JUDGEMENT SHEET

IN THE ISLAMABADHIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

Writ Petition No. 2491 of 2023

Shehryar Afridi
vs.
Federation of Pakistan through Secretary Ministry of Interior & others

PETITIIONERS BY: Mr. Sher Afzal Khan Marwat, Ch. Usama Tariq and Mr. Salah ud Din, Advocates petitioners in Writ Petition Nos. 2490 and 2491 of 2023.
Dr. Babar Awan, Ms. Amna Ali, Ms. Shahina Shahab-ud-Din and Mr. Abdullah Babar Awan, Advocates for petitioners in Writ Petition Nos. 2513 and 2536/2023.
Barrister M. Usama Rauf and Raja Bilal Naseer, Advocates for petitioner in W.P No. 3159/2023.
Malik Qatadah Jamal, Advocate for petitioner in W.P No. 2833/2023.

RESPONDENTS BY: Barrister Munawar Iqbal Duggal, Additional Attorney General, Mr. Fazal ur Rehman, Deputy Attorney General, Mr. Aqeel Akhtar Raja and Mr. Muhammad Iqbal Kallu, Assistant Attorney Generals.
Malik Abdur Rehman, State Counsel.
Syed Tahir Kazim, Law Officer, IGP's Office.

Cap. (R) Anwar ul Haq, Chief Commissioner.
Mr. Irfan Nawaz, Deputy Commissioner, Islamabad.
Mr. Rabnawaz Khan, S.O, Ministry of Interior.
Mr. Muhammad Riaz DSP Legal.
Mr. Haider Ali, Sub-Inspector/SHO, Police Station Margallah, Islamabad, Mr. Ishfaq Hussain Warraich, Sub-Inspector, P.S Bani Gala and Mr. Basharat Hussain, Sub-Inspector/SHO, Police Station Secretariat, Islamabad.

AMICUS CURIAE: Mr Salah ud Din Ahmed, ASC assisted by Mr. Ehsan Malik, Advocate.
Mr. Muhammad Waqar Rana, ASC, assisted by Mr. Amjad Ghaffar Toor, Advocate.

DATES OF HEARING: 06.09.2023, 27.09.2023, 28.09.2023, 10.10.2023, 16.10.2023, 26.10.2023, 07.11.2023, 21.11.203 and 23.11.2023

BABAR SATTAR, J.- Through this judgment the Court will decide the afore-titled petition as well as the petitions listed in the Annexure.

2. According to the population census of 2023, approximately 2.364 million citizens of Pakistan live in Islamabad Capital Territory. Article 1(2)(b) of the Constitution of Islamic Republic of Pakistan **("Constitution")** identifies Islamabad Capital Territory **("ICT")** as the Federal Capital that doesn't form part of any Province. The State claims that pursuant to the Presidential Order 18 of 1980 (enacted by General Zia-ul-Haq, who had abrogated the Constitution after imposing Martial Law in 1977, and usurped the authority of the State and arrogated it to himself) read together with Presidential Order No. 02 of 1987 and Presidential Order No. 02 of 1990, the Chief Commissioner Islamabad – a civil servant serving in Basic Scale-20 – is a one-man Provincial Government for ICT and its denizens. This one-man is the repository of the sum total of all powers, functions and duties of the Provincial Government under all provincial laws applicable to ICT.

3. The question of who is to be regarded as the Provincial Government for ICT has arisen in the context of the exercise of authority under the Maintenance of Public Order Ordinance, 1960 **("MPO")**, which vests in the Provincial Government the authority to order detention of citizens under Section 3(1) of MPO and also authorizes the Provincial Government pursuant to Section 26 to delegate its authority under Section 3(1) to the District Magistrate. Successive Deputy Commissioners of ICT,

who also wear the hat of District Magistrate, have continued to exercise powers under Section 3(1) to order arrest and detention of citizens in ICT purportedly to maintain public order in the Federal Capital. Since May 2023, the present incumbent has merrily passed a little shy of six dozen detention orders under Section 3(1) of MPO, mainly to arrest members of Pakistan Tehreek-e-Insaaf who he deemed to be a threat to public order.

4. The arrest and detention of three such detainees – Shehryar Afridi, Shandana Gulzar and Akseer Ahmed – has been challenged in Writ Petitions 2491, 2490 and 2536 of 2023, respectively, on the basis that such detention orders are *ultra vires* Articles 4, 8, 9, 10A, 14 and 25 of the Constitution and in breach of the substantive and due process rights guaranteed by the Constitution and also for being *coram non judice*, without jurisdiction and mala fide. The petitioners in Writ Petitions 3159 and 2833 of 2023 have challenged the legality of the existing legal regime in place in ICT that regards the Chief Commissioner as the Provincial Government for ICT and have sought declarations that Presidential Order No. 18 of 1980, Presidential Order No. 02 of 1987, Presidential Order No. 02 of 1990 and S.R.O.1316(I)/80 dated 31.12.1980 conferring on Administrator ICT (now Chief Commissioner) the powers of Provincial Government be declared *ultra vires* Articles 2A, 48, 90, 97, 98, 99, 141 and 142 of the Constitution.

5. The afore-mentioned petitions have been heard together and will be decided through this common judgment as the question of the identity of the Provincial Government for ICT

under provisions of the Constitution is integral to determining who can exercise the Provincial Government's power to order arrest under Section 3(1) of MPO and/or delegate it to the District Magistrate pursuant to Section 26 of MPO for purposes of ICT. The additional questions that arise re challenges to detention orders include whether MPO was ever extended to ICT and remains in force in the Federal Capital, whether the Provincial Government's powers under Section 3(1) are validly delegated to District Magistrate ICT and to what extent can such powers be delegated under Section 26 of MPO, and whether such powers were exercised in a manner that is in accordance with law and not violative of the fundamental rights of detainees guaranteed by the Constitution.

Arguments of the Counsels for Parties

6. The arguments of the learned counsels for the parties are not being reproduced in this judgment in the interest of economy, as almost all counsels filed written submissions that form part of the court record and the opinion of the court rests wholly on these legal arguments, as will become evident. The arguments will, however, be identified and addressed in the analysis where the opinion of the court is informed by the acceptance or rejection of an argument canvassed at the bar. This court must express its gratitude at the outset to Mr. Waqar Rana and Mr. Salahuddin Ahmed, learned ASCs, who agreed to act as amici and provided very able assistance and materials addressing the legal questions that are being adjudicated. The court was provided valuable assistance by all the learned counsels who appeared in these matters, especially Dr. Babar

Awan, ASC and Mr. Usama Rauf, AHC. The court must also acknowledge the assistance rendered by Barrister Munawar Iqbal Duggal, learned Additional Attorney General and Mr. Malik Abdur Rehman, learned state counsel, who also provided a compendium of relevant legal instruments to trace the history of distribution of authority between the Federation and the Provinces since 1935 and its further delegation. The research assistance provided by Mr. Adeen Siddiqi, the Law Clerk assigned to this court, has also been very beneficial.

Opinion of the Court

7. The most logical scheme to address the questions that form the subject matter of the petitions is to start with the determination of the identity of the Provincial Government for ICT, tracing the history of how various constitutional and unconstitutional dispensations led to the evolution of the legal regime that exists today under the Constitution, as amended from time to time, and especially after promulgation of the 18th Constitutional Amendment. This will be followed by a discussion regarding the scope of preventive detention under our Constitution in view of the fundamental rights guaranteed by it, in order to determine the constitutionality of the detention orders impugned before this court and the scope of judicial review in relation to such orders. The last part of the analysis will address the procedure prescribed for exercise of powers under the MPO and the extent to which the power to order arrest and detention under Section 3(1) can be delegated by the Provincial Government.

8. Making a few contextual observations may be in order before we begin grappling with the legal questions. One, while the roots of our present constitutional dispensation need to be traced back to the Government of India Act, 1935, to appreciate elements of continuity and change, we cannot lose sight of the stark distinction between (A) a legal dispensation stitched together by a Colonizing State to exercise dominance over and maintain order amongst subjects of colonized territories ruled in the name of an Alien Monarch, and (B) a constitutional regime in a representative and sovereign democracy regulating the relationship between the citizens and the state exercising authority in their name and on their behalf. What Allama Muhammad Iqbal had written in his treatise *"The Reconstruction of Religious Thought in Islam"* in the context of appreciating religious texts, is equally applicable to legal texts in view of our colonial history*: "false reverence for past history and its artificial resurrection constitute no remedy for a peoples' decay."*

9. Two, the rule of law regimes of the contemporary epoch stand in contradistinction to the erstwhile regimes characterized by the rule of men. The legitimacy of a rule of law regime is rooted in the fair and impartial enforcement of laws and rules that bind the polity and form part of the social contract between the citizen and the state. To ensure that rule of law doesn't degenerate into rule of men, constitutions across democratic polities put together institutional structures of separation of powers laced with checks and balances. Wide distribution of power preventing its concentration in any one individual or entity has thus come to be recognized as the safest means to prevent

abuse of power. Separation of powers is recognized as a salient feature of our Constitution. The jurisprudence produced by the Supreme Court in the realm of constitutional and administrative law has established over time that the concept of any one individual or institution being conferred with arbitrary power and discretion is anathema to our constitutional scheme.

10. Three, the moral authority of a rule of law system depends on its ability to apply law in a manner that reduces the gap between law and its uniform enforcement, and enforcement of laws such that they produce just and fair outcomes. The Constitution (and laws enacted or recognized under it) cannot claim normative force and moral authority if the Constitutions and laws are interpreted and applied in a manner that the outcomes produced in individual cases militate against the foundational human rights such as liberty, dignity and equality. Because the Constitution is a living document, the constitutional text is an unfolding narrative. The fundamental rights guaranteed by the text of the Constitution may remain the same over time. But the standards of conduct that must be met by those exercising authority on behalf of the state to uphold the rights of citizens evolve with time in order to breathe life into such rights and prevent them from being reduced to black letter.

The Provincial Government for ICT

11. Some basic features of the Constitution can be traced back to the Government of India Act, 1935 ("GoIA"). It distributed legislative and executive powers between the Federation and Provinces. The executive authority of the

Federation extended to matters in relation to which the Federal Legislature had authority to make laws. The same principle applied to the executive authority of the Provinces. The Additional Attorney General had argued that Part IV of the GoIA dealt with the Chief Commissioner's Provinces, which were administered directly by the Governor General through a Chief Commissioner appointed by him. And it was this model of governance that was still in vogue in Islamabad. The argument however doesn't really flow in the context of ICT's administration today. The GoIA was not a democratic or representative legal instrument. Its preamble stated that it was enacted by *"the King's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled…"* The Governor-General had overriding authority and could direct Parliament to legislate or otherwise enact laws in his discretion and/or issue proclamations etc. Due to the overriding authority of the Governor-General exercised on behalf of the King, there was neither any strict separation of powers nor any concept of federalism as understood today. Further, the Chief Commissioner's provinces were unrepresented territories where the Governor-General could do as he pleased. On a purely legal plane, the GoIA carved out Chief Commissioner's Provinces, as noted above. Our Constitution neither recognizes Chief Commissioner's Provinces nor vests in the President any executive authority to be exercised in his discretion to administer the Federal Capital as a Chief Commissioner's Province.

12. The Indian Independence Act, 1947, made no special provision for the Federal Capital. Section 290-A of GoIA vested power in the Governor General to demarcate areas that were to form part of Provinces or Federal territories. The Pakistan (Establishment of Federal Capital) Order, 1948 ("**Federal Capital Order**"), published on 23.07.1948, locating the capital of Pakistan at Karachi, relied on power flowing from section 290-A of GoIA. Clause (b) of its preamble clarified that the administrative and executive authority in respect of Karachi was to be exercised by the Government of Pakistan and the legislative authority by the Federal Legislature. Article 5 provided that, *"the executive authority of Karachi shall be exercised by the Governor-General either directly, or to such extent as he thinks fit, through an Administrator to be appointed by him…"* Under Article 5 of the Federal Capital Order was issued a notification on 23.07.1948 vesting in the Administrator for Karachi *"all powers and duties conferred or imposed on the Government of Sindh under any enactment, notification, order, rule or bye-law…",* subject to special or general instructions issued by the Central Government. It is the State's position that this transitional scheme for administration of the newly created Federal Capital hurriedly put together immediately after independence is still in force in ICT pursuant to Presidential Order 18 of 1980.

13. The Establishment of West Pakistan Act, 1955, integrated Governor's Provinces, Chief Commissioner's Provinces, States and territories of West Pakistan, including the Capital of the Federation, into the Province of West Pakistan.

Section 2(2) provided that, "*the Capital of the Federation shall be administered in accordance with the provisions of section 290A of the Government of India Act, 1935",* even though section 3 clarified that the properties and assets in respect of the Capital would remain vested in the Federal Government.

14. The Constitution of 1956 entered into force on 23.03.1956. Article 39 provided that the executive authority of the Federation would extend to matters in relation which Parliament had the authority to make laws. Article 211 of the Constitution of 1956 specifically dealt with the Federal Capital. Article 211(2) provided that, "*the administration of the Federal Capital shall vest in the President who may, by Order, make such provisions as he may deem necessary or proper…"* including, *inter alia, "for its Government and administration"*, and "*with respect to the laws which are to be in force there."* Article 211(3) clarified that, "*notwithstanding anything in the Constitution, Parliament shall have power to make laws for the Federal Capital with respect to matters enumerated in the Provincial List and matters not enumerated in any List in the Fifth Schedule, other than matters related to the High Courts."* In other words, while for purposes of governance and administration of the Federal Capital, Article 211 conferred discretion on the President, Article 211(3) clarified that the Parliament was the competent and exclusive legislature for all matters in relation to the Federal Capital.

