

JUDGMENT SHEET
PESHAWAR HIGH COURT, PESHAWAR
JUDICIAL DEPARTMENT

W.P No.2479-P/2017

JUDGMENT

Date of hearing.....01.03-2018.....

Petitioner: (Arbab Muhammad Usman Khan President,
Peshawar High Court Bar Association,
Peshawar): In person.

Respondents: (Government of Khyber Pakhtunkhwa through Chief
Secretary & others) By: Mr. Mujahid Ali Khan, AAG.

QALANDAR ALI KHAN, J.- Arbab Muhammad Usman Khan, as President, Peshawar High Court Bar Association, Peshawar, invoked the writ jurisdiction of this Court under Article 199 of the Constitution of the Islamic Republic of Paksitan,1973 (**hereinafter referred to as “the constitution”**) for striking down the amendment in Section 6 of the Khyber Pakhtunkhwa Ehtisab Commission Act, 2014, (**hereinafter referred to as “the Act of 2014”**) being unconstitutional, against the independence of judiciary and rules of business.

2. Being elected President of Peshawar High Court Bar Association, Peshawar, and feeling aggrieved of the amendment in Section 6 of **Khyber**

Pakhtunkhwa Ehtesab Commission Act, 2014, the petitioner invoked the constitutional jurisdiction of this Court for striking down the impugned amendment, which was to the following effect:

“6. Constitution of Selection Committee. (1) There shall be constituted a Selection Committee consisting of the Judges of the Administrative Committee of the High Court and the Advocate General for recommending suitable persons for each category to the Commission, for their appointment as Director General, Prosecutor General and Director Internal Monitoring and Public Complaints Wing, by inviting applications from the general public through advertisement.

Provided that incase of appointment of commissioners, such recommendation shall be given to the Government.

Provided further that the recommendations given under this Sub section shall be binding on the Government.

(2). The procedure of selection shall be completed within a period of one hundred and twenty (120) days, when any position falls vacant, while the procedure for such selection shall be started within a period of seven (07) days, from the date when the position falls vacant.

(3) The criteria for evaluating the candidate shall be such as the Selection Committee may determine in this behalf; provided that before giving recommendation to the Government or the Commission, as the case may be, for appointment, comments and objections of

general public may be obtained with respect to eligible candidate.

(4) Within fifteen (15) days of the receipt of recommendations of the Selection Committee, the government or the Commission, as the case may be, shall appoint the person on the vacant position and shall issue notification accordingly.

(5) The Selection Committee shall also:-

(a) Inquire into allegation of abuse of authority or misconduct by the Commissioners, Director General, Prosecutor General and Director Internal Monitoring and Public Complaints Wing and after giving an opportunity to be heard in person, if found guilty, may recommend to the Government or the Commission, as the case may be, for removal and such recommendation shall have binding effect;

(b) Oversee the overall performance of the Director General, its officers and employees without interfering in day to day operational matters; and

(c) Inquire into allegations the corruption and the corrupt practices within the Directorate General or any other officer or employee of the Directorate General and recommend competent authority for necessary action in accordance with rules and regulations.”

3. The impugned amendment has been assailed on the grounds that the same is wrong, illegal, inconsistent with Articles 2-A, 4, 8, 10-A, 25, 38 and 175 of **the Constitution**, against the independence of judiciary and principle of trichotomy of power, and

that the judiciary being an independent organ of the State as enshrined in **the Constitution** had a special role for granting relief to the aggrieved person(s) and being the custodian of rights of the general public, its independence was a *sine-qua-non* for administration of justice in the country. According to the petitioner, Article 175 of **the Constitution** not only provided for establishment of the Supreme Court of Pakistan and High Courts for all the provinces and Islamabad Capital Territory, but also envisaged progressive separation of the judiciary from the executive within 14 years from the commencing date. The judiciary has, accordingly, been separated from the executive after long struggle of the lawyer's community, therefore, any attempt now to involve judiciary in the executive functions and vice-versa would certainly be against the independence of judiciary and violation of Article 175 of **the Constitution**. The petitioner claimed that the impugned amendment had been tabled without publishing for the information of general public and consulting the law department as envisaged under rules 12, 28 and 29 of the Rules of Business, 1985. Moreover, before introduction of the impugned amendment in Section 6 of **the Act of 2014**, the High Court being a separate and important organ of the State was not consulted. It was also pointed out in the writ

