

Form No: HCJD/C-121

ORDER SHEET

IN THE ISLAMABAD HIGH COURT, ISLAMABAD
(JUDICIAL DEPARTMENT)

W.P. No.1838/2024

Luqman Zafar, Advocate

Versus

The Federation of Pakistan
through Secretary, Ministry of Law & Justice and 7 others

Petitioners by : Mr Zahid Asif Ch., Advocate.
Mr Luqman Zafar, Advocate-in person.
Mr Muhammad Bilal, Advocate.
Mr Muhammad Zaheer, Advocate.
Mr Abdul Haleem, Advocate.

Federation by : Mr Khalid Mehmood Dhoon, Asstt. Attorney General.

ICT Administration by : Sardar Salman Ijaz, State Counsel.
Mr Riasat Ali Azad, President, IHCBA – Amicus Curiae.

Date of Hearing : **31.07.2024**

Arbab Muhammad Tahir, J.- The petitioner, *Luqman Zafar*, is a practicing lawyer who filed the instant petition being matter of public interest and importance. It is his case that against the spirit and mandate of the Constitution of the Islamic Republic of Pakistan, 1973 (hereinafter the "**Constitution**"), particularly, Article 175(3) thereof, judicial powers are being exercised by the Executive in the Islamabad Capital Territory. He has highlighted that officers of the Islamabad Capital Territory Administration, while exercising judicial powers do not follow the rules of procedure framed by the High Court under Article 202 of the Constitution and that they are outside the supervisory jurisdiction of the High Court, contrary to Article 203 of the Constitution. He has, therefore, prayed that the officers of the Islamabad Capital Territory Administration be perpetually restrained

from taking cognizance of criminal matters and exercising judicial powers.

2. Learned counsel for the petitioner has argued that; the Constitution envisages trichotomy of powers i.e. Legislature, Executive and Judicature; the Executive cannot encroach upon powers of the judicature; Article 175(3) of the Constitution is being violated; the officers of ICT Administration are subordinate to the Executive; their control & administration, promotion & transfer, discipline, supervision and confidential reports are managed exclusively by the Executive; they are posted and transferred at the whim and wish of the Executive; the officer of ICT Administration while exercising judicial powers convict / acquit persons thereby determining their criminal liability; they conduct identification parades under the provisions of the Code of Criminal Procedure, 1898 (hereinafter "**Cr.P.C.**"); the Supreme Court in the cases of *Sharaf Faridi's*¹ and *Mehram Ali*² has held that members of the Executive cannot act as judicial officers; Article 175 of the Constitution has been complied with throughout Pakistan except the Islamabad Capital Territory; conducting trials and recording of statements under section 164 Cr.P.C. by the officers of ICT Administration is illegal and unlawful; they conduct defective identification parades due to lack of required qualification and training due to which culprits earn acquittals during trials; the time specified under Article 175(3) of the Constitution for its enforcement has already lapsed, therefore, it shall be deemed to have been enforced automatically; laws of the land must conform to the provisions of the Constitution and in case of any inconsistency between both, the provisions of the Constitution shall prevail.

3. The learned Assistant Attorney General has argued that; judicial system of Pakistan is choked with hundreds and thousands of cases and it does not appeal to a prudent mind to burden it further,

¹ Government of Sindh v. Sharaf Faridi (PLD 1994 SC 105)

² Mehram Ali v. Federation of Pakistan (PLD 1998 SC 1445)

with the cases of petty offences such as traffic laws, municipal offences or with the offences entailing less than 3 years punishment under local and special laws, since doing so would have disastrous repercussions for the entire country; while placing reliance upon *Sharaf Faridi's*³ case it has been argued that executive magistracy has been acknowledged and recognized by the Supreme Court in the referred case; the executive magistracy neither encroaches upon the judicial sphere nor it intends to put in place a parallel judicial system and such exercise of authority by the Executive Magistrates is in furtherance of and in recognition of the principle of separation of powers and independence of judiciary; the executive Magistracy is in place by virtue of substantive provisions of the Cr.P.C. as amended by the Law Reforms Ordinance, 1972, Legal Reforms Acts of 1996 and 1997.

4. The learned State Counsel representing the Islamabad Capital Territory has referred to various provisions of the Law Reforms Ordinance, 1972, Legal Reforms Acts of 1996 and 1997, wherein the executive magistracy has been vested with powers to try multiple offences. It has been argued that executive magistracy exercise powers conferred upon them as it has not been entirely abolished to the extent of Islamabad Capital Territory.

