

SUPREME COURT OF PAKISTAN
(Original Jurisdiction)

PRESENT:

Mr. Justice Gulzar Ahmed, CJ
Mr. Justice Ijaz ul Ahsan
Mr. Justice Mazhar Alam Khan Miankhel

CONSTITUTION PETITIONS NO.24 OF 2017

[Petition under Article 184(3) of the Constitution of the Islamic Republic of Pakistan, 1973]

Const.P.24 of 2017

MQM (Pakistan) and others Vs. Pakistan through Secretary Cabinet Division, Government of Pakistan and others.

For the Petitioner (s) (in Const.P.No.24)	: Mr. Salahuddin Ahmed, ASC (via video link from Karachi) Mr. Mehmood A. Sheikh, AOR at Islamabad
For the Federation (Respondents No.1-2)	: Mr. Khalid Jawed Khan, Attorney General for Pakistan Mr. Sohail Mehmood, Additional Attorney General
For the Government of Sindh (Respondents No.3-7)	: Mr. Salman Talib ud Din, Advocate General, Sindh (via video link from Karachi)
For Respondent No.8	: Sardar Shahbaz Ali Khosa, ASC Along with Sardar Muhammad Latif Khan Khosa, Sr.ASC
Date of Hearing	: 26.10.2020

ORDER

Gulzar Ahmed, CJ:- This petition has been filed under Article 184(3) of the Constitution of the Islamic Republic of Pakistan, 1973 (hereinafter called "**the Constitution**") in which the following prayers have been made:-

"It is accordingly prayed that this Hon'ble Court may kindly be pleased:-

a. Declare section 3 of the KDA (Revival and Amending) Act, 2016 and similar dispensations in other statues to be completely without jurisdiction, illegal, unconstitutional, void ab initio and of no legal effect, while striking down the same:

b. Declare sections 74 and 75 of the Sindh Local Government Act, 2013 and section 18 of the Sindh Buildings Control Ordinance, 1979 to be completely without jurisdiction, illegal, unconstitutional, void ab initio and of no legal effect, while striking down the same:

c. Declare that "Authority" under section 4 of the Sindh Buildings Control Ordinance, 1979, for each territorial jurisdiction falling under the local government institutions, shall be the Mayor or the Chairman as the case may be, of such local government institutions, while annulling all dispensations, statues, notifications, rules, delegated legislations or executive orders in derogation to such declaration as ultra vires to law and the constitution;

d. Direct the respondents to suitably amend the Sindh Building Control Ordinance, 1979, the KDA Order No.5 of 1957, the Malir Development Authority Act, 1993, the Liyari Development Authority Act, 1993, Karachi Water and Sewerage Board Act, 1996, the Hyderabad Development Authority Act, 1976, Sehwan Development Authority Act, 1993, the Larkana Development Authority Act, 1994, any

dispensation pertaining to the Board of Revenue or the Master Plan Departments of any Body or any other Development Authority in Sindh, the Sindh Mass Transit Authority Act, 2014, the Sindh Food Authority Act, 2016, the Sindh Environmental Protection Agency Act, 2014, all delegated legislations or executive orders thereunder, so that the powers, functions and authorities under the said dispensations devolve to the local government institutions in consonance with Article 140-A of the Constitution;

e. Order that the employees of the all boards, authorities or bodies liable to be devolved to the local government institutions, are to be transferred to the said local government institutions, who would function under their service rules and structures;

f. Permanently and pending disposal of the main petition pass such interim orders for the purposes of devolution of powers to the local government institutions, as are deemed fit by this Hon'ble Court so as to make compliance of Article 140-A;

g. Direct the Respondents to release Rs.29.366 Billion to the Karachi Metropolitan Corporation, pertaining to its share of Octroi/Zila Tax (OZT) alongwith mark up and additional mark up;

h. Direct the Respondents to suitably amend the Sindh Local Government Act, 1913, and any delegated legislation or executive order issued thereunder so that all functions and powers of

subjects falling under Article 140-A of the Constitution, presently usurped by the Respondent No.3, are devolved to the local government institutions, at least in a manner similar to the dispensation available under the erstwhile Sindh Local Government Ordinance, 2001;

i. Alternatively the Sindh Local Government Act, 2013 may be annulled and directions be issued to the Respondents to revive the Sindh Local Government Ordinance, 2001;

j. Direct the respondents to release all the due share of the funds to the local governments of Sindh, in particular the KMC for the period from 2008 till date along-with mark up/additional mark up, so also the due share of the Annual Development Programmes (ADPs) pertaining to the latter period;

k. For future also direct the Respondents to keep on releasing the due share of funds to the local governments of Sindh, so also funds for any devolved departments;

l. Award costs and special costs;

m. Award any other relief, deemed fit in the circumstances of the case."

2. Comments have been filed by Respondent No.7- Government of Sindh through Secretary Finance by way of CMA No.5627 of 2020. Concise statement being CMA No.10101 of 2018 is filed on behalf of the Secretary, Cabinet Division, Government of Pakistan.

3. We have heard the learned counsel appearing for the parties and have also gone through the record of the case.

4. Mr. Salahuddin Ahmed, learned counsel for the petitioners has also filed written synopsis/arguments by way of CMA No.6728 of 2020. Additional written synopsis have also been filed by the learned counsel for the petitioners.

5. Mr. Khalid Javed Khan, learned Attorney General for Pakistan has also filed written synopsis/arguments.

6. Mr. Salman Talib-ud-Din, learned Advocate General, Sindh has also filed written synopsis/arguments.

7. Sardar Shahbaz Ali Khoso, learned counsel appearing for Respondent No.8-Pakistan Peoples' Party Parliamentarian has also filed written synopsis/arguments.

8. Learned counsel for the petitioners has argued about the history of Local Government in Sindh. He has contended that in the democratic system of governance, the Local Government empowers people at grassroots level and gives them authority over their day to day issues. He contended that globally the empowerment of people at grassroots level has improved interaction between the public and their elected representatives, politically educated the people and given the people sense of participation in the governance and also improved accountability of political parties. He contended that the Local Government System

works as nurseries for future Provincial and National level leadership.

9. Relying upon Article 32 of the Constitution, the learned counsel contended that as a Principle of Policy, the State is under-command to encourage local Government institutions, while Article 37(i) of the Constitution provides for decentralization of the Government administration to enhance public convenience. Learned counsel for the petitioners further contended that the Local Governments were already functioning in whole of Pakistan when Article 140A was added to the Constitution by the Legal Framework Order, 2002 (**LFO of 2002**). This Article was omitted from the Constitution by the Constitution (Eighteenth Amendment) Act, 2010 and by the same Act of 2010, new Article 140A was inserted in the Constitution. He contended that the inherent functions of the Local Government includes, Building Control and Town Planning, Water Supply, Sewerage and Waste Disposal, Local/Public Transport and Civic Facilities like Parks, Playground, Libraries, Mosques, Graveyards, Parking Facilities etc. He contended that in terms of existing Article 140A of the Constitution, the Provincial Government is under-command to establish a Local Government System and devolve political, administrative and financial responsibility and authority to the elected representatives of the Local Governments.

10. He further contended that Article 140A of the Constitution does not provide any measure and extent the Province shall establish a Local Government System, devolve political, administrative and financial responsibility and authority to the elected representatives of the Local Governments, rather this Article provides establishment of a Local Government System and to devolve political, administrative and financial responsibility and authority to the elected representatives of the Local Governments in full, in that, the province has no power to allow certain functions of the Local Governments to the Local Governments and not to allow certain other functions of the Local Governments to the Local Governments. He contended that Article 140A *ibid* is being clearly violated in the Province of Sindh, where the Province of Sindh, though has established Local Government System but has not actually devolved political, administrative and financial responsibility and authority to the elected representatives of the Local Governments has usurped many functions of the Local Governments by making amendments in the very Act of 2013 so also by enacting the provisions of Sections 74 and 75 in the Act of 2013 and also Sections 4 and 18 of the Sindh Building Control Ordinance, 1979 as well as the Karachi Development Authority (Revival and Amending Act) 2016, specially Section 3, which may be declared unconstitutional. He has also contended that the Sindh

Building Control Authority Ordinance, 1979, the KDA Order No.5 of 1957, the Malir Development Authority Act, 1973, the Liyari Development Authority Act, 1993, the Hyderabad Development Authority Act, 1976, the Sehwan Development Authority Act, 1993, the Larkana Development Authority Act, 1994, the Karachi Water and Sewerage Board Act, 1996, the Sindh Solid Waste Management Board Act, 2014, the Sindh Mass Transit Authority Act, 2014, the Sindh Food Authority Act, 2016, the Sindh Environment Protection Agency Act, 2014, the Board of Revenue Master Plan Developments may be amended suitably to ensure that the functions contained under the laws are devolved to the Local Governments in consonance with Article 140A of the Constitution.

