

**ORDER SHEET.**

**IN THE ISLAMABAD HIGH COURT, ISLAMABAD.**  
**JUDICIAL DEPARTMENT.**

**Writ Petition No.3777/2019**

Brig. (R) Dr. Hafeez-ud-Din Ahmad Siddiqui, etc.

*versus*

Federation of Pakistan, etc.

S. No. of order/ proceedings	Date of order/ Proceedings	Order with signature of Judge and that of parties or counsel where necessary.
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08.01.2020

Vide my detailed judgment of even date passed in  
W.P. No.3800/2019 (Saira Rubab Nasir, etc. v. President of  
Pakistan, etc.), the instant writ petition is hereby **ALLOWED.**

(MOHSIN AKHTAR KAYANI)  
JUDGE

Announced in open Court on: **11.02.2020.**

~  
JUDGE

Khalid Z.

## **JUDGMENT SHEET.**

### **IN THE ISLAMABAD HIGH COURT, ISLAMABAD.** **JUDICIAL DEPARTMENT.**

#### **Writ Petition No. 3800/2019**

Saira Rubab Nasir, etc. v. President of Pakistan, etc.

#### **Writ Petition No.3777/2019**

Brig. (R) Dr. Hafeez-ud-Din Ahmad Siddiqui, etc. v. FOP, etc.

#### **Writ Petition No.3825/2019**

Dr. Sitara Hassan, etc. vs. President of Pakistan, etc.

#### **Writ Petition No.3837/2019**

Raja Aftab Ashraf, etc. v. President of Pakistan, etc.

#### **Writ Petition No.3901/2019**

Dr. Saleem Khattak v. PMDC, Islamabad, etc.

*and*

#### **Writ Petition No.3905/2019**

Dr. Javaid Akhktar v. Federation of Pakistan, etc.

Petitioners by: Mr. Babar Sattar, Ms. Zainab Janjua, Mr. Abdul Rahim Bhatti, Mr. Qaiser Rahim Bhatti, Mr. Yasser Rahim Bhatti, Mr. Umer Sajjad Chaven, Mr. Zafarullah Khan, Mr. Qausain Faisal Mufti, Mr. Ali Nawaz Kharal and Mr. Danish Aftab, Advocates in their respective petitions.  
Dr. Saleem Khattak in person in W.P No.3901/2019.

Respondents by: Mr. Tariq Mehmood Khokhar, Additional Attorney General.  
Mr. Saqlain Haider Awan and Mr. Muhammad Nadeem Khan Khakwani, AAGs.  
Mr. Saim ul Haq Satti, Malik Qamar Afzal, Mr. Saad Khan, Ms. Misbah Ashiq, Ms. Tania Bazai, Advocates.  
Zahid Hussain Shah, Dy. Assistant Solicitor, M/o Law & Justice.  
G. M. Jakhrani, D.D (Lit) M/o NHSR&C.

Date of Hearing: 08.01.2020.

**MOHSIN AKHTAR KAYANI, J:-** Through this common judgment, I intend to decide all the captioned writ petitions arisen out of common question of law, whereby *vires* of Pakistan Medical Commission Ordinance, 2019 have

been assailed alongwith notification of appointment of respondents No.5 to 13 in (W.P. No.3800/2019) being members of the Pakistan Medical Council.

2. Brief and consolidated facts referred in captioned writ petitions are that the President of Pakistan in exercise of powers under Article 89 of the Constitution of Islamic Republic of Pakistan, 1973 (*hereinafter referred to as "Constitution"*) has promulgated Pakistan Medical Commission Ordinance, 2019 (*hereinafter referred to as "PMC Ordinance, 2019"*) on 20.10.2019 in violation of fundamental rights of the petitioners guaranteed under the Constitution as the Federal Government has not put forward any advice before promulgation of the said law in terms of case reported as **PLD 2016 SC 808 (Mustafa Impex Vs. Government of Pakistan)** and as such, the President has not achieved the satisfaction required before promulgation of the PMC Ordinance, 2019. Even otherwise, the President/Federal Government earlier promulgated PMDC Ordinance, 2019 and the matter was placed before the Senate by considering the same as bill, but the same was disapproved, however the President of Pakistan has again promulgated identical provisions of the said disapproved PMDC Ordinance, 2019 in the shape of PMC Ordinance, 2019 having same preamble as that of the disapproved PMDC Ordinance, 2019 despite the fact that the apex Court in its recent pronouncement reported as **2018 SCMR 1956 (PMDC Vs. Fahad Malik)** declared the re-promulgation of an similar/identical ordinance as fraud as requirement of Article 89 has not been applied before re-promulgation. Furthermore, under the PMC Ordinance, 2019, respondents No.5 to 13 have been appointed as Members of Pakistan Medical & Dental Council (*hereinafter referred to as "PMDC"*) in pursuant to notification dated 23.10.2019 without observing any criteria for selection at the touchstone of merits, eligibility and other standards highlighted by the superior courts, but the Ministry of National Health Services, Regulations and Coordination (Respondent No.2) has constituted an Advisory Committee, which comprises of

the same persons who were Members of the erstwhile PMDC under the PMDC Ordinance, 2019, whereby the Advisory Committee was encouraged to assume the role of the PMDC in violation of Section 6 of the PMDC Ordinance, 2019. Similarly, under Section 49 of the PMC Ordinance, 2019, the services of petitioners/employees of the PMDC have been terminated without serving any prior notice in this regard. Hence, the captioned writ petitions.

3. Learned counsel for petitioners in their respective captioned writ petitions have argued their grounds, which are as under:

- i) PMDC Ordinance, 1962 having the status of permanent legislation was updated and comprehensively amended by the PMDC Act, 2012 i.e. an Act passed by the Parliaments and its Standing Committees after due debates, which has unlawfully been repealed by the impugned legislative instrument i.e. PMC Ordinance, 2019 in violation of Article 70 of the Constitution
- ii) Federal Government has acted in haste in the interregnum period of two sessions of Parliament only to defeat the principle of parliamentary supremacy and promulgated the impugned Ordinance without fulfillment of legal requirements;
- iii) the Government is not free to dispense with the state authority in whimsical and arbitrary manner, especially in the light of PMC Ordinance, 2019, whereby fundamental rights of petitioners to work have been revoked in violation of fundamental guarantees required to be applied in such type of cases;
- iv) in terms of Article 89 of the Constitution the President is required to satisfy that circumstances exist which render it necessary to take immediate action which leads to promulgation of ordinance, however the concept of satisfaction is subject to judicial review in shape of scrutiny by this Court;

- v) the apex Court in recent pronouncement reported as 2018 SCMR 1956 (PMDC vs. Fahad Malik) has examined and interpreted the power of the President to promulgate Ordinances under Article 89 of the Constitution, whereby it was interpreted that the President cannot be accepted as a parallel source of law making and re-promulgation of Ordinances especially when the earlier identical or somewhat identical Ordinances had been disapproved or not approved;
- vi) Members of the PMDC have been appointed as per Section 4 of the PMC Ordinance, 2019 without any advertisement, transparent process or declared criteria;
- vii) The Registrar as well as Director Finance of the PMDC being appointed under the repealed PMDC Ordinance, 2019 continue to function as instruments for the Ministry of National Health Services, Regulations and Coordination, which is in violation of recent judgment of the apex Court reported as 2018 SCMR 1956 (PMDC vs. Fahad Malik);
- viii) promulgation of the impugned PMC Ordinance, 2019 is in utter violation of the provisions of Constitution, including Article 8 of the Constitution, which states that any law inconsistent with or in derogation of the fundamental rights is void; and,
- ix) in terms of Section 49 of the impugned PMC Ordinance, 2019 the petitioners/employees of PMDC have been deprived of their fundamental rights including the right to earn livelihood together with the socio-economic rights as envisaged in Articles 9 and 14 read with Articles 2-A, 3, 4, 24, 25 and 37 of the Constitution;

4. Conversely, Additional Attorney General contends that all the captioned writ petitions are not maintainable as constitutionality has to be presumed in

favour of PMC Ordinance, 2019, which was promulgated in terms of Article 89 of the Constitution of Islamic Republic of Pakistan, 1973 and *vires* of the Constitution could not be assailed in terms of Article 69 of the Constitution as PMC Ordinance, 2019 has been laid down before the Parliament as a bill, therefore, intervention/interference in the legislation process is considered to be violation of constitutional mandate; that Parliamentary sovereignty must not be limitized by the act of judicial review as propriety, expediency and necessity of legislative act has to be determined by the legislative authority and not by the Courts as held in PLD 2014 Peshawar 210 (Badshah Gul Wazir vs. Government of KPK); that petitioners were employees of PMDC and are not civil servants, rather they were employees of autonomous body without any statutory rules and their terms and conditions of service could only be settled by contract, which protects their rights and as such, no clog could be placed upon the presidential authority from the promulgation of ordinance including the action taken by the President in terms of Section 49 of the PMC Ordinance, 2019; that Special Committee on Pakistan Medical Ordinance Commission was constituted by the Government comprising of all parties including PTI, PML(N), PPP, BAP, MQM, GDA and JUI vide letter dated 20.12.2019 for settlement of differences amongst the different political parties and as such, the courts cannot entered into these questions, which are only meant for legislation.