15. The Constitution of 1956 was abrogated and Martial Law was imposed in 1958. President's Order (Post-Proclamation)

No. 1 of 1958 was published on 10.10.1958. It provided in Article 2(1) that, "*notwithstanding the abrogation of the Constitution…Pakistan shall be governed as nearly as may be in accordance with the late Constitution.*" Article 5(1) provided that: "*The powers of a Governor shall be those which he would have had had the President directed him to assume on behalf of the President all the functions of the Government of the Province under the provisions of Article 193 of the late Constitution and such powers of making Ordinances as he would have had and within such limitations had Article 106 and clauses (1) and (3) of Article 102 of the Constitution been still in force.*" Two matters need to be flagged here. One, the power vested in the Governor of West Pakistan under the dispensation did not include any power in relation to the Federal Capital and the executive powers of the Governor were limited to matters in relation to which the Legislature of the Province of West Pakistan had the authority to make laws. Two, while legislative powers were not conferred on the Governor of West Pakistan, he had the power to issue Ordinances.

16. President's Order No. 20 of 1960 (Seat of Government Order, 1960) was published on 01.08.1960. Article 5(1) provided that, "*the territory demarcated by the Pakistan (Establishment of the Federal Capital) Order, 1948, and heretofore known as the Federal Capital shall henceforth be and be known as the Federal Territory of Karachi and shall continue to be administered by the President, from such day forward as he may appoint, acting to such extent as he may think fit through an agent to be appointed by him.*" The President's Order No. 9 of 1961 (West

Pakistan Administration (Merger of the Federal Territory of Karachi) Order, 1961) was published on 29.06.1961. Under Articles 2 and 3 of this Order, the Federal Territory of Karachi was merged with and became a part of West Pakistan and ceased to be part of Federal Territory with effect from 01.07.1961, pursuant to notification dated 29.06.1961. (The merger of Karachi with West Pakistan and it seizing to be Federal Territory will have some relevance when we discuss the scope of West Pakistan Maintenance of Public Order Ordinance, 1960 and the West Pakistan Maintenance of Public Order (Amendment) Ordinance, 1962, later in this opinion).

17. The Constitution of 1962 was enacted under the regime run by General Ayub Khan. Article 224 provided the Constitution of 1962 would come into force on the day when the National Assembly first met. The National Assembly first met on 8-06-1962. There are two provisions of this constitution that are noteworthy for our present purposes. One, Article 31 provided that, "*the executive authority of the Republic is vested in the President and shall be exercised by him, either directly or through officers subordinate to him, in accordance with the Constitution and the law*." For purposes of capital territories, Article 131(4) vested in the Central and Provincial legislatures concurrent legislative jurisdiction in relation to matters that fell within the provincial field as follows: "*The Central Legislature shall have power (but not exclusive power) to make laws for the Islamabad Capital Territory and Decca Capital Territory with respect to any matter not enumerated in the Third Schedule*". The Provincial Legislatures had the authority to make laws in

relation to matters not listed in the Federal Legislative List under the Third Schedule.

18. Karachi stood merged with the Province of West Pakistan with effect from 01.07.1961. The Constitution of 1962 Constitution, under Article 211(1), established Islamabad as the Capital of the *Republic "situated in the district of Rawalpindi in the Province of West Pakistan at the site selected for the Capital of Pakistan".* Pakistan suffered another Martial Law imposed on 25.03.1969, whereby the 1962 Constitution was abrogated that under clause 5(a), it was provided that *"all laws, including Ordinances, Martial law Regulations, orders, rules, bye-laws, regulations, notifications, and other instruments, in force immediately before the abrogation of the Constitution shall continue in force".*

19. Under President's Order No. 1 of 1970 (Province of West Pakistan (Dissolution) Order, 1970) dated 30.03.1970, the West Pakistan Province, under clause 4, was divided into four (04) provinces and separately identified Centrally Administered Areas, which included the Islamabad Capital Territory. Under clause 5(2), the Centrally Administered Areas, including Islamabad, were to be administered by the President. Further, under clause 6(1)(b), the President was to have exclusive power *"in relation to the Islamabad Capital Territory, to make laws with respect to all matters*". This instrument is of relevance, as pursuant to it, for the first time since the creation of Pakistan, ICT as the Federal Capital was identified as an independent territory that did not fall within the territorial boundaries of any

Province. Then came President's Order 12 of 1971, Islamabad Capital Territory (Administration) Order, 1971 dated 22.10.1971. Under clause 2(1), it was provided that *"the Government of Punjab shall, on behalf of the President, exercise and perform in relation to the Islamabad Capital Territory the same powers and functions as were exercisable in relation to that territory by the Government of West Pakistan immediately before the first day of July 1970".*

20. If one were to try and make sense of arbitrary Martial Law instruments, pursuant to President's Order No. 1 of 1970, the Islamabad Capital Territory was placed under the President's administrative and legislative competence. Under the President's Order 12 of 1971, the Government of Punjab was delegated the authority to exercise the same powers and functions being exercised by the "Government of West Pakistan", given that under the Constitution of 1962, the Government of West Pakistan in relation to provincial subjects enjoyed legislative competence concurrently with the Central Legislature. If President's Order No. 1 of 1970 is read together with President's Order 12 of 1971, the President while exercising administrative authority over the Islamabad Capital Territory, delegated to the Government of the Punjab, to be exercised on his behalf, authority in relation to provincial matters that fell beyond the Federal Legislative List prescribed under Schedule Three of the Constitution of 1962.

21. Under the Constitution of 1973 Article 1(2)(b) defined Islamabad Capital Territory as the Federal Capital Territory. Article 142(d) provided that *"Majlis-e-Shoora (Parliament) shall*

have exclusive power to make laws with respect to all matters pertaining to such areas in the Federation as are not included in any Province." Article 97 of the Constitution provided that "*the executive authority of the Federation shall extend to the matters with respect to which Majlis-e-Shoora (Parliament) has power to make laws."* The scheme of distribution of executive and legislative authority under the Constitution is therefore unequivocal. Provincial governments have executive authority in relation to the territory that falls within the domain of province. The Federal Government has exclusive executive authority in relation to matters with respect to which Parliament has power to make laws. In view of Article 142(d), what emerges from the scheme of distribution of executive and legislative authority within our Federation is that while Federal Government has executive authority across Pakistan in relation to matters that fall within the legislative competence of the Parliament, Provincial Government has no authority in relation to any territory that falls beyond the territorial boundaries of the province in question. ICT is a separately identified territory being the Federal Capital that does not fall within any province. And Parliament has exclusive authority to legislate in relation to all matters when it comes to the affairs of the Federal Capital, whether such matters are listed in the Federal Legislative List or not. Therefore, by virtue of Parliament being the competent legislature in relation to the federal subjects as well as the provincial subjects to the extent of Federal Capital, by virtue of Article 97 of the Constitution, the executive authority of the Federation extends across the Federal Capital in relation to the

federal subjects and other subjects that are otherwise deemed to be provincial subjects when it comes to the Provinces of our Federation.

22. The next legal instrument of relevance is the Validation of Laws Act, 1975, published on 29.07.1975, which validated various legal instruments issued between 25.03.1969 and 19.12.1971 i.e. when the Martial Law of General Yahya was in place. In the schedule to the Validation of Laws Act, 1975, was included the Islamabad Capital Territory (Administration) Order, 1971 (P.O No. 12 of 1971). Pursuant to the validation of Laws Act, 1975, the actions of the Government of Punjab in relation to affairs of the Federal Capital between 25.03.1969 and 19.12.1971 were validated. In view of the above instrument, it was only between 22.10.1971 when the Islamabad Capital Territory (Administration) Order, 1971 (P.O No. 12 of 1971) was enacted and the entry into force of the Constitution, that Government of Punjab was vested with authority in relation to the Federal Capital which authority was exercised by the Government of Punjab on behalf of the President.

23. The Constitution was abrogated when General Zia-ul-Haq imposed Martial Law on 5.07.1977 and issued the Laws (Continuance in Force) Order, 1977. Article 2 of this Order provided that despite the abrogation of the Constitution Pakistan would be governed *"as nearly as may be in accordance with the Constitution."* Pursuant to the General Clauses (Amendment) Ordinance, 1979, promulgated by the Chief Martial Law Administrator, which was given effect from 01.07.1979 Section

3(43A)(aaaa) was included, which provided that, *"as respects anything done or to be done after the thirtieth day of June, 1970, in relation to Islamabad Capital Territory under any law coming into force after that day, shall mean the Federal Government."* Under the General Clauses Amendment Ordinance, 1979, therefore, Federal Government was defined as the Provincial Government for purposes of ICT and when read with Article 97 of the Constitution this meant that there was no ambiguity that the Federal Government was both the Federal Government and the Provincial Government for purposes of ICT.

24. In exercise of the authority appropriated by General Zia-ul-Haq as Chief Martial Administrator he enacted President's Order 18 of 1980 (Islamabad Capital Territory (Administration) Order, 1980) which was issued on 31.12.1980. Article 2 of P.O No. 18 of 1980 provided that "*the executive authority of the federation in respect of Islamabad Capital Territory shall be exercised by the President, either directly or to such extent as he thinks fit, through the administrator to be appointed by him"* and on the same day the President issued a notification under Article 2 of P.O No. 18 of 1980 which states the following:

> *In pursuance of Article 2 of the Islamabad Capital Territory (Administration) Order, 1980 (P.O No. 18 of 1980), the President is pleased to direct that, subject to general or special instructions as may from time to time be given to him by the Federal Government the administrator shall have, in respect of the Islamabad Capital Territory, all the powers and duties conferred or imposed on the provincial government under any law for the time being in force in Islamabad Capital Territory.*

The Chief Martial Law Administrator also issued on the same day President's Order No. 17 of 1980 Islamabad Capital Territory (Administration) (Repeal) Order, 1980, through which the Islamabad Capital Territory (Administration) Order, 1970 (P.O No. 12 of 1970) was repealed. The reference in aforementioned repeal order appears to be P.O No. 12 of 1971 pursuant to which the President had conferred authority in relation to Islamabad Capital Territory on the Government of Punjab, as under P.O No. 18 of 1980 issued on the same day, the authority in relation to the Federal Capital had been expropriated by the President himself and further conferred on the Administrator to be appointed by him. In view of P.O No. 17 of 1980 it appears that notwithstanding the provisions of the Constitution that have been discussed above the Government of Punjab continued to exercise authority in relation to ICT pursuant to Islamabad Capital Territory (Administration) Order 1971 by virtue of its inclusion within the schedule of Validations of Laws Act, 1975, notwithstanding its conflict with provisions of the Constitution that vested under Article 97 exclusive authority in relation to the ICT in the Federal Government. The Constitution was revived pursuant to the Revival of the Constitution of 1973 Order, 1985 (President's Order No. 14 of 1985 dated 02.03.1985) ("**Revival of the Constitution Order**"). Pursuant to the Revival of the Constitution Order, the Constitution was brought back to life subject to changes introduced in it by General Zia-ul-Haq.

25. After the Revival of the Constitution Order, the President under the President's Order No. 2 of 1987 enacted Islamabad Capital Territory (Administration) (Amendment)

Order, 1987, which included a proviso under Article 2 of P.O No. 18 of 1980 empowering the President, by order, to, *"direct that the executive authority of the Federation in respect of Islamabad Capital Territory in so far as it relates to any matter specified in the Order shall, subject to such conditions and limitations as may be specified therein, the exercise by such authority established by or under any law as may so specified.*" P.O No. 2 of 1987 was purportedly issued in exercise of authority under Article 258 of the Constitution. Similarly, under Presidential Order 2 of 1990 once again Islamabad Capital Territory (Administration) (Amendment) Order, 1990, was passed purportedly in exercise of authority under Article 258 of the Constitution which omitted the word "Administrator" used in Article 2 of P.O No. 18 of 1980 and replaced it with the word "Chief Commissioner". It is the Federation's position that ICT continues to be administered pursuant to provisions of P.O No. 18 of 1980 read with P.O No. 02 of 1987 and P.O No. 02 of 1990 through a Chief Commissioner appointed pursuant to Article 2 of P.O No. 18 of 1980. The learned Additional Attorney General submitted before the Court that the aforementioned Presidential Orders remain in field as they stand protected under Article 270A(2) of the Constitution, which provides the following:

> *(2) All order made, proceedings taken and acts done by any authority or by any person, which were made, taken or done, or purported to have been made, taken or done, between the fifth day of July, 1977, and the date on which this Article comes into force, in exercise of the powers derived from any Proclamation, President's Orders, Ordinances, Martial Law Regulations, Martial Law Orders, enactments, notifications, rules, orders or by- laws, or in*

> *execution of or in compliance with any order made or sentence passed by any authority in the exercise or purported exercise of powers as aforesaid, shall, notwithstanding any judgment of any court, be deemed to be and always to have been validly made, taken or done and shall not be called in question in any court on any ground whatsoever.*

26. Mr. Usama Rauf, learned counsel for the petitioner in W.P No. 3159/2023 submitted that P.O No. 18 of 1980 could not continue to vest authority in an Administrator or Chief Commissioner once the Constitution stood revived as the validation provided under Article 270A only cured lack of legislative competence on part of the Chief Martial Law Administrator while the Constitution stood abrogated and did not transform the legal instruments issued during the Martial Law period from 1977 till the revival of the Constitution into supra constitutional instruments that would continue to hold the field notwithstanding their conflict with provisions of the Constitution. He submitted that in view of Article 90 the President was to exercise authority on the advice of the Cabinet, which in view of Article 48 of the Constitution was binding on the President. He further submitted that Article 258 of the Constitution did not vest any legislative or executive authority in the President as the Article itself states that it confers powers subject to other provisions of the Constitution. Therefore, P.O No. 02 of 1987 and P.O No. 02 of 1990 seeking to amend P.O No. 18 of 1980 in exercise of powers under Article 258 of the Constitution were devoid of jurisdiction and *ultra vires* Articles 48, 90, 91, 97, 98 and 99 of the Constitution. He further submitted that the scope of validation clause was clarified by the Supreme Court in ***Miss***

Benazir Bhutto Vs. Federation of Pakistan ***(PLD 1988 SC 416)*** wherein it was held that the effect of validation was to condone steps taken by the Martial Law authorities during the period when the Constitution stood abrogated as opposed to conferring continuing legitimacy to actions under such instruments in breach of provisions of the Constitution. He submitted that this was then reiterated in ***Sindh High Court Bar Association Vs. Federation of Pakistan*** ***(PLD 2009 SC 879).*** He contended that once the Constitution stood revived, the Federal Government in view of Articles 97 and 142 of the Constitution read together with the definition of Provincial Government under section 3(43a)(aaaa) of the General Clauses (Amendment) Act, also stood revived as the Provincial Government for purposes of ICT and neither any powers could be conferred on an Administrator or Chief Commissioner pursuant to P.O No. 18 of 1980 in breach of requirements of Article 98 of the Constitution nor could an Administrator or Chief Commissioner fashion himself as the Provincial Government for ICT.

