appointment is required to be made, it is acceptable, in the case of sensitive Senior Civil Service positions, to allow temporary promotion or substitution. In the case of public appointments, the current term may be extended to cover the Election period, or as required, with the prior approval of the Commissioner for Public Appointments. This will allow time for new Ministers to take a decision about longer term appointment. In any cases of doubt, and particularly where circumstances make it difficult to apply these temporary arrangements, Departments should consult the Propriety and Ethics Team in the Cabinet Office.

The Cabinet Manual: *A guide to laws, conventions and rules on the operation of government*, 1st edition, October 2011 provides, *inter alia*, as under: -

PARLIAMENT

7. Parliament has a number of functions, which include: controlling national expenditure and taxation; making law; scrutinising executive action; being the source from which the Government is drawn; and debating the issues of the day. All areas of the UK are represented in the House of Commons, which provides a forum for Members of Parliament (MPs) to speak and correspond on behalf of their constituents, where they can seek redress if necessary.

8. Parliament comprises the Sovereign in Parliament and two Houses: the House of Commons, which is wholly elected, and the House of Lords, which comprises the Lords Spiritual and Temporal. Parliament has overall control of the public purse; the Government may not levy taxes, raise loans or spend public money unless and until it has authorisation from Parliament. The House of Commons claims exclusive rights and privileges over the House of Lords in relation to financial matters, and the powers of the House of Lords to reject legislation passed by the House of Commons are limited by statute.

9. In the exercise of its legislative powers, Parliament is sovereign. In practice, however, Parliament has chosen to be constrained in various ways – through its Acts, and by elements of European and other international law.

10. Parliament also scrutinises executive action. Indeed, the government of the day is primarily responsible to Parliament for its day-to-day actions. This function is exercised through a variety of mechanisms, such as the select committee system, Parliamentary questions, oral and written statements, debates in both Houses and the Parliamentary Commissioner for Administration. See Chapter Five for more on Parliament.

[Emphasis supplied]

11. By the Scotland Act 1998, the Government of Wales Acts 1998 and 2006 and the Northern Ireland Act 1998, Parliament devolved powers over areas of domestic policy such as housing, health and education to directly elected legislatures in Scotland, Wales and Northern Ireland. Parliament retains the legal power to continue to legislate on these matters, but it does not normally do so without the consent of these devolved legislatures. See Chapter Eight for more on devolution.

17. Coming to the case in hand, it may be mentioned here that this is not the first time that this Court is confronted with such a situation. Earlier too, identical matters have been dealt with by the Superior Courts of Pakistan. In the case of *Khawaja Muhammad Sharif v. Federation of Pakistan* (PLD 1988 Lahore 725) wherein the Lahore High Court held that caretaker Cabinets have to confine themselves to take care of the day-to-day administration of the State. Relevant portion of the judgment reads as under: -

"26. The learned Attorney-General submitted that it is quite correct that Caretaker Cabinets have to take care of the day-to-day administration of the State. There may be no bar to take policy decisions if so required by the circumstances. He is right. Caretaker Cabinets have to confine themselves to take care of the day-to-day administration of the State. They can take all decisions requiring attention or action, may be having far-reaching effects, like in respect of war and peace or earthquake or floods. But they can neither forget the predominant position of their being Caretaker nor can they take undue advantage of their position either for themselves or for their political parties. They have to be impartial to everybody, including their rivals or opponents in the political fields. They cannot take advantage of their official position of Caretaker Government at the expense of other political forces or people at large. Neutrality, impartiality, detachment and devotion to duty to carry on day-to-day affairs of the State without keeping in view one's own interest or of one's party are the sine qua non of a Caretaker Cabinet."
[Emphasis supplied]

In the case of Regional Commissioner of Income Tax v. Zaffar Hussain (PLD 1992 SC 869) Mr. Justice (R) Abdul Shakurul Salam J., in his dissenting note held as under: -