5. Similarly, learned counsel for PMC and respondents No.5 to 13 contended that the entire issue relates to erstwhile PMDC, which is now under legislative process with the Parliament and PMC Ordinance, 2019 is converted into a bill and as such, any verdict of this Court might affect the working of the Parliament; that courts have to show restraint while adjudicating the matters pending with the Parliament on the touchstone of principle of subjudice and doctrine of rightness; that all the questions relating to terms and conditions of service of erstwhile PMDC employees will be dealt by the Parliament while

considering the constitutional guarantees, however, at this stage, Section 49 of PMC Ordinance, 2019 extends protection to the employees in shape of six (06) months' salary and the same has been released in their favour without performing any duty from the date of promulgation of the Ordinance; that the reason for re-promulgation of PMC Ordinance, 2019 is the conduct of employees involved in nefarious activities and bringing bad name to the erstwhile PMDC, due to which all the employees have been removed through promulgation of PMC Ordinance, 2019 and as such, the protection available to Ordinance in terms of Article 89 of the Constitution could not be called in question through any court of law, therefore, the writ petitions are not maintainable; that if the Ordinance, if not extended by the Parliament, loses its effect on expiry of 120 days, and as such, the status of employees stand restored by efflux of time, therefore, judicial propriety demands that this Court may not pass any verdict regarding constitutionality of the PMC Ordinance, 2019.

6. Arguments heard, record perused.

7. Perusal of record reveals that all the petitioners have assailed the *vires* of the Pakistan Medical Commission Ordinance, 2019 along with its contents and structure in the manner in which it was re-promulgated on the touchstone of Constitutional guarantees provided to the citizen of Pakistan. In the captioned writ petitions i.e. W.P. No.3800/2019, W.P. No.3777/2019, W.P. No.3825/2019 and W.P. No.3837/2019, all the petitioners/employees of erstwhile PMDC have been deprived of their right to employment in terms of Section 49 of the PMC Ordinance, 2019, whereas in other captioned writ petitions i.e. W.P. No.3901/2019 and W.P. No.3905/2019, the *vires* of the Ordinance have been challenged regarding establishment of Council together with the appointments of Members of Council to regulate the affairs of PMDC on the ground that the very appointment of those members is in violation of settled principles as no

subjective criterion was fixed on the basis of which the Members i.e. Respondents No.5 to 13 in W.P. No.3800/2019 have been appointed.

### **HISTORY OF PMDC LAWS**

8. While dilating upon the propositions raised through the captioned writ petitions, it is necessary to go through the history of different Ordinances promulgated for managing the affairs of medical education as well as recognition of qualification in medical and dentistry. The first legislation in this regard namely PMDC Ordinance, 1962 was promulgated/notified on 05.06.1962 to expedient and consolidates the law relating to registration of medical practitioners as well as of dentists and to reconstitute the Council in order to establish a uniform minimum standard of basic and higher qualifications in medicine and dentistry. As per Section 3 of the Ordinance, the Council to be consisted of approximately 18 members and supervised by Head of the Council. Similarly, the said Ordinance in terms of Sections 4, 5 & 7 also provides the mechanism for election of members of the Council, its nomination and terms of the office. The powers and functions of the Council have been defined as the apex body to deal with the affairs of medical profession in all respects. The PMDC was also authorized to make regulations on subject enumerated in Section 33 of the PMDC Ordinance, 1962 and provides recognized medical qualification as well as institutions and the manner in which the medical colleges/universities are to be regulated.

9. In the year 2012, the PMDC Ordinance, 1962 was amended through PMDC (Amendment) Act, 2012, as notified on 13.08.2012, whereby the structure of the Council has been changed by incorporating the concept of recognition of hospital, institutions, house jobs, internships, terms of office, restriction of nomination of members, mode of election, withdrawal of recognition, penalties, commission of inquiry, etc.



10. On 19.03.2014, another amendment has been made through PMDC Ordinance (Amendment), 2014 incorporating transitory provision of Section 36B and also to regulate free and fair election of the Council and to deal with procedure of irregularity of the Management Committee and as such, the role of the Federal Government was also highlighted. Lastly, the amendment was referred in order to supersede the judgment of the superior Courts.

11. On 28.08.2015, another amendment has been made through PMDC (Amendment) Ordinance, 2015, whereby the constitution and composition of the Council has been changed with further amendment regarding the mode of election, restriction and nomination of election, executive committee, power to make regulations and transitory provisions. However, the fate of said Ordinance was settled by the apex Court through case reported as 2018 SCMR 1956 (PMDc Vs. Muhammad Fahad Malik).

12. On 08.01.2019, a new Ordinance known as PMDC Ordinance, 2019 was promulgated to provide for the regulation and control of the medical profession and to establish a uniform minimum standard of basic medical education and training and recognition of qualification in medicine and dentistry with detailed concepts extending the powers to the Council, its composition, election, restriction, terms of office, committees of the Council, recognition of the institutions and education, withdrawal of recognition, medical practitioners, removal, penalties, offences as well as further provided the concept of medical tribunals with its jurisdiction, appeals, and rule making authority along with the commission of inquiry as well as the terms and conditions of officials working in the PMDC, however the said PMDC Ordinance, 2019 was disapproved by the Senate on 28.09.2019 after due deliberation, which resulted into promulgation of a new Ordinance on 20.10.2019 i.e. the Pakistan Medical Commission Ordinance, 2019 with the purpose *to provide for the regulation and control of the medical profession and to establish a*

*uniform minimum standard of basic and higher medical education and training and recognition of qualifications in medicine and dentistry.* However, since the petitioners have assailed the said PMC Ordinance, 2019 in terms of Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973, therefore, I have to go through the history of the Ordinances of PMDC as well as the 89 of the Constitution providing the concept of promulgation of an ordinance by the President.

### **HISTORY OF THE ORDINANCE**

13. While dealing with the proposition, learned Additional Attorney General Mr. Tariq Khokhar has drawn the attention of this Court towards historical documents explaining the concept of Ordinance, which are as under:

#### **Article 23 of the Indian Councils Act, 1861**

23. *Notwithstanding anything in this Act contained, it shall be lawful for the Governor General, in Cases of Emergency, to make and promulgate from Time to Time Ordinances for the Peace and good Government of the said Territories or of any Part thereof, subject however to the Restrictions contained in the last preceding Section; and every such Ordinance shall have like Force of Law with a Law or Regulation made by the Governor General in Council, as by this Act provided, for the Space of not more than Six Months from its Promulgation, unless the Disallowance of such Ordinance by Her Majesty shall be earlier signified to the Governor General by the Secretary of State for India in Council, or unless such Ordinance shall be controlled or superseded by some Law or Regulation made by the Governor General in Council at a Meeting for the Purpose of making Laws and Regulations as by this Act provided.*

#### **Article 72 of the Government of Indian Act, 1915**

72. *The governor-general may, in cases of emergency, make and promulgate Ordinances for the peace and good Government of British India or any part thereof, and any Ordinance so made shall, for the space of not more than six months from its promulgation, have the like force of law as an Act passed by the Governor-General in Legislative Council; but the power of making Ordinances under this Section is subject to the like restrictions as the power of the Governor-General in Legislative Council to make laws; and any Ordinance made under this Section is subject to the like disallowance as an Act passed by the Governor-General in Legislative Council, and may be controlled or superseded by any such Act.*

#### **Article 71 of the Government of Indian Act, 1924**

71. (1) *The local Government of any part of British India to which this Section for the time being applies may propose to the Governor-*

*General in Council the draft of any regulations for the peace and good Government of that part, with the reasons for proposing the regulations.*

*(2) Thereupon the Governor-General in Council may take any such draft and reasons into consideration; and when any such draft has been approved by the Governor-General in Council and assented to by the Governor-General, it shall be published in the Gazette of India and in the local official gazette, if any, and shall thereupon have the like force of law and be subject to the like disallowance as if it were an Act of the [Indian legislature].*

*(3) The Governor-General shall send to the Secretary of State in Council an authentic copy of every regulations to which he has assented under this Section.*

*(3a) A regulations made under this Section for any territory shall not be invalid by reason only that it confers or delegates power to confer on Courts or administrative authorities power to sit or act outside the territory in respect of which they have jurisdiction or functions, or that it confers or delegates power to confer appellate jurisdiction or functions on Courts or administrative authorities sitting or acting outside the territory.]*

*(4) The Secretary of State may, by resolution in Council, apply this Section to any part of British India, as from a date to be fixed in the resolution, and withdraw the application of this Section from any part to which it has been applied.*

#### **Article 42 of the Government of India Act, 1935**

*42. (1) If at any time when the Federal Legislature is not in session the Governor-General is satisfied that circumstances exist which render it necessary for him to take immediate action, he may promulgate such Ordinances as the circumstances appear to him to require:*

*Provided that the Governor-General---*

- (a) Shall exercise his individual judgment as respects the promulgation of any Ordinance under this Section if a Bill containing the same provisions would under this Act have required his previous sanction to the introduction thereof into the Legislature; and*
- (b) Shall not, without instructions from His Majesty, promulgate any such Ordinance if he would have deemed it necessary to re-serve a Bill containing the same provisions for the signification of His Majesty's pleasure thereon.*

*(2) An Ordinance promulgated under this Section shall have the same force and effect as an Act of the Federal Legislature assented to by the Governor-General, but every such Ordinance---*

- (a) Shall be laid before the Federal Legislature and shall cease to operate at the expiration of six (06) weeks from the reassembly of the Legislature, or, if before the expiration of that period resolutions disapproving it are passed by both Chambers, upon the passing of the second of those resolutions;*
- (b) Shall be subject to the provisions of this Act relating to the power of His Majesty to disallow Acts as if it were an*

- Act of the Federal Legislature assented to by the Governor-General; and*
- (c) *May be withdrawn at any time by the Governor-General.*

(3) *If and so far as an Ordinance under this Section makes any provision which the Federal Legislature would not under this Act be competent to enact, it shall be void.*

**Article 43 of the Government of India Act, 1935**

44. (1) *If at any time it appears to the Governor-General that, for the purpose of enabling him satisfactorily to discharge his functions in so far as he is by or under this Act required in the exercise thereof to act in his discretion or to exercise his individual judgment, it is essential that provision should be made by legislation, he may by message to both Chambers of the Legislature explain the circumstances which in his opinion render legislation essential, and either---*