27. Dr. Babar Awan, learned Senior ASC appearing in Writ petition 2536/2023 emphasized that under Article 2A of the Constitution it had been provided that the state shall exercise its authority through the chosen representatives of the people. Consequently, the authority of the state within ICT could not be exercised through a civil servant appointed by the President. He submitted that whatever the reading of the Constitution may have been up until enactment of the 18th Constitutional Amendment, the scheme of the Constitution was clear since then

as enumerated by the Supreme Court in ***Mustafa Impex and others vs. The Government of Pakistan and others*** **(PLD 2016 SC 808)** where the manner of exercise of authority by the Federal Government pursuant to Articles 90, 97 and 99 of the Constitution had been clarified and it had been mandated that Federal Government means the Cabinet and not the Prime Minister or any other Minister or Secretary. He submitted that since the enactment of 18th Constitutional Amendment, the authority of the Federation under Article 97 of the Constitution in relation to ICT could only be exercised by the Federal Cabinet.

28. What emerges from provisions of the Constitution, read together with the General Clauses Act, is the following:

1. The Islamabad Capital Territory has been identified by Article 1(2)(b) of the Constitution as territory comprising the Federal Capital that does not fall within any province. The exclusive legislative authority in relation to ICT whether emanating from Federal Legislative List or any provision of the Constitution or in relation to residuary matters falls within the exclusive competence of the Parliament. Consequently, by virtue of Article 97 read together with Article 142 and section 3(43a)(aaaa) of the General Clauses Act, the Federal Government is also the Provincial Government for ICT.
2. After the restoration of the Constitution pursuant to Revival of the Constitutional Order, the Federal Government as repository of exclusive executive

authority in relation to ICT under Article 97 of the Constitution stood revived and the President could neither confer any power or function on an Administrator or Chief Commissioner appointed in exercise of authority under P.O No. 18 of 1980 nor could any such Administrator or Chief Commissioner assume and exercise the executive authority of the Provincial Government in relation to ICT in breach of provisions of Article 97 of the Constitution.

3. The effect of the protection afforded to P.O No. 18 of 1980 under Article 270A of the Constitution was not to transform P.O No. 18 of 1980 into a supra-constitutional instrument that would trump a provision of the Constitution that it was in conflict with. This was explained by the Supreme Court in ***Miss Benazir Bhutto***, wherein it was held in relation to validity conferred on Martial Law instruments under Article 270A of the Constitution that, *"although the validity of protected laws granted ex post facto was found to have placed them above reproach in their operation during the protected period, their future operation was held subject to all the limitations contained in the Constitution."* It was clarified that the legal competence of authorities enacting Martial Law instruments notwithstanding, which may have been cured by the validating provisions in the Constitution, the content of such instruments could be tested on the touchstone of

their inconsistency with fundamental rights. In ***Federation of Pakistan Vs. Ghulam Mustafa Ghar (PLD 1989 SC 26)*** it was reiterated that Article 270A did not *"take away the jurisdiction of the High Courts from reviewing acts, actions, or proceedings which suffered from defect of jurisdiction or were coram non judice or were mala fide."* This was reiterated by the Supreme Court in ***Mahmood Khan Achakzai Vs. Federation of Pakistan (PLD 1997 SC 426)*** and **Federation of Pakistan Vs. Israr-ul-Haque (2005 SCMR 558).** In ***Sindh High Court Bar Association Vs. Federation of Pakistan*** **(PLD 2009 SC 879 @ 1056)**, it was observed that, *"the holding in abeyance of the Constitution in the first place, and then making amendments in it by one man by the stroke of his pen, that is to say, in a manner not envisaged or permitted by the Constitution, are mutilation and/or subversion of the Constitution simpliciter, and no sanctity is attached to such amendments per se. No sanctity attaches to them if they are made after a declaration to that effect is made by the Court while adjudging the validity of such assumption of power. Equally bereft of sanctity remain the amendments of any such authority, which are ratified, affirmed or adopted by the Parliament subsequently and deemed to have been made by the competent authority*." The effect of

> Article 270A in relation to P.O No. 18 of 1980 was therefore limited to conferring validity on actions taken pursuant to such Order while Constitution stood abrogated. And P.O No. 18 of 1980 could not be regarded as a valid law under which authority could be assumed or exercise on a continuing basis in conflict with provisions of the Constitution.

29. Article 98 of the Constitution that existed in its original form and was also not amended by the Revival of the Constitution Order, 1985, states that, *"on the recommendation of Federal Government, Parliament may by law confer functions upon officers or authorities subordinate to the Federal Government."* Once the Constitution stood revived in 1985 the President could not confer any functions or powers of the Federal Government under Article 97 of the Constitution on officers or authorities subordinate to the Federal Government, including an Administrator or Chief Commissioner appointed under P.O No. 18 of 1980. Article 98 upholds the promise contained in the Objective Resolution, which forms a substantive part of the Constitution under Article 2A of the Constitution, and provides that, *"the State shall exercise its powers and authority through the chosen representatives of the people"* and further that*, "the principles of democracy, freedom, equality… shall be fully observed."* The moment the Constitution stood revived in 1985, P.O No. 18 of 1980 and the notification issued under Article of such Order that conferred powers and duties of the Provincial Government in relation to ICT that was vested with the Federal Government in view of Article 97 of the

Constitution, on an Administrator, fell foul of provisions of Article 98 of the Constitution, as the functions conferred on the Provincial Government for purposes of ICT under the laws for the time being in force in ICT could not be conferred on an Administrator in exercise of authority by the President under P.O No. 18 of 1980. Once the Constitution stood revived only Federal Government could confer functions on a subordinate authority and that too if such conferral took the form of a law enacted by Parliament. The Constitution does not envisage even the Federal Government conferring its functions on a subordinate authority with the effect that state authority begins to be exercised in any manner other than through the chosen representatives of the people. Therefore, for such conferral to be valid, it can only be made with the consent of the chosen representatives of the people i.e. if Parliament enacts a law for such purpose in the exercise of authority under Article 98 of the Constitution.

30. In the instant matter, it is not disputed that Parliament has never conferred any function of Provincial Government under any law for the time being in force for purposes of ICT on an Administrator or Chief Commissioner on the recommendation of the Federal Government.

31. Article 258 of the Constitution neither vests any executive authority nor any legislative authority in the President which can be exercised by the President in its discretion in conflict with other provisions of the Constitution. Article 258 provides that*, "subject to the Constitution, until Majlis-e-Shoora*

(Parliament) by law otherwise provides, the President may, by Order, make provision for peace and good government of any part of Pakistan not forming part of a Province." This provision is in the nature of a transitory and emergency provision which cannot take effect in conflict with the requirements of Articles 48 and 98 of the Constitution. The exercise of any power under Article 258 is in the nature of exercise of executive authority, which in view of Article 48 can only be exercised by the President on the recommendation of the Federal Government. However, as has been explained above, the executive authority in relation to ICT is exclusively vested in the Federal Government under Article 97 of the Constitution. And if such authority is to be conferred on an officer or authority subordinate to the Federal Government, that can only be done in compliance with requirements of Article 98 of the Constitution and not in exercise of authority under Article 258 of the Constitution. Further P.O No. 18 of 1980 stood protected under Article 270A of the Constitution. Once the Constitution stood revived, such Order could not be amended by the President in exercise of any authority under Article 258 of the Constitution. Amending a legislative instrument, even if issued by Martial Law authorities when the Constitution stood abrogated, required exercise legislative authority. And the competent legislature for purposes of P.O No. 18 of 1980 was the Parliament. It could therefore only be amended by Parliament or otherwise on a temporary basis in exercise of President's authority to issue Ordinances under Article 89 of the Constitution. As P.O No. 02 of 1987 and P.O No. 02 of 1990 were issued by the President in the exercise of his

authority claimed under Article 258 of the Constitution, which, as mentioned above, vested no legislative authority in the president, such Presidential Orders are *ultra vires* the Constitution.

32. The manner in which the executive authority vested in the Federal Government is to be exercised after enactment of the 18th Constitutional amendment was enumerated by the Supreme Court in ***Mustafa Impex and others vs. The Government of Pakistan and others*** **(PLD 2016 SC 808)**. It was emphasized by the Supreme Court that the Prime Minister, *"is neither a substitute nor a surrogate for the Cabinet. He cannot exercise its powers by himself. The reason that he cannot stand in the position of the Cabinet is because the Cabinet is, in fact, the Federal Government and is so described in Article 90. If we treat the office of the Prime Minister as being equivalent to that of the cabinet, it would follow that the Prime Minister, by himself, as a single individual, becomes the Federal Government. This is simply inconceivable. It is the antithesis of a constitutional democracy and would amount to a reversion to a monarchical form of Government reminiscent of King Louis XIV's famous claim that "I am the State" (literally "L'etat, c'est moi"). It is most emphatically not the function of this court to surrender the hard won liberties of the people of Pakistan to such a fanciful interpretation of the constitution which would be destructive of all democratic principles. We have no doubt in rejecting it, in its entirety."*

33. In view of the law laid down in ***Mustafa Impex*** read together with provisions of the Constitution discussed above, the

Federal Government is the repository of all executive authority under the Constitution in relation to ICT, whether such authority flows from federal legislation or provincial laws. The executive authority of the Federal Government in relation to ICT, when required to be exercised by the Government, can only be exercised by the Federal Cabinet acting as a collegium. If the functions of the Government under any existing provincial laws are to be conferred on any officer or authority subordinate to it, it can only be done through law in compliance with requirements prescribed under Article 98 of the Constitution. It is another matter where the legislature in its wisdom creates functions to be performed under any law within the provincial domain and vests powers for exercise of such functions in an authority subordinate to the government. Such legislation would not trigger requirements under Article 98 of the Constitution. However, where the legislature through law requires that a certain function is to be performed by the government, such function cannot then be conferred on an authority subordinate to the government except in compliance with requirements of Article 98. Article 99(3) creates a mandatory obligation for the Federal Government to make rules for the allocation and transaction of its business. Such business includes the functions and duties to be discharged under provincial laws that are applicable to ICT and for such purpose the Federal Government must frame appropriate rules as has been done in relation to the business of the Federation through Rules of Business,1973.

34. Over 2.3 million citizens live in Islamabad Capital Territory who are not subject to any constitutional instrument

other than the Constitution. They cannot be treated as aliens whose right to be governed through "chosen representatives" can be usurped by vesting the authority of the Provincial Government in one servant of the state. The citizens of Pakistan living in provinces have been empowered to elect three tiers of government, which governments then exercise the authority of the state in relation to such citizens i.e. local government, Provincial Government and Federal Government. Within our Constitutional scheme the citizens living in ICT have not been endowed the authority to elect a Provincial Government different from the Federal Government, and consequently have the benefit of electing only two tiers of government for purposes of administration of state authority in relation to them. This makes it even more critical that the state upholds their right to be governed through their chosen representatives within the Local Government as well as the Federal Government. As was emphasized by the Supreme Court in ***Mustafa Impex***, unlike King Louis XIV, neither the President nor an Administrator or Chief Commissioner appointed by him can claim to be the state in relation to citizens of Pakistan residing in ICT.