11. He further contended that the Provincial Financial Commission, constituted under Section 112 of the Act of 2013, should also workout financial implications of such devolution and make appropriate recommendation of fund allocations from the Provincial Consolidated Funds (PCF) to each Local Council and such be implemented by the Sindh Government. He further contended that the Local Government law should contain appropriate legislation to ensure that the Local Government is able to levy sufficient tax/fee to achieve maximum financial autonomy. He referred to the collection of Octroi/Zila Tax by the Local Governments

in Karachi, which was abolished and the National Finance Commission recommended that 0.66% of provincial share in the net proceed of divisible pool be reserved and the same was incorporated by Section 7 of the President's Order No.5 of 2010. He contended that the Sindh Government has failed to provide to Karachi Metropolitan Corporation (**KMC**) with its due share from this allocation and there are arrears in this regard for the years 2008-09 to 2015-16, amounting to Rs.29.366 billion. He contended that the arrears may be paid to KMC by the Sindh Government to enable better provision of municipal services to the citizens of Karachi and future share be also paid promptly. He finally contended that the Sindh Government be directed to frame and ensure passage of appropriate legislation to provide for meaningful enforcement of Article 140A of the Constitution. He also relied upon the framework and functions of the Local Government in other jurisdictions of Canada, UK, India, US, Brazil and Bangladesh and in this respect filed CMA No.5622 of 2020. He has relied upon the cases of Raja Rab Nawaz vs. Federation of Pakistan through Secretary, Defence and others (2013 SCMR 1629), Province of Sindh through Chief Secretary and others vs. M.Q.M. through Deputy Convener and others (PLD 2014 Supreme Court 531), Government of Balochistan through Additional Chief Secretary vs. Azizullah Memon and 16 others (PLD 1993 SC 341), Sharaf Faridi and 3 others vs.

The Federation of Islamic Republic of Pakistan through Prime Minister of Pakistan and another (PLD 1989 Karachi 404), Government of Sindh through Chief Secretary to Government of Sindh, Karachi and others vs. Sharaf Faridi and others (PLD 1994 SC 105), Al-Jehad Trust through Habibul Wahab Al-Khairi Advocate and 9 others vs. Federation of Pakistan through Secretary, Ministry of Kashmir Affairs, Islambaad and 3 others (1999 SCMR 1379), Election Commission of Pakistan through Secretary vs. Province of Punjab through Chief Secretary and others (PLD 2014 Supreme Court 668), Khan Asfandiyar Wali and others v vs. Federation of Pakistan through Cabinet Division, Islamabad and others (PLD 2001 Supreme Court 607), Mehram Ali and others vs. Federation of Pakistan and others (PLD 1998 Supreme Court 1445) and Awais Younas vs. Federation of Pakistan and others (PLD 2016 Lahore 1).

12. Learned Attorney General for Pakistan, on the other hand, contended that as the Local Governments are empowered to impose tax or cess or fee by virtue of Article 7 of the Constitution, it has a status that of a State. He contended that by Article 140A of the Constitution, Provinces are mandated to establish Local Government System by law and devolve political, administrative and financial responsibility and authority to the elected representatives of the local governments and such mandate has to be complied

with by the provincial government to ensure and good governance at grassroots level for effective delivery of municipal/public services. He contended that the power of such devolution rests with the provincial legislature and it has to ensure establishment of an effective Local Government System by law. While relying upon the case of Lahore Development Authority through D.G. and others vs. Ms. Imrana Tiwana and others (2015 SCMR 1739), the learned Attorney General contended that instead of declaring the statutory provisions as invalid or *ultra vires* to Article 140A of the Constitution, as prayed for by the petitioners, the Court may give certain guidelines on issues, which are as follows: -

- i) What is the essence of Local Government.
- ii) Relationship between Provincial and Local Government.
- iii) Essence of Local Government (Functional test/structure):
 - (a) Local Government-Representative of people,
 - (b) Mayor-Elected Directly,
 - (c) Devolution at District Level,
 - (d) All Civil Agencies performing functions in the area should be made accountable to Provincial Assembly.
- iv) What functions are inherently local and can be performed by Local Government only. Such as:
 - (a) Sewerage.
 - (b) Water Supply.
 - (c) Garbage Collection/Solid Waste.
 - (d) Town Planning/Building Control.

- (e) Intra City Transport.
- (f) Civic Facilities i.e. parks, parking facilities, mosques and graveyards.
- v) Provincial Financial Commission (Local Government Autonomy Strong Accountability to Provincial Government).
- vi) No concept of suspension and or dissolution of Local Government.
- vii) Accountability (Audit by Accountant General for Pakistan-Provincial Accountability Committee.
- viii) The Honourable Court may, if deem appropriate, make it mandatory that 2/3rd majority is required for amending any Local Government Laws.

13. Referring to the Constitution of India, learned Attorney General contended that by 73rd and 74th Constitutional Amendments, adopted in 1992, Articles 243-G and 243-W, were added to the Indian Constitution, which laid down that the State legislature will endow on Municipalities and *Panchayats* with such powers and authority necessary to enable them to function as institutions of self-government and devolution of powers and responsibilities upon the Municipalities. He relied upon the cases of K. Krishna Murthy & Others vs. Union of India [(2010) 7 SCC 202], U.P Gram Panchayat Adhikari vs. Daya Ram Saro [(2007) 2 SCC 138)], State of U.P. & another vs. Zila Parishad Ghaziabad [(2013) 11 SCC 783)] and Shanti G. Patel & others vs. State of Maharashtra & others [(2006) INSC 48)]. He also gave

comparative table of Local Governments of Bangladesh, Malaysia and United Kingdom.

14. Learned Advocate General, Sindh has contended that no sufficient measure has been brought on record by the petitioners to invoke the jurisdiction of Article 184(3) of the Constitution and such jurisdiction should not be exercised by this Court and the petitioners be asked to approach the High Court in the first instance. He contended that the Sindh Government has fully complied with Article 140A of the Constitution by promulgation of the Act of 2013. He contended that Article 140A *ibid* only requires a province by law to establish a system within which a Local Government shall function and keeping in view the said system, devolve corresponding political, administrative and financial responsibility and authority to the elected representatives of the Local Governments. He contended that the Act of 2013 has complied with the mandate of Article 140A *ibid*. He further contended that the petitioners by this petition have sought a change in the system established by the Act of 2013, which objective can best be achieved through political means and not through judicial intervention. He has contended that this Court and the High Court have consistently declined to exercise jurisdiction in the matters, where the political questions are involved and the laws sought to be amended by this petition by the petitioners, have been legitimately enacted

reflecting the will of the people. He contended that the learned Attorney General in his submission has already contended that none of the provisions of various laws be struck down as prayed for by the petitioners but the Court may give some directions or observations regarding the import of Article 140A *ibid* and as to what it required. Learned Advocate General contended that he supports the submission of the learned Attorney General that none of the provisions of law, as prayed for by the petitioners, be struck down.