- (a) *Enact forthwith, as a Governor-General's Act, a Bill containing such provisions as he considers necessary; or*
- (b) *Attach to his message a draft of the Bill which he considers necessary.*

(2) *where the Governor-General takes such action as is mentioned in paragraph (b) of the preceding sub-section, he may at any time after the expiration of one month enact, as a Governor-General's Act, the Bill proposed by him to the Chambers either in the form of the draft communicated to them or with such amendments as he deems necessary, but before so doing he shall consider any address which may have been presented to him within the said period by either Chamber with reference to the Bill or to amendments suggested to be made therein.*

(3) *A Governor-General's Act shall have the same force and effect, and shall be subject to disallowance in the same manner, as an Act of the Federal Legislature assented to by the Governor-General and, if and in so far as a Governor-General's Act makes any provision which the Federal Legislature would not under this Act be competent to enact, it shall be void.*

(4) *Every Governor-General's Act shall be communicated forthwith to the Secretary of State and shall be laid by him before each House of Parliament.*

(5) *The functions of the Governor-General under this Section shall be exercised by him in his discretion.*

14. The above referred legislative history explaining the definition of the Ordinance in different constitutional documents refers certain commonalities i.e.,

- a) Satisfaction of Governor General/Individual Judgment.
- b) When legislation is not in session;
- c) In case of emergency,
- d) Immediate action is required,

- e) Is like force of law,
- f) For peace and good governance

All these factors are almost similar and common with the ingredients of Article 89 of the Constitution, which shows that the Ordinances were only promulgated, when the circumstances emerged with extreme emergent conditions to cater those requirements, the competent authority at that time was Governor General, who could take action and promulgate the Ordinance as he desired, but all those actions are qualified with certain restriction like non-availability of legislature and requirement of immediate action, which was considered in the relevant term of “**satisfaction**”. For ready reference, Article 89 of the Constitution is reproduced as under:

**89. Power of President to promulgate Ordinances**

(1) *The President may, except when the [Senate or] National Assembly is in session, if satisfied that circumstances exist which render it necessary to take immediate action, make and promulgate an Ordinance, as the circumstances may require.*

(2) *An Ordinance promulgated under this Article shall have the same force and effect as an Act of [Majlis-e-Shoora (Parliament)] and shall be subject to like restrictions as the power of [Majlis-e-Shoora (Parliament)] to make law, but every such Ordinance:*

(a) *shall be laid:*

(i) *before the National Assembly if it [contains provisions dealing with all or any of the matters specified in clause (2) of Article 73], and shall stand repealed at the expiration of [one hundred and twenty days] from its promulgation or, if before the expiration of that period a resolution disapproving it is passed by the Assembly, upon the passing of that resolution[:]*

*[Provided that the National Assembly may by a resolution extend the Ordinance for a further period of one hundred and twenty days and it shall stand repealed at the expiration of the extended period, or if before the expiration of that period a resolution disapproving it is passed by the Assembly, upon the passing of that resolution:*

*Provided further that extension for further period may be made only once.*

- (ii) *before both Houses if it [does not contain provisions dealing with any of the matters referred to in sub-paragraph (i)], and shall stand repealed at the expiration of [one hundred and twenty days] from its promulgation or, if before the expiration of that period a resolution disapproving it is passed by either House, upon the passing of that resolution[:]*

*Provided that either House may by a resolution extend it for a further period of one hundred and twenty days and it shall stand repealed at the expiration of the extended period, or if before the expiration of that period a resolution disapproving it is passed by a House, upon the passing of that resolution:*

*Provided further that extension for a further period may be made only once.]*

- (b) *may be withdrawn at any time by the President.*
- (3) *Without prejudice to the provisions of clause (2)---*
- (a) *an Ordinance laid before the National Assembly under sub-paragraph (i) of paragraph (a) of clause (2) shall be deemed to be a Bill introduced in the National Assembly; and*
- (b) *an Ordinance laid before both Houses under sub-paragraph (ii) of paragraph (a) of clause (2) shall be deemed to be a Bill introduced in the House where it was first laid.*

15. The above referred Article lays down minimum standards as key variables for promulgation of any ordinance by the President and on the contrary, the very promulgation of the Ordinance will be defeated. As such, the key factors recognized under the constitutional mandate for promulgation of an ordinance are:

- a) When the National Assembly is not in session;
- b) Satisfaction of the President; and
- c) Existence of circumstances rendering it necessary to take immediate action.

The above mentioned key factors are the requirements for promulgation of the PMDC Ordinance, 2019 and its onus is upon the Federal Government to prove

that these three factors have been met under the spirit of law enunciated in the Constitution as well as under the judicial pronouncements.

### **REASONING AND LOGIC OF ARTICLE 89 OF THE CONSTITUTION IN PARLIAMENTARY DEBATES**

16. The minimum requirements referred in the constitutional history of the term “**Ordinance**” discussed above, when seen in the light of parliamentary debates made on Article 89 of the Constitution before the Assembly in March, 1973, the true intent will be understood, which prevailed the then Parliament to formulate the Constitution of the Islamic Republic of Pakistan, 1973 (retrieved from the archives of the Parliament), which is in the following manner:

#### ***What was the rationale behind the inclusion of Article 89 of the constitution?***

*The powers exercised under Article 89 were the powers conferred on the executive when the Parliament was not in session such as when there is the dissolution of the Parliament at the time of the elections and the Parliament is dysfunctional. In such instances, the Executive was prescribed such powers to pass Ordinances until the new parliament or legislative body was to take effect. It was for this reason that such powers were only conferred for 120 days and not in perpetuity. The use of Article 89 was not to act as a replacement of the legislative functions of the Parliament as that would be against the spirit of the constitution and the concept of trichotomy of powers.*

*This spirit is also evident from the 22 March 1973 Parliamentary Debate of Malik Mohammad Akhtar.*

**“Malik Muhammad Akhtar:** Sir, under Article 89, it has been provided that for a period of four months, when the National Assembly stands dissolved and if there is no Budget which has been authenticated or the period for which the budget has been authenticated has already expired, or there are certain such expenses which have been mentioned in Article 87 under the heading “Supplementary and Excess Grants”. If there is question of making or providing for some unforeseen expenditure in case of dissolution of the Assembly, whether the Budget has been passed for that particular year, there is a gap. And in order to cover that gap when we have provided that the elections shall be held within a period of ninety days, a period of four months has been provided to meet the expenditure to run the affairs of the Government. As a matter of fact, my honourable friend is trying to do away with the mechanism of the Government in case of dissolution of the Assembly. He wants that there should be deadlock and I consider that being a sensible

*person he should withdraw his objection because it is necessary to fill in the gap and it is necessary to make this provision over here."*

Although, at present, the Cabinet and Prime Minister are not going through the history and reasons referred in the above mentioned parliamentary debate as the powers to promulgate the Ordinance was envisaged in the Constitution only to cover the gap period for the approval of unforeseen expenditure to run only the affairs of the Government.

17. The background, if placed in juxtaposition with Article 89 of the Constitution, the satisfaction of the President has to be seen as a key factor to resolve to apply the legislative intent, whereas at present, question arises whether the satisfaction of the President is an independent thought or it is the satisfaction of the Cabinet? Similarly, it is also required to be considered whether the President can directly promulgate Ordinance without the advice of the Cabinet and the Prime Minister? Both these questions have been answered in terms of Article 48 of the Constitution, which reads that, "*in exercise of its functions, the President shall act on and in accordance with advice of the Cabinet or the Prime Minister*". Hence, there is no cavil to proposition that advice is the key factor in parliamentary form of Government to be given by the Cabinet and Prime Minister, which made the basis of every action taken by the President, although the President has been empowered to direct the Prime Minister or the Cabinet, as the case may be, to "*reconsider such advice*", but at the same time, the President shall exercise its discretion regarding any matter in respect of which he is empowered by the Constitution to do so in terms of Article 48(2) of the Constitution. These Articles of the Constitution explain the executive authority of the President of Pakistan, who is dependent upon the advice of the Cabinet and Prime Minister, but in some actions he is independent to exercise certain powers extended to him under the Constitution of the Islamic Republic of Pakistan, 1973.



18. The above referred discussion leads to two different actions to be taken by the President i.e. when the Cabinet and the Prime Minister put forward any advice, the President has to act in accordance with such advice or he may refer back the matter to the Cabinet or Prime Minister for reconsideration of the advice, which act on the part of President could not be taken as a rejection in any manner.

#### **PROCEDURE FOR APPROVAL OF SUMMARY BY CABINET**

19. Mr. Babar Sattar, Advocate Supreme Court has referred the intent of the constitutional mandate as explained in the case of *Mustafa Impex* reported as (PLD 2016 SC 808), in which the concept of Federal Government was highlighted on the basis of Article 90 of the Constitution, which says, “*subject to the Constitution, the executive authority of the federation shall be exercised in the name of the President by the Federal Government, consisting of the Prime Minister and the federal ministers, which shall act through Prime Minister, who shall be the chief executive of the federation.*” Similarly, Article 99 of the Constitution deals with the conduct of business of Federal Government where *all executive actions of the Federal Government shall be expressed to be taken in the name of President*. The Federal Government shall also make rules for allocation and transaction of its business in terms of Article 99(3) of the Constitution, therefore, when dealing with the proposition in hand the cumulative authority vested to the Cabinet and Prime Minister in collective manner in terms of Article 91 of the Constitution, which reads that *there shall be a Cabinet of ministers, with the Prime Minister at its head, to aid and advise the President in exercise of his functions*, then the Rules of Business, 1973 formulated under the constitutional mandate plays an important role being closely intervened with the concept of good governance for and in the public interest.