5. It is important to note that since the petitions involve questions of public importance and interpretation of constitutional and other legal provisions was involved, therefore, formal notice to the learned Attorney General for Pakistan under Order XXVIIA of the Code of Civil Procedure, 1908 was issued vide order, dated 09.07.2024.

6. Heard. Record perused.

³ PLD 1994 SC 105

7. Courts which are manned and run by executive authorities without being under the control and supervision of the judiciary can hardly meet the demands of Constitution⁴. The right of 'access to justice to all' is a well-recognized inviolable right enshrined in Article 9 of the Constitution. This right is equally found in the doctrine of 'due process of law'. The right of access to justice includes the right to be treated according to law, the right to have a fair and proper trial and a right to have an impartial Court or Tribunal. This conclusion finds support from the observation of Willoughby in Constitution of United States, Second Edition, Vol.II at page 1709 where the term 'due process of law' has been summarized as follows:-

- (1) He shall have due notice of proceedings which affect his rights.
- (2) He shall be given reasonable opportunity to defend.
- (3) That the Tribunal or Court before which his rights are adjudicated is so constituted as to give reasonable assurance of his honesty and impartiality, and
- (4) That it is a Court of competent jurisdiction.

8. It therefore follows that in terms of Article 9 of the Constitution a person is entitled to have an impartial Court and Tribunal. Unless an impartial and independent Court is established the right to have a fair trial according to law cannot be achieved. Therefore justice can only be done if there is an independent judiciary which should be separate from executive and not at its mercy or dependent on it⁵. The supervision and control over the subordinate judiciary vested in the High Court under Article 203 of the Constitution keeping in view Article 175, is exclusive in nature, comprehensive in extent and effective in operation. It comprehends the administrative

⁴ Government of Balochistan through Additional Chief Secretary v. Azizullah Memon and 16 others (PLD 1993 SC 341)

⁵ Sharaf Faridi v. Islamic Republic of Pakistan (PLD 1989 Karachi 404), Syed Abul A'la Maudoodi (PLD 1964 SC 673 at 710) and Ms. Benazir Bhutto (PLD 1989 SC 416)

power as to the working of the subordinate Courts and disciplinary jurisdiction over the subordinate judicial officers. In this view of the matter, any provision in an Act or any rule or a notification empowering any executive functionary to, have administrative supervision and control over the subordinate judiciary will be violative of above Article 203 of the Constitution. Besides, it will militate against the concept of separation and independence of judiciary as envisaged by Article 175 of the Constitution and the Objectives Resolution⁶. The Supreme Court, in *Mehram Ali's*⁷ case, while considering the question of independence and separation of judiciary from the executive in light of the precedent case-law concluded as follows.-

- (i) That Articles 175, 202 and 203 of the Constitution provide a framework of Judiciary i.e. the Supreme Court, a High Court for each Province and such other Courts as may be established by law.
- (ii) That the words "such other Courts as may be established by law" employed in clause (1) of Article 175 of the Constitution are relatable to the subordinate Courts referred to in Article 203 thereof.
- (iii) That our Constitution recognises only such specific Tribunal to share judicial powers with the above Courts, which have been specifically provided by the Constitution itself, Federal Shariat Court (Chapter 3-A of the Constitution), Tribunals under Article 212, Election Tribunals (Article 225). It must follow as a corollary that any Court or Tribunal which is not founded on any of the Articles of the Constitution

⁶ Sharaf Faridi v. Islamic Republic of Pakistan (PLD 1989 Karachi 404), per Justice Ajmal Mian, CJ (as he then was).

⁷ Mehram Ali and others v. Federation of Pakistan and others (PLD 1998 SC 1445)

cannot lawfully share judicial power with the Courts referred to in Articles 175 and 203 of the Constitution.