"3. The following points are obvious and noteworthy. Firstly, that when the leader of the Opposition became care-taker Prime Minister, displeasure or rancour of the Opposition was given vent to by ordering the removal of the respondents from their service. It was rather petty. Secondly, as far as the authority of the Care-taker Cabinet is concerned, I had said in the case of "Muhammad Sharif v. Federation of Pakistan" (PLD 1988 Lahore 725) in the Lahore High Court that "Care-taker Cabinets have to confine themselves to take care of the day to day administration of the State. They can take all decisions requiring attention or action, may be having far-reaching effects, like in respect of war and peace or earthquake or floods. But they can neither forget the predominant position of their being Care-taker nor can they take undue advantage of their position either for themselves or for their political parties. They have to be impartial to everybody, including their rivals or opponents in the political fields. They cannot take advantage of their official position of care-taker Government at the expense of other political forces or people at large. Neutrality, impartiality, detachment and devotion to duty to carry on day to day affairs of the State without keeping in view one's own interest or of one's own party are the sine qua non of a Care-taker Cabinet. The judgment was upheld by this

Court in "Federation of Pakistan v. Haji Muhammad Saifullah Khan and others" (PLD 1989 SC 166). The action of removal of the respondents clearly did not fall within the scope or ambit of the Care-taker Cabinet whose primary function was to hold election and carry on(day to day administration with the civil servants available and not to throw out those who had been given employment by the previously elected Government."
[Emphasis supplied]

In the case of Tanveer A. Qureshi v. President of Pakistan (PLD 1997 Lahore 263) it has been held as under: -

"26. Another principal attack on the formation of the C.D.N.S. by the petitioner was that the decision to set up such a council being of great importance and a matter of policy could not have been taken by the Caretaker Cabinet appointed under Article 48(5) of the Constitution. It was emphasised by Mr. Talib H. Rizvi, as also Mr. Abdul Rehman Cheema that the life of the Caretaker Cabinet being for 90 days it cannot take decisions of permanent nature but its activities are confined only to running day-to-day affairs of the Government and should be geared towards holding of free and fair elections. Reliance has been placed on Kh. Muhammad Sharif v. Federation of Pakistan and 18 others PLD 1988 Lah. 725, Federation of Pakistan etc. v. Aftab Ahmad Khan Sherpao and others PLD 1992 SC 723 and Madan Murari Verma v. Ch. Charan Singh and another AIR 1980 Calcutta 95.

28. Article 48(5) of the Constitution enjoins the President to appoint a caretaker Cabinet to run the affairs of the country pending the elections to the National Assembly and formation of Government. The use of word 'Caretaker' is not without significance and has to be given some meaning. The argument of the learned Attorney-General and Mr. Sharif-ud-Din Pirzada that 'Caretaker' signifies the temporary nature of the tenure appears to be attractive and coming from a jurist like Mr. Sharif-ud-Din Pirzada is entitled to great respect but with due deference we are unable to agree with them. A Cabinet appointed by the Prime Minister to run the affairs of the country till the next General Elections by its very nature is temporary and the life of it is limited by the Constitution itself till the next General Elections which are to be held within 90 days. It was thus not necessary to use the word 'Caretaker' to indicate temporary nature of the tenure. On the other hand we are of the view that this word has been used in Article 48(5) to emphasises the purpose of appointment and the nature of the power available to the Caretaker Government.

30. Although no hard and fast rules can be laid down in respect of the, powers available to the Caretaker Cabinet to take decisions as the answer would depend upon facts of each case but generally speaking a major policy-decision which can await the formation of regularly elected Government without causing any disruption or danger to the functioning of the State or orderly running of the country should be left to be determined by the elected representatives of the people, moreso when the Caretaker Cabinet cannot claim to have been given any mandate by the people. There may not be any express restriction on the powers of the Caretaker Cabinet by the Constitution itself but the conclusion reached by us flows from the use of words "Caretaker Cabinet" in Article 48(5) of the Constitution as also very nature of the Caretaker Cabinet and the purpose for which it has been appointed.

In the case of Khawaja Ahmad Tariq Rahim v. the Federation of Pakistan (PLD 1992 SC 646), this Court held as under: -

"5. The object of the Care-taker Cabinet is to fill a temporary void, so that it may conduct day to day administration, without getting involved in matters of substantive importance or policy or subjects having far-reaching effects, other than during an emergency or some urgency, till the new Government is installed. Above all, it is not supposed to influence the elections or do or cause to be done anything whereby which Government machinery or funds are channelled in favour of any political party."