35. It appears that the state has continued to function under the misconception that a Chief Commissioner appointed in exercise of authority under P.O No. 18 of 1980 comprises Provincial Government for purposes of ICT, which instrument could not have vested any continuing executive authority in an Administrator or Chief Commissioner after the restoration of the Constitution in 1985. But as no declaration has thus far been issued by any constitutional court declaring that P.O No. 18 of

1980 only remained a valid instrument for conferral of authority in the interlude when the Constitution stood abrogated, it is essential to apply the doctrines of de facto and past and closed transaction to actions taken by Administrators and Chief Commissioners claiming to exercise authority under P.O No. 18 of 1980. This was the approach also followed by the Supreme Court in relation to the law laid down in ***Mustafa Impex,*** which was interpreted to have prospective effect through judgment ***Pakistan Medical and Council vs Muhammad Fahad Malik (2018 SCMR 1956)***. While the Supreme Court in ***Mrs. MN Arshad Vs. Naeema Khan (PLD 1990 SC 612)*** clarified that, "*the Federal Government discharges dual functions namely, of the Federal Government and of the Provincial Government",* in relation to ICT, there was no explicit declaration that P.O No. 18 of 1980, and P.O No. 02 of 1987 and P.O No. 02 of 1990 are *ultra vires* the Constitution and while P.O No. 18 of 1980 has been validated by Article 270A of the Constitution, no authority could be exercised under it in conflict with provisions of the Constitution since its restoration in 1985. It is thus that the de facto doctrine must be applied in order to let past and closed transactions rest which have been affected by Administrators and Chief Commissioners purportedly acting as Provincial Government for ICT.

Scope of Preventive Detention under the Constitution

36. The laws of preventive detention have an odious provenance. In her treatise "Arrest, Detention and Criminal Justice: A study in the context of the Constitution of India", B. Uma Devi argues that "*it is ironical that the provisions for*

preventive detention, which were introduced in India by the foreign imperialist for their convenience and with absolute disregard for the rights of the natives, have found their way into the Constitution of the independent India." These provisions were first introduced under the East India Company Act, 1784. The Bengal Regulation III of 1818 provided for detention of Indian natives without trial. The Defence of India Act, 1915 passed after the First World War had special provisions for preventive detention. The scheme of preventive detention was further refined under the Rowlatt Act of 1919. Uma Devi argues that *"for what essentially are executive failures, the State has been conveniently choosing an imperial device to deal with situations which could hardly be compared to those at the dawn of independence and, obligingly, the judiciary – the guardian of individual rights – has consented to it".* She argues that preventive detention orders to pass the test of reasonableness must only be passed when a proclamation of emergency is in effect declaring the security of the state under threat. Faqir Hussain has contributed a Chapter on Pakistan in "Preventive Detention and Security Law: A Comparative Survey" (edited by Andrew Harding and John Hatchard and published by Martinus Nijhoff Publishers). While tracing the history of preventive detention laws in the subcontinent dating back to the time of East India Company, Mr. Hussain argues that while United Kingdom regarded preventive detention as the extraordinary measure applicable in face of grave emergency and armed conflict, "*the prevention detention statutes, enacted for this purpose, were confined to the period of active hostilities*

and were repealed as soon hostilities terminated. However, following their independence in 1947, both India and Pakistan chose to retain the law of preventive detention as a permanent measure… it is misused in a variety of ways, ranging from oppressing political opponents to being used as substitute for ordinary criminal provisions."

37. Under the Constitution of 1956, Article 7 created safeguards as to arrest and detention. Article 7(3) created a carve out from constitutional safeguards where a person had been arrested or detained under a preventive detention law. The Constitution of 1962 under Article 8(2) similarly created carve outs from safeguard otherwise afforded to persons placed under arrest or detention. Article 8(2)(a) clarified that a law providing for preventive detention could only be made for security of Pakistan or public safety. Article 26 further provided that no bill relating to preventive detention could be introduced in the National Assembly without the previous consent of the President.

38. Article 10(1) and (2) of the 1973 Constitution mandate that the person who is arrested shall (i) be informed of the grounds for arrest, (ii) not be denied the right to consult legal practitioner, and (iii) shall be produced before a Magistrate within period of 24 hours of such arrest. Article 10(3) excludes the application of these safeguard in relation to a person arrested or detained under any law providing for preventive detention. Article 10(4) circumscribes the purposes for which a law providing for preventive detention can be made and

prescribes other instructions in relation to preventive detention as follows:

> *(4) No law providing for preventive detention shall be made except to deal with persons acting in a manner prejudicial to the integrity, security or defence of Pakistan or any part thereof, or external affairs of Pakistan, or public order, or the maintenance of supplies or services, and no such law shall authorise the detention of a person for a period exceeding three months unless the appropriate Review Board has, after affording him an opportunity of being heard in person, reviewed his case and reported, before the expiration of the said period, that there is, in its opinion, sufficient cause for such detention, and, if the detention is continued after the said period of three months, unless the appropriate Review Board has reviewed his case and reported, before the expiration of each period of three months, that there is, in its opinion, sufficient cause for such detention.*

39. As is evident from the plain language of Article 10(3) read with 10(1) and 10(2), the only carveout created by the Constitution in relation fundamental rights guaranteed under Chapter 1 of the Constitution is in relation to (i) the right to be informed of grounds of arrest at the time of arrest, (ii) the right to immediately consult a legal practitioner, and (iii) the right to be produced before a Magistrate within twenty-four hours of arrest. All other fundamental rights guaranteed by the Constitution remain effective in relation to persons arrested or detained under a law providing for preventive detention. It is in this backdrop that provisions of the MPO are to be understood and interpreted.

40. Article 8 provides that any law inconsistent with the fundamental rights guaranteed by the Constitution is void to the extent of such inconsistency. Article 9 guarantees the right of

any person in Pakistan to life and liberty. Article 10A guarantees the right to a fair trial and due process in relation to a criminal charge and/or determination of a civil right or obligation. Article 14 declares that the dignity of a person is inviolable. Articles 15, 16, 17, 19 and 19A guarantee the rights of citizens to freedom of movement, freedom of assembly, freedom of association, freedom of speech and the right to information, respectively. The question that arises in our present context is the extent to which and the manner in which the power to order preventive detention of a citizen under MPO can be exercised keeping in view the aforementioned fundamental rights guaranteed by the Constitution. In relation to Article 9 and the right of liberty read together with Article 4, it is now settled that a citizen is free to do what he/she is not prohibited by law from doing and the state can only do what it is explicitly authorized by law to do. The right to liberty guaranteed by Article 9 includes the freedom of conscience.

41. The question of the extent to which liberty of a citizen can be curtailed in the interest of maintaining public order has come before constitutional courts in multiple contexts. The phrase "public order" has not been defined in the Constitution or a statute and is not amenable to an exact definition. The interpretation of public order came before the Supreme Court in ***Mrs. Arshad Ali Khan Vs. Government of Punjab*** (**1994 SCMR 1532).** In the context of application of MPO the Court held that, *"before an act is held to be prejudicial to public order, it must be shown that the act or activity is likely to affect the public-at-large. As a corollary, therefore, it follows that an act*

which concerns only to an individual and does not amount to an activity [p]rejudicial to the public peace and tranquility cannot fall within the ambit of section 3 of the Ordinance." While public order has not been defined in the Constitution, Article 17(1) of the Constitution guaranteeing the right of a citizen to freedom of association, subjects such right to reasonable restrictions by law in the interest of, *inter alia*, "public order". While interpreting Article 17 in ***Miss Benazir Bhutto***, the Supreme Court cited with approval the judgment of US Supreme Court in ***Cantwell v. Connecticut, (1940) 310 US 296*** equating public interest to public order. It was held in ***Cantwell*** that, *"breach of the peace embraces a great variety of conduct… [and that] When clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order appears, the power of the State to prevent or punish is obvious."*

42. In ***All Pakistan Muslim League Vs. Government of Sindh*** **(2012 CLC 714),** the question of whether the police could restrain a political party from conducting a public meeting on the basis that it could create a law-and-order situation came before the Sindh High Court. It was observed that, *"Insofar as the issue of fundamental rights is concerned, it is important to remember and keep in mind that while each fundamental right is a separate and distinct right enforceable as such, all the fundamental rights conferred by the Constitution also constitute an interconnected whole and it may be the case that in any given situation, two or more fundamental rights may simultaneously be applicable."* While in ***All Pakistan Muslim League*** the Sindh

High Court alluded to application of multiple fundament rights in any given situation, the Supreme Court in ***Mian Muhammad Nawaz Sharif Vs. President of Pakistan*** ***(PLD 1993 SC 473)*** acknowledged that notwithstanding lack of explicit text, fundamental rights guaranteed by the Constitution create penumbral rights that are also protected under the Constitution. Justice Nasim Hasan Shah, speaking for the Court referred to ***Abul A'la Maudoodi v. Government of West Pakistan*** ***(PLD 1964 SC 673*** wherein it was stated that *"forming of associations necessarily implies carrying on the activities of an association for the mere forming of association would be of no avail."* Supreme Court concluded that in order to justify that curtailment of fundamental rights was reasonable, the government had to establish three things. One, the restriction on fundamental rights had to be imposed by law i.e. there must be an express statuary provision that provided for curtailment of fundamental rights. Two, the curtailment of fundamental rights by the legislature was subject to judicial review in exercise of which powers the court would determine whether the curtailment was reasonable. And three, "*the restriction must be relatable to the matter specifically provided for in relation the fundament rights in question."*

43. In ***Hague, Mayor et al. v. Committee for Industrial Organization et al. 307 US 496(1939)*** the US Supreme Court had to determine whether the City Ordinance that forbade the leasing of hall for public meeting in which a speaker was to advocate obstruction of the government of United State was constitutional. The Court citing ***United States Vs. Cruikshank 92 US 542 (1875)*** held that, *"the very idea of a government,*

republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances... the privileges and immunities of the individual respondents as citizens of the United States, were infringed by the petitioners, by virtue of their official positions, under color of ordinances of Jersey City, unless, as petitioner contends, the city's ownership of streets and parks is as absolute as one's ownership of his home, with consequent power all together to exclude citizens from use thereof, or unless though the city holds street in trust for public used, the obvious denial of their use to the respondents is a valid exercise of police power."

44. In ***Edwards v. South Carolina*** **372 US 229 (1963)** the petitioners were students, convicted in a Magistrate's Court in Colombia, South Carolina, for the common law crime of breach of peace. The court held that the petitioners, who were arrested while protesting discriminatory actions, were, "*convicted of an offence so generalized as to be, in the worlds of South Carolina Supreme Court, "not susceptible of exact definition""*. The US Supreme Court in setting aside the convictions, referred to ***Terminiello v. Chicago*** **337 U.S. 1 (1949)**, wherein it was held that, "*a function of free speech under our system of government is to invite dispute. It may indeed serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea… there is no room*

under our Constitution for a more restrictive view. For the alternative would lead to standardization of ideas either by legislatures, courts, or dominant political and community groups."

45. The right to protest is a subset of the right to liberty guaranteed by Article 9 of the Constitution and is also linked to rights of assembly, association and speech guaranteed by Articles 16, 17 and 19 of the Constitution. The scope of the right to protest was addressed by the Supreme Court in ***Suo Moto Case No. 7/2017 (PLD 2019 SC 318)*** ("**Faizabad Dharna Case**") wherein it was held that, *"every citizen and political party has the right to assemble and protest provided such assembly and protest is peaceful… the right to assemble and protest is circumscribed only to the extent that it infringes on the fundamental rights of others, including their right to free movement and to hold and enjoy property."* It was observed that, *"the Constitution does not specifically stipulate a right to protest", but that such right is implied in, "the right to assemble peacefully", in the "right to form associations or unions", or in the "right to form or be a member of a political party"* and in *the "right to freedom of speech and expression".* The Sindh High Court in ***Shaheen Freight Services vs. Federation of Pakistan, through Secretary, Ministry of Petroleum and Natural Resources (2021 CLC* 323)** also mentioned while relying on the ***Faizabad Dharna Case*** that the right to protest is an implied constitutional right that forms a subset of the right to peaceful assembly, the right to form associations or unions and the right to freedom of speech and expression. The Lahore

High Court in ***Mian Ali Asghar Vs. Government of the Punjab and others*** **(2020 CLC 157)** also observed that, *"the right to peaceful protest and procession is a fundamental right of all the citizens in a democratic country like ours."* It was held by the Supreme Court in ***Pakistan Muslim League (N) through Khawaja Muhammad Asif, M.N.A. others Vs. Federation of Pakistan through Secretary Ministry of Interior and others (PLD 2007 SC 642)*** that, *"Fundamental Rights cannot be waived… citizens of Pakistan cannot themselves waive out of the various fundamental rights which the Constitution grants them. The fundamental rights are not to be read as if they included the words 'subject to a contract to the contrary'."*

46. The precedents referred to above make a larger point that the fundamental rights mentioned in the Constitution are inviolable rights guaranteed by the Constitution and even where the Constitution itself creates allowance for placing reasonable restrictions on such rights, the restrictions placed by virtue of statutory law can only be imposed in a manner that is least restrictive of these fundamental rights. In other words, if there are two or more options available to the State to pursue the object or purpose of a statute and State action shall have the effect of curtailing a fundamental right of citizens, the action least restrictive of the fundamental rights will be the only reasonable action permissible under the Constitution. The requirement to opt for a means of realizing legitimate state objects least restrictive of fundamental rights is also a requirement under the doctrine of proportionality. Thus, while pursuing a legitimate state purpose, the state must adopt means

that are least restrictive of fundamental rights and proportionate to the end that is to be achieved in consonance with the statutory object or duty, such as to maintain public order or public safety. While the Supreme Court did not explicitly hold so in the ***Faizabad Dharna Case***, it appears to have endorsed the "harm principle" as articulated by John Stuart Mill in the context of the right of protest. The State has an obligation to maintain public order and will therefore be within its right to regulate the right of citizens to protest, but only to such extent that the right to protest is not interfering with the fundamental rights of other citizens. In such context, the State cannot impose arbitrary and overbearing restrictions on the right of citizens to assemble, speak and protest etc. but has to adopt the least restrictive means so that the rights of one set of citizens to protest etc. are regulated such that they do not unreasonably infringe upon the fundamental rights of the rest of the citizens to enjoy their lives and liberties.