20. The question proposed in the instant case has further been elaborated by the apex Court in *Mustafa Impex case supra* in the following manner:

*The concept of the President being the Head of State should not be confused with the completely different concept of the Head of*

*Government and nor should the two offices be conflated. Article 48 merely stipulates that, in the discharge of his functions, the President is mandated to act on, and in accordance with, the advice of the Cabinet or the Prime Minister. This article relates to the performance of the constitutional functions of the President by making it binding on him to **follow the advice of the Cabinet**. This is by no means the same as asserting that, by doing so, he becomes a part of the Federal Government. He is not. He is the Head of State. There are many functions of state which are discharged by different organs without their becoming part of the Federal Government.*

21. In view of above, all cases have to be brought before the Cabinet in terms of Rule 16 of the Rules of Business, 1973 and Prime Minister while sitting in the Cabinet has to exercise certain powers as highlighted in the case of *Mustafa Impex supra* in the following manner:

43. Rule 6 reflects the constitutional concept of individual and collective responsibility and reads as under:-

**"6. Individual and collective responsibility.** - The Cabinet shall collectively be responsible for the advice tendered to, or the executive orders issued in the name of the President whether by an individual Minister or as a result of decision by the Cabinet; but the Minister shall assume primary responsibility for the disposal of business pertaining to his portfolio."

Rule 7 provides that, subject to Article 173, all executive actions of the Government shall be expressed to be taken in the name of the President. Rule 12 renders consultation with the Finance Division mandatory in relation to matters which may involve the relinquishment, remission or assignment of revenue or expenditure for which no provision exists in the Budget. Rule 14 bears the heading "Consultation with the Law, Justice and Human Rights Division" and Clause (1) is material and is reproduced below insofar as relevant:-

**"14. Consultation with the Law, Justice and Human Rights Division.**---(1) The Law, Justice and Human Rights Division shall be consulted--

- (a) on all legal questions arising out of any case;
- (b) on the interpretation of any law;
- (c) before the issue of or authorization of the issue of an order, rule, regulation, by-law, notification, etc. in exercise of statutory powers;"

Rule 15 makes it mandatory to obtain the approval of the Prime Minister in relation to important policy matters.

44. Rule 16 is an important rule and, insofar as material, is reproduced below:-

*"16. Cases to be brought before Cabinet.---(1) The following cases shall be brought before the Cabinet:--*

*(a) proposals for legislation, official or non-official, including money bills;*

*(b) promulgation and revocation of Ordinances;*

*(c) the budgetary position and proposals before the presentation of the Annual Budget Statement and a Supplementary Budget Statement or an Excess Budget Statement under Articles 80 and 84.*

*(d) Proposals for levy, abolition, remission, alteration or regulation of any tax and floatation of loans;*

*(e) to (m)*

*(2) Notwithstanding the provisions of sub-rule (1), the Prime Minister may in any case give directions as to the manner of its disposal without prior reference to the Cabinet."*

*It will be noted, and this is relevant for purposes of the present matter, that it is mandatory to bring any proposal for the levy, abolition, remission, alteration or regulation of any tax to the Cabinet. Whilst it is no doubt true that the Prime Minister has been given discretionary power in the matter it is clear that the exercise thereof is circumscribed by the following conditions:*

*(i) There must be a conscious application of mind by the Prime Minister to the existing circumstances justifying the need for this departure through passing of a reasoned and formal order prior to the action taken, and*

*(ii) More critically, and definitively, a determination whether the constitutional provisions justify such a departure? This is a matter which we will examine infra.*

*We note that, ex facie, this Rule has been violated by the Finance Division in issuing the impugned notification merely on the basis of the approval of the Secretary and the Advisor. This is a matter we will further discuss at a later stage in this judgment, when we will also consider the question of the constitutionality of Rule 16(2).*

45. Rule 17 deals with the method of disposal of cabinet cases and is reproduced below:

**"17. Method of disposal of Cabinet cases. - (1) Cases referred to the Cabinet shall be disposed of -**

**(a) by discussion at a meeting of the Cabinet; or**

**(b) by circulation amongst Ministers; or**

*(c) by discussion at a meeting of a committee of the Cabinet.*

*Provided that the decisions of the Committee shall be ratified by the Cabinet unless the Cabinet has authorized otherwise."*

*The procedure for the submission of matters for decision making by the Cabinet is set out in Rule 18 and again is important. The relevant provisions thereof are reproduced below:-*

**"18. Manner of submissions of Cabinet cases.** (1) *In respect of all cases to be submitted to the Cabinet, the Secretary of the Division concerned shall transmit to the Cabinet Secretary a concise, lucid and printed memorandum of the case (hereinafter referred to as the "summary"), giving the background and relevant facts, the points for decision and the recommendations of the Minister-in-Charge. In the event of the views of the Division being different from the views of the Minister both the views shall be included in the summary.*

*Provided that the Executive Director, Higher Education Commission, shall be the ex-officio Federal Secretary and may submit summaries, or cases to cabinet directly with the approval of Chairman, Higher Education Commission, having the status of a Federal Minister. (note:- this proviso, however, has been deleted vide SRO 226(I)/2010 dated 2.4.2010)*

*(2) In the case of a proposed legislation to which approval is sought in principle, the summary shall bring out clearly the main issues to be legislated upon.*

*(3) The summary shall be self-contained as far as possible, not exceeding two printed pages and may include as appendices only such relevant papers as are necessary for the proper appreciation of the case. The number of copies of the summary and the form in which it is to be drawn up shall be prescribed by the Cabinet Secretary.*

*(4) Where a case concerns more than one Division, the summary shall not be submitted to the Cabinet unless it has been considered by all the Divisions concerned. In the event of a difference of opinion between them, the points of difference shall be clearly stated in the summary, a copy of which shall be sent by the sponsoring Division to the other Division concerned simultaneously with the transmission of the summary to the Cabinet Division.*

*(5) All draft Bills, Ordinances or Orders shall be submitted to the Cabinet after they have been scrutinized by the Law, Justice and Human Rights Division, and no changes shall be made therein except in consultation with that Division.*

*(6) No case for inclusion in the agenda of a meeting of the Cabinet shall be accepted unless it reaches the Cabinet Secretary at least several clear days in advance of the meeting:*

*Provided that, if a case is urgent and is required to be taken up at short notice, the Secretary concerned will obtain approval of the*

*Prime Minister for its inclusion in the agenda before it is transmitted to the Cabinet Secretary.*

*(7) It shall be the duty of the Cabinet Secretary to satisfy himself that the papers submitted by a Secretary are complete and in appropriate form. He may return the case until the requirements of the rules have been complied with. If the Cabinet Secretary is satisfied that the case does not merit consideration of the Cabinet he may advise the matter to be placed before an appropriate forum or require it to be submitted to the Prime Minister."*

22. The above referred detailed concept is the key parameter determined by the apex Court in the case of *Mustafa Impex supra* while dealing with the functions enumerated under the Rules of Business, 1973 for the functioning of the Cabinet, Ministers and the Prime Minister before giving any advice to the President, especially in cases of promulgation of any Ordinance, the concerned ministry/law division will mention the reasons and objects together with the circumstances in which an Ordinance required to be promulgated, however when all those factors, if fall within the parameters laid down in Article 89 of the Constitution, would be presumed that *satisfaction has been achieved by the President*.

23. The above concept also highlights that the term "satisfaction" is dependent upon the mechanism referred and discussed above in Rules of Business, 1973 through a constitutional approach. In essence, every action has to be taken through a constitutional framework. The other factor for looking into the affairs of the term "satisfaction" has been highlighted in PLD 1959 West Pakistan Lahore 76 (Ch. Qaseem-ud-Din (Ex-Councilor City of Lahore Corporation vs. Ali Shah), in the following manner:

*"13. The argument in support of the proposition that an Ordinance is liable to attack on the ground of mala fides is simple enough. When it is said that the Ordinance has been promulgated mala fide, it means this: the satisfaction of the Governor (rather of the Cabinet) as to the existence of "circumstances which render immediate action necessary", which is a condition precedent to the exercise of legislative powers, is lacking; or, the legislation is not such as appears to be required by the circumstances, which too is a condition, precedent; or it may mean that both conditions precedent are wanting. Courts are entitled to go into the question of the validity of Ordinances. That is not a disputable proposition. If there be a condition precedent to the exercise of the*

*power of promulgating an Ordinance, the Courts can obviously inquire into whether such condition precedent in fact existed or not. It is for the other party to show that in this particular case there is some legal bar to an inquiry by the Court as to a condition precedent."*

24. In the above referred case law, the concept of emergency has also been highlighted in the following manner:

*"I will for the present confine myself to the satisfaction of the Governor in the first part of Article 102, that is, the satisfaction that an emergency exists. As conceded by the learned Attorney General and as is apparent on the face of it, the Governor, when he makes up his mind that an emergency exists, acts only in an executive capacity. He becomes possessed of the legislative power only when he is satisfied that an emergency exists. Once the Governor attains a status similar to the legislature because of his satisfaction of the existence of an emergency, it may be possible to argue that henceforth he is like a legislature and even if in enacting a law he abused his powers and used them for a collateral purpose, his motives could not be questioned. Even this I would not concede. I will not accept that even while acting in the second part of Article 102 the Governor is an autocrat, the legality of whose acts is not liable to be questioned, but so far as the first part of Article 102 is concerned, I do not see how it is possible to put forward a contention at all that because the motives of the legislature cannot be questioned, his action is not liable to examination in a Court of law. The legislature admittedly possesses the power of legislation and the attack is that it has used a power which it did possess for an improper purpose. With respect to an Ordinance, the question is whether the Governor possessed the power at all, for the power was to come into existence on the happening of an event. Even as regards the second part of Article 102, I do not see any reason for deleting the condition precedent to the exercise of Power,, namely, that the legislation should appear to him to be need for meeting the emergency. The power of the Governor which arises on account of an emergency is confined to the requirements of the emergency. And if he promulgates an Ordinance not to meet the emergency but for a collateral and improper purpose, his act can as much be impeached as any other act of the executive Government can be impeached on the ground of mala fides. The act though legislative in character remains an act of the executive Government. Should the acts of the executive Government become immune from attack merely on the ground that they take the form of Ordinances, little check will there remain, on its mala fide action, because it is easy for it to secure the promulgation of an ordinance. Even if the Assembly be in session, it can be dissolved or prorogued. The Governor is bound to dissolve or prorogue it on the advice of the Cabinet. In any case, as long as the Government can prevent a session of the Assembly it should be free to act mala fide by just invoking the aid of an Ordinance. The real attack on the action of the Government in the present case is that it has put its stooges in control of the local*