In the case of Madan Murari Verma v. Choudhuri Charan Singh (AIR 1980 Cal 95), the Court held as under: -

"The President has accepted the resignation of the respondent No. 1 and his Council of Ministers and has asked them to continue in office "till other arrangements are made". It is the limited pleasure indicated and in that field only in my opinion the respondent No. 1 and his Council of Ministers can function. There is no mention of any care-taker Government as such, in our Constitution or in the constitutional law, though Sir Ivor Jennings has described in his book -- Cabinet Government, Third Ed. p. 85 the ministry that was formed by Mr. Churchill in England after the war before and pending the General election in 1945 as care-taker Government. But an extraordinary situation like the present, in my opinion, calls for a care-taker Government and therefore, the respondent No. 1 and his Council of Ministers can only carry on day-to-day administration in office which are necessary for carrying on "for making alternative arrangements". In

effect the President, in my opinion is therefore, not obliged to accept the advice that the respondent No. 1 and his Council of Ministers tender to him except for day-to-day administration and the Council of Ministers and the respondent No. 1 should not make any decisions which are not necessary except for the purpose of carrying on the administration until other arrangements are made. This in effect means that any decision or policy decision or any matter which can await disposal by the Council of Ministers responsible to the House of People must not be tendered by the respondent number 1 and his Council of Ministers. With this limitation the respondent No. 1 and the Council of Ministers can only function. And in case whether such advice is necessary to carry on the day-to-day administration till "other arrangements are made" or beyond that, the President, in my opinion, is free to judge. It is true again that this gives the President powers which have not been expressly conferred by the Constitution. But, in my opinion, having regard to the basic principle behind this Constitution under Article 75(3) read with Article 74(1) in the peculiar facts and circumstances of this case is the only legitimate, legal and workable conclusion that can be made.

In the case of R. Krishnaiah v. State Of Andhra Pradesh (AIR 2005 AP

10) it was held that: -

"10. In support of his submissions learned Counsel placed reliance on the recommendations of the Sarkaria Commission referred to by a Constitution Bench of the Supreme Court in S.R. Bommai and Ors. etc., etc. v. Union of India and Ors. etc., etc., , more particularly, recommendation No. 6-8-04(A) that after dissolution of the Assembly and till new Government takes over, during the interim period, the Caretaker Government should be allowed to function. But as a matter of convention, Caretaker Government should merely carry on day-to-day Government and desist from taking any major policy decision. He thus urged that issuing Ordinance permitting to withdraw amount from the Consolidated Fund of the State of Andhra Pradesh to meet (a) the grants made in advance in respect of the estimated expenditure for a part of the financial year commencing on the 1st April, 2004 as set forth in Column (3) of the Schedule appended to the Ordinance and (b) the expenditure charged on the Consolidated Fund of the State of Andhra Pradesh, for the part of the same financial year, as set forth in Column (4) of the Schedule, is nothing but a major policy decision which ought not to have been taken.

.....
16. Therefore, the submission that the Ordinance could not have been promulgated is misconceived. Ordinance has the same force and effect as any Act of the State

Legislature and there is no prohibition in the Constitution that during the period an Assembly is dissolved and fresh Assembly has not yet been constituted, that Ordinance could not have been promulgated by the Governor. This act of the Governor will be deemed to be an exercise of power of the Legislative Assembly, as envisaged under Article 206 and even under Article 205 and as noticed above. Clause (3) of Article 203 is a prohibition not to withdraw from the Consolidated Fund any amount being subject to provisions of Articles 205 and 206 of the Constitution. The Ordinance having validly been promulgated there is hardly any force in the other submission that a situation has arisen where power must be exercised or directed to be exercised by the President of India under Articles 356 or 360 of the Constitution."

18. The crux of the above case-law and conventions/guidelines is that the Caretaker Government/Cabinet has to confine itself to the running of the day-to-day administration of the State. Indeed, it may take decisions required for ordinary orderly running of the state, but decisions having far-reaching effects should only be taken in extraordinary circumstances, like in war, earthquake, floods, etc. Although there may not be any express restriction on the powers of the caretaker government by the Constitution itself, but a major policy-decision which can await the formation of regularly elected Government without causing any disruption or danger to the functioning of the State or orderly running of the country should be left to be determined by the elected government. Thus, there can be no two opinions that the caretaker government has to exercise the powers for a limited purpose as it has been highlighted hereinabove, namely, relating to the elections and not to make fresh appointments of the civil servants or make appointments of the heads of the Autonomous, Semi-Autonomous Bodies, Corporations, Regulatory Authorities, etc., appointments on contract basis or allowing deputation or promotion to the civil servants without realizing the

scope of their efficacy to share higher responsibilities to run the affairs of the Government.