15. As regard the submission of learned Attorney General for issuing of direction regarding the import of Article 140A *ibid*, learned Advocate General contended that he does not support the same and gave reason that any direction or observation made by the Court will be binding upon all provinces and it should not be done without affording opportunity of hearing to them. He further contended that the compliance of Article 140A *ibid* is completed when a province enacts law as is done by the Province of Sindh by Act of 2013, devolving some political, administrative and financial responsibility on the Local Governments and in doing so, the Provincial Government has striped itself of those political, administrative and financial responsibilities. He contended that the silence of Article 140A *ibid* about the extent of political, administrative and financial responsibility and authority to be devolved on the Local Government is not

without reason. He contended that Article 140A's silence on these aspects is explained by the fact that the dynamics of each province are not only different but are prone to change from time to time and these changes are addressed by the provincial legislature in the manner that best serves the populous and thus, it is not a case of one size fits all solution. He contended that such silence in Article 140A *ibid* of the Constitution be not regarded as a flaw and remedy by judicial intervention and such has been recognized by this Court in Imrana Tiwana's case (supra).

16. Sardar Shahbaz Ali Khosa, learned counsel appearing for Respondent No.8 has raised question of *locus standi* of the petitioners to file the petition after the expiry of its tenure and has contended that the petition is liable to be dismissed or declared as infructuous. He has further contended that the petition before this Court is not maintainable, for the reason that the petitioners have not approached the High Court in the first place. He has contended that every province has its own sources to set up the Local Governments and that their problems and solutions are also distinct and the judgment passed by this Court will have an impact on all the provinces. He contended that in Imrana Tiwana's case (supra), this Court has exercised caution for the reason that it will have application on other provinces. He contended that rolling back powers from the

local government to the provincial government is not illegal and *ultra vires* and such has been dealt with by this Court in Imrana Tiwana's case (supra).

17. On merits, he contended that the petitioners have miserably failed to discharge their powers/duties for the welfare of the public at large and shows their incapability despite enjoying full tenure of office at Karachi. He contended that the prayer made in the petition is in fact to usurp the power of the legislature of the Province of Sindh and also the executive power of the Province of Sindh. He contended that under Article 140A of the Constitution as interpreted by this Court, devolution is to take place as a process and no extent in this regard has been mentioned in Article 140A of the Constitution, and such has been intentionally left so as to ascertain the strength of bargaining power of Local Government *vis-à-vis* Provincial Government. Learned counsel in support of his submissions also relied upon the cases of the Province of East Pakistan and others vs. Sirajul Huq Patwari and others (1966 Supreme Court 854), Mehreen Zaibun Nisa vs. Land Commissioner, Multan and others (PLD 1975 Supreme Court 397), Mst. Kaneez Fatima vs. Wali Muhammad and another (PLD 1993 Supreme Court 901), Multiline Associates vs. Ardeshir Cowasjee and other (1995 SCMR 362), Messrs Elahi Cotton Mills Ltd. and others vs. Federation of Pakistan through Secretary, Ministry of Finance,

Islamabad and 6 others (PLD 1997 Supreme Court 582), Dr. Tariq Nawaz and another vs. Government of Pakistan through the Secretary, Ministry of Health, Government of Pakistan, Islamabad and another (2000 SCMR 1956), Mian Asif Islam vs. Mian Muhammad Asif and others (PLD 2001 Supreme Court 499), Pakistan Muslim League (Q) and others vs. Chief Executive of Islamic Republic of Pakistan and others (PLD 2002 Supreme Court 994), Pakistan Lawyers Forum and others vs. Federation of Pakistan and others (PLD 2005 Supreme Court 719), Messrs Master Foam (Pvt.) Ltd. And 7 others vs. Government of Pakistan through Secretary, Ministry of Finance and others (2005 PTD 1537), Wattan Party through President vs. Federation of Pakistan through Cabinet Committee of Privatization, Islamabad and others (PLD 2006 Supreme Court 697), Federation of Pakistan through Secretary, Ministry of Finance and others vs. Haji Muhammad Sadiq and others (PLD 2007 Supreme Court 133), Dr. Mobashir Hassan and others vs. Federation of Pakistan and others (PLD 2010 SC 265) and Engineer Iqbal Zafar Jhagra and another vs. Federation of Pakistan and others (2013 SCMR 1337). Learned counsel further contended that one provincial legislature could not bind the future legislature in making of Local Government law, for the provincial legislature in existence is only the competent forum who can decide as to what matters

are to be devolved and to what extent to the Local Government.

18. First of all we propose to take up the question of very maintainability of the petition under Article 184(3) of the Constitution filed by the petitioners, as to whether the same is at all maintainable.

19. The case of the petitioners is that in terms of Article 140A of the Constitution, there has to be a full-fledge third tier of Government with devolution of political, administrative and financial responsibility and authority. The Sindh Government, by denying such devolution to the Local Government, is infringing upon the rights of the people as envisaged in Article 2A, the Objectives Resolution, Article 4 and the Fundamental Rights under the Constitution. That the third tier of Government is responsible for decision making in policy areas, which have direct impact on the life of citizens' health, art, culture and sports, local transport, water and energy, regional planning, education, social services and improving law and order. The petitioners have made reference to the Fundamental Rights contained in Articles 9, 14, 17 and 25 of the Constitution and have alleged that the Sindh Government has let loose a complete rule of loot and plunder, virtually spending nothing upon Urban areas of the Province of Sindh and funds meant for the Rural Sindh, have been looted with impunity. Making reference to Urban Sindh, in

particular to Karachi so also Rural Sindh areas such as Larkana and Ghotki of untreated garbage and sewage piled up and hardly any provision of drinking water or useable water is made. Water is polluted and unhygienic living conditions prevail in the Province of Sindh and there is epidemic of Chikungunya and other fatal diseases. No municipal service is available. That the Health Department and the Government Hospitals are in deplorable state, where medicines are also not available and employment is mostly sold out and no appointment on merit is made. Schools and colleges run by the Sindh Government are in state of complete shambles. Most of the schools have ghost teachers, ghost students and no furniture. School premises are used for keeping of cattle and animals. That since 2008 till-date, an amount of Rs.1227 billion was allocated by the Government of Sindh for Annual Development Programme but hardly any budget was allocated to or spent on Urban Sindh and the allocated amount of Rural Sindh has also been eaten away. That the third tier of Government provided in Article 7 read with Article 140A of the Constitution, has direct nexus with the people at grassroots level, if allowed to function with devolution of political, administrative and financial authority, as required by Article 140A of the Constitution, the day to day inflection on the people and

depriving them of their Fundamental Rights could be addressed.

20. No concise statement has been filed by the Province of Sindh disputing the facts alleged in the Memo of Petition. The Secretary Finance, Government of Sindh has filed comments by way of CMA No.5627 of 2020 in which stand taken is that Finance Department, Government of Sindh is releasing OZT share according to PFC Award on the basis of actual receipts from Federal Government. Current distribution of OZT share is tentative. The KMC is being released Rs.806.532 million on monthly basis and claim of KMC of Rs.29.366 billion is baseless. The learned Advocate General, Sindh in his oral submission so also in his written synopsis has argued that the petitioners have not provided sufficient measures, where this Court could exercise jurisdiction under Article 184(3) of the Constitution. It is pertinent to consider Article 184(3) of the Constitution, which is as follows:

“184. (3) Without prejudice to the provisions of Article 199, the Supreme Court shall, if it considers that a question of public importance with reference to the enforcement of any of the Fundamental Rights conferred by Chapter 1 of Part II is involved, have the power to make an order of the nature mentioned in the said Article.”

This Article provides that, without prejudice to the provisions of Article 199, the Supreme Court shall, if it considers that a question of public importance with reference to the enforcement of any of the Fundamental Rights conferred by Chapter 1 of Part II is involved, has the power to make an order of the nature mentioned in the said Article.

21. Reference to Article 17 of the Constitution, apparently, has become redundant, for the reason, that during the pendency of the petition, the tenure of the Local Government, formed by Petitioner No.1 in some Urban areas of Sindh has come to an end and now there is no elected local government in the Province of Sindh. The petition to the extent of Petitioner No.1 has become infructuous and is dismissed. However, the remaining Articles of the Constitution in Chapter 1, Part II of the Constitution, as pleaded and argued from the side of remaining individual petitioners, need to be considered and examined.