*bodies. That in 'order to install the stooges it has armed itself with an Ordinance cannot in reason validate the abuse of power.'*  
(Underlining is provided for emphasis)

### **TEST AND PRINCIPLES FOR EXAMINATION OF ANY STATUTE**

25. The apex Court has also laid down a test that the Court has the jurisdiction to examine whether prerequisite provided for in the relevant provision of the Constitution/statute for exercise of the power there-under exists when the impugned order was passed, if the answer to the above question is in negative, the exercise of power will be held without jurisdiction calling for interference by the court. Reliance is placed upon PLD 1999 SC 57 (Farooq Ahmed Khan Leghari v. Federation of Pakistan).

26. Similarly, the satisfaction of the President is a condition precedent to the exercise of power and if it can be shown that there was no satisfaction of the President at all, or that the satisfaction was observed or perverse or malafide or based on extraneous or irrelevant ground, it would be no satisfaction. Reliance is placed upon PLD 2009 SC 879 (Sindh High Court Bar Association v. Federation of Pakistan).

27. The apex Court has also held that the Court need not have to go into whether there was any objective basis for the satisfaction required by Article 89 of the Constitution nor into the issue whether such satisfaction is to be entirely subjective. The example in this regard is NRO, 2007, which has not been defended by the Federal Government and the same clearly asserts that the satisfaction is not available as held in PLD 2010 SC 265 (Dr. Mubashar Hassan, etc. vs. Federation of Pakistan). There is no bar to call in question the satisfaction of the President in such type of cases where the satisfaction is absurd or perverse or malafide or based on wholly extraneous or irrelevant ground. However, the existence of satisfaction can always be challenged on the ground that it is malafide or based on wholly extraneous or irrelevant ground. Reliance is placed upon 1977 AIR 1361 SC (State of Rajasthan vs. Union of

India). It is not denied that the Ordinance as well as any other enactment both are equally products of the exercise of legislative power and therefore, both are equally subject to the limitation which the Constitution has placed upon that power. An Ordinance can be issued by the President provided that both the houses in parliament are not session and the President must satisfy that circumstances exist, which render it to take an immediate action. An Ordinance satisfying these preconditions has the same force and effect as an Act of parliament as held in AIR 1982 SC 710 (A.K. Roy Ors vs. Union of India). The immediate promulgation of Ordinance and the parliamentary process of legislation are based upon their timeframes and the mechanics of legislative power were devised evidently in order to take case of urgent situation which cannot sustain due to delay, but it does not mean that the powers of the President are unbridled, therefore, the same could only be processed through the advice of the Prime Minister and the Cabinet in terms of the constitutional mandate, which was further qualified with the mechanisms provided under the Rules of Business, 1973 discussed above, hence, the President's satisfaction is nothing but the satisfaction of his council of minister in whom the executive powers resides.

28. The Supreme Court of India has also highlighted the concept of burden through which a satisfaction has to be achieved, whereby the Government has to discharge the burden that there exists material which shows that the Government could not function in accordance with provision of the Constitution, which requires a proclamation as held in AIR 1994 SC 1918 (S.R. Bommai v. Union of India). Similarly, when the proclamation is challenged by making out *prima facie* case, with regard to its invalidity, the burden would be on the Union Government to satisfy that there exists material. Since such material would be exclusive within the knowledge of the Union Government, the onus is upon the Government to prove those circumstances as held in *S.R.*



*Bommaï supra*, and as such, this concept was further considered by the apex Court in case reported as PLD 1999 SC 57 (Farooq Ahmed Khan Leghari v. FOP).

29. I have confronted the learned Additional Attorney General as well as representatives of Ministry of Law and Ministry of National Health Services, Regulations and Coordination to submit the record of the summary proposed before the Cabinet for the purpose of its approval before forwarding an advice to the President of Pakistan for promulgation of PMDC Ordinance, 2019, the solicitor general of Ministry of Law had taken a categorical stance that all the record being privileged in nature could not be made public, therefore, the original record was taken in a sealed envelope for perusal in Chamber. While going through each and every page of summary/file, I am astonished to see the affairs of the Government as there was no reason, objective and factor under which the approval of draft of PMC Ordinance, 2019 was taken into account except one page/document in this case:

	<u><b>SUMMARY FOR THE PRIME MINISTER</b></u>
Subject:	<u><b>APPROVAL OF DRAFT PAKISTAN MEDICAL COMMISSION ORDINANCE, 2019.</b></u>
	<p><i>The Pakistan Medical and Dental Council Ordinance, 2019 was promulgated on 28-02-2019 to provide for the regulation and control of the medical profession and to establish a uniform minimum standards of basic medical education and training and recognition of qualifications in medicine and dentistry.</i></p> <p>2. <i>Consequent upon disapproval of PMDC Ordinance 2019 by the Senate of Pakistan through a resolution passed on 29<sup>th</sup> August, 2019, the PMDC Ordinance ceased to exist forthwith. Eversince, in order to run the day to day affairs of the PMDC, an Interim Management Committee was constituted.</i></p> <p>3. <i>Now to establish a permanent structure and reorganize the Pakistan Medical and Dental Council in such a manner that PMDC regains its lost reputation within the country as well as in the international arena, a draft Pakistan Medical Commission Ordinance 2019 (Annex-I) is proposed to be promulgated repealing the existing Medical and Dental Council (Amendment) Act, 2012. The proposed order dated has been seen and suitably amended by the National Health Reforms Task Force.</i></p> <p>4. <i>The Prime Minister in his capacity as Minister Incharge for NHSR&amp;C has accorded the approved for submission of Summary to Federal</i></p>

*Cabinet for in principle approval (Annex-II). The approval of the Federal Cabinet in terms of Rule 17(I) (b) of Rules of Business, 1973 through circulation is at (Annex-III).*

5. *The Prime Minister’s Office is requested to advise the President of Pakistan for the promulgation of Pakistan Medical Commission Ordinance 2019, under Article 89 of the Constitution of Pakistan.*

**Decision Dated 16.10.2019**

**DECISION**

*The Cabinet considered the summary dated 15<sup>th</sup> October, 2019 submitted by National Health Services, Regulations & Coordination Division, which was circulated in terms of rule 17(1)(b) read with rule 19(1) of the Rules of Business, 1973 for “Approval of Draft Pakistan Medical Commission Ordinance 2019” and approved the proposal at Para 4 of the summary.*

**Approval by Prime Minister**

**PRIME MINISTER**

*Subject: APPROVAL OF DRAFT PAKISTAN MEDICAL COMMISSION ORDINANCE 2019.*

7. *In terms of Article 89 (1) of the Constitution of the Islamic Republic of Pakistan, 1973 the President is advised to make and promulgate the “Pakistan Medical Commission Ordinance, 2019” (Annex-I), as proposed in para 5 of the summary.*

**IMRAN KHAN**

**Approval by President of Pakistan**

**PRESIDENT**  
*Islamic Republic of Pakistan*

*Subject: APPROVAL OF DRAFT PAKISTAN MEDICAL COMMISSION ORDINANCE 2019.*

8. *The Prime Minister’s advice at para 7 of the summary is approved. The Pakistan Medical Commission Ordinance, 2019 is signed and promulgated.*

**(DR. ARIF ALVI)**  
**PRESIDENT**

30. The above referred process, whereby drafts/summary approved by the Prime Minister of Pakistan followed by its decision, which was later on placed

before the Hon'ble President of Pakistan for his approval, clearly spells out three reasons provided in the summary, i.e.;

- a) *To provide for the regulation and control of the medical profession and to establish a uniform minimum standards of basic medical education and training and recognition of qualifications in medicine and dentistry.*

The above referred clause is the same old preamble as it has been copied from the previous Ordinances and as such, there is no material change in the said portion of preamble. Similarly, the second reason, referred as:

- b) *In order to run day to day affairs of the PMDC, an interim Management Committee was constituted after the disapproval of the PMDC Ordinance, 2019 by the Senate of Pakistan.*

The above referred fact is the previous history of PMDC Ordinance, 2019, but this does not suggest any emergent situation to be considered as the reasons for promulgation of the Ordinance. However, the third reason refers that:

- c) *Now to establish a permanent structure and reorganize the Pakistan Medical and Dental Council in such a manner that PMDC regains its lost reputation within the country as well as in the international arena.*

31. The above summary reflects two separate contents i.e. *firstly*, to constitute a ***permanent structure*** for the recognition of the PMDC and *secondly*, to ***regain PMDC's lost reputation***, but if such reasons could be considered for establishment of PMDC on a permanent basis, there is no need to promulgate an Ordinance as the reference given above in the summary is silent qua the concept of divergent views of the cabinet members, the factors which forced the Cabinet to apply the constitutional requirements envisaged under Article 89 of the Constitution i.e. *circumstances exist which render it necessary to take immediate action*, for which a satisfaction is required. The wordings used in Article 89 of the Constitution highlight three basic words i.e. "circumstances exist", which means "*situation, conditions, affairs, events, incidents, occurrence, happening, episodes, factors, background & environment*", which persuaded the constitutional machinery i.e. the executive head i.e. President of Pakistan through the Cabinet and its members, including the Prime Minister of

Pakistan, who considered those factors/circumstances and grounds as “necessary” which means “*obligatory, required, compulsory, mandatory, imperative, demanded, needed, essential, indispensable & vital*” for the “immediate action” which means “*instantaneous, on-the-spot, prompt, swift, speedy, rapid, quick, expeditious, sudden & abrupt*” (as referred in Oxford Thesaurus of English). But surprisingly, all these requirements are missing from the summary placed before the Cabinet.