- (iv) That in view of Article 203 of the Constitution read with Article 175 thereof the supervision and control over the subordinate judiciary vest in High Courts, which is exclusive in nature, comprehensive in extent and effective in operation.
- (v) That the hallmark of our Constitution is that it envisages separation of the Judiciary from the Executive (which is founded on the Islamic Judicial System) in order to ensure independence of Judiciary and, therefore, any Court or Tribunal which is not subject to judicial review and administrative control of the High Court and/or the Supreme Court does not fit in within the judicial framework of the Constitution.
- (vi) That the right of "access to justice to all" is a fundamental right, which right cannot be exercised in the absence of an independent judiciary providing impartial, fair and just adjudicatory framework i.e. judicial hierarchy. The Courts/Tribunals which are manned and run by executive authorities without being under the control and supervision of the High Court in terms of Article 203 of the Constitution can hardly meet the mandatory requirement of the Constitution.
- (vii) That the independence of judiciary is inextricably linked and connected with the process of

appointment of Judges and the security of their tenure and other terms and conditions.

9. The Supreme Court, in *Aziz Ullah Memon's*⁸ case has observed that "Article 175 envisages separation and independence of judiciary which includes the lower judiciary as well. The lower judiciary is a part of the judicial hierarchy in Pakistan. Its separation and independence is to be equally secured and preserved as that of the superior judiciary. The lower judiciary is more dependent and prone to financial dependence and harassment at the hands of the executive. In practice and effect the separation of judiciary is the main problem of the lower judiciary which under several enactments and rules is practically under the control and supervision of the executive. Articles 175 and 203 lay down that the judiciary including lower judiciary shall be separated from the executive and 'High Court shall supervise and control all Courts subordinate to it'. Such control and supervision can be achieved only when the judiciary is administratively and financially separate from the executive. Separation of Magistracy is the first step towards separation and independence. The next step should be taken to devise proper scheme and frame rules dealing with financial problems within the framework of the Constitution. So long financial independence is not achieved, it will be difficult to improve the working conditions, accommodation, building and expansion to meet the growing needs of the people." In the referred case, it was further observed that "Separation of judiciary is the cornerstone of independence of judiciary and unless judiciary is independent, the fundamental right of access to justice cannot be guaranteed. One of the modes for blocking the road of free access to justice is to appoint or hand over the adjudication of rights and trial of offence in the hands of the Executive Officers. This is merely a semblance of establishing Courts which are authorised to decide cases and adjudicate the rights, but in fact such Courts which are manned and

⁸ Government of Balochistan through Additional Chief Secretary v. Azizullah Memon and 16 others (PLD 1993 SC 341)

run by executive authorities without being under the control and supervision of the judiciary can hardly meet the demands of Constitution. In the referred case it was held that "The Constitution provides for progressive separation of the judiciary and had fixed a time limit for such separation. It expired in the year 1987 and from then onwards, irrespective of the fact whether steps have been taken or not, judiciary stands separated and does not and should not seek aid of executive authorities for its separation."

10. The Supreme Court in *Sh. Riaz-ul-Haq's*⁹ case has examined the expressions "court" and "judicial powers" in the context whether the Service Tribunal established pursuant to Article 212 of the Constitution are "courts" exercising "judicial powers". The Supreme Court observed that the term "Court" is at times used for quasi judicial or administrative tribunals also but on this premises it cannot be inferred that such forums should be equated with the "Court" of law. Therefore, in our opinion "Courts" are such organs of the State which administer justice strictly in accordance with law, meaning thereby that while applying laws to the controversies, they follow certain rules with regard to procedures and evidence and are not left altogether unguided and uncontrolled to act on their whims and fancies... The Supreme Court after examining multiple dictionary meanings of the expression "Court" held that three elements were essential for the conception of a Court i.e. (i) time when judicial functions may be exercised. (ii) a place for the exercise of judicial functions, and (iii) a person or persons exercising judicial functions. Judicial functions are the common characteristic of each element. The term 'judicial function' has also not been clearly spelt out either in any Dictionary or in any other book. However, Griffith, C.J. in *Huddart Parker's* case has defined the term as, "the words 'judicial power' as used in section 71 of the Constitution mean the power which every sovereign authority must of necessity have to decide controversies