19. In the context of instant case, besides relying upon the guidelines in the judgments noted hereinabove, one may conveniently pose a question, particularly in view of Article 48(5) of the Constitution and other constitutional provisions, as to why a caretaker cabinet/government appointed under Article 224 or as the case may under Article 224A of the Constitution, should not exercise powers available to a duly elected government? Answer to this question lies in the expression "Interim Cabinet" used in Article 48(5) of the Constitution, which enables to draw the inference that the interim Cabinet or caretaker Cabinet headed by a Prime Minister means a caretaker cabinet or a government, which has been entrusted temporary charge of government during the period when the National Assembly is dissolved because ordinarily for a period of five years under Article 58, the National Assembly exists for the purpose of running the affairs of the State and in absence of elected Parliament, continuity of the governance system in the country has to be kept intact, otherwise running the affairs of the State would not be possible at all. In addition to it, although in our country in respect of the powers of the caretaker government no conventions have been developed and for such reasons the instant Caretaker Government indulged in taking vital policy decisions and making postings and appointments of heads of statutory bodies, postings and appointments in civil service, statutory bodies, autonomous, semi-autonomous bodies, corporations and regulatory authorities, including appointments on contract or accepting the services of various persons

on deputation by allowing them to occupy one step higher positions than the one, which they were holding previously.

20. Petitioner Khawaja Muhammad Asif appeared and pointed out that caretaker government had made transfers/postings in civil service, statutory bodies, autonomous, semi-autonomous bodies, corporations and regulatory authorities, etc., the list of which has been made part of the record.

21. The learned Attorney General while appearing in Constitution Petitions No.14 of 2013, etc., made a statement, already mentioned in the order dated 22.05.2013, which is reproduced hereinbelow: -

"12. That the federation is already on record in taking up a principled stand before this Hon'ble Court that the care-taker government needs only to confine their work to 'day to day' routine matters and effectively maintain the status quo for the incoming elected government, while submitting the views of the federation vide a CMA filed in Constitutional Petition Nos.14, 16 to 18 of 2013. It is submitted that vide the said CMA the Attorney General submitted that the care-taker government should avoid taking and controversial step and should not commit any process that is not reversible by the incoming elected government and further that the care-taker government should restrict itself to activity that is a) routine, b) non-controversial, c) urgent and in public interest, d) reversible by the elected government; and e) any significant appointment thereby avoiding any major decisions except agreed to by the opposition.

13. That the learned Attorney General whilst representing the case of the federation in the foresaid constitutional petitions also relied upon Australian Caretaker Conventions

and highlighted that the key elements of the code of conduct should include:

- a) avoiding major policy decisions,*
- b) avoiding any significant appointments,*
- c) signing any major contract,*
- d) avoiding international treaty or commitment, etc.*

It was in the same light that the learned Attorney General submitted before this Hon'ble Court that the care-taker government had deferred some items of the Council of Common Interests (CCI) in a recently held meeting and was not, therefore, making any binding decisions/commitments with IMF, World Bank or any other donor agency and had further decided not to enter into any binding agreement or treaty to bind the future elected government. It is submitted, therefore, that the care-taker government having earlier taken a principled stand cannot thereafter be allowed to recuse from the same."

Similarly, the Law Minister of the Caretaker Government also objected to the appointments, which were being made directly or indirectly under the verbal or written directions/observations of the caretaker Prime Minister or Cabinet Ministers or the heads of different Departments, Divisions, Ministries, etc. Relevant extract from his statement was published in Daily Dawan, Islamabad dated 19.05.2013, which is reproduced hereinbelow: -

"... caretaker Law Minister Ahmar Bilal Soofi has also criticised the postings and transfers being made by the government of Prime Minister retired Justice Mir Hazar Khan Khoso.

He warned the caretaker set-up against transgressing its mandate by making undue transfers and postings in important government departments.

In a letter to his cabinet colleagues a copy of which he also sent to the Prime Minister Secretariat and the establishment secretary, Mr Soofi said: "Cabinet members

should abide by the legal limitation they enjoy under the constitution. They should not trespass the mandate of the interim government.