32. I have gone through each and every word of the summary as well as reasons for approval of the draft of PMC Ordinance, 2019, but unfortunately it is silent qua any such circumstances required to achieve the satisfaction of the President through the Cabinet and the Prime Minister, rather the Cabinet and the Prime Minister have not performed their executive duties to met with the constitutional mandate, which is required in such type of approvals.

33. The concept of approval has to be considered in line with the constitutional mandate in a manner provided in Rules 6, 14, 15, 16, 17, 18 & 20 of the Rules of Business, 1973 as highlighted in the case of *Mustafa Impex supra*, failing which any action, decision or order, which was not taken in accordance with manner provided under the law, is to be considered nullity in the eyes of law and it could not be considered as a valid action.

34. Learned counsel Mr. Babar Sattar, ASC has referred the example of the National Reconciliation Ordinance, 2007, whose status and its legality has been settled through PLD 2010 SC 1 (Dr. Mubashar Hassan, etc. v. Federation of Pakistan), whereby NRO, 2007 was declared *ultra vires* and *void ab initio* in the following manner:

“14. In depth examination of the NRO suggests that it has not been promulgated to provide reconciliation on national basis as this nation has seen reconciliation in 1973, when a Constituent Assembly gave the Constitution of 1973 to the nation, guaranteeing their fundamental rights, on the basis of equality and brotherhood, as a result whereof, the nation had proved its unity, whenever it faced a challenge to its

*sovereignty and existence. The representation of the people, in subsequent Legislative Assemblies, has upheld the provisions of 1973 Constitution, except for few occasions when they have made amendments under peculiar circumstances. However, salient features of the Constitution i.e. Independence of Judiciary, Federalism, Parliamentary form of Government blended with Islamic provisions, now have become integral part of the Constitution and no change in the basic features of the Constitution, is possible through amendment as it would be against the national reconciliation, evident in the promulgation of the Constitution of 1973, by a Legislative Assembly. Therefore, promulgation of the NRO seems to be against the national interest and its preamble is contrary to the substance embodied therein. Thus, it violates various provisions of the Constitution."*

### **PRINCIPLES LAID DOWN IN FAHAD MALIK CASE**

35. Putting in juxtaposition the laws with respect to the affairs of PMDC promulgated in shape of Ordinances i.e. PMDC Ordinance, 1962, PMDC Ordinance, 2019 and PMC Ordinance, 2019, this Court observed that the said Ordinances are somewhat identical in provisions as the perusal of PMC Ordinance, 2019 reveals that the purpose and preamble together with most of the Sections are similar/somewhat identical to the purpose, preamble and Sections of the earlier disapproved PMDC Ordinance, 2019.

36. The apex Court while dealing with the proposition in previous round had thoroughly examined the provisions of earlier law i.e. PMDC (Amendment) Ordinance, 2015 and declared the same as *ultra vires* to the constitutional mandate as referred in Para-24 of the judgment reported as **2018**

**SCMR 1956 (PMDC Vs. Fahad Malik)** in the following manner:

- (a) *CCI does not have supervisory role over the functions of Parliament, since it is responsible to Parliament under the Constitution;*
- (b) *Parliament, without any restriction or constraint, has absolute and unfettered authority to make laws with respect to the matters enumerated in the Federal Legislative List, without requiring any approval or assent from any forum or authority in the country, including CCI (except Presidential assent in terms of Article 75 of the Constitution);*
- (c) *Therefore, Ordinances, including the Amendment Ordinances, are not invalid on the ground that those were not laid before CCI before promulgation;*

(d) *Similarly, with the same strength and force, regulations, rules etc. promulgated by PMDC in exercise of delegated powers available under the parent statute, i.e. Ordinance of 1962, also do not require the approval of CCI;*

(e) *Therefore, the approval of CCI was not necessary for the promulgation of the Regulations of 2016;*

(f) *PMDC is authorized to monitor the whole process of admission through a centralized admission program which includes, but is not limited to, the central entry test in the public and private medical and dental institutions;*

(g) *There is a clear distinction between a temporary enactment made by Parliament and an Ordinance promulgated by the President (or the Governor);*

(h) *Any amendment/insertion/introduction made by an Ordinance would not survive after its lapse/repeal. If, notwithstanding the fact that an Ordinance promulgated under Article 89 of the Constitution expires through efflux of time, the amendments made by it to a permanent statute, i.e. an Act of Parliament, are allowed to possess a permanent character, then this will virtually amount to giving plenary power of making permanent legislation to the Executive; it would be tantamount to providing the Executive a machinery to bypass the constitutional mandate of the Legislature and this we cannot permit, being absolutely against the spirit of the Constitution which embodies the important principles of democracy and trichotomy of powers;*

(i) *The Ordinance making power under Article 89 (or Article 128) of the Constitution does not constitute the President (or the Governor) into a parallel source of law making or an independent legislative authority. The power to promulgate Ordinances is subject to legislative control. The failure to comply with the requirement of laying an Ordinance before the legislature is a serious constitutional infraction and abuse of the constitutional process. Re-promulgation of Ordinances, especially when the earlier ones were either not approved or disapproved by Parliament, is a fraud on the Constitution and a subversion of democratic legislative processes;*

(j) *Therefore, any amendment/insertion/substitution made by the Amendment Ordinances in the Ordinance of 1962 did not survive after the former lapsed/were repealed, and the latter stood revived;*

(k) *The judgments of this Court, unless declared otherwise, operate prospectively, as such, the Amendment Ordinances are not hit by Mustafa Impex's case (supra);*

(l) *Since the Amendment Ordinances had lapsed/been repealed therefore the Council constituted thereunder had ceased to exist with effect from 25.04.2016;*

(m) *As a necessary corollary, the Regulations of 2016 framed under Section 33 of the Ordinance of 1962 by the Council constituted under Section 3 thereof, both of which were substituted by the Ordinance of 2015, also ceased to exist having been illegally and invalidly framed;*

37. However, the most important feature of the said judgment, which is the key to entire proposition, has been referred in Para-24(i) of *Fahad Malik case supra* in which it was held that, *“Re-promulgation of Ordinances, especially when the earlier ones were either not approved or disapproved by Parliament, is a fraud on the Constitution and a subversion of democratic legislative processes.”* This aspect and findings of the apex Court laid down a thought process that the democratic institutions i.e. the Parliament, the Prime Minister and the Cabinet are not catering to the requirements of Article 89 of the Constitution in its true wisdom, which have to be considered on the touchstone in its original debate when the said Article was under discussion before the Parliament in the preliminary debate of Malik Muhammad Akhtar on 22.03.1973, whereby it was suggested that:

*“When a national assembly stands dissolve and if there is no budget which has been authenticated or the period for which the budget has been authenticated has already expired, or there are certain such expenses which have been mentioned in Article 87 under the headings “supplementary and excess grants” if there is question of making or providing for some unforeseen expenditure in case of dissolution of assembly, whether budget has been passed for that particular year, there is a gap. And in order to cover that gap when we have provided that elections shall be held within the period of 90 days, a period of 4 months has been provided to meet the expenditure to run the affairs of the Government”.*

This wisdom seems to be missing in the working of Cabinet who has not attended to the mandate provided in Article 89 of the Constitution, rather approved the summary in a mechanical fashion, which is an executive action and this Court in terms of Article 199 of the Constitution of the Islamic Republic

of Pakistan, 1973 can look into the circumstances that if any emergent situation arose at times when the Assembly is not in session, the Cabinet succeed to approve the summary for promulgation of Ordinance, although the Assembly in that particular timeframe when PMC Ordinance, 2019 was promulgated was not available only for few days, this shows the extreme non-professional attitude of the Government, who has not only violated the spirit of law, rather approved the summary for certain unseen motivated agenda even without considering the principles laid down in *Fahad Malik case supra*. The advice of the Prime Minister, which has been routed towards the President of Pakistan for promulgation of the Ordinance, lacks the basic requirement of advice, which could only be given after achieving the satisfaction, however the summary as well as the decision (reproduced in Para-29 of this judgment) placed by the learned Additional Attorney General is silent qua all those factors, even minimum requirements were not followed by the Cabinet Division, Law Division and the Ministry of Health, Services and Regulations under the Rules of Business, 1973.

38. The circumstances in which the PMC Ordinance, 2019 has been promulgated do not fulfill the requirements of Article 89 of the Constitution, whereas the satisfaction of the President is based on emergent situation and under constitutional scheme the President cannot act except in accordance with the aid and advice of the Cabinet, as such the executive, which is vested with this legislative power, is based on democratic political structure. The legislature must belongs exclusively to the representatives of people, which extend its power vesting it in executive, however in such a manner, when this authority has been abused without going into the parliamentary debate and forums, it will be considered as bypassing the process envisaged in the constitutional mandate. The legislative power conferred to President under this Article is not



parallel power of legislation and it is the power exercisable only when both the houses of parliament are not in session and it has been conferred ex-necessitate in order to enable the executive to meet an emergent situation. Reliance is placed upon AIR 1981 SC India 2138 (R.K. Garg vs. Union of India). Similar proposition has also been discussed in AIR 1998 SC 2288 (Krishna Kumar Singh etc. vs. State of Bihar) where the Court observed that the executive in Bihar has almost taken the role of legislation in making laws not for limited period but a year together in disregard of constitutional limitation. This was clearly contrary to the constitutional scheme and was improper/invalid. Accordingly, the Court struck down the Ordinance with further observations that the manner in which a series of Ordinances have been promulgated by the State of Bihar also clearly shows misuse of powers by executive in terms of Article 213 and it has been referred as fraud on the Constitution.