22. In Al-Jehad Trust's case (supra), while dealing with the question with regard to maintainability of petition under Article 184(3) of the Constitution, this Court considered the issues being faced by the people of the Northern Areas of Pakistan by which they were being denied the Fundamental Rights enshrined in the Constitution and observed as follows:

“10. Adverting to Ch. Muhammad Frooq's second contention that this Court has no jurisdiction to entertain the above Constitution Petitions, it may be observed that the grievance of the petitioners is that the Federation is not discharging its Constitutional duty by denying the Fundamental Rights to the people of Northern Areas. In our view, since the Federal Government is situated within the territory over which this Court admittedly has jurisdiction, the above Constitution Petitions are maintainable. It cannot be denied that the question as to, whether the people of Northern Areas have the right to invoke Fundamental Rights under the Constitution, is a question of public importance relating to the enforcement of Fundamental Rights contained in Chapter 1 of Part II of the Constitution and hence this Court has competently entertained the above Constitution Petitions under Article 184(3) of the Constitution.”

In the case of Ms. Shehla Zia and others vs. WAPDA (PLD 1994 Supreme Court 693), the Court observed as follows:-

“Article 9 of the Constitution provides that no person shall be deprived of life or liberty save in accordance with law. The word ‘life’ is very significant as it covers all facts of human existence. The word ‘life’ has not been defined in the Constitution but it does not mean nor can it be restricted only to the vegetative or animal life or mere existence from conception to death. Life includes all such amenities and facilities which a person born in a free country is entitled to

enjoy with dignity, legally and constitutionally. For the purposes of present controversy suffice to say that a person is entitled to protection of law from being exposed to hazards of electromagnetic fields or any other such hazards which may be due to installation and construction of any grid station, any factory, power station or such like installations. Under the common law a person whose right of easement, property or health is adversely affected by any act of omission or commission of a third person in the neighbourhood or at a far off place, he is entitled to seek an injunction and also claim damages, but the Constitutional rights are higher than the legal rights conferred by law be it municipal law or the common law. Such a danger as depicted, the possibility of which cannot be excluded, is bound to affect a large number of people who may suffer from it unknowingly because of lack of awareness, information and education and also because such sufferance is silent and fatal and most of the people who would be residing near, under or at a dangerous distance of the grid station or such installation do not know that they are facing any risk or are likely to suffer by such risk. Therefore, Article 184(3) can be invoked because a large number of citizens throughout the country cannot make such representation and may not like to make it due to ignorance, poverty and disability. Only some conscientious citizens aware of their rights and the possibility of danger come forward and this has happened so in the present case."

In the case of Bank of Punjab and another vs. Haris Steel Industries (Pvt.) Ltd., and others (PLD 2010 Supreme Court 1109), this Court in respect of entertaining of a petition under Article 184(3) of the Constitution observed as follows: -

“21. We shall first take up the objection of the learned Prosecutor-General with respect to the maintainability of this Application and to the assumption of jurisdiction by Court with respect to the matter in question.

22. As has been mentioned above, the matter in question relates to one of the gravest financial scams in the banking history of our country as a result of which the Bank of Punjab stood cheated of an enormous amount of around eleven billion rupees which amount of money in fact belonged to around one million innocent depositors including depositors of small amounts of money whose life-savings and property had come under serious threat casting thus an obligation on this Court to move in to protect and defend the right of property of such a large section of the population i.e. about ten lakh depositors and customers of the Bank of Punjab which right of property stood guaranteed to them by Article 24 and Article 9 of the Constitution.

23. The background of the case in question has been noticed in some detail in the earlier parts of this order and it appears that it was in view of the said facts and circumstances that the Bank of Punjab had felt compelled to approach this Court under Article 184(3) of the Constitution read with Order XXXIII, Rule 6 of the Supreme Court Rules of 1980 through

Constitutional Original Petition No.39 of 2009
with the following prayer:

"It is, therefore, prayed that given the callous manner and the enormity of the fraud played by the respondents, and the resultant threat to the safety of the savings of more than 9,00,000 innocent small-scale depositors of the BOP holding Rs.100,000 or less in their respective Accounts on account of this fraud, as result of which a sum of upward of Rs.10 Billion belonging to inter alia these small-scale borrowers and fraudulently withdrawn from the Bank and misappropriated by respondents Nos. 1-3, is not even secured to the extent of 10% of this amount coupled with the fact that these respondents and their associates are hooding and supporting holders of fake CNIC's and identities, against which they are holding more than 120 urban Properties in DHA, Lahore Cantt. etc., and another 105 properties, which are predominantly rural (though mostly worthless) in Kasur, Chunian, Muridke etc., and are dealing with or are likely to deal with hundreds of persons/citizens and with Banks etc., on the basis of these fake identities, and even travel abroad on that basis, besides being a security threat to the State, it is evident that this is case which, consistent with the pronouncements of this august Court, is one involving serious violations of and threat of violation of fundamental rights of hundreds and, potentially, thousands of innocent persons and, as such, the issues involved herein may be taken up by this august Court, directly under this august Court's jurisdiction under Article 184(3) of the Constitution of the Islamic Republic of Pakistan, 1973, and appropriate dictations be given and orders passed to secure the fundamental rights of more than "9,00,000 small-scale depositors of BOP. It is further prayed that during the pendency of this petition the NAB or any other Investigation Agency may very kindly be directed to initiate and carry out full investigation in the case, and, for this purpose, to have full power and authority to associate any and all persons in the

investigation, including the respondents herein as well as the Writ Petitioner, and if sufficient incriminating evidence is found or is available against them, to forthwith arrest, detain and interrogate in accordance with law.

It is further prayed that the immovable property belonging to the respondents Nos.1-5 and their associates may very kindly be ordered to be attached and possession delivered to BOP and the vehicles recovered from them may very graciously be allowed to be sold and sale proceeds utilized towards partial adjustments of the outstanding amounts.

Any other interim order which is deemed fit and proper by this hon'ble Court under the facts and circumstances of the case and to secure the rights of the small scale depositors of BOP may also be passed in the interest of justice, equity and fairplay."

24. As has been mentioned above, besides other petitions filed in this Court under various other provisions of the Constitution and the law, Constitution Petition No.39 of 2009 had been filed under clause (3) of Article 184 of the Constitution which clause (3) reads as under:--

"(3). Without prejudice to the provisions of Article 199, the Supreme Court shall, if it considers that a question of public importance with reference to the enforcement of any of the Fundamental Rights conferred by Chapter-I of Part-II is involved, have the power to make an order of the nature mentioned in the said Article."

25. A perusal of the above quoted provision would demonstrate that this Court was possessed of powers to make any order of the nature mentioned in Article-199 of the Constitution, if, in the opinion of this Court, a question of public importance relating to the enforcement of any of the Fundamental Rights

was involved in the matter, as has been mentioned in the preceding parts of this order, what was at stake was not only a colossal amount of money/property belonging to at least one million depositors i.e. a large section of the public but what was reportedly at stake was also the very existence of the Bank of Punjab which could have sunk on account of the mega fraud in question and with which would have drowned not only the said one million depositors but even others dealing with the said Bank". And what had been sought from this Court was the protection and defence of the said public property. It was thus not only the right of this Court but in fact its, onerous obligation to intervene to defend the said assault on the said fundamental right to life and to property of the said public."

23. In the above cited judgments, this Court has discussed in various circumstances the enforcement of Fundamental rights being part of Chapter 1 of Part II of the Constitution are violated or infringed upon and where sizable number of citizens are deprived of their fundamental rights so conferred on them, the Court will ensure that the people do enjoy the fundamental rights and such are not infracted upon and shall exercise its power given to it under Article 184(3) of the Constitution, for that, the matter would be that of a public importance with respect to enforcement of fundamental rights conferred by Chapter 1, Part II of the Constitution.

24. Having noted in the preceding paras facts pleaded by the petitioners, which are not denied by the Province of Sindh, we consider them to be substantial questions giving rise to the very enforceability of fundamental rights of the citizens of the Province of Sindh and such fundamental rights relates to question of public importance and for this the petition filed under Article 184(3) of the Constitution is maintainable.