"I would again reiterate that we may continue the prevalent transparency and may not take action which may be counter-productive to the important role performed by the caretaker government."

Talking to Dawn on Sunday, the law minister confirmed that he had highlighted in the letter the issue of unnecessary postings and transfers being carried out by some of his colleagues in the cabinet. But he did not mention any specific posting or transfer. He said the letter had been dispatched on Saturday.

In his letter Mr Soofi has also mentioned the cancellation of contract of two officials of the information ministry and the recent replacement of the National Highway Authority's chairman. The letter also referred to a statement he had earlier made in cabinet that it was advisable to avoid making controversial appointments in major departments and leave them to the elected government."

22. We consider it appropriate to make reference of the case titled as *In re: Abdul Jabbar Memon* (1996 SCMR 1349) wherein it has been observed that the Federal Government, Provincial Governments, Statutory Bodies and the Public Authorities have been making initial recruitments, both *ad-hoc* and regular, to posts and offices without publicly and properly advertising the vacancies and at times by converting *ad-hoc* appointments into regular appointments. It was held that this practice is *prima facie* violative of Fundamental Right enshrined in Article 18 of the Constitution guaranteeing to every citizen freedom of profession, which must be discontinued forthwith and immediate steps should be taken to rectify the situation, so as to bring the practice in accord with the Constitutional requirement. But unfortunately it has been noticed that the guidelines/principles have neither been followed by the duly elected governments in the past nor by the caretaker governments. Inasmuch as, principle of transparency

has not been adhered to in the appointments of the Members of the Federal Public Service Commission under the Ordinance of 1977 to conduct tests/examinations for recruitment of persons to all Pakistan Services, Civil Services of the Federation and civil posts in connection with the affairs of the Federation and Provinces. No transparent system is in place to ensure merit-based selection of persons for appointment as the heads of the autonomous, semi-autonomous bodies, corporations, organizations, etc. Record available in archives would indicate that except for a shorter period, despite presence and availability of renowned knowledgeable and reputable personalities, these vacancies were allowed to be occupied by persons having connections with the higher functionaries of the State, who openly indulged in favouritism and nepotism. In such a scenario, how the object of making appointments on merit could be achieved, including by the elected government.

23. It is to be noted that reportedly there are more than 100 organizations/corporations, which are causing colossal loss of trillion of rupees to the public exchequer, like Pakistan International Airline, Pakistan Railways, Pakistan Steel Mills, PEPCO, PASCO, Utility Stores Corporations, OGDCL, NEPRA, PEMRA, PTA, KESC, SSGPL, NICL, etc. It is a fundamental right of the citizens of Pakistan under Article 9 of the Constitution that the national wealth/resources must remain fully protected whether they are under the control of the banks or the autonomous and semi-autonomous bodies.

24. There are cases where favorites were appointed despite lacking merits to hold such posts/positions. Reference may be made to the case of Adnan A. Khawaja v. The State

(2012 SCMR 1434) where a convict, who was acquitted of criminal charges taking benefit of NRO, was appointed as the head of OGDCL. Similarly, in the case of Mir Muhammad Idris v. Federation of Pakistan (PLD 2011 SC 213), the validity of the reappointment of Syed Ali Raza as President of the National Bank of Pakistan for fifth time for one year was challenged. The Court declared the said reappointment to be unconstitutional. Relevant para therefrom is reproduced hereinbelow: -

"11. ... Since, admittedly, the amendment made in section 11(3)(d) of the Act of 1974 by the Finance Act, 2007 was unconstitutional and illegal, the appointment of respondent No.3 made under an unconstitutional and illegal legislation would not remain unaffected as the foundation on which its superstructure rested stood removed. The argument of the learned counsel for respondent No. 3 that the appointment of respondent No.3 was made by the Federal Government in exercise of the power conferred upon it by a legislative instrument passed by the concerned legislature, therefore, the same was not liable to be interfered with being a past and closed transaction is not tenable. If the appointments of Judges were affected on account of a similar defect in legislation, how the appointment of respondent No.3, who, too, was appointed under such an unconstitutional and illegal amendment could be protected.

13. ... The reappointment of respondent No.3 Syed Ali Raza as President NBP by way of notification dated 10.4.2010 is declared to be unconstitutional and he shall cease to hold office as President NBP with immediate effect."

In the same context, reference may also be made to the case of Chairman of NICL Ayaz Khan Niazi, who again was appointed without determining whether he is fit and proper person to hold the said post as a result whereof the government exchequer had to suffer an enormous loss, some of its portions have been recovered and still cases are pending before the Courts. This Court in Suo Moto Case No. 18 OF 2010 (PLD 2011 SC 927)

directed the Secretary Commerce to lodge complaint before FIA against the concerned persons for causing loss to the public exchequer. Similarly, the appointment of one Mr. Tauqir Sadiq as Chairman of the Oil and Gas Regulatory Authority was challenged before this Court on the ground that he did not possess the necessary credentials for holding the said office. The Court in the case reported as Muhammad Yasin v. Federation of Pakistan (PLD 2012 SC 132), after considering the importance of the OGRA and scrutinizing the appointment process of its Chairman, declared his appointment *void ab initio*. There are other cases where some of the persons had succeeded in getting contract employments after their retirement in violation of section 14 of the Civil Servants Act, 1973 as well as instructions contained in ESTA Code. Reference may be made to Suo Motu Case No. 24 of 2010 (PLD 2011 SC 277) wherein it was observed that in the disciplined forces, particularly, like police and FIA where people have to work in a well defined discipline, the persons supervising the forces were permitted to hold charge of the posts on contract basis. It may not be out of context to note that in terms of the definition of section 2(1)(6)(ii) of the Civil Servants Act, 1973, a person who is employed on contract does not fall within the definition of a civil servant, so his authority to command and maintain discipline can be well imagined from the fact that if a person himself is not a civil servant, he is considered only bound by the terms and conditions of his contract and not by the statutory law, because if any condition laid down in the contract is violative of any statutory provision, he would only be

subject to action under the said contract. In this view of the matter, the officers who were reemployed after retirement, were directed to be removed. In a recent case titled as Muhammad Ashraf Tiwana v. Pakistan (Constitution Petition No.59 of 2011), this Court found that the appointments of Chairman and Members of the Securities & Exchange Commission of Pakistan did not meet the requirement of the Securities & Exchange Commission of Pakistan Act, 1997 as such, the same too, were set aside. Last but not the least, this Court while hearing the case regarding implementation of directions issued in Suo Motu case No.16/2011 regarding law and order situation in Karachi, directed the Government of Sindh to terminate the services of 86 employees appointed in different grades from 12 to 21 on contract basis in various provincial departments.

25. During hearing of the case, it has been pointed out to petitioner Khawaja Muhammad Asif that although he being an elected Member of the Parliament had raised questions touching upon the transparency in the appointment of the heads of the autonomous, semi-autonomous bodies, corporations, regulatory authorities, etc., but in his own capacity as a public representative, he had also to ensure that all the appointments in such like bodies as well as the appointments on contract basis must be made in a transparent manner. In some of the countries, effective steps have been taken to stop such colossal loss of the national resources by day-to-day measures to improve the professional quality and political neutrality of appointments to public bodies/regulatory authorities by ensuring that selection in such bodies is based on merit, fairness and openness. It

may not be out context to note that in UK, an independent Commissioner is available to regulate, monitor, report and advice the public appointments, the performances etc. All the government departments while making such appointments are bound to follow the code of practice which has been issued by such Commissioner. Similarly, in Canada all appointments for Chief Executives, Directors and Chairpersons of public sector corporations are subject to strict merit-based system. It may be noted that elected government has to heavily rely upon public bodies to implement their policies and the object essentially cannot be achieved if honest and competent persons are not holding such public offices. While making such appointments, following parameters are to be considered: -

(1) Integrity:

Holders of public office should not place themselves under any financial or other obligation to outside individuals or organizations that might seek to influence them in the performance of their official duties.

(2) Objectivity:

In carrying out public business, including making public appointments, awarding contracts, or recommending individuals for rewards and benefits, holders of public office should make choice solely on merit.

(3) Accountability:

Holders of public office are accountable for their decisions and actions to the public and must submit themselves to whatever scrutiny is appropriate to their office.

(4) Openness:

Holders of public office should be as open as possible about all the decisions and actions that they take. They should give reasons for their decisions and restrict information only when the wider public interest clearly demands.

(5) Honesty:

Holders of public office have a duty to declare any private interests relating to their public duties and to take steps to resolve any conflicts arising in a way that protects the public interest.

(6) Leadership:

Holders of public office should promote and support these principles by leadership and example.

26. Be that as it may, in order to ensure the enforcement of the fundamental right enshrined in Article 9 of the Constitution and considering it to be a question of public importance, a Commission headed by and comprising two other competent and independent members having impeccable integrity, may be the Federal Ombudsman or Chairman NAB or a Member of Civil Society having exceptional ability and integrity, is required to be constituted by the Federal Government through open merit based process having fixed tenure of four years to ensure appointments in statutory bodies, autonomous bodies, semi-autonomous bodies, regulatory authorities to ensure appointment of all the government controlled corporations, autonomous and semi-autonomous bodies, etc. The Commission should be mandated to ensure that all public appointments are made solely on merits. The Commission should discharge mainly the following functions: -

- (i) Regulate public appointments processes within his remit;
- (ii) implement a Code of Practice that sets out the principles and core processes for fair and transparent merit-based selections;
- (iii) chair the selection panels for appointing heads of public/statutory bodies and chairs and members of their boards, where necessary;
- (iv) appoint Public Appointments Assessors to chair the selection panels for appointing heads of public/statutory bodies and chairs and members of their boards, where appropriate;

- (v) report publicly on a public/statutory body's compliance with the Code of Practice, including examples of poor and good performance, and best practice;
- (vi) investigate complaints about unfair appointment process;
- (vii) Monitor compliance with the Code of Practice;
- (viii) Ensure regular audit of appointments processes within his remit;
- (ix) Issue an annual report giving detailed information about appointments processes, complaints handled, and highlights of the main issues which have arisen during the previous year. The annual report for the previous calendar year should be laid before the Parliament by 31st March; \
- (x) Take any other measures deemed necessary for ensuring that processes for public sector appointments that fall in his remit are conducted honestly, justly, fairly and in accordance with law, and that corrupt practices are fully guarded against.

27. The Code of Practice should provide foundations for transparent merit-based public appointments. All public appointments must be governed by the overriding principle of selection based on merit, out of individuals who through abilities, experience and qualities have a proven record that they best match the need of the public body in question. No public appointment must take place without first being recommended by the Commission. The appointments procedures should be subjected to the principle of proportionality, that is, what is appropriate for the nature of the post and the size and weight of its responsibilities. Those, selected must be committed to the principles and values of public service and perform their duties with highest level of integrity. The information provided about the potential appointees must be made public. The Commission may from time to time conduct an inquiry into the policies and procedures followed by an appointing authority in relation to any appointment. He may also issue a statement or publish a report commenting publicly on any breach or anticipated breach of the Code. The appointment of the successful candidate must be publicized.

28. In light of discussion made hereinabove, we hold that: -

(a) The Caretaker Cabinet/Prime Minister appointed under Article 224(1)(2) or 224A, as the case may be, is empowered to carry out only day-to-day affairs of the State with the help of the available machinery/resources/ manpower and also to watch national interest against war or national calamity or disaster faced by the nation, including terrorism, etc.

(b) The civil servants who have already been appointed in accordance with the rules/regulations on the subject ought not to be posted/transferred, etc., except in extraordinary circumstances, that too, temporarily.

(c) Major policy decisions including making of appointments, transfers and postings of the Government servants should be left to be made by the incoming government in view of the provisions of Constitution that the affairs of the State are to be run by the chosen representatives of the people.

(d) As newly elected Government is mandated to perform its functions of achieving the object and purpose of welfare of the people for which it has been duly appointed, therefore, caretaker Cabinet/government/Prime Minister, having no mandate of public support, is only caretaker set up and due to this connotation should detach itself from making permanent policies having impact on future of the country.

29. As we have noted hereinabove that since the Caretaker Government after its appointment, had made more than 400 appointments, transfers and postings of Government servants/employees, including transfer on deputation with promotion to next higher grade or as the case may be, heads of autonomous, semi-autonomous bodies, regulatory authorities, heads of government controlled institution, etc., therefore, it may not be possible for this Court to discuss and deal with each and every case in these

proceedings, therefore, their cases shall be subject to declaration, which is being made hereinbelow.

30. Thus, at the touchstone of the parameters laid down in the paras supra about the powers of the Caretaker Cabinet/Government, it is declared and held as under: -

- (a) The orders of appointment/deputation, transfers as well as postings, etc., of civil servants and Chief Executive Officers of statutory bodies, autonomous/semi-autonomous bodies, corporations, regulatory authorities, etc., made by the Caretaker Cabinet/Prime Minister are hereby declared to be void, illegal and of no legal effect w.e.f. date of issuance of notifications respectively, except the transfers and appointments of senior government officers including the Chief Secretaries and IGP of any of the Provinces during the election process.
 - (i) However, the Federal Government, in exercise of its powers would be authorized to allow to continue any of such appointments, transfers made by the Caretaker Cabinet/Government in the public interest, subject to following requisite provision of law.
 - (ii) As far as the issue of notifications in the cases of (i) Mumtaz Khan (CMA 3451/2013), (ii) Muhammad Nadeem, AGM Marketing (CMA 3480/2013) and (iii) General Syed Wajid Hussain, Chairman HIT Taxila are concerned, their notification of appointment shall remain frozen as process of their appointments had taken place before assumption of charge by Caretaker Cabinet/Government but their notifications were issued by the Caretaker Government. However, the Federal

Government through competent authority shall decide fate of their cases within 15 days after receipt hereof and copy of decision shall be sent to Registrar for our perusal in Chambers.

- (iii) Needless to say that if there are identical cases as noted in para (a)(ii), same shall be dealt with in the same manner.
- (b) All the orders of removal or transfers as well as posting on deputation of civil servants and Chief Executive Officers of statutory bodies, autonomous/ semi-autonomous bodies, corporations, regulatory authorities, etc., by the Caretaker Cabinet/Prime Minister are hereby declared void, illegal and of no legal effect w.e.f. date of issuance of notifications respectively, however:
 - (i) the Federal Government would be empowered to continue the removal or transfers, etc., of Chief Executive Officers/heads of the departments, statutory bodies, autonomous/ semi-autonomous bodies, corporations, regulatory authorities, etc. in the public interest, subject to following requisite provision of law.
- (c) As far as contract employees are concerned, whose contracts have been cancelled or those to whom fresh contracts of service have been given by the caretaker Cabinet/Government, shall stand cancelled as holders of contract employment of both these categories deserve no interference in view of the judgment of this Court in the case of State Life Insurance Employees Federation of Pakistan v. Federal Government of Pakistan (1994 SCMR 1341), because no relief can be granted to them in these proceedings as no question of public importance with

reference to enforcement of their any of the fundamental rights arises;

- (d) As far as the cases of the transfers of the civil servants/employees before the completion of tenure made allegedly in violation of the law laid down by this Court in Anita Turab case are concerned, the concerned departments of Federal Government shall examine their individual cases on the touchstone of the principles laid down in the said case. However, decision given on the complaint of any of the employees by this Court alleging violation of the principles enunciated in the judgment referred to hereinabove, shall be deemed to be in accordance with law.
- (e) The appointments in autonomous/semi-autonomous bodies, corporations, regulatory authorities, etc., made before the appointment of Caretaker Government shall also be subjected to review by the elected Government by adopting the prescribed procedure to ensure that right persons are appointed on the right job, in view of the observations made in above paras (Para. No. 25 & 26); and
- (f) The Federal Government through the concerned Secretaries shall take up the issue of postings of 100 officers on deputation from Balochistan, as it was pointed out during the hearing of this case on 22.05.2013 and accomplish the same, if required, in accordance with law.

31. The Secretary Establishment is directed to communicate this judgment to all other Divisions, Ministries, Organizations, etc. for implementation of the same.

32. The case of the Ombudsman be de-linked and it shall be heard/decided separately in view of the question of interpretation of law on the subject namely, Establishment of the office of Wafaqi Mohtasib (Ombudsman) Order, 1983.

33. In the result, Constitution Petition No.30 of 2013 partially allowed and the titled CMAs as well as CMAs No.2991 & 3015/2013 in Constitution Petition No.23/2012 are disposed of accordingly.

CHHIEF JUSTICE

JUDGE

JUDGE

ANNOUNCED IN OPEN COURT ON _____
AT ISLAMABAD

CHHIEF JUSTICE

APPROVED FOR REPORTING