⁹ *Sh. Riaz-ul-Haq and another v. Federation of Pakistan through Ministry of Law and others* (PLD 2013 SC 501)

between its subject, or between itself and its subjects, whether the rights relate to life, liberty, or property. The exercise of this power does not come into being until some tribunal which has power to give binding and authoritative decision (whether subject to appeal or not) is called upon to take action." The same definition has been quoted with approval in *Shell Co. of Australia Limited v. Federal Commissioner of Taxation* ((1930) All E R 671) and *United Engineering Workers' Union v. Uevanayagam* ((1976) 2 All E R 367). From the detailed analysis of above case-law, it is clear that the exercise of judicial power is considered to be an essential feature of a Court, and it distinguishes a Court from an administrative tribunal. Reference was made to the case of *Tariq Transport Company v. The Sargodha-Bhera Bus Service* (PLD 1958 SC 437) wherein while considering the question that as to whether an act is judicial, quasi-judicial or administrative, Justice Muhammad Munir, C.J. has observed that the said question is clouded by a confusion which is extremely difficult to resolve and no clear cut distinction between these three functions can be discovered from the case law. In modern States where expertise is the dominating feature of Government more than one function is combined in administrative tribunals, and more often than not an administrative agency discharges not only legislative and administrative but also judicial functions. The true question in the case of such tribunals always is whether the act which is complained of is a judicial act and not whether the procedure adopted by the tribunal is judicial or quasi judicial or whether the dominant or general aspect of the tribunal is that of a judicial, quasi-judicial or administrative body. A tribunal is not always furnished with the trappings of a Court, nor will such trappings make its action judicial. The character of the action taken in a given case and the nature of the right on which it operates must determine whether that action is judicial, ministerial or legislative or whether it is simply the act of a public agent. A tribunal acts judicially in the full sense of the term if it has to determine a dispute; the dispute relates to a right or liability

which, whatever its immediate aspect, is ultimately referable to some right or liability, recognised by the Constitution or statute or by custom or equity which by the domestic law is declared to be the rule of decision; since every right or liability depends upon facts, the tribunal is under an obligation to discover the relevant facts; the ascertainment of the facts is in the presence of the parties either of whom is entitled to produce evidence in support of its respective case and to question the truth of the evidence produced by his opponent; and after an investigation of the facts and hearing legal arguments the tribunal renders a judgment which so far as the tribunal is concerned terminates the dispute. In the case of an administrative tribunal, however, the emphasis is on policy, expediency and discretion to enable it to achieve the object with which it was set up. In the case of such a tribunal the, approach in determining the relevant facts is therefore often subjective and not objective, there being generally no *lis* before it in which the parties are arrayed against each other for the enforcement of a private right or liability and who for that purpose are entitled to produce evidence and adduce legal argument. The word 'quasi' as prefixed to the word 'judicial' may either indicate that the tribunal is not acting purely administratively or that it is acting in a manner in which a judicial tribunal is expected to act.

11. In *Sheikh Riaz-Ul-Haq's* case, *supra*, it was further held that perusal of above case-law makes it abundantly clear that a tribunal does not always function as a 'Court', nor its action is always judicial; however, the determining factor is the nature of the dispute to be resolved by the Tribunal. If the Tribunal has to determine a dispute relating to a right or liability, recognised by the Constitution or law and is under an obligation to discover the relevant facts, in the presence of the parties, in the light of the evidence produced by them, it acts judicially. Besides, whenever judicial power is vested in a forum, be it called a Court or Tribunal, for all legal intents and purposes it is a Court. Further, such Tribunals have to be manned,

controlled and regulated in accordance with the established judicial principles. The Supreme Court in the referred case further observed that the principle of separation and independence of judiciary as envisaged in Article 175 of the Constitution is also applicable to the lower judiciary as it is the part of the judicial hierarchy. Thus, its separation and independence has to be secured and preserved as that of superior judiciary. In terms of Article 175 read with Article 203 of the Constitution, the lower judiciary should be separated from the Executive and the High Court shall supervise and control all courts subordinate to it. Reference may be made to the case of *Government of Sindh v. Sharaf Faridi* (PLD 1994 SC 105). In the case of *Dr. Mobashir Hassan v. Federation of Pakistan* (PLD 2010 SC 265) it has been held that the Legislature is competent to legislate but such legislation would not be sustainable if it is contrary to the principle of independence of judiciary as mentioned in Article 2A of the Constitution, which provides that independence of judiciary shall be fully secured read with Article 175 of the Constitution, which lays down a scheme for the establishment of the Courts, including the superior Courts and such other Courts as may be established by law. It was further held that it is to be noted that the independence of judiciary is one of the salient features of our Constitution. The preamble to the Constitution provides that whereas sovereignty over the entire Universe belongs to Almighty Allah alone, and the authority to be exercised by the people of Pakistan within the limits prescribed by Him is a sacred trust; and whereas it is the will of the people of Pakistan to establish an order wherein the independence of the judiciary shall be fully secured. The Objectives Resolution, which is now a substantive part of the Constitution by means of Article 2A of the Constitution, also commands that independence of judiciary has to be fully secured. The superior Courts have elaborately interpreted the words 'fully' and 'secured' to elucidate the concept of 'independence of judiciary'.