25. The whole gamut of the case emanates from Article 140A of the Constitution, which is as follows: -

“140A. (1) Each Province shall, by law, establish a local government system and devolve political, administrative and financial responsibility and authority to the elected representatives of the local governments.
(2) Elections to the local governments shall be held by the Election Commission of Pakistan.”

This Article commands each province by law to establish a local government system and devolve political, administrative and financial responsibility and authority to the elected representatives of the local governments. The elections to the local governments are provided to be held by the Election Commission of Pakistan. The Article is couched in imperative and mandatory term by use of the word “shall” binding the provinces to make the law. Pursuant to this very Article of the Constitution the province of Sindh has

promulgated the Sindh Local Government Act, 2013 **(the Act of 2013)**. This Act of 2013 in its preamble provides that whereas; it is expedient to establish an elected local government system to devolve political, administrative and financial responsibility and authority to the elected representatives of the local governments; to promote good governance, effective delivery of services and transparent decision making through institutionalized participation of the people at local level; and, to deal with the ancillary matters.

26. The submission of the learned counsel for the petitioners was that though the law for establishing of a local government system has been made but by very same law, particularly, by Sections 74 and 75 thereof, the powers and functions of the local government have been specifically taken over by the provincial government and by doing so the very compliance of Article 140A of the Constitution has been made redundant and this manner Objectives Resolution and Fundamental Rights gravely infringed.

27. We have gone through the provisions of Sections 74 and 75 of the Act of 2013. Section 74 of the Act is as follows: -

"74. Transfer of functions from Councils to Government and Vice Versa.- Notwithstanding anything contained in any other law for the time being in force, Government may -

- (a) take over the management and control of any institution or service maintained by a Council; and
- (b) transfer the management and control of any institution or service maintained by Government to a Council.

28. Section 74 *ibid* starts with a non-obstante clause giving overriding power to the government to take over the management and control of any institution or service maintained by a Council and to transfer the management and control of any institution or service maintained by government to a Council. Section 75 of the Act of 2013 is as follows:-

- “[75 Commercial schemes.-** (1) Government may set up a Board, Authority or any corporate body to perform any one or more functions of any Council, singly or jointly with any public or private body, and may acquire, continue, manage or operate any commercial venture or activity as deemed necessary in the public interest.
- (2) Any commercial operations or venture jointly with any private body or person in existence at the time of commencement of this Act shall continue to do so.
- (3) The Council may, with the prior permission of Government, promote, administer, execute or implement schemes for undertaking any commercial, business enterprise or enter into public private partnership.”

Section 75(1) *ibid* gives all embracing and complete power to the government to set up a Board, Authority or any corporate body to perform any one or more functions of any Council, singly or jointly, with any public or private body and may acquire, manage or operate any commercial venture or activity as deemed necessary in the public interest. Section 74 which, as noted above, starts with the non-obstante clause gives to the government all pervasive powers without any restraint or restriction and without any cause or reason or justification and at any time, it likes to takeover management and control of any institution or service maintained by a Council. What number of institution or service will be taken over from a Council by the government, the same has been left for the government to chose. No time frame is given for how long the government would retain management and control of institution or service of a Council. It also seems to mean that over the time, the government may one after the other take over the management and control of institution or service maintained by a Council, to the extent that the very Act of 2013 laying down the local government system pursuant to the mandate of Article 140A of the Constitution demonstratively becomes nonexistent. There is no structure provided in Section 74 *ibid* for the government to exercise such powers. Similar is the position with regard to Section 75(1) *ibid* in which government has been given all embracing

and complete power to set up a Board, Authority or any corporate body to perform any one or more functions of any Council. This power given under Section 75(1) of the Act of 2013, while contains all attributes of Section 74 *ibid* except that it does not start with non-obstante clause, thus, has no overriding effect. In any case, the powers provided to the government under Section 75(1) *ibid* also seems to be all pervasive with no restraint or restriction and such powers could be exercised without any cause, reason or justification and at any time it likes and the number of functions of Council or Councils to be given to a Board, Authority or corporate body is also not specified and for what period such functions of Council will be given to a Board, Authority or corporate body is also not provided. This provision also reads in it, over time, the government may one after the other gives all of the functions of a Council to a Board, Authority or corporate body set up by it. This provision also does not contain structured authority conferred on the government and both Sections 74 and 75 *ibid* in this regard have made excessive delegation to the government in matters relating to management and control of institution or service of a Council and functions of a Council. Whether this nature of delegation of power to the government by legislature was at all intended by Article 140A *ibid* and whether these provisions of Sections 74 and 75 *ibid* are also in direct conflict with the Objectives

Resolution in Article 2A of the Constitution, where principle of democracy, freedom, equality, tolerance and social justice are required to be observed by the State and also contrary to Articles 9, 14, and 25 of the Constitution.

29. We may note that the Constitution does not envisage unstructured, uncontrolled and arbitrary discretion being conferred by legislature on State functionary or holder of a public office; even if, some discretion is conferred by law on a State functionary or on holder of a public office, the same has to be exercised justly, honestly, fairly, and transparently. There has to be a structured policy in the interest of uniformity even handedness, probability and fairness. Under the Constitution, legislature has plenary powers within its allotted field and there could be no application of legislative function or authority by complete effacement or even partially in respect of a particular topic or matter entrusted by the Constitution to the legislature. It has been noted that entrustment of power without guidance suffers from excessive delegation, which in the scheme of Constitution is not permissible. Reference is made to the case of Malik Munsif Awan,, Advocate, Chairman, Pakistan Justice Party, Lahore vs. Federation of Pakistan through Secretary, Law and Justice, Islamabad and others (PLD 2021 Supreme Court 379).

30. We may further observe that wherever the legislature devolves its authority and power to be exercised by government or any of its functionary, it has to be circumscribed by structured exercise of discretion. The basic ingredients of structured exercise of discretion have been time and again stated by this Court. In the case of Jurists Foundation through Chairman vs. Federal Government through Secretary, Ministry of Defence and others (PLD 2020 Supreme Court 1), this Court observed as follows:-

"41. This Court has time and again held that the essential legislative function of the Parliament cannot be delegated. The wisdom behind it is that the delegatee must have legislative guidelines to formulate Rules and Regulations, and that guidelines, contours or boundaries must come from the Legislature itself. Delegation of an "essential legislative function" by the Legislature to the Executive is not permissible under the Constitution. The foundation of embargo owes its genesis to the concept of trichotomy of powers between the Legislature, the Executive and the Judicature, which is a fundamental principle of our constitutional construct. Under the Constitution, these three organs of the State have been entrusted with separate and specified functions. The primary function of the Legislature is to legislate laws, of the Executive to execute laws, and of the Judicature to interpret laws. The words of Chief Justice Marshall of the US Supreme Court frequently

quoted, in explaining the doctrine of separation of powers, by the Courts of various jurisdictions in the last about two centuries still hold: “the Legislature makes, the Executive executes, and the Judiciary construes, the law.” The Legislature cannot abdicate performance of the function assigned to it by the Constitution and set up a parallel Legislative authority. Though the Legislature can confer upon any person or body the power to make subordinate/ delegated legislation (rules, regulations or byelaws, etc) in order to give effect to the law enacted by it yet it must perform itself the essential legislative function, i.e. to exercise its own judgment on vital matters of policy and enact the general principles providing guidance for making the delegated legislation. Through section 176A, the Parliament appears to have divested itself of the essential legislative function which amounts to excessive delegation.”