#### **DUTY OF A PERSON OF AUTHORITY IN HOLY QURAN**

39. Mrs. Zafrullah Khan, Advocate Supreme Court has heavily relied upon the Quranic injunctions to justify that the person of authority in the affairs of Government is responsible to act in a fair manner, pass justiciable orders and no injustice should be done while dealing with the affairs of people. The said learned counsel had relied upon the following Quranic injunctions.

##### ***Surah An-Nisa [Verses: 58 & 59]***

*“(O Muslims), Allah enjoins you to give the trusts into the care of those persons who are worthy of trust and to judge with justice, when you judge between the people. Excellent is the counsel that Allah gives you, for Allah hears everything and sees everything. [58]*

*O Believers, obey Allah and obey the Messenger and those entrusted with authority from among you. Then if there arises any dispute about anything, refer it to Allah and the Messenger, if you truly believe in Allah and the Last Day. This is the only right way and will be best in regard to the end.” [59]*

**Surah Yusuf [Verse: 55]**

*"When Joseph had a talk with the king, he said, "From now you have an honourable place with us, and you will enjoy our full confidence." Joseph said, "Please place all the resources of the land under my trust for I know how to guard them and also possess knowledge."*

**Surah Al-Qasas [Verse: 25]**

*"One of the two women said to her father, "Dear father, employ this man as a servant, for the best man for you to employ as a servant can be the one who is strong and trustworthy. Her father said (to Moses), "I wish to give you one of my daughters in marriage provided that you serve me for eight years; and if you wish you may complete ten. I do not want to be harsh to you; if God wills, you will find me a righteous man." Moses replied, "Be it an agreement between me and you. Whichever of the two terms I complete, let there be no injustice to me after that; and Allah is a witness to what we have agreed upon."*

40. The above referred Quranic injunctions place a heavy onus upon the person having the authority to decide the things in a justiciable manner as the trust has been extended to the person of authority, therefore, it is expected that the discretionary powers conferred on Government should be exercised reasonably subject to existence of essential conditions required for exercise of such powers with the scope of law. All judicial, quasi judicial and administrative authorities must exercise powers in reasonable manner and also must ensure justice as per spirit of law as held in 2010 SCMR 1301 (Tariq Aziz ud Din, etc. in Human Right Case). It was further held that provisions of Article 25 of the Constitution guarantee equality of citizen and denying such protection in peculiar circumstances of case on the basis of reasonable classification founded on intelligible differentia, which distinguishes persons or things that are grouped together from those who have been left out, as such, Section 49 of PMC Ordinance, 2019 lacks such test, which was also highlighted in case reported as PLD 2010 SC 265 (Dr. Mubashar Hassan vs. FOP). The constitutional mandate has laid down object of good governance which cannot be achieved by exercising discretionary power unreasonably, arbitrarily and without application of mind, which has been seen in the instant case of PMDC, whereby approval of summary by the Federal Cabinet was sought.

**ILLEGALITIES IN THE PMC ORDINANCE, 2019**

41. Furthermore, the other important aspect which has been negated in the composition of Council in PMC Ordinance, 2019 is that the Prime Minister of Pakistan has been given absolute discretion to nominate the members in terms of Section 4 of the Ordinance, whereby the following members have been nominated for composition of the Council.

Clause	Clause	Nomination	Member
4(1)(a)	Three members of civil society who shall be nominated by the Prime Minister of Pakistan consisting of a nationally recognized philanthropist or person of known repute, a legal professional and a chartered accountant.	Roshaneh Zafar, Kashf Foundation, Lahore (Punjab)	Member
		Muhammad Ali Raza, RKA Law, Lahore (Punjab)	Member
		Tariq Ahmad Khan, Partner, Baker Tilly, Islamabad (ICT)	Member
4(1)(b)	Three members being licensed medical practitioners with at least twenty years experience of outstanding merit and not being the Vice Chancellor, Dean, Principal or administrator or owner or shareholders of a medical or dental university, college or hospital, nominated by the Prime Minister.	Dr. Rumina Hassan, Aga Khan University (Sindh)	Member
		Dr. Asif Loya, Shaukat Khanum Memorial Cancer Hospital, Lahore (Punjab)	Member
		Dr. Arshad Taqi, Hameed Latif Hospital, Lahore (Punjab)	Member
4(1)(c)	One member being a licensed dentist with at least twenty years experience of outstanding merit and not being the Vice Chancellor, Dean, Principal, Administrator or owner or shareholders of a medical or dental university, college or hospital, nominated by the Prime Minister of Pakistan.	Dr. Anees Rehman, Islamabad (ICT)	Member

42. The abovementioned members of the Council referred in the Ordinance were appointed by the Prime Minister of Pakistan on the strength of Section 4(1)(a)(b) & (c), whereby an absolute discretion has been extended to the Prime Minister. The respondent Federal Government as well as the respective ministries have failed to substantiate as to how and under what circumstances

the Prime Minister came to know that Roshaneh Zafar of Kashf Foundation Lahore (respondent No.5), Muhammad Ali Raza, Advocate (Respondent No.6) and Tariq Ahmad Khan, Partner, Baker Tilly, Member (Respondent No.7) fall within the concept of “*recognized philanthropist or person of known repute, a legal professional and a chartered accountant*” as there are thousands of Chartered Accountants, Philanthropists, Advocates and professionals who have been excluded from consideration. It is necessary for an authority like Prime Minister to call upon those individuals through a structured formula by way of open advertisement, which is missing in this case or a fair chance to be given to every professional for his selection in this regard.

43. Similarly, the other three members nominated in terms of Section 4(1)(b) of the PMC Ordinance, 2019 being licensed medical practitioners, with at least 20 years experience with outstanding merit were notified by the Prime Minister as Dr. Rumina Hassan, Aga Khan University, Sindh (Respondent No.8), Dr. Asif Loya, Shaukat Khanum Memorial Cancer Hospital, Lahore (Respondent No.9), and Dr. Arshad Taqi, Hameed Latif Hospital, Lahore (Respondent No.10), but in this nomination best of the best formula has not been adopted, especially when Shaukat Khanum Memorial Hospital, Lahore was established by the Prime Minister himself and he claims that he has established a state of the art hospital, as such, the nomination of Dr. Asif Loya clearly spells out the conflict of interest on the part of Prime Minister of Pakistan. Similarly, the other two members nominated by the Prime Minister under this provision could not be selected or nominated without any structured criteria, which is lacking in this case.

44. Likewise, Dr. Anees-ur-Rehman of Islamabad (Respondent No.11) has been nominated by the Prime Minister in terms of Section 4(1)(c) being a licensed dentist with at least 20 years experience with outstanding merit, but in this case the Prime Minister or relevant Ministry has not referred anything on record that the said Member has been selected amongst hundreds of dentists

available in Islamabad or Pakistan or what factors distinguish him from other to be nominated and appointed as Member of the Council. This composition of the Council in terms of Section 4(1)(a)(b) & (c) as drafted in the Ordinance is based on a person specific selection concept, whereas the Prime Minister is bound to follow the spirit of fair competition, equal opportunity and merit in all respects being the Executive Head while holding such a prestigious position. The PMC Ordinance, 2019 with reference to composition of Council negates the wisdom laid down in Article 25 of the Constitution as well as the latest judgment of the Hon'ble apex Court reported as 2019 SCMR 1952 (in the matter of: SELLING OF NATIONAL ASSETS INCLUDING PIA AT THROWAWAY PRICE) wherein it has been settled that authority being responsible for planning, succession and appointment of a public sector company, had to evaluate a potential candidate for appointment on a fit and proper criteria, and must act independently, transparently, totally impartially and in an unbiased manner, so as to select the best and most suitable candidate strictly on merit. Hence, the very selection of Members of Council under Section 4 is against the wisdom laid down in the Constitution of the Islamic Republic of Pakistan, 1973, therefore, their further selection of the President is also not justified, which could not be allowed to perpetuate for any decision as it amounts to enhance the illegalities with multiplying factors, which has direct bearing on entire process on medical profession including registration, examination and licensing of medical experts.

45. While considering the above background, this Court has come to an irresistible conclusion that the very nomination of members of the Council to represent PMC for the objective of said Ordinance i.e. to rationalize the medical profession and its allocation, is in violation of the principles laid down by the superior Courts in cases reported as PLD 2015 Lahore 522 (Imrana Tiwana vs. Province of Punjab), 2015 SCMR 1739 (Lahore Development Authority vs. Ms. Imrana Tiwana), 2013 SCMR 1159

(Muhammad Ashraf Tiwana vs. Pakistan), 2014 PLC 428 SC (Syed Mubashar Raza Jafri, etc. vs. EOBI), PLD 2013 SC 195 (Syed Mehmood Akhtar Naqvi vs. FOP), PLD 2011 SC 963 (Suo Moto Case on corruption of Hajj arrangements), PLD 2012 SC 132 (Muhammad Yasin vs. FOP) and 2010 SCMR 1301 (Tariq Aziz ud Din, etc. in Human Right Case).