12. In the case of *Messrs Ranyal Textiles*¹⁰, the learned Sindh High Court has observed that under the judicial system as established by the Constitution of the Islamic Republic of Pakistan, there are Courts and there are Tribunals. However, the Tribunals are only limited to the Tribunals specified in the Constitution such as Election Tribunal [Article 225], Administrative Tribunal [Article 212] and Tribunal relating to military affairs [Article 199(5)]. Beside these Tribunals, whenever judicial power is vested in a forum, whatever be its designation, be it called a Court, be it called a Tribunal or be it called a Commission, for all legal intents and purposes it is a Court and therefore has to be manned, controlled and regulated in accordance with the established judicial principles and the law relating to manning, regulation and control of Courts in Pakistan.

13. In the case of *Baz Muhammad Kakar*¹¹ the Supreme court has held that the right of access to justice and independent judiciary is also one of the most important rights of the citizens and if there is any threat to the independence of judiciary, it would be tantamount to denial of access to justice, which undoubtedly is a fundamental right under Article 9 of the Constitution. In *Baz Muhammad Kakar's* case, supra, the Supreme Court while referring to the case of *Khurshid Anwar Khan*¹², observed that the Court acting under rules framed by virtue of the Constitutional power was not bound to follow any other statutory dispensation, which came in conflict with the independence of judiciary. Supreme Court was not even bound by the provisions of Civil Procedure Code, 1908 or Criminal Procedure Code, 1898 in so far as regulation and control of practice and procedure of the Court itself was concerned. It was further held that Article 2A of the Constitution (Objectives Resolution) commands that independence of judiciary has to be fully secured. Words 'fully' and 'secured' are explicit enough not

¹⁰ Messrs Ranyal Textiles v. Sindh Labour Court (PLD 2010 Karachi 27)

¹¹ Baz Muhammad Kakar v. Federation of Pakistan (PLD 2012 SC 92)

¹² Chairman, N.-W.F.P. Forest Development Corporation v. Khurshid Anwar Khan (1992 SCMR 1202)

to leave any doubt that Constitutional set up of Pakistan preserves the independence of Supreme Court by a definite mandate."

14. In *Syed Zafar Ali Shah's*¹³ case, it has been held that the Constitution of Pakistan is the supreme law of the land and its basic features i.e. independence of judiciary, federalism and parliamentary form of government, blended with Islamic Provision cannot be altered even by the Parliament.

15. In case reported as PLD 2011 SC 963¹⁴ it has been held that the judiciary including the High Courts and the Supreme Court is bound to protect and preserve the Constitution as well as to enforce fundamental rights conferred by the Constitution either individually or collectively, in exercise of the jurisdiction conferred upon it either under Article 199 or 184(3) of the Constitution. We are fully cognizant of our jurisdiction, it is one of the functions of the judicial functionaries to decide the matters strictly in accordance with the Constitution and law. We are conscious of our jurisdiction, and exercise the same with judicial restraint. But such restraint cannot be exercised at the cost of rights of the citizens to deny justice to them. The scheme of the Constitution makes it obligatory on the part of superior Courts to interpret Constitution, law and enforce fundamental rights.

16. Having discussed the precedent law on the subject, I shall now advert to the legal framework applicable in the Islamabad Capital Territory dealing with executive magistracy. Through the Law Reforms Ordinance, 1972 (hereinafter "**Ordinance-1972**"), the Acts and Ordinance specified in the Schedule to section 2 *ibid* were amended to the extent and in the manner specified in the fourth column thereof. Multiple amendments were made in the Cr.P.C. alongside substitution

¹³ Syed Zafar Ali Shah v. General Pervez Musharaf (PLD 2000 SC 869)

¹⁴ Corruption in Hajj Arrangements in 2010 (PLD 2011 SC 963)

of section 6 thereof. Section 6 Cr.P.C. was substituted in the following manner.-