In the case of Sabir Iqbal vs. Cantonment Board, Peshawar through Executive Officer and others (PLD 2019 Supreme Court 189), this Court observed as follows: -

“5. There is yet another dimension of the case. The court can examine and judicially review the executive discretion exercised by the authorized officer on the ground of proportionality. Alongside reasonableness, proportionality is now a central standard directing the action of the executive branch. The point of departure is that a disproportionate act that infringes upon a human right is an illegal act. The court, which guards the legality of the acts of the executive branch, performs judicial

review over these acts and examines whether they fulfil the tests of proportionality. Proportionality is a standard that examines the relationship between the objective the executive branch wishes to achieve, which has the potential of infringing upon a human right, and the means it has chosen in order to achieve that infringing objective. The fiduciary duty, from which the administrative duty of fairness and administrative reasonableness are derived, demands administrative proportionality as well. "The courts will quash exercises of discretionary powers in which there is not a reasonable relationship between the objective which is sought to be achieved and the means used to that end, or where punishments imposed by administrative bodies or inferior courts are wholly out of proportion to the relevant misconduct. An administrative measure must not be more drastic than necessary or to sum up in a phrase - not taking a sledgehammer to crack a nut. According to De Smith's Judicial Review, the standards of proportionality and unreasonableness are inextricably intertwined. Unreasonableness contains two elements of proportionality when it requires the weight of relevant considerations to be fairly balanced and when it forbids unduly oppressive decisions. Under the first element, proportionality is a test requiring the decision-maker to maintain a *fair balance*. Under this category the courts evaluate whether manifestly disproportionate weight has been attached to one or other considerations relevant to the decision. The second element is that the courts consider whether there has been a disproportionate interference with the

claimants rights or interests. A more sophisticated version of proportionality provides for a *structured test*. Here the courts ask first whether the measure, which is being challenged, is suitable to attaining the identified ends (the test of *suitability*). Suitability here includes the notion of "rational connection" between the means and ends. The next step asks whether the measure is necessary and whether a less restrictive or onerous method could have been adopted (the test of *necessity* - requiring minimum impairment of the rights or interest in question).

6. Applying the test of proportionality to the executive discretion exercised in the instant case, the order of the authorized officer, other than the legal infirmities discussed above, fails to maintain fair balance by removing a person from service because he absented himself from duty for a day. The executive discretion also fails the *structured test* of proportionality including the *test of suitability* and test of necessary requiring minimum impairment of the right of the petitioner."

31. It is trite an accepted principle of Constitutional jurisprudence that the Constitution being a basic document is always treated to be higher than other statutes and whenever a document in the shape of law given by the Parliament or other competent authority, is in conflict with the Constitution or is inconsistent, then to that extent, the same is liable to be declared unconstitutional. It is also a settled maxim and the very concept of fundamental rights is that it being the right guaranteed by a

Constitution cannot be taken away by any law. In order to examine the *vires* of the Statute on its scrutiny of violation on the touchstone of taking away or abridging any of the fundamental rights guaranteed by the Constitution, such provision of law is declared to be *ultra vires* and struck down.

32. Further, this Court has dealt with the subject of local government extensively in Raja Rab Nawaz's case (supra). The following observation of this Court is relevant:-

"12. It may be observed that the life of a community is essentially the creation of its particular environment. It is difficult to establish an organization that would effectively look after the well being of all the social groups in a country. Only such political system can succeed which is essentially indigenous. Therefore, establishment of democratic institutions at the grass root level is basic requirement for the welfare of the society. The Local Self-Government institutions lay the foundation of such a system. They are based upon the recognition that the only way to respond to the needs of the individuals is to associate them with the process of authority. In this regard, it would be appropriate to quote Sydney Webb's remarks who said that any system of government, however mechanically perfect, would fail to take roots in the midst of the masses of people, unless it was in some way grafted on to the spontaneous grouping of the people themselves. As such, the broad masses of people are to be genuinely associated with the management of their affairs and encouraged to work for their own welfare. Essentially, the

institutions at local/grass root levels protect the human dignity of common man to which he is entitled.

13. Local Government or Municipal Government is a form of public administration, which in a majority of contexts, exists as the lowest tier of administration within a given state or district. In many countries, it usually comprises the third tier of government, often with greater powers than higher-level administrative divisions. The question of municipal autonomy is a key question of public administration and governance. It is noteworthy that Local Governments generally act within powers delegated to them by legislation or directives of the higher level of government. The political analysts have always emphasized on the importance of local self-government. There are two principles underlining the establishment of Local bodies. Firstly, local bodies enjoy extensive powers to act in a way they like for the betterment of the community unless restricted by law in any sphere of activity. Secondly, local bodies cannot go beyond the specific functions delineated to them in various acts and statutes.

14. The concept of participation of ordinary people in the conduct of public affairs was advanced by the liberal philosopher John Stuart Mill as early as the mid 19th century. He considered the broad involvement of citizens to be the most effective guarantee of a well-functioning democratic polity, counterbalancing the threats posed by an over-powerful and interventionist state. In his view, the citizen's

opportunity to articulate his views and assert his rights afforded him the best protection against any abuse of these rights by the State.

15. In general, this tier of government is responsible for decision-making in those policy areas which have a direct impact on the lives of local citizens, e.g. urban regeneration, housing, schools, employment and social security, health, arts, culture and sport, local public transport, water and energy, and regional planning. These are the areas where the local citizens must have the opportunity to exert direct influence on policy-makers and thus participate in the decision-making process. Thus, local self-government not only has a legal and a political dimension, but it also has sociological connotations, namely, it directly affects community life within a demarcated locality. It is pertinent to mention here that in the developed democracies, local self-government has contributed substantially to social and economic development and the emergence of a civil society and its importance for democratic development has been recognized consistently all over the world.

16. It is important to bear in mind that local government is the most vital element in a democracy, though not generally recognized as such. Existence of local bodies is important for strengthening the process of democracy. In the recent years, local self-government has been playing a vital role in the establishment of good governance and community development. The local bodies, at one end, provide services to the

local community and, on the other, act as an instrument of democratic self-government. The existence of local self-government provides mechanism for the enforcement of Fundamental Rights of the people. Such government bodies are helpful for development including education, health, social services as well as in improving, law and order situation. In short, the local self-government is necessary not only for strengthening democracy in country but also for securing good governance, which is essential to ensure the welfare of the citizens. This tier of government is always appreciated by the general public because it remains within their approach, as such they get involved in the decision making process.

17. All modern States have developed a system of self-governing local authorities. In many countries, the basic unit of local self-government is the municipality. Over the course of history, two types of self-governing units, namely, cities and municipalities have evolved at local level. The territorial boundaries of units of local self-government are defined by law. Local self-government is presumed to be in existence where a local government is established as a legal, corporate and political institution with decision-making powers. One of the main traits of local self-government is that there must be a representative body, a council or an assembly, directly elected by local citizens through elections, with budgetary autonomy and power to make legislation at local level. The brief of local government structure in various countries is given hereinbelow:--

INDIA

In India the local government is the third level of government apart from the State and Central governments. There are two types of Local Government in operation; firstly, Panchayats in rural areas and Municipalities in urban areas. The Panchayats are a linked-system of local bodies with village panchayats (average population about 5,000), panchayat samities at the intermediate level (average population about 100,000), and district panchayats (average population about 1,000,000). The local government bodies are the democratic institutions at the basic level.

FRANCE

In France there are three main tiers of local administration; namely, the commune, department and region. These are both districts in which administrative decisions made at national level are carried out and local authorities with powers of their own. A local authority is a public-law corporation with its own name, territory, budget, employees, etc. and has specific powers and a certain degree of autonomy vis-a-vis central government. In addition, there are France's overseas territories and regional bodies (collectivites territoriales) with special status (Paris, Marseille, Lyon, Corsica, Mayotte and Saint-Pierre-et-Miquelon).

JAPAN

Since the Meiji restoration, Japan has had a local government system based on prefectures. The national government oversees much of the

country. Municipal governments were historical villages. There are 47 prefectures. They have two main responsibilities; one is mediation between national and municipal governments, and the other is area wide administration. Now mergers are common for cost effective administration.

TURKEY

Turkey has two levels of local government; provinces (iller) and districts (ilceler). The territory of Turkey is subdivided into 81 provinces for administrative purposes. The provinces are organized into 7 regions for census purposes; however, they do not represent an administrative structure. Each province is divided into districts, for a total of 923 districts.

SOUTH AFRICA

South Africa has a two tiered local government system comprising local municipalities which fall into district municipalities, and metropolitan municipalities which span both tiers of local government.