46. While considering the principles laid down in the above mentioned case laws, this Court has come to an irresistible conclusion that the appointment of Respondents No.5 to 11 is in violation of basic principles of law as unstructured discretion was applied by the Prime Minister of Pakistan without any subjective criteria, even no rational approach was laid down in Section 4 of the PMC Ordinance, 2019, whereas the other law in terms of Public Sector Companies (Corporate Governance) Rules, 2013 is in application to other positions by the same Government and even the Prime Minister is exercising its authority under the said law through structured formula, but in this case all the relevant processes and procedures were not referred in Section 4 in order to accommodate the blue eyed persons by the Prime Minister, which is in violation of the constitutional mandate as discretion was specifically provided to the Prime Minister, which could not be applied in a wide manner in violation of the governing principles laid down in the cases of *Tariq Aziz-ud-Din* and others referred *supra*.

#### **NATIONAL MEDICAL AUTHORITY**

47. PMC Ordinance, 2019 also refers an Authority known as National Medical Authority, which has been constituted in terms of Section 16 of the Ordinance, which provides seven (07) members dealing with education, evaluation, examination, licensing, information and technology, finance, legal and administration sides, who have been appointed for 4 year term with reference to Section 16(2) "*Through a transparent process on merit*", however no criteria has been referred as to what is the qualification/experience, on

which transparent process on merit has to be evaluated by the Council, whereas when no criteria has been fixed, a discretion has been extended to the Council which will affect the selection process as all the positions referred in terms of Section 16(a) to (g) require a structured criteria, otherwise the entire working of National Medical Authority will be hampered, but the concerned ministry as well as the draftsmen of this Ordinance have not taken into account this aspect, which itself is against the concept of merit as settled in the above referred judgment i.e. 2019 SCMR 1952 (in the matter of: Selling of National Assets Including PIA at Throwaway Price).

#### **STATUS OF EMPLOYEES OF ERSTWHILE PMDC**

48. Another most important fact spelling out the blatant violation of fundamental rights of employees/officers of the dissolved PMDC is Section 49 of the PMC Ordinance, 2019, whereby their status whether permanent, regular, temporary or contractual has been declared "*ceased to be employees of the Council upon the promulgation of PMC Ordinance, 2019*" and as such, the employees, who have gained permanent employment and performed their duties for a number of years, could not be thrown out in such a manner as if the Federal Government as well as the President of Pakistan were allowed to remove all the civil servants, public servants or any other authority, who was appointed through the Act of Parliament, by promulgating an Ordinance despite the fact that the employees have achieved their constitutional guarantee through a permanent legislation. PMC Ordinance, 2019 is a temporary legislation, the same cannot be allowed to supersede the permanent right of employees given under a permanent legislation i.e. PMDC Ordinance, 1962. It is the sacred duty of the Government to obey the command and mandate of the Constitution, especially the concept of right to life, whereas in this case, the employees of the erstwhile PMDC have been ousted without considering their fundamental rights. Such like illegalities on the part of Federal Cabinet, the

Prime Minister and the President of Pakistan are considered to be negation of the basic constitutional guarantees, and such action is not expected from such an esteemed offices.

49. I have considered the entire structure of PMC Ordinance, 2019 as to whether the same could be saved if its composition of Council under Section 4 as well as of the status of employees in terms of Section 49 of the Ordinance be settled through the instant judgment, but it is difficult to segregate these two major defective pillars of the PMC Ordinance, 2019 as the entire structure spells out the colorable legislation from its structure, even the question of competency has been raised on the part of President of Pakistan, Prime Minister and the Cabinet, who are not competent to pass such kind of law without observing the minimum requirements of Article 89 of the Constitution, therefore, on the touchstone of PLD 2012 SC 923 (Baz Muhammad Kakar, etc. v. Federation of Pakistan), such kind of colorable legislation could be saved on the application of doctrine of severability, but this Court comes to the irresistible conclusion that after expunging the invalid portions i.e. Sections 4, 16 and 49 from the statute, what remains cannot be enforced without making alterations or modifications therein, then the whole of it must be struck down as void as otherwise it will amount to judicial legislation. Even otherwise, by removing the defect in PMC Ordinance, 2019 in its structure, the valid part, if sustains, will not serve the purpose.

### CONCLUSION

50. The entire discussion, if seen in the light of constitutional history of Article 89 of the Constitution of the Islamic Republic of Pakistan, 1973, the judgment passed in the cases of *Fahad Malik* and *Mustafa Impex*, and the provisions of PMC Ordinance, 2019, there is no other opinion through which it could be assumed that the Federal Government while performing its executive function in approval of the summary of PMC Ordinance, 2019 has not



considered the fundamental rights of the employees of erstwhile PMDC and violated Articles 4, 9, 18 and 25 of the Constitution in a blatant manner and it has been observed that unbridled discretion was extended to the Prime Minister for appointment of members of the Council under Section 4 of the PMC Ordinance, 2019. While approving the summary before referring the matter to the President of Pakistan, the advice required in such type of cases is missing, the reasons which prevail the approval of summary were also lacking in this case as there is no emergent requirement exists which renders it necessary to take immediate action for re-promulgation of the Ordinance even the satisfaction has not been achieved as per the required standards of Article 89 of the Constitution, nor the steps given in Rules of Business, 1973 have been followed before approval of the summary, therefore, the authority, which has been vested by the people of Pakistan to the chosen representatives, is clearly violated, especially when the re-promulgation of the Ordinance itself is in violation of the constitutional mandate.

51. The PMC Ordinance, 2019 is no doubt a fraud on the Constitution on the touchstone of *Fahad Malik case supra* where the last hope of the employees regarding their secured employment and right to life in terms of Article 9 of the Constitution is withdrawn. It is settled law that any legislation which is in violation of the fundamental rights protected in the Constitution is said to be called a void law, although the Constitution provides the mechanism for promulgation of Ordinance in terms of Article 89 of the Constitution but it does not mean that law is to be set in violation of fundamental rights, especially by the Federal Government, who is considered to be the custodian of rights of citizens of Pakistan. It is not possible for the Federal Government to act beyond the constitutional mandate, therefore, the manner in which the summary of re-promulgation of PMC Ordinance, 2019 has been approved by the Federal Government is in violation of Rules of Business, 1973, the fundamental rights

protected in the Constitution, and the very object of the said Ordinance is based upon personal whims of certain stakeholders, which has not been approved on the touchstone of constitutional mandate, therefore, PMC Ordinance, 2019 is declared to be *ultra vires* to the Constitution of the Islamic Republic of Pakistan, 1973 and its effect is considered to be nullity in the eyes of law from the date of its promulgation, although it has now been converted into a Bill which is pending with the parliament, however it has no legal effect as Bill has yet to take effect unless it has been passed by the Parliament in the manner provided in the Constitution.

52. The actions, orders and decisions taken by the PMC pursuant to promulgation of the PMC Ordinance, 2019 are hereby declared unlawful and they are not allowed to proceed further in any manner, however the actions affecting the rights of any individual in this regard will have to be considered by the interim regime notified in the case of *Fahad Malik supra* in Para-24(n), (o) & (p).

53. All the employees of erstwhile PMDC are hereby reinstated into service w.e.f. the promulgation of the PMC Ordinance, 2019, any amount, salary or financial remunerations received by those employees shall stand adjusted in accordance with original positions and any overpaid amount is to be treated as advanced salary accordingly. They are allowed to attend their offices by all means and the Federation of Pakistan shall ensure the due protection of their employment rights. Any person who has been appointed against their positions shall be reverted back to his parent department or if any newly appointed person on their positions stands de-notified.

54. The Members of the Council appointed in terms of Section 4 of the PMC Ordinance, 2019 i.e. Respondents No.5 to 11 are neither allowed to represent PMC or erstwhile PMDC in any manner, nor suppose to join any meeting or pass any order dealing with the affairs of the Council in any manner as their

appointment/nomination is illegal and void. Similarly, all of their actions, approvals and orders are also illegal and subject to rectification by the regular Council as and when appointed under the law.

55. It is expected from all the stakeholders, including the Federal Government, to take appropriate measures for enactment of a law which is pending before the Parliament as per the constitutional mandate by considering the objectives and functions of PMDC as well as while considering the fundamental rights of the employees of PMDC and other stakeholders.

56. It is high time to settle the scheme of Article 89 of the Constitution of the Islamic Republic of Pakistan, 1973, therefore, it is further expected from the Parliament to reconsider the wisdom of Article 89 of the Constitution in line with its original mandate as referred in the Parliamentary debate taken place in the year 1973 as well as under present circumstances when Article 89 of the Constitution has been misused, therefore, the promulgation of Ordinance or any other such type of instrument should not be used for elimination of permanent enactment or for elimination of permanent rights which were achieved through the act of Parliament so that the constitutional Authority of the Parliament would not be undermined in future or its mandate should not be violated.

57. In future, in case any emergent situation arises for promulgation of any Ordinance, the Federal Government shall state the reasons with justification in the summary before its approval in accordance with the Rules of Business, 1973 together with the procedure provided in terms of *Mustafa Impex case*. However, it is not considered to be lawful that any Ordinance would be promulgated when Parliament is in existence and its sessions dates were not fixed for a short period of time, as such practice on the part of the Federal Government will show their inability to manage the political authority in the Parliament vested

by the Constitution due to their lack of majority or due to their poor advice by different advisors who are not equipped with the scheme of law.

58. Before parting with this judgment, it is made clear that the PMC Ordinance, 2019 is *ultra vires* to the Constitution, therefore, the affairs of PMDC have to be regulated under the PMDC Ordinance, 1962 which stands revived in its original position as referred in *Fahad Malik case supra*.

59. In view of above, the captioned writ petitions are hereby ALLOWED in the above terms.

(MOHSIN AKHTAR KAYANI)  
JUDGE

Announced in open Court on: 11.02.2020.

JUDGE

Approved for reporting.

Khalid Z.

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