*6. Classes of Criminal Courts and Magistrates.-
(1) Besides the High Court and the Courts constituted under any law other than this Code for the time being in force, there shall be two classes of Criminal Courts in Pakistan, namely :--*

*I. Court of Sessions;
II. Courts of Magistrates*

(2) There shall be the following classes of Magistrates, namely.—

*I. Judicial Magistrates.-
(1) Magistrates of the first class.
(2) Magistrates of the Second class.
(3) Magistrates of the third class.
(4) Special Judicial Magistrates.*

***II. Executive Magistrates.-
(1) District Magistrates.
(2) Additional District Magistrates.
(3) Sub-Divisional Magistrates.
(4) Special Executive Magistrates.***

Section 10 Cr.P.C. was also substituted by the Ordinance-1972, which empowered the Provincial Governments to appoint District Magistrates, Additional District Magistrates to exercise powers under the Cr.P.C. or any other law for the time being in force, as the Provincial Government may direct. Section 14 Cr.P.C. was substituted through clause 6 of fourth column of the Schedule to section 2 of the Ordinance-1972, which empowered the Provincial Government to confer upon any person all or any of the powers conferred or conferrable by or under the Cr.P.C. on a Judicial Magistrate, on recommendation of the High Court. Sub section (3) *ibid* provides that the Provincial Government may also appoint Executive Magistrates for particular areas or for performance of particular functions and confer upon them all or any of the powers conferred or conferrable by or under this Code on an Executive Magistrate. Section 17 Cr.P.C. was

also substituted through the Ordinance-1972 which provides that all the Judicial Magistrates shall be subordinate to the Sessions and all the Executive Magistrates to the District Magistrate.

Section 37 Cr.P.C. was substituted through clause 19 of the fourth column of the Schedule to section 2 of the Ordinance 1972, which empowered the Provincial Government to invest powers specified in the fourth schedule to Cr.P.C. (section 37) in any Magistrate in addition to his ordinary powers. Such additional powers, inter alia, include, the power to try summarily, record confessions under section 164 Cr.P.C., authorize detention of person in custody of police under section 167 Cr.P.C., conducting identification parades and taking cognizance of offences under section 190 Cr.P.C. Through the Ordinance-1972 a separate system of executive magistracy was constituted and empowered to perform functions as and when assigned/conferred by the Provincial Government.

17. The Cr.P.C. and the Ordinance-1972 were further amended through the Legal Reforms Act, 1997 (hereinafter the "**Act of 1997**") which came into force on 3rd July, 1997. Through the Act of 1997 the powers of the District Magistrate were enhanced and the Magistrates of the First Class, Magistrates of the Second Class and Magistrates of the third class were made subordinate to the District Magistrate (section 17). The proviso to section 28 Cr.P.C. was substituted in the following manner.-

"Provided that the offences falling under Chapter VIII, X, XIII and XIV of the Pakistan Penal Code (Act XLV of 1860) except offences specified in section 153A and section 281 of the said Code, shall be tried by the Executive Magistrates and the expression "Magistrate" used in the said eight column shall mean Executive Magistrate of the respective class."

Through item 11A of fourth column of the Schedule to section 2 of the Ordinance-1972, sub-section (2) of section 29 Cr.P.C. was amended in the following manner.-

"11A. In section 29, in sub-section (2), for the full stop at the end a colon shall be substituted and thereafter the following proviso shall be added namely. -

Provided that the offences punishable with imprisonment for a term not exceeding three years, with or without any other punishment, shall be tried by the Executive Magistrates."

18. Subsequent to the above Ordinance, in the year 2001, Code of Criminal Procedure (Amendment) Ordinance, 2001 (hereinafter the **"First Amendment Ordinance"**) was promulgated. This Ordinance repealed almost all the provisions/amendments made through the Ordinance-1972 which had introduced executive magistracy. The most relevant part is, substitution of sub-section (2) of section 6 of Cr.P.C. in the following manner.-

(2) There shall be the following classes of Magistrates, namely.—

I. Judicial Magistrates.-

(1) Magistrates of the first class.

(2) Magistrates of the Second class.

(3) Magistrates of the third class.

The legislature, through the above substitution, omitted clause "II" of sub-section (2) of section 6 Cr.P.C., whereby District Magistrates, Additional District Magistrates, Sub-