PAKISTAN

Local government is the third tier of government in Pakistan, after Federal Government and Provincial Government. There are three types of administrative unit of local government in Pakistan; namely, District Government Administrations, Town Municipal Administrations and Union Council Administrations. There are over five thousand local governments in Pakistan. After the promulgation of Local Government Ordinance, 2001, there established democratically elected

local councils, each headed by a Nazim (Supervisor or Mayor). Some of the districts consisting of large metropolitan areas are called City Districts. A City District often contains subdivisions called Towns and Union Councils. As per local government laws, elections of union councils are to be held after every four years. District Governments also include a District Coordination Officer (DCO), who is a civil servant in-charge of all devolved departments. Currently, the Powers of Nazim are also held by the DCO."

33. Keeping in view the above principles of law, which have repeatedly been pronounced by this Court, we now deal with the subject provisions of Sections 74 and 75(1) of the Act of 2013, whether they do infringe upon Article 2A (Objectives Resolution), Right of Life (Articles 9), Inviolability of dignity of man (Article 14), Equality of citizens (Article 25) and also Article 140A of the Constitution.

34. Thus, we note that the local government is a third tier of government provided by the Constitution and that it being government at the grassroots level having direct impact on the life of citizens in matters relating to their day to day living i.e.;

- (i) Right to adequate and safe drinking water.
- (ii) Right to have neat, clean and healthy environment, free from all sorts of garbage and sewage piling on the roads, streets and open spaces,

- (iii) Keeping the citizen safe from flood devastation and other natural calamities.
- (iv) Keeping the citizen safe from fire.
- (v) Making provision for medical treatment of all citizens without any discrimination and providing all requisite medicines.
- (vi) Giving equal opportunity to all citizens without discrimination of employment in service on merit basis.
- (vii) Protecting life and liberty of all citizens without any discrimination.
- (viii) Making provision for all citizens to have adequate education in schools and colleges with competent teaching staff and provision of all amenities needed for a school and college.
- (ix) School and Colleges premise are free from all encroachments and illegal uses.
- (x) Provision of sports facilities.
- (xi) Provision of local/public transport.
- (xii) Provision of graveyard, mosque and libraries.
- (xiii) Provision of parks and playgrounds.

These are some of the basic ingredients of fundamental rights provided to be enjoyed by the citizens.

35. Local government system having pledged to deliver these basic necessities of life and to maintain inviolability and dignity of human beings and to provide all these basic necessities to all citizens without discrimination, any infringement on the part of the government to take away from

the local government system through an executive fiat as provided in Sections 74 and 75(1) of the Act of 2013, renders them palpably derogatory to such rights of the citizens and will not be sustainable.

36. Article 140A of the Constitution commands the province to establish by law local government system and devolve political, administrative and financial responsibility and authority to the elected representatives of the local governments. The mandate of the Constitution, gives power to the provincial legislature to comply with this command. Where such command is directly addressed to the provincial legislature itself, there is no room left for allowing the legislative power to be rested in the executive and that too, which is not structured and tempered with by any declared legislative policy. The legislature cannot delegate un-canalised and uncontrolled power, as the power to delegate must not be unconfined and vagrant but must be canalised within banks that keep it from overflowing. The banks that set the limits of power delegated are to be constructed by the legislature by declaring the policy of a law and by laying down standards for guidance of those on whom the power to execute the law is conferred. Therefore, we are of the considered view that Sections 74 and 75(1) of the Act of 2013 are against the principle enshrined in the Objectives Resolution and the fundamental rights enacted in Articles 9, 14 and 25 of the

Constitution and are also contrary to and in direct conflict with Article 140A of the Constitution and thus, declared *ultra vires* and struck down.

37. The further submissions of the learned counsel for the petitioners is based on Article 140A of the Constitution that the local government should include subjects of Building Control and Town Planning, Water Supply, Sewerage and Waste Disposal, Local/Public Transport and Civic Facilities like Parks, Playground, Libraries, Mosques, Graveyards, Parking Facilities etc. and that the KDA Order No.5 of 1957, the Sindh Building Control Ordinance, 1979, the Malir Development Authority Act, 1993, the Liyari Development Authority Act, 1993, the Karachi Water and Sewerage Board Act, 1996, the Hyderabad Development Authority Act, 1976, the Sehwan Development Authority Act, 1993, the Larkana Development Authority Act, 1994, any dispensation pertaining to the Board of Revenue or the Master Plan Department or any other Development Authority in the province of Sindh and the Sindh Mass Transit Authority Act, 2014, the Sindh Food Authority Act, 2016, the Sindh Environmental Protection Agency Act, 2014, be suitably amended in order to devolve them to the local government.

38. Learned Advocate General, Sindh has vehemently opposed this submission of the learned counsel for the petitioners by contending that the government has fulfilled

the mandate of Article 140A of the Constitution by promulgating and enforcing the Act of 2013 and there is nothing more which the government can give.

39. Learned counsel for Respondent No.8 has also seriously opposed the submission of the learned counsel for the petitioners.

40. Learned Attorney General for Pakistan, on the other hand, has given his valuable suggestion that where the local government system is made more vibrant, through consultative process between the provincial government and the local government.

41. Article 140A has already been reproduced above. In interpreting constitutional provisions, the Court has always approached and given dynamic and progressive meaning to the words of the Constitution and has also leaned towards giving effect to the Constitution, which is addressed by the Constitutional provisions. The Court has always avoided giving interpretation to the Constitution, which represents results not intended by the Constitutional makers or to narrow down or make the Constitutional provision pedantic. The Court has always strived to construe the Constitution broadly so that it may meet the requirements, which it sets down to address.

42. It is also well settled principle of interpretation i.e. statute made pursuant to the provision of the Constitution

cannot restrict or retard the constitutional provision as the constitutional provision being the supreme law the statute must under it conform to the Constitutional law.

43. S.M. Zafar on Understanding Statutes, Cannons of Construction, Fourth Edition has dealt with this subject as follows: -

“Every problem about statutory interpretation also comes up in the constitutional interpretation, but crucial differences between most statutes and most constitutional provisions do exist in as much as the principles enunciated in the Constitution are deemed fundamental; as they draw their authority from the general will of the people, which is supreme, and can seldom act, they are designed to be permanent. Furthermore, constitutional law being the supreme law of the land must not be equated with the statute law which is the creation of the legislature and which must conform to constitutional law if it is to exist at all. If this is so, then why should the same principle of construction applicable to statute law be applied to constitutional law. Constitutional word and phrases should receive a broader and wider interpretation for the achievement of its social, economic and political mission.”

Under the heading of special rules of Construction of Constitution, learned author has commented as follows: -

“(H) Any interpretation which seeks to comply with or advance principles of policy enumerated in the Constitution should be adopted as

against an interpretation which goes against such principles, as the directive principles of State policy are to be regarded as fundamental to the governance of the State.

(I) Constitutional document is to be broadly construed so as to cover all exigencies. A narrow construction has no room in the context of a constitutional dispensation.”

44. Thus noted, the aim of Article 140A of the Constitution was to create a local government system by devolving political, administrative and financial responsibility and authority to the elected representatives of the local governments. This is a simple command to the Province to make law giving effect to the measures laid down by the Constitution and there are no ifs and buts in complying with the very mandate of Article 140A of the Constitution.

45. All the learned counsel appearing for the parties before us, during the course of arguments, have extensively referred to the judgment of this Court in **Imrana Tiwana’s case** (supra). It would, therefore, be appropriate to deal with this case and in doing so, the facts, as are mentioned in para-1 of the judgment, are reproduced as follows: -

“The facts of this case though hotly disputed are relatively uncomplicated. Under challenge is the Signal Free Corridor Project (the “Project”). The Lahore Development Authority (“LDA”), a statutory authority established by the Government of Punjab (“GoPb”), is “introducing” two underpasses, 7 U-turns and 5 overhead

pedestrian bridges on an existing 7.1 Kms of the existing Jail Road and Main Boulevard. It starts from Qurtaba Chowk (roundabout) and ends at Liberty Market Main Chowk. According to the judgment of the High Court, this remodelling would convert this stretch into “a signal free, high speed expressway”.