47. The Supreme Court emphasized in ***In Re Suo Motu Constitutional Petition (1994 SCMR 1028)*** that dignity of man declared as fundamental right by Article 14 of the Constitution, *"is not subject to law but is an unqualified guarantee."* In ***Mohtarma Benazir Bhutto and another vs. President of Pakistan and others (PLD 1998 SC 388)*** it was observed that, "*the inviolability of privacy is directly linked with the dignity of man. If a man is to preserve his dignity, if he is to live with honour and reputation, his privacy whether in home or outside the home has to be saved from invasion and protected from illegal intrusion*." Arguing that the right to dignity is a

foundational human right, Justice Aharon Barak writes in his treatise "The Judge in a Democracy" (Princeton University Press, 2006, pp. 85) that, "*The right to dignity reflects the recognition that a human being is a free agent, who develops his body and mind as he wishes, and the social framework to which he is connected and on which he depends. Human dignity is therefore the freedom of the individual to shape an individual identity. It is the autonomy of the individual will. It is the freedom of choice.*"

48. What cannot be allowed in a free and civilized society is for public office holders and state officials to wield and exercise police powers of the State, including the power to order preventive detention, in order to trample upon human agency, freedom of conscience, freedom of movement, freedom of association and the right of an individual to shape his or her identity. The State is not empowered to besmirch a citizen's agency, autonomy, dignity and the right to assemble and protest against the Government under an expanded notion of maintaining public order or public safety. It is the obligation of the executive authorities to maintain public order and public safety in a manner that allows the citizens to enjoy their fundamental rights to the fullest. In a democracy the notion of order cannot be pitted against the notion of law. The obligation of the state to produce order and preserve it is an obligation that flows from the law and the Constitution, and the purpose of creating such obligation in a democratic state is to enable the citizens to enjoy their fundamental rights guaranteed by the Constitution, including their right to critique and to protest

against the policies of the government that exercises state authority in their names.

49. As highlighted in ***Faizabad Dharna Case*** the right to freedom of assembly does not protect illegal assemblies. No one has a right to overthrow an elected government by force. Nor can such right be exercised in a manner that undermines the rights and freedoms of other citizens. This is why a balance must be struck to uphold the competing rights of citizens. But striking a balance does not mean a complete obliteration of one set of rights to let a competing set of rights exist. As mentioned above, it only means regulating the rights of one set of citizens in a manner that is least restrictive for the focused purpose of enabling the rest of citizens to reasonably enjoy their fundamental rights.

50. While recognizing penumbral rights, which are to be upheld while providing for textual rights, it was held in ***Benazir Bhutto v. Federation of Pakistan (PLD 1988 SC 416)*** that, "*our Constitution envisages democracy as a way of life in which equality of status, of opportunity, equality before law and protective of law. It has violation in representation; it is not a system of self-government, but a system of the government and limitation of government… the democracy the role of people is to produce a government and, therefore, the democratic method is a constitutional arrangement for arriving at political decision in which individuals acquire the power to decide by means of competitive struggle for the people's votes*".

51. Fundamentally, democracy rests upon the idea of freedom. And emphasizing the scope of fundamental rights and the limitations imposed on the state when it comes to their curtailment is to underline that a salient feature of our Constitution recognized in ***Mehmood Khan Achakzai*** and reiterated in ***Wukala Mahaz Barai Tahafaz Dastoor vs Federation of Pakistan (PLD 1998 SC 1263)*** and subsequently in ***District Bar Association Rawalpindi vs. Federation (PLD 2015 SC 401)*** is a parliamentary form of government. A parliamentary form of government cannot sustain or thrive unless the fundamental rights of citizens to pursue partisan politics as guaranteed by Article 17 of the Constitution through means guaranteed by Articles 9, 15, 16, 19 and 19A of the Constitution are upheld. In the context of preventive detention, if the state were allowed to adopt an overbroad definition of public order or public safety, an attractive strategy for any political government in control of the state would be to use the notion of public order and public safety to scuttle political opposition, competition and dissent and wield the law of preventive detention as a weapon for such purpose. This cannot be allowed in a constitutional democracy founded on the basis of parliamentary form of government that guarantees a fundamental right of citizens to freedom and liberty to pursue their politics in accordance with their conscience. It is in this larger constitutional framework that the provisions of a law on preventive detention need to be interpreted.

Judicial Review and Approach to Constitutionalism

52. In ***Al-Jehad Trust Vs. Federation of Pakistan*** **(*PLD 1996 SC 324),*** Justice Mian Ajmal observed that, *"a written Constitution is an organic document designed…. It is like a living tree, it grows and blossoms with the passage of time in order to keep pace with the growth of the country and its people; Thus, the approach, while interpreting a Constitutional provision should be dynamic, progressive and oriented with the desire to meet the situation, which has arisen, effectively. The interpretation cannot be a narrow and pedantic."* This approach to constitutional interpretation was reemphasized in ***Munir Hussain Bhatti Vs. Federation (PLD 2011 SC 407)***.

53. The dicta in ***Al-Jehad Trust*** settles the dispute for our purposes between strict constructionism versus contextual constructionism. The textual rights as guaranteed by the Constitution do not change with time, but the shared understanding of a community with regard to the scope of such rights evolves. The Constitution thus becomes an organic document, which, much like the norms of a community, is simultaneously marked by elements of continuity and change. Slavery, gender and ethnic bias etc. continued to exist despite the textual promise of equality. In its 1857 decision in ***Dred Scott v. Sanford*** **60 U.S. 393 (1856)** the US Supreme Court found that segregation on the basis of race did not offend the promise of equality. In ***Brown v. Board of Education*** **347 U.S. 483 (1954)** the US Supreme Court changed its mind and found that segregation on any basis offended the principle of equality. What changed between 1857 and 1954 was not the text or the

principle itself, but the manner in which the principle was to be applied to uphold the ideal to be realized. Thus, state action fettering liberty and dignity of citizens which may have been deemed kosher back in 1950 may not pass constitutional muster in 2023. We will therefore see that our jurisprudence in relation to preventive detention has also followed an evolutionary path, with courts becoming less and less deferential to the exercise of police powers by the state where such exercise infringes upon fundamental rights.

54. It is now well settled that the manner in which fundamental rights can be encumbered under statutory law must be proportionate to the mischief that is sought to be prevented. In ***Pakistan Muslim League (N) Vs. Federation of Pakistan*** **(PLD 2007 Supreme Court 642)** the question before the Supreme Court was whether Mian Muhammad Nawaz Sharif, the head of PML(N), could be restrained from returning to Pakistan by encumbering his right to freedom of movement guaranteed by the Constitution. The Supreme Court held that such right could not be casually suspended. It was observed that, *"the aim of having a declaration of Fundamental Rights is that certain elementary rights of the individual, such as his right to life, liberty, freedom of speech, freedom of faith, and so on, should be regarded as inviolable, under all conditions and that the shifting majorities in the Legislature of the country should not be able to tamper with them*." It was explained that *"restriction is unreasonable if it is for an indefinite period or an unlimited period or a disproportionate to the mischief sought to be*

prevented or if the law imposing the restrictions has not provided any safeguard at all against arbitrary exercise of power."

55. The question of scope of freedom of speech guaranteed by Article 19 of the Constitution came before the Supreme Court of Pakistan in ***Pakistan Broadcasters Association versus Pakistan Electronic Media Regulatory Authority*** **(PLD 2016 SC 692)** wherein the Court held as follows:

> *"16. Undoubtedly no one can be deprived of his fundamental rights. Such rights being incapable of being divested or abridged. The legislative powers conferred on the State functionaries can be exercised only to regulate these rights through reasonable restrictions, and that too only as may be mandated by law and not otherwise. The authority wielding statutory powers conferred on it must act reasonably (emphasis supplied) and within the scope of the powers so conferred."*

56. Another constitutional concept that is relevant to cases of preventive detention is that penal statutes are to be strictly construed. Where two interpretations of provisions of penal statute are possible, the interpretation more favorable to the accused must be adopted. **(*State Bank Of Pakistan Vs Securities And Exchange Commission Of Pakistan* (P L D 2018 Supreme Court 52), *ZAHID REHMAN vs The STATE* (PLD 2015 SC 77) and *BRIG. (RETD.) F. B. ALI vs THE STATE* (PLD 1975 SC 506).** There is nothing to gainsay that MPO is a penal statute. It enables the state to order the arrest and detention of individuals, placing a restriction on their right to liberty guaranteed by Article 9 of the Constitution. Anyone who contravenes provisions of MPO, is liable to be punished with imprisonment for up to three years as provided in section 13 of

MPO. The law laid down by the Supreme Court in ***Mrs. Arshad Ali Khan*** cited above is in the context of a test for when an activity can be deemed to be prejudicial to public order i.e. when it affects the community-at-large. In such a case, the petitioner was charged with extending threats to the Consulate General of US at Lahore. The Supreme Court observed that, "*the detenu was accused of substantive offences under the penal law, and therefore preventive detention on the same allegation could not be justified in law*."

57. The law as laid down in ***Mrs. Arshad Ali Khan*** must be understood in the context of right of a citizen to access justice guaranteed by Article 9 of the Constitution read together with Article 175 of the Constitution. When an individual is alleged to have committed a cognizable offense, he must be charged with a criminal offence under Section 154 of the Code of Criminal Procedure. If arrested, he must be produced before a court of competent jurisdiction, and his right to due process and fair trial is guaranteed under Article 10A of the Constitution. In such case it is for the court exercising judicial powers to determine whether or not the liberty of a citizen who is being investigated for a criminal offence is to be curtailed and whether such an individual is entitled to be granted bail pending his trial in view of principle that an accused is to be deemed innocent until proven guilty. In such a situation the liberty of the citizen and the manner in which it is regulated falls within the domain of the Judiciary which acts as a neutral arbiter of law, and not the executive which is responsible of the prosecution of the accused. The right of a citizen charged with or liable for a criminal offense to fair

trial and due process, and to have his right to liberty pending trial adjudicated by the judiciary, cannot be circumscribed by the executive by using its arrest and detention powers against such citizen under a preventive detention law.

58. The law for grant of post arrest bail is well settled. ***Mst. Sughran Bibi vs. The State*** **(2018 PLD SC 595)** was a seminal case that held that the mere registration of an FIR is not sufficient to order the arrest of an accused. And that a mechanical exercise of the power to arrest an accused poses inherent danger to cherished liberty of a citizen who may ultimately be found to be innocent. Similarly, the proper approach that courts must adopt while considering grant of pre-arrest bail was enunciated by the Supreme Court in ***Shahzada Qaisar Arafat vs The State*** **(PLD 2021 Supreme Court 708)**, wherein it was highlighted that, "*The power of the High Courts and the Courts of Sessions to grant pre-arrest bail, first and foremost, must be examined in the constitutional context of liberty, dignity, due process and fair trial*. *Pre-arrest bail is in the nature of a check on the police power to arrest a person*". The jurisprudence within the domain of criminal law therefore establishes that courts exercise their power to grant bail, to check the propensity of the police and executive agencies to fetter the right of citizens to liberty, due process and fair trial. It cannot be countenanced that where criminal charges have been brought against an accused, courts would be more protective of the rights of such accused to liberty, than in a matter where a citizen is being detained without any charge on the basis of

apprehension on part of the executive that he or she might be a threat to public order or public safety.

59. It has been discussed above that public order is not amenable to an exact definition. While Article 10 makes allowance for preventive detention, it does so without excluding the application of other fundamental rights guaranteed by the Constitution, except to the limited extent provided in Article 10(1) and 10(2). It was held by the Supreme Court in ***Mrs Arshad Ali Khan*** that not every disturbance or interference with the order of the community will trigger the exercise of powers under Section 3 of MPO. This requires further comment. It is for the executive authorities of the state to uphold fundamental rights, including the right to movement, assembly, association, speech and protest. The exercise of such rights by one set of citizens will, by necessary implication, cause some disturbance to the rights of other citizens to go about their lives. This is where balancing of rights and principles of proportionality and utilization of least restrictive means comes in, as has already been explained.

60. In the context of encumbering fundamental rights of citizens, emergency provisions of the Constitution under Articles 232 and 233 of the Constitution become relevant. The grounds for proclamation of emergency under Articles 232 include threat to security of Pakistan or any part due to external aggression or internal disturbance beyond the power of a provincial government to control. Articles 233 then provides that where proclamation of emergency is enforced, nothing contained in

Articles 15, 16, 17, 18, 19 and 24 shall restrict the power of the state to make laws or take executive action. The power created under the MPO is conferred on the provincial government. The power so created affects and fetters the fundamental rights of those in relation to whom such power is exercised. In this context, the exercise of preventive detention powers under MPO cannot be treated as a localized affair where the state has conferred on a District Magistrate the power to suspend the liberties and freedom of citizens living in a certain district at will, solely on the basis of his apprehension that such citizens might create public inconvenience or disorder. Given that what is at peril are the fundamental rights guaranteed by the Constitution itself, the use of the term public safety and public order within the MPO is relatable to the circumstances eluded by Article 232 of the Constitution i.e. a grave emergency for the country or a part of it, which emergency situation can escalate and fall beyond the control of a province. In such situation, the Constitution entitles the executive to take action which may fall foul of fundamental rights guaranteed by Articles 15, 16, 17, 18, 19 and 24. In other words, the threat to public order or public safety that might justify exercise of preventive detention powers, which by design curb Article 9 rights of citizens, must be of a character that rises to the level of a grave emergency within the meaning of the term as used in Article 232 of the Constitution, wherein the Constitution envisages temporary infringement over fundamental rights.

61. There is one more observation that requires to be made in relation to Article 10. Article 10(4) provides that, *"no law*

providing for preventive detention shall be made except to deal with persons acting in a manner..." In other words, there must be an act that has been done, or is being done that is to be controlled through use of preventive detention law and not the mere apprehension or suspicion that an act may happen in future that is to be preempted. If permission were to be granted by the Constitution to frame laws to pre-empt future acts, such restraint on suspected action would create a whole new category of thought-crimes, which would be destructive for the idea of freedom and liberty guaranteed by the Constitution. The concept of thought-crimes attracted attention after George Orwell's Nineteen Eight-Four, which predicted a situation where 'Big Brother' would be watching all actions inside and outside homes and would have the capability to even read minds and punish people for thought-crimes. Thankfully, our Constitution makes no such allowance. Under Section 107 of the Criminal Procedure Code, 1898, in a situation where a person is likely to commit breach of peace or disturb public tranquility, a Magistrate, after satisfying himself that sufficient grounds for proceeding exist, can require the person to show cause as to why he should not be ordered to execute a bond or provide sureties for keeping the peace under Section 107. In case of such apprehension, resort must be had to provisions of CrPC., that caters to the right of a citizen to due process by providing him access to the judiciary. The police, a District Magistrate or the Provincial Government cannot resort to exercise of preventive detention powers in such situation instead of abiding by the process prescribed by CrPC.

62. The principles that emerge from the above discussion are following:

1. Article 10(3) and (4) does not oust the application of fundamental rights, except to the limited extent provided therein. Further, laws providing for preventive detention can only be enacted to deal with a person who has acted or is acting in a manner that triggers the grounds mentioned in Article 10(4) of the Constitution. No preventive detention law can be framed to preempt action that has not yet happened.

2. Preventive detention laws cannot be employed for purposes of convenience by the executive. The exercise of the right to freedom of movement, assembly, association, speech and protest naturally affect the competing rights of fellow citizens to a certain extent. The executive is under a duty to strike a balance between competing rights of citizens by opting for time, place and manner restrictions that are least restrictive for the fundamental rights of all categories of citizens.

3. Any law that provides for placement of reasonable restrictions on exercise of fundamental rights is to be employed and applied in a manner that is least restrictive of such fundamental rights. In choosing the manner or restraint that is to be applied to a citizen that affects his/her fundamental rights, the doctrine of proportionality applies and the restraining action of the executive must be narrowly tailored to prevent the

mischief that is to be prevented in exercise of statutory authority.

4. Power of arrest and detention under preventive detention laws can never be exercised where the dominant object of such exercise is to curtail or encumber the right of citizens or a class of citizens to freedom of movement, assembly, association, speech and protest. Such curtailment of the right to liberty guaranteed under Article 9 contravenes the penumbral rights guaranteed by the Constitution that sustain political competition within the polity and provide the basis for a representative form of government, which is a salient feature of the Constitution.

5. Preventive detention laws can never be employed against an individual who is accused of an offence, for which such accused can be charged or has been charged under a penal law in force in Pakistan. Exercise of preventive detention laws against an accused against whom a cognizable case is made out is in breach of provisions of the Cr.PC and also falls out of the right of an accused to access justice guaranteed by Article 9 and 10A read with Article 175 of the Constitution. Where the case for criminal offense is made out the authority of the executive to opt to fetter his rights by exercise of powers under preventive detention laws is tantamount to playing a fraud on the Constitution and denying the citizen access to justice and due process.

6. Neither a preventive detention law can be framed nor can power under any preventive detention law be exercised for the purpose of pre-empting acts that have not happened. Such law or action would be *ultra vires* Article 10(4) of the Constitution as well as the fundamental rights guaranteed by the Constitution that do not permit the state to take penal action against a thought that has not matured into action.

Checkered History of Preventive Detention Laws

63. The initial preventive detention laws included Public Safety Ordinance, 1949, Public Safety Ordinance, 1952 and the Security of Pakistan Act, 1952 which were applicable across Pakistan and were probably designed to address challenges that the state faced for purposes of maintaining supplies and services essential to the community in the immediate aftermath of an emergency of Pakistan. The Security of Pakistan Act, 1952, was designed as a temporary law. Its life continued to be extended from time to time and it still remains in force. It is hard to ignore the fact that while preventive detention laws had their genesis in colonialism, they were enacted and most vociferously employed under martial law regimes and authoritarian regimes. The MPO was enacted during General Ayub Khan's regime and so was the Defense of Pakistan Ordinance, 1965. The Defense of Pakistan Ordinance, 1971 was not repealed in 1977 and was followed by the Martial Law Order No. 12 of 1977 on 05.07.1977 as General Zia-ul-Haq's gift to the polity.

64. A perusal of the case law that will be discussed later in this opinion suggests that powers under preventive detention

laws have been enthusiastically employed to control political activity and political outcomes, especially before electoral contests. Another unflattering observation for our democracy is that while preventive detention laws were enacted under authoritarian regimes, the democratic regimes that followed also did not shy away from their abuse. Parliament in its wisdom has elected not to reconsider provisions of Article 10 of the Constitution or the MPO and other preventive detention law in force in Pakistan. It is, however, not for the court to direct legislative policy and declare what laws ought to be promulgated or repealed. It is only the interpretation of the Constitution and law that falls within the province of the judicature. And it is only in the context of determining the legality of the impugned detention orders that the history, evolution, object, purpose and use of preventive detention laws has been considered.

65. The jurisprudence in relation to MPO reflects that constitutional courts initially adopted a deferential approach toward detention orders. With time, the deference contracted and courts began subjecting detention orders to strict and searching scrutiny to afford protection to the fundamental rights of those on the receiving end of preventive detention powers. After 1947, the constitutional courts ruled that the executive while passing preventive detention orders could base its satisfaction on subjective reasons and it was not for the court to investigate the sufficiency of material on which the executive's satisfaction was based (see for example ***Maulvi Muhammad Ali vs. Crown (1950 F.C. 1))***. Where preventive detention orders were held not to be sustainable, it was more on procedural

grounds i.e. that the executive authority had simply not applied its mind to the necessity of issuing a detention order (see ***Abdul Ghafoor Versus The Crown*** (***PLD 1952 SC 624)***, ***Maulvi Farid Ahmad Vs Government Of West Pakistan*** ***(P L D 1965 (W. P.) Lahore 135).*** ***Ghulam Jilani vs. Government of West Pakistan*** ***(PLD 1967 SC 373)*** marked a changed in the approach of the Supreme Court. While considering the exercise of powers under Defence of Pakistan Ordinance, 1965, read with rule 32 of Defence of Pakistan Rules, 1965, the Court rejected the subjective satisfaction test and opted for an objective satisfaction test. It was held that the court in exercise of judicial power had the authority to confirm the existence of reasonable grounds for passing of a preventive detention order. The law laid down in ***Ghulam Jilani*** was reiterated in ***Mir Abdul Baqi Baloch Vs. Government of Pakistan*** ***(PLD 1968 SC 313)*** wherein it was held that, "*What the Court is concerned with is to see that the executive or administrative authority had before it sufficient materials upon which a reasonable person could have come to the conclusion that the requirements of law were satisfied. It is not uncommon that even high executive authorities act upon the basis of information supplied to them by their subordinates. In the circumstances it cannot be said that it would be unreasonable for the Court, in the proper exercise of its constitutional duty, to insist upon a disclosure of the materials upon which the authority had so acted so that it should satisfy itself that the authority had not acted in an 'unlawful manner'.*"

66. The scope of judicial review was enumerated by Sindh High Court ***Liaquat Ali vs Government Of Sind*** ***(PLD 1973***

Karachi 78), which enumeration was then reproduced by the Supreme Court in ***Federation of Pakistan Versus Mrs. Amatul Jalil Khawaja*** **(PLD 2003 SC 442).** The test laid down and reiterated by ***Amatul Jalil*** has been paraphrased by Faqir Hussain in Chapter 10 of the book "Preventive Detention and Security Law: A Partition Survey" as follows:

> *(a) It is the inalienable right of every citizen to be treated in accordance with law and only in accordance with law, that is, according to the accepted norms of legal process and in strict compliance with all the functions and duties* laid down by the law.
>
> *(b) Superior Courts are empowered to probe into exercise of public power by the executive to determine whether it has acted with lawful authority and in a lawful manner.*
>
> *(c) The burden lies on the detaining authority to show the legality of the preventive detention, for which purpose the authority must place the whole material upon which the order of detention is based before the Court, the validity of the claim of privilege with respect to any document being within the competence of the Court alone to decide.*
>
> *(d) The exercise of power by the detaining authority is subject to the ascertainment of reasonable grounds, which is a judicial or quasi judicial function.*
>
> *(e) Action taken without proper application of the mind of the detaining authority would not qualify as action in accordance with law and the power to order detention of a particular person is coupled with the duty to apply the mind as to the necessity of such parson's detention on the material available to the authority.*
>
> *(f) The superior Courts are empowered to examine the reasonableness of the action of the detaining authority, that is to say, to see whether a responsible person would have formed, on the material available to the detaining authority, the same opinion as that formed by the authority with regard to the detention and in doing so it would be competent to also consider whether the grounds are within the law-making power of the legislature and within the ambit of the statute relating to preventive detention, and are non-existent or otherwise bad.*
>
> *(g) "Satisfaction" of the detaining authority means the state of mind which has been induced by the existence of reasonable grounds for such satisfaction. The word "satisfaction" connotes a state of mind bordering on the conviction induced by the existence of facts which have removed the doubts, if any, from the mind and taken it out of the stage of suspicion.*

> *(h) The superior courts are empowered to make an enquiry into the bona fides or good faith of the action taken by the detaining authority.*
>
> *(i) If there are several grounds of detention, then each ground contributes to the satisfaction of the detaining authority and no ground can be excluded from consideration in judging the legality of the order of detention and wrongful inclusion of any ground would render the orders of arrest and detention illegal.*

In her review article "Law and Colonialism" published in *Law & Society Review* (Vol. 25, No. 4, 1991, pp. 889-922), Sally Engle Merry defined colonialism as "*a relation between two or more groups of unequal power in which one not only controls and rules the other but also endeavors to impose its cultural order onto the subordinate group(s)*." She argued that, "*law often serves as the handmaiden for processes of domi-nation, helping to create new systems of control and regulation*" and within the colonial project law was central to the colonizing process. In an independent state, which is the successor of a colonial state, colonial laws cannot be given effect in accordance with the original intent of colonial laws to subjugate indigenous people. Where text of a law traces its origin to colonial times, it is to be interpreted in consonance with fundamental rights guaranteed by the Constitution as understood today. In ***Haroon Farooq vs. Federation*** **(2023 LHC 1450)** the Lahore High Court declared section 124-A of Pakistan Penal Code *ultra vires* the Constitution, where Justice Shahid Karim noted that, "*a law which was the product of a colonial mindset must be subjected to a searching scrutiny and analysed punctiliously by placing it against the Constitution and to ask if it is disloyal to the language chosen by the framers of the Constitution*." In view of the origins of preventive detention laws, their purpose and historical use on

the one hand, and the scope of fundamental rights and especially the right to liberty as understood and applied today on the other, a preventive detention order will attract strict and searching judicial scrutiny and only in very extraordinary circumstances constituting a grave emergency will such order pass muster.

Use of preventive detention to regulate political activity

67. A perusal of reported judgments re preventive detention orders corroborates the charge made by academics that powers under MPO and preventive detention laws are abused to engineer political outcomes and control political activity. In ***Maulvi Farid Ahmad Vs Government of West Pakistan*** **(PLD 1965 (W.P) Lahore 135)**, the petitioner had been arrested for making critical speeches against the government of General Ayub Khan. The Lahore High Court observed that the petitioner, "*has indeed criticized the Government and its policies, but the criticism of the administration cannot always be interpreted to mean that it was intended to undermine respect for the Government with a view to bringing about disorder. The right to utter a reasonable criticism is a privilege and a source of strength to a community. On "Freedom of speech" lies the foundation of all democracy*." The Court found that speeches did not have effect of causing incitement and cited with the approval the judgment of US Supreme Court in ***Terminiello***, wherein it was held that the freedom of speech is protected "*unless shown likely to produce a clear and present danger of a serious substantive evil that arises far above public inconvenience, annoyance or unrest*". The

petition was allowed and preventive detention order was found to have been not sustainable. In **Liaquat Ali** the petitioner was son of a member of National Assembly and preventive detention order was not found to be sustainable in the eyes of law. In ***Abdul Haque Vs District Magistrate*** **(PLD 1990 Karachi 481)** the detenue alleged that he had been subject to preventive detention due to his role in an election dispute. The detention order was set aside.

68. The case of ***Rana Sana Ullah vs Secretary, Home'department, Government Of Punjab*** **(2001 P Cr. L J 2004)** is pertinent, especially as Rana Sana Ullah Khan was the Minister of Interior at the time when the impugned detention orders were passed. On 21.11.2000, District Magistrate Faisalabad ordered the arrest of Rana Sana Ullah on the basis that he was fiery speaker involved in anti-state activities and his detention was necessary to avoid disturbance to public peace and tranquility. The detention order was passed in view of speeches involving criticism of Armed Forces of Pakistan at the residence of Mr. Pervez Elahi and also on the visit of Mrs. Kalsum Nawaz to Faisalabad. The Lahore High Court held that detention order had merely been issued on the basis of a report of a police officer and there had been no application of mind by the District Magistrate. The order was declared to be unlawful.

69. The cases cited above reflects that delegation of power under section 3(1) of MPO has consistently been abused by District Magistrates and the power to arrest has been exercised for extraneous reasons mostly against politicians. In the instant

matter, the Deputy Commissioner Islamabad, acting as District Magistrate, issued at least 67 detention orders between May 2023 and September 2023. An overwhelming majority of the detainees in such cases were either leaders of Pakistan Tehreek-e-Insaf (PTI) or members of PTI who alleged that they were being targeted due to their political affiliation and for exercise of their right of speech and protest against the government that was targeting PTI. Of the detention orders that were challenged before Islamabad High Court, not one order has been upheld by as having been passed in accordance with law. The detention orders were either withdrawn by the District Magistrate after the issuance of notice by the court or were set-aside by the court or the petitions were withdrawn for having become infructuous as the period of detention had expired.

70. In the case of Shehryar Afridi, one of the petitioners before the court, initial detention order was passed on 16.05.2023 which was set-aside for being illegal through judgment of this Court in Writ Petition No. 1639/2023. Notwithstanding the judgment and the strictures passed against the District Magistrate for colorable exercise of authority, he passed another detention order on 08.08.2023, which forms the subject-matter in the present petition. The District Magistrate has informed the Court that repeated detention order had been passed on the basis of reports generated by police authorities. Appearing in person, the District Magistrate stated before the Court that in passing the impugned detention orders, he relied solely on the recommendation of police officials. This is despite the plethora of case law wherein case after case it has been

emphasized by courts that an order of arrest or detention under section 3(1) of MPO cannot be passed unless the competent authority has satisfied itself based on material before it that ordering the detention of an individual is necessary in the interest of public order or public safety. Despite grant of repeated opportunities no material establishing the necessity of ordering arrest of the petitioners was produced before the court either by police officials who initiated the reports recommending such arrests or by the District Magistrate who issued the impugned detention orders. The case of Shehryar Afridi sticks out as Mr. Afridi had remained under arrest since May 2023 in various districts of Pakistan, under detention orders issued by District Magistrates of various Districts in a manner that was so synchronized that right before the expiry of an order or an order being set aside by a court, a fresh detention order was issued to prevent the release of Mr. Afridi. This Court has found that the manner in which the authority was exercised by District Magistrate in the instant matter was colorable and completely devoid of any rational basis aimed of achieving the objects of MPO i.e. to maintain public order or public safety.

71. In view of the record that has produced before the court it is evident that the conduct of District Magistrate/Deputy Commissioner constitutes a fraud on the statute and the Constitution and amounts to exercise of statutory authority in a manner that can be characterized as malice in law. As this court has found that the impugned detention orders are *ultra vires* the Constitution and have been passed in breach of provisions of MPO and are coram non judice and without jurisdiction, the court

will restrain itself from dwelling further on the considerations that may have prevailed with the District Magistrate in passing the impugned detention orders. The District Magistrate is facing contempt of court proceedings for obstruction of justice and in order to uphold his right to fair trial and due process it is essential for this Court not to form a firm opinion with regard to his conduct and what inspired such conduct.

MPO and its application to ICT

72. It was the opinion of the learned amici who were invited to assist the court that MPO had never validly been extended to ICT. The basis of argument was that MPO had been enacted by the Government of West Pakistan in exercise of authority under the President's Order (Post-Proclamation) No. 1 of 1958. Under Article 5 of the said order the Governor of West Pakistan had only been vested with powers of the Government of the Province under the abrogated Constitution of 1956. Under Article 211 of the Constitution of 1956, executive and legislative power in relation to Federal Areas vested in the Central Government and the Federal Legislature. And consequently, while exercising the powers of the Government of West Pakistan, the Governor could not enact legislation for the Federal Capital, which is why Article 1(2) of MPO as originally enacted, excluded from MPO's application Federal Capital and special areas. It was submitted that West Pakistan Maintenance of Public Order (Amendment) Ordinance, 1962 amended section 2 of MPO and the exclusion of MPO in relation to the Federal Capital was omitted. It was stated by the learned amici that given the West Pakistan Maintenance

of Public Order (Amendment) Ordinance, 1962, had also been passed by the Government of West Pakistan under Laws (Continuance in Force) Order, 1958, such Ordinance was *ultra vires* due to the Governor's law for lack of legislative competence to legislate in relation to the Federal Capital. Learned Additional Attorney General submitted in response that up until the Constitution of 1962 took effect, Karachi was the Federal Capital and not Islamabad Capital Territory. At the time when MPO was enacted, the territory which is now the Islamabad Capital Territory formed part of West Pakistan. The Government of West Pakistan therefore had both subject-matter and territorial jurisdiction to enact MPO and make it applicable to all territories falling within West Pakistan, including the territory that was later carved out as Islamabad Capital Territory. He submitted that merely because Islamabad Capital Territory was subsequently carved out of West Pakistan and Punjab and designated as the Federal Capital did not render previously applicable provincial laws redundant or requiring re-promulgation to be effective.

73. This court agrees with the contention of learned Additional Attorney General. The establishment of West Pakistan Act, 1955, created West Pakistan and province of Punjab and territory that fell within the province, including the territories that subsequently became part of the Federal Capital, formed part of West Pakistan. The Federal Capital Order The Pakistan Establishment Federal Government Order, 1948, declared Karachi as the Capital. The Establishment of West Pakistan Act afforded special treatment to the Federal Capital which was already discussed in the initial part of this judgment. Article 211

of the Constitution of 1956 dealt with the exercise of administration and legislative authority in relation to the Federal Capital, which at the time was Karachi and not Islamabad. MLR 82 of 1960 dated 24.06.1960 identified Islamabad as the Capital site but not as the Federal Capital. The President's Order No. 20 of 1960 changed the seat of government from Karachi to Rawalpindi, while Karachi remained Federal Government territory that was ultimately merged into West Pakistan in July 1961. Article 211 of the Constitution of 1962 provided for the establishment of Islamabad Capital Territory as a Federal Capital. Article 211(7) however provided that till such time that provisions was made for establishment of government in Islamabad, the seat of Federal Government would remain in Rawalpindi.

74. In view of the aforementioned legislative instruments it is evident that at the time of enactment of MPO, the territory of ICT was part of the province of West Pakistan in relation to which government of West Pakistan had territorial and subject-matter competence to legislate. There is weight in the submissions of the learned amici that in 1962 the Government of Pakistan did not legislate to extend MPO to the Federal Capital and consequently West Pakistan Maintenance of Public Order (Amendment) Ordinance, 1962, extending the MPO to the Federal Capital was without jurisdiction. This, however, does not impact on our analysis in relation to ICT. It was not by virtue of West Pakistan Maintenance of Public Order (Amendment) Ordinance, 1962, that MPO was extended to Islamabad, but by virtue of MPO itself, which applied to the entire territory of West

Pakistan in 1960 when it was enacted, and ICT formed part of West Pakistan at the time. By the time the West Pakistan Maintenance of Public Order (Amendment) Ordinance, 1962, was enacted, the Constitution of 1962 had come to life and West Pakistan Maintenance of Public Order (Amendment) Ordinance, 1962, probably died its natural death for not being approved by the legislature as an Act. This again is not relevant for our purposes. This Court therefore agrees with the learned Additional Attorney General that MPO was validly enacted for purposes of the territory that subsequently became the Islamabad Capital Territory, and MPO, as a provincial law was applicable in relation to such territory and was protected under the validation provisions of the Constitution of 1962. MPO would not automatically stand repealed for purpose of ICT merely because such territory was subsequently carved out and declared to be the Federal Capital. It might be pertinent of note here that within the Constitution of 1962, as has been discussed in initial part of the judgment, the Parliament and the West Pakistan Assembly both had concurrent jurisdiction in relation to the Federal Capital.

75. Once it is found that the MPO was validly executed to ICT as of the original date of promulgation of MPO the next question was delegation of authority by the provincial government to the District Magistrate for purposes of section 26 of the MPO and whether it had been validly made. The learned AAG had relied on notification issued by Government of West Pakistan in 1964 (III-104-M-SP-1 of 1964). This notification cannot be a basis for claiming that the authority was validly conferred on District Magistrate of ICT. The district of Islamabad

had not been created at the time and the Federal Government continued to work from Rawalpindi. Learned State Counsel appearing on behalf of Chief Commissioner office relied on a notification issued by Chief Commissioner Islamabad dated 10.05.1992 delegating to the District Magistrate Islamabad the authority of the Provincial Government under section 3(1) of MPO. In view of discussion in the initial part of the judgment it has already been held that the Provincial Government for purposes of ICT is the Federal Government and not Chief Commissioner Islamabad. The P.O No. 2 of 1987 read with P.O No. 2 of 1990 and the notifications issued under such orders to designate Chief Commissioner Islamabad as the Provincial Government for ICT have been declared *ultra vires* the Constitution and void. Even employing the principle of past and close transactions, the continuing exercise of authority under a notification that is *corum non judice* and without jurisdiction would not be protected. As District Magistrate Islamabad claims to exercise authority of the Provincial Government under section 3(1) of MPO, deriving such authority from Chief Commissioner's notification of 1992, the question of legality of such notification cannot be treated as a past and closed transaction. It is therefore declared that Chief Commissioner's notification dated 10.05.1992 is *coram non judice* and without jurisdiction, as the authority for purposes of section 26 of MPO could only have been exercised by the Federal Government through a decision rendered by the Federal Cabinet. This Court therefore finds that the District Magistrate is vested with no authority to exercise powers of the Provincial Government under section 3(1) of MPO.

And consequently, the impugned detention order passed by the District Magistrate in exercise of authority section 3(1) of MPO are also *coram non judice* and without jurisdiction.

The Scope of Delegation for purposes of Section 26 of MPO.

76. The question of what the scope of the delegation of power is under Section 26 of the MPO to the District Magistrate, is also relevant to the discussion. There are conflicting judgments on the extent of authority that can be delegated by the Provincial Government to the District Magistrate under Section 26 read with Section 3(1) of MPO. The Sindh High Court in ***Liaquat Ali*** held that Section 26 permits delegation of the authority of the Provincial Government to order the arrest or detention of an individual, but not the exercise of judgment and discretion to satisfy itself re the necessity of such detention in the interest of public safety or public order. The satisfaction must be that of the Provincial Government itself. It is only the ministerial function of ordering the police to arrest an individual for purposes of Section 3(3) that can be delegated. It was observed that:

> *"The West Pakistan Maintenance of Public Order Ordinance, 1960, being an infringement of the rights and liberties of the citizens, should be strictly construed, and, when two interpretations of a provision are possible, then the one which is in favor of the citizen should be adopted. In our opinion, the requirements laid down in sub-section (2) of section 3 are not dispensed with when powers of the Provincial Government under sub-section (1) are delegated to the District Magistrates. Notwithstanding such delegation, it would still be necessary for the District Magistrate to make reference to the Provincial Government with regard to the prejudicial activities of a citizen, and, when such reference is*

> *made, the Provincial Government may pass such order as it may deem fit. Therefore, section 26, which permits delegation of the Provincial Government's powers under sub-section (1) of section 3 should be interpreted in the context of provisions of sub-section (2) of this section. What can be delegated under section 26 is only the power to arrest and detain a citizen. But the faculty of satisfaction cannot be delegated to the District Magistrate…The procedure under these provisions, therefore, would appear to be that first a reference is made by the District Magistrate to the Provincial Government with regard to the prejudicial activities of a citizen and then it is that Provincial Government which should be satisfied as to the necessity that such person should be detained under the Ordinance, and, upon such satisfaction being reached, the necessary order is made directing the District Magistrate to arrest and detain such person."*

The Lahore High Court in ***Noor Mohammad v. District Magistrate (PLD 1976 Lahore 233)*** disagreed and held that the sum total of Provincial Government's authority to satisfy itself re the necessity of detention and its continuation can be delegated to the District Magistrate for various reasons, including, *inter alia*, that such view was taken by the Lahore High Court, while relying on a judgment of the Lahore High Court, in ***Nasim Fatima v. Government of West Pakistan (PLD 1967 Lahore 103)*** and by the Supreme Court in ***Ghulam Jilani v. Government of West Pakistan (PLD 1967 SC 373)***. The view in ***Noor Mohammad*** was subsequently followed by the Lahore High Court in ***Shazia Parveen v. District Magistrate (PLD 1988 Lahore 611)***, ***Muhammad Siddiq Khan v. District Magistrate (PLD 1992 Lahore 140)*** and henceforth.

77. With respect (and of course with the benefit of hindsight), the view taken by the Lahore High Court cannot be adopted as being good law. The law laid down by the Singh High Court in ***Liaquat Ali***, in the opinion of this court, was correct all along for multiple reasons. One, the Supreme Court in ***Malik Ghulam Jillani*** or in ***Mir Abdul Baqi Baluch***, where the question of legality of delegation came up, did not interpret provisions of the MPO, but the scope of delegation under the Defense of Pakistan Ordinance, 1965 and the Defense of Pakistan Rules, 1965, which were preventive detention instruments enacted during the India-Pakistan War of 1965. The question raised before the Supreme Court was the application of the principle *delegata potestas non potest delegari*, which held that the principle was not attracted where the statute itself permitted further delegation. It was not the prohibition of further delegation of authority that formed the basis of the law laid down in ***Liaquat Ali***, as section 26 obviously permits delegation of authority to the District Magistrate, but the scope of authority that can be delegated under section 26 read with section 3 of MPO. Two, the law as enumerated by Sindh High Court re MPO was quoted by the Supreme Court in ***Mrs. Amatul Jalil Khawaja*** and till date remains the oft-repeated test to be applied by constitutional courts in determining the legality of detention orders under MPO. Three, Sindh High Court's view is the correct textual enunciation of provisions of MPO.

78. Section 3(1) creates the power of arrest and detention and vests it in the Provincial Government. The rest of the sub-sections of Section 3 provide the framework and procedural

details as to how such power is to be used. After ***Mustafa Impex*** it is settled that the Provincial Government must act collectively as a collegium. There must be some means to place information before it that the detention of an individual must be ordered to maintain public order. That means is provided in Section 3(2) whereby the District Magistrate (or other state official so authorized) puts up a reference for consideration of the Provincial Government. Section 3(4) creates the mechanism for consideration of such reference by the Provincial Government with the option of either approving it or rejecting it. If the reference is approved, an order for detention is then to be issued for purposes of Section 3(1), as a ministerial act, and provision has been made for execution of such order through the police under section 3(3). Section 26 doesn't allow delegation of power of Provincial Government under Section 3(4). Through this reference process the Provincial Government satisfies itself re the necessity of ordering detention and curtailing the liberty of an individual in the absence of a criminal charge against him. Such overarching discretionary authority requiring the satisfaction of the Provincial Government as a collegium cannot be delegated.

79. Therefore, the sensible reading of Section 3 and 26 of the MPO suggests that it is only the ministerial function of issuing an order or detention under section 3(1) to be executed by police authorities for purposes of Section 3(3) that power can be delegated by the Provincial Government under Section 26. Had the legislature wished to authorize the Provincial Government to delegate its entire power under section 3 to the

District Magistrate, why would it limit the scope of delegation to section 3(1) as opposed to leaving it open for the entire section 3 or at least including therein section 3(4) as well? The contrary reading of sections 26 and 3 seems outlandish. Under Section 3(2) the District Magistrate is required to frame a reference for consideration of the Provincial Government building a case for ordering the arrest or detention of a citizen. If the sum total of power of the Provincial Government under Section 3 can be delegated to the District Magistrate, he would be considering his own reference and then satisfying himself regarding the necessity of arresting an individual in the interest of public order. It would be bizarre to think that the legislature wished to transform a District Magistrate into prosecutor, judge and executor, placing the fundamental right of liberty of citizens in the hands of one bureaucrat.

80. Such reading of Sections 3(1) and 26 of MPO would also fall foul of the doctrine of excessive delegation. For our present purposes we need not trace the entire body of case law on excessive delegation. In ***MQM (Pakistan) and others v. Pakistan***, ***(PLD 2022 Supreme Court 439)***, Supreme Court underscored the imperative structuring discretion as follows:

> *"… the Constitution does not envisage unstructured, uncontrolled and arbitrary discretion being conferred by legislature on State functionary or holder of a public office; even if, some discretion is conferred by law on a state functionary or holder of a public office, the same has to be exercised justly, honestly, fairly, and transparently. There has to be a structured policy in the interest of uniformity, even handedness, probability and fairness … It has been*

> *noted that entrustment of power without guidance suffers from excessive delegation, which in the scheme of Constitution is not permissible".*

How can section 26 of MPO be read as permitting the delegation of discretion to a District Magistrate to suspend the fundamental right of citizens to liberty guaranteed by Article 9, when such delegation essentially vests *"unstructured, uncontrolled and arbitrary discretion"* in officers serving in BS17-19 scales. There are also no guidelines provided as to how such discretion would be exercised, what might constitute a threat to public safety or public order, and when might the extreme step of ordering arrest and detention of a citizen might be warranted without applying lesser restrictions on freedom of movement provided for in Section 6 of MPO. The Provincial Government has also framed no rules to oversee or regulate the exercise of discretion.

81. Supreme Court's most recent judgment in ***Pakistan Electronic Media Regulatory Authority (PEMRA), Islamabad v. Pakistan Broadcaster's Association and another***, ***(2023 SCMR 1043)*** has further honed its administrative law jurisprudence that has grown since the 1990s, providing that there can be no unfettered, unstructured and unbridled state authority vested in any one individual. This body of law draws its logic from the words of Lord Acton when he famously said, *"power tends to corrupt and absolute power corrupts absolutely."* ***PEMRA*** provides the analytical tools through which the question of delegation under section 26 of the MPO must be analyzed. (In the discussion that follows the

citated words and sentences in inverted commas are from PEMRA.)

82. From the analytical standpoint with respect to delegation, the first question is *"what is it that it is to be delegated*". The answer this question then provides a framework to answer the two further related questions: (i) to whom can the delegation be made, and (ii) in what manner can that delegation be made. For the purposes of determining *"what is it that is to be delegated"*, the following has to be considered: (A) the significance of what is to be done in terms of power, responsibility or function; and (B) the impact on those affected by the delegated power, responsibility or function. Once this analysis is undertaken, the second step is to determine who is to exercise that delegated authority, and in what manner: *"[t]he more important the nature of the power, responsibility or function (i.e., the higher up it is on the "scale") the higher also in the hierarchy must be the person to whom the delegation can be made and the manner in which it is made (i.e. by general or special order)"*.

83. On the question of manner, the Supreme Court stated that *"[t]he more important the power, responsibility or function being considered for delegation, the higher must be the 'threshold' for the Authority in deciding not to impose any conditions and vice-versa"*. In other words, there has to be structure, through rules and regulations, for the delegatee, especially if the power, responsibility or function is of significance, or can have a huge impact on those affected by that

power, responsibility or function. In ***PEMRA*** the Supreme Court held that it is not sufficient that the power to delegate exists in the legislative instrument. And for the suspension of license power to be delegated to Chairman under section 13 of the PEMRA Ordinance, 2002, it was not enough to cite "public interest" or "necessity", which are just amorphous and malleable terms. For such a power to be delegated *"[a] strong case must be made out and there must be a very serious application of mind by the Authority for it to be satisfied that the power of suspension ought to be delegated"* to the Chairman.

84. For the purposes of section 26 of MPO, the law laid down in ***PEMRA*** is squarely attracted. First, the "significance" and "impact" of the power under section 3 of the MPO, is extensive as it entails deprivation of an individual's liberty in the absence of a criminal charge against him, which in any situation warrants strict scrutiny. Because what is being delegated is so crucial, and of such high significance, it would have to be seen whether this power can ever be delegated to the District Magistrate. This is particularly relevant since the delegation is to happen from the Provincial Government, with is a collegium of elected ministers who act collectively, to a single civil servant – a District Magistrate – who in the hierarchy of governmental structure is not very high. And further, there is no guidance, whatsoever, for how this authority is to be exercised.

85. The burden is thus on the Provincial Government as delegator to establish through *"very serious application of mind"* whether this power can even be delegated, and even it can be

delegated, then the delegator has to assess the manner in which this power is to be delegated. As with *"public interest"* and *"necessity"*, the terms *"prejudicial to public safety"* and *"maintenance of public order",* used in section 3 of the MPO, are amorphous and malleable terms, which, in and of themselves, caution against the delegation of power. This delegation, therefore, as provided in ***PEMRA***, has to be for "valid and sustainable" reasons, which would necessarily mean that delegation simpliciter cannot be upheld, and there is going to be judicial review of the delegation, the manner of delegation, and the office of the individual to whom the power is being delegated, even, in the situation, where delegation is provided for in the statute. And as the state action in such case involves the most prized fundamental rights of a citizen to liberty and dignity, in exercising judicial review the courts will apply the strict scrutiny standard.

86. Thus, if section 26 is read as delegating the sum total of power vested in the Provincial Government to satisfy itself regarding the necessity of ordering the arrest or detention of a citizen as well as the power to subject such decision to review in order to further extend such arrest or detention, Section 26 would be found *ultra vires* Article 9 and 10A, read together with Articles 4 and 8, for suffering from excessive delegation. It has however been held by the Supreme Court in ***Lahore Development Authority v. Ms. Imrana Tiwana***, ***(2015 SCMR 1739)*** that where it is possible to accord more than one interpretation to a statutory provision, a court must undertake the interpretive exercise such that the statutory provision is

saved. And to do so courts employ the principle of reading down a provision to save what can be saved.

87. It is for these reasons that this court finds that section 26 can only be regarded as constitutionally valid if it is read as permitting the delegation of limited authority to the District Magistrate as enunciated in ***Liaquat Ali***.

Declarations and Directions of the Court

88. For the reasons stated above, this Court finds the following:

1. The Federal Government exercises exclusive executive authority under the Constitution and in relation to Federal Laws and Provincial Laws applicable to ICT and is consequently both the Federal Government and the Provincial government for purposes of ICT.
2. In accordance with the law laid down in ***Mustafa Impex***, where any law requires the decision or action or exercise of authority by the government in relation to ICT, whether as Federal Government or Provincial Government, such decision, action or exercise of authority can only be exercised by the Federal Cabinet as collegium.
3. P.O No. 18 of 1980, P.O No. 2 of 1987, P.O No. 02 of 1990 and notifications issued thereunder declaring the Administrator or Chief Commissioner Islamabad to be Provincial Government for purposes of ICT are

ultra vires the Constitution and are declared to be void.

4. Article 99 of the Constitution creates a mandatory obligation for Federal Government to frame rules for allocation of its business, and such business of the Federal Government includes the power, duties and functions to be discharged in its capacity as Provincial Government. The Federal Government shall frame such rules or include such rules within the Rules of Business, 1973, for allocation and discharge of functions to be performed by it in relation to provincial laws applicable to the ICT, within a period of three months.

5. The declaration by this Court that the Federal Government is also the Provincial Government for purposes of ICT and the Chief Commissioner is not the Provincial Government for ICT will apply prospectively and will affect past and closed transaction. Notwithstanding the time frame provided for framing appropriate Rules of Business for purposes of ICT, any decision that ought to be taken by the Provincial Government under any law for the time in force in ICT can only be taken by the Federal Cabinet.

6. The impugned detention orders are declared to be *coram non judice*, without jurisdiction and are set aside for being of no legal effect. The notification of Chief Commissioner dated 10.05.1992 delegating

authority of the Provincial Government under section 3(1) of MPO to District Magistrate ICT in exercise of power under section 26 of MPO is declared to be *coram non judice* and without jurisdiction. Such delegation can only be made by the Federal Government in its capacity as Provincial Government for ICT, subject to the law laid down by the Supreme Court in ***Pakistan Electronic Media Regulatory Authority v. Pakistan Broadcaster's Association and another (2023 SCMR 1043)***.

7. When delegation in exercise of power under section 26 of MPO is made to the District Magistrate, such delegation is limited to exercise of ministerial authority under section 3(1) of MPO to issue arrest and detention orders, as the legislature, pursuant to section 26 of MPO, has not empowered the Provincial Government to delegate its authority under 3(4) of MPO to determine whether a reference made under section 3(2) to order the arrest or detention of an individual in exercise of authority under section 3(1) is to be accepted or rejected. The decision with regard to acceptance or rejection of a reference seeking the order of preventive detention is subject to satisfaction of the Provincial Government, which discretionary authority to be exercised by the government as a collegium cannot be delegated to one individual.

8. Section 3(2) of the MPO to the extent that it allows the initiation of a reference on the pretext that the person "is about to act" in a manner prejudicial to the public safety and order is ultra vires to Article 10(4) of the Constitution as no law for arrest and detention could be framed unless the individual has acted or is acting in a manner prejudicial to public safety and maintenance of public order. The arrest of an individual on the suspicion that he might act in the future in a manner prejudicial to safety or public order would allow the state to apprehend an individual on the suspicion of a thought crime not linked to an action that has transpired or is transpiring and is not permitted by the Constitution.

9. The impugned detention orders could not be passed without resort to lesser restriction available to the Provincial Government under section 5 of the MPO, as while passing preventive detention orders that impinge on fundamental rights guaranteed by the Constitution, the government is under an obligation to adopt the means less restrictive to enjoyment of fundamental rights and are proportionate to the mischief that is sought to be prevented.

10. In the absence of sufficient material establishing that arrest or detention of a citizen is a necessity to preserve public safety and public order, failing which there might emerge a grave emergency beyond the control of the Provincial Government, issuance of

detention orders infringing the rights of the petitioner to liberty and dignity constitutes malice in law and colorable exercise of jurisdiction rendering the officials seeking such orders and issuing such orders liable for the tort of breach of statutory duty actionable under Article 212(b) of the Constitution.

89. In view of above, Writ Petitions No. 2490/2023, 2491/2023, 2536/2023, 2833/2023 and 3159/2023 are **allowed.** Writ Petition No. 2513/2023 has become infructuous and it is **disposed of.**

90. Let a copy of this order be sent to the Secretary, Cabinet Division for information and compliance.

(BABAR SATTAR)
JUDGE

Announced in the open Court on **29.12.2023.**

JUDGE

Approved for reporting.

Saeed

ANNEXURE

Sr. No.	***Case No.***	***Case Title***
1.	*W.P No. 2490 of 2023*	*Sabahat Gulzar Khan Vs. Inspector General of Police.*
2.	*W.P No. 2513 of 2023*	*Sabahat Gulzar Khan Vs. Deputy Commissioner, Islamabad*
3.	*W.P No. 2536 of 2023*	*Akseer Ahmed Vs. The State, etc.*
4.	*W.P No. 2833 of 2023*	*Ch. Muhammad Junaid Akhtar Vs. Federation of Pakistan, etc.*
5.	*W.P No. 3159 of 2023*	*Malik Bashir Ahmed Vs. Federation of Pakistan, etc.*