petition that through the impugned amendment, the High Court was given the executive role of selection of Director General, Prosecutor General, Director Internal Monitoring and Complaint Wing of *Ehtesab* Commission, which negated the express provision of Article 175 of **the Constitution**. It was further pointed out that in case of a person aggrieved of a selection made under the impugned amendment would be deprived of getting relief from the High Court which was against the spirit of fair and impartial hearing, hence against equity and justice as envisaged under Article 10-A of **the Constitution**. According to the petitioner, the impugned amendment tend to malign the judiciary and shatter confidence of the public in the impartiality and independence of the judiciary, besides being against the fundamental rights of people of the country in general, and that of the province in particular. The petitioner claimed that the impugned amendment was aimed at covering up the inefficiency, incompetency and lack of transparency and fairness on the part of the government, apart from shifting the burden of selection to the High Court in utter violation of express provision of **the Constitution**, which may lead to chaos and anarchy as a result of interference by

different organs of the State in each other's affairs; hence the writ petition.

4. The learned Advocate General, KPK, did not appear in response to the notice issued by the Court on 21.06.2017, perhaps, due to the fact that he is also a member of the selection committee besides the Judges of the "*Administrative Committee*" of the High Court; neither comments were filed to contest the writ petition during the period from 13.06.2017 till arguments on the writ petition, today. However, the petitioner himself, the learned Additional Advocate General on behalf of the respondents, and learned DPG on behalf of KPK Ehtisab Commission, though not a party to the writ petition, were heard and the case file as well as relevant provisions of **the Constitution** and relevant law perused with their valuable assistance.

5. Apart from serious questions raised about constitutionality and legality of the impugned amendment, it may also be worthwhile to see whether the "*Administrative Committee*" or "*Administration Committee*" of the High Court, as mentioned in the High Court Rules and Orders, fits in the scheme and object of the Khyber Pakhtunkhwa Ehtesab Commission established by the Provincial Government, in general, and selection of its

officials/staff, in particular. The “Administration Committee” of the High Court is constituted under High Court Rules and Orders, Volume V, Chapter 10-A, which lays down as follows:-

“PART A---RULES FOR THE DISPOSAL OF EXECUTIVE AND ADMINISTRATIVE BUSINESS.

1. Administrative Business.---The Administrative and executive work of the High Court shall be controlled by a Committee of Judges to be known as the Administration Committee.

Provided that the work of the Benches at Karachi and Peshawar shall be conducted in such manner as the Chief Justice may direct.

Provided further that those matters which are the exclusive concern of the Chief Justice, namely, the constitution of Benches and the appointment and control of the High Court Establishment, shall be dealt with in accordance with such instructions as may from time to time be issued by the Chief Justice.

2. Constitution and appointment of Administration Committee.---The Administration Committee shall consist of seven Judges. The Chief Justice and the Senior Puisne Judge shall be ex-officio members and the Chief Justice shall annually nominate the other five members of the Committee.

3. Quorum of Administration Committee.—At all meetings of the Administration Committee, three Judges shall form a quorum.

4. (a) Each member of the Administration Committee shall act as an Administration Judge and the powers and duties of each Administration Judge shall be defined by the Chief Justice from time to time.

(b) The following matters shall invariably be referred by an Administration Judge to the Administration Committee:-

- (i) All cases which are to go before a meeting of all the Judges.*
- (ii) All cases involving the amendment of the Rules and Orders of the Court other than purely routine amendments.*
- (iii) The issue of circular letters and instructions to the Subordinate Courts in other than purely routine matters.*
- (iv) All circulars issued by District and Sessions Judges and District Magistrates for the guidance of Courts subordinate to them.*
- (v) All proposals for the confirmation or promotion of District and Sessions Judges and Subordinate Judges.*
- (vi) The grant of permission to Subordinate Judges to cross efficiency bars.*
- (vii) All pension cases of District and Sessions Judges and Subordinate Judges.*
- (viii) All cases in which disciplinary action is to be taken against District and Sessions Judges and Subordinate Judges, and all cases in which there is a question of the recovery from an officer of any loss suffered by Government.*
- (ix) The selection of officers for deputation, and magisterial commercial or special training.*
- (x) Recommendation for the direct appointment of Government servants as Extra Assistant Commissioners.*
- (xi) The fitness of officers for appointment as District and Sessions Judges.*
- (xii) The monthly returns of work done by District and Sessions Judges.*
- (xiii) All cases in which lawyers seek relaxation of the High Court Rules applicable to them, other than those in which the Judges or the Administration*

Committee have laid down a policy to be followed.

(xiv) All proposals for the execution of Civil Major works in the Judicial Department.

(xv) All cases in which the opinion of all the Judges is sought by Government.

(xvi) Recording of annual confidential report on the work and conduct of a Civil Judge or Magistrate where:-

(a) it is intended to comment unfavourably on his conduct and work; or

(b) another reporting authority has recorded adverse remarks.

(xvii) All cases of conferment of civil and criminal powers on Subordinate Judges and Magistrates except:-

(a) powers under the Provincial Small Cause Courts Act.

(b) powers under the Guardians and Wards Act.

(c) permission to exercise powers under the Provincial Insolvency Act already conferred by Punjab Government Notification No.780, dated the 15th July 1914.

(d) First class powers on stipendiary magistrates after the exercise of second class powers for six months.

(xviii) All cases not specifically provided for which, in the opinion of the Administration Judge, involve question of principle or policy.

(c) All administrative work for which there is no explicit provision in the Rules and Orders of the Court or in the rules made by the Administration Committee, shall be disposed of under the orders of the Administration Judge who may refer to the Committee any matter on which he could pass orders.

(d) The Administration Judge shall pass orders on the postings and transfers of judicial officers

serving under the High Court, and after orders have issued they shall be circulated to all members of the Administration Committee.”

6. A glance over the above reproduced provisions of the High Court Rules and Orders pertaining to the constitution and work/functions of the “*Administration Committee*” would leave no doubt in the mind of someone who goes through the aforementioned provisions that the “*Administration Committee*” is only meant for disposal of Internal Executive and Administrative Business of the High Court and the Courts subordinate thereto. In other words, the scope, and work functions assigned to the “*Administration Committee*”, do not admit involvement of the “*Administration Committee*” in outside selection process of the Government Departments/Institutions; which, on the other hand, are amenable to the constitutional/writ jurisdiction of the High Court, if violation of the provisions of law and constitution are alleged/pleaded by the aggrieved person(s). When powers of judicial review of the Executive/Administrative Orders/Decisions of the Executive Government, including selections/appointments, were well entrenched in the constitution, then how will it be akin to the principles of justice to also involve the “*Administration Committee*” of the High Court, comprising the Chief

Justice and senior most Judges of the High Court in the purely Executive/Administrative functions of the Government to make appointments of officials/staff of the Ehtesab Commission. In such a situation, the High Court may unnecessarily become subject of controversy and criticism of the general public for a purely Executive/Administrative job/function; which has, indeed, been thrust upon it without prior consultation and also in violation of the provisions of law and constitution. It needs be stressed that involvement of the Judiciary in purely Executive/Administrative functions never contributed or enhance its image or inspire confidence of the general public, rather had exposed the institution to public criticism, like the Executive had to face hostility of the general public while exercising judicial powers, which was not its domain. This aspect of the matter, as such, becomes more sensitive in the aftermath of separation of the Judiciary from the Executive as a consequence of fulfillment of a constitutional requirement.

7. One may not entertain any doubt about the intention of the Government to provide a transparent and credible process of selection of the officials/staff of the Ehtesab Commission for curbing the menace of corruption in the Province; but a look at

the impugned amendment would bear testimony not only to the lack of knowledge about the constitution and functions of “*Administration Committee*” of the High Court on the part of concerned quarters in the Government; but also to glaring violation of the rules of business and essential requirement of prior consultation with the main stakeholder, which in this case was the Peshawar High Court. The involvement of the Judiciary in the selection process appears to be a kneejerk response of the Government to the onslaught of criticism which it had to face from certain quarters relating to previous appointments in the Ehtesab Commission. Needless to say that decisions taken in haste in a thoughtless fashion without proper homework and adopting the path of deliberations and consultations and application of mind to the implications following such a reckless decision, invariably end in fiasco.

8. Consequently, while consciously stopping short of striking down the impugned amendment, while keeping in mind consistent view of the Superior Courts about jurisdiction of the High Courts in legislative matters, we nevertheless feel constrained to observe that the impugned amendment not only militates against the trichotomy of powers envisaged in the constitution, and separation of

Judiciary from the Executive; but also tend to violate the fundamental rights of the citizen to have access to impartial and fair justice, guaranteed by the constitution, beside contravening the rules of business and other laws. Besides, a law enacted without the blessing and support of the main stakeholder is bound to yield no positive results either for the Government or the institution unwittingly involved in the process.

9. In the given situation and circumstances, the Government will be well advised to reconsider/revisit the impugned amendment in the interest of good governance and establishment of a transparent and flawless system of accountability in the province. The writ petition is, accordingly, disposed of in the above terms.

Announced
01-03-2018

JUDGE

JUDGE

M.Iqbal

(D.B)

*Hon'ble Mr. Justice Ikramullah Khan.
Hon'ble Mr. Justice Qalandar Ali Khan.*