Apparently, three writ petitions were filed in the Lahore High Court, Lahore challenging the action of the Government of Punjab and the Lahore Development Authority (**LDA**) of undertaking the project mentioned in para-1 of the judgment. All the three writ petitions were heard by a Full Bench of the Lahore High Court, Lahore and vide judgment dated 17.04.2015, the Bench accepted all the three writ petitions striking down Sections 6, 13, 13A, 14, 15, 16, 18, 20, 23, 24, 28, 34A, 34B, 35, 38 and 46 of the LDA Act, 1975, as *ultra vires* the Objective Resolution, Articles 2A, 4, 9, 14, 17 and 25 of the Constitution and offensive to Articles 32, 37(i) and 140A of the Constitution.

Three appeals were filed by the Lahore Development Authority and others before this Court which were allowed vide judgment reported in **Imrana Tiwana's case** (*supra*), para-94 of the judgment contains the short order passed by this Court, which is as follows: -

- (i) Elected Local Governments are presently not in existence in the Province of Punjab. The Provincial Government through its agencies is

performing their duties and functions. The disputed Signal Free Corridor Project was conceived by an agency of the Provincial Government, LDA, in the year 2014 and included in its budget allocation for 2014-15. Construction of the project was awarded to the Contractor on 19-2-2015, who had already undertaken construction in the value of Rs.60 million before the interim restraint order was issued by the learned High Court on 6-3-2015. In the vacuum resulting from the absence of an elected Lahore Metropolitan Corporation, the initiation, approval and execution of the disputed Signal Free Corridor project by the Provincial Government through its agency, LDA, is held to be valid. The said project may accordingly be completed subject to provision of additional facilities for pedestrians, inter alia, including road crossing and passes at intervals of one-kilometre or less along the project road distance.

(ii) Subject, inter alia, to the criteria of spill over, economies of scale, effectiveness as shall be determined in the detailed reasons by the Court, any new project falling within the domain of Lahore Metropolitan Corporation for approval or execution shall not be undertaken by the Provincial Government or its agency without prior consultation and consent, unless withheld without justified reasons, as the case may be, of the elected Lahore Metropolitan Corporation in respect of such project.

(iii) Article 140A of the Constitution of Islamic Republic of Pakistan casts a mandatory

obligation on the Provinces to establish Local Governments possessing meaningful authority and responsibility in the political arena, administrative and financial matters. It is the duty of a Province through the Provincial Government and the Provincial Assembly to purposefully empower Local Governments in the Province so as to comply with their mandatory obligation under Article 140A of the Constitution.

(iv) In the present case, the powers in relation to master plan and spatial planning historically belonging to Lahore Metropolitan Corporation have been superimposed with similar functions vesting in LDA under Provincial law. To the extent of conflict in the exercise of their respective powers and functions by the two bodies or on account of legal provisions having overriding effect, Article 140A of the Constitution confers primacy upon the authority vesting in an elected Local Government over the powers conferred by law on the Provincial Government or an agency thereof. Notwithstanding the above, the Provincial Government is in any case under a duty to establish harmonious working relationship with an elected Local Government wherein respect is accorded to the views and decisions of the latter. Accordingly, section 46 of the Lahore Development Authority Act, 1975, purporting to override conflicting action taken by an elected Local Government, is held to be against the scheme of the Constitution and should either be read down or declared ultra vires as determined in the detailed judgment.

(v) Section 5(6) of the Punjab Environmental Protection Act, 1997 imposes a mandatory duty on the Provincial Government to constitute Advisory Committee under the said Act. This Committee is meant to assist the Environmental Protection Agency in evaluating the environmental impact of projects under consideration. The failure by the Provincial Government to constitute the said Committee violates its statutory duty. However, in the present case the impugned judgment has not attended any objection to the EIA on its merits, nor have the respondents highlighted any objection that has remained unattended and yet is fatal to the EIA. Moreover, the right of appeal and further remedies on the merits of the EIA approval available under the Pakistan Environmental Protection Act, 1997, have not been availed by the objecting respondents. The EIA cannot be struck down upon presumption or mere apprehension.

(vi) It is improper that disparaging references are made in the impugned judgment to a learned senior counsel, who had objected to the composition of the Bench. Contents of paragraphs 10(d), 21 and 22 in the impugned judgment containing such remarks are accordingly expunged. Equally, the academic expositions on the concepts of subsidiarity and federalism within the federating units, in the present case a Province, cannot be made grounds by the impugned judgment for striking down statutory law. The only touchstone for this purpose is conflict of statutory law with the provisions of the Constitution. Consequently,

the said grounds adopted by the impugned judgment are rejected.

(vii) The action proposed in the impugned judgment to be taken against the officials of the LDA or any other person as envisaged by paragraph 100A thereof is also set aside.”

46. This very operative part of the judgment, given by this Court in the **Imrana Tawana’s case** (*supra*), in our view, with full force applies to the present case also. As the controversy in the present petition also substantially revolves around the same subject, as has been dealt with by this Court and the judgment being a law declared by a 3-Member Bench of this Court, in terms of Article 189 of the Constitution, is the operative law of the land. We tend to agree with the operative part of the judgment of this Court in **Imrana Tiwana’s case** (*supra*) and thus, would dispose of this petition in the following terms:-

- (i) Elected Local Government are presently not in existence in the Province of Sindh. The Provincial Government through its agencies is performing their duties and functions. In the vacuum resulting from the absence of an elected Local Government in Sindh, the initiation, approval and execution of any of the duties and functions of the elected local government are allowed to be carried out by the provincial government and no new project following within the domain of the elected local government shall be

undertaken by the provincial government or its agency without prior consultation and consent unless withheld without justified reasons, as the case may be of the elected local government in respect of such project.

- (ii) Article 140A of the Constitution of Islamic Republic of Pakistan casts a mandatory obligation on the Provinces to establish Local Government possessing meaningful authority and responsibility in the political arena, administrative and financial matters. It is the duty of a province through the Provincial Government and the Provincial Assembly to purposefully empower Local Governments in the province so as to comply with their mandatory obligation under Article 140A of the Constitution.
- (iii) The powers in relation to master plan and spatial planning which historically belongs to the elected local government have been superimposed with similar functions vesting in the provincial laws. To the extent of conflict in the exercise of their respective powers and functions by the elected local government and the statutory authorities or on account of legal provisions having overriding effect, Article 140A of the Constitution confers primacy upon the authority vesting in an elected local government over the powers conferred by law on the provincial government or agency thereof. Notwithstanding the above, the provincial government in any case is “under

a duty to establish harmonious working relationship with an elected local government” wherein respect is accorded to the views and decisions of the latter.

(iv) Thus, the laws made by the provincial government i.e. the Sindh Building Control Ordinance, 1979, KDA Order No.5 of 1957, Malir Development Authority Act, 1993, Liyari Development Authority Act, 1993, Karachi Water and Sewerage Board Act, 1996, Hyderabad Development Authority Act, 1976, Sehwan Development Authority Act, 1993, Larkana Development Authority Act, 1994, any dispensation pertaining to the Board of Revenue or the Master Plan Department or any other Development Authority in the province of Sindh and the Sindh Mass Transit Authority Act, 2014, the Sindh Food Authority Act, 2016, the Sindh Environmental Protection Agency Act, 2014, purporting to override and conflicting action taken by an elected local government are held to be against the scheme of the Constitution and the provincial government is directed to bring all those laws in accord with the mandate of Article 140A of the Constitution.

(v) The Government of Sindh shall ensure that all local governments in the province of Sindh do get their share in the divisible pool of funds by implementing the Provincial Financial Commission Award and also to ensure that no arrears in this regard are

accumulated and if, there are arrears, the same are released.

- (vi) Sections 74 and 75(1) of the Act of 2013 are against the principle enshrined in the Objectives Resolution and the fundamental rights enacted in Articles 9, 14 and 25 of the Constitution and are also contrary to and in direct conflict with Article 140A of the Constitution and thus, declared *ultra vires* and struck down.

Special Bench-I
Islamabad
2022
APPROVED FOR REPORTING
Rabbani/

Announced in open Court on 15th February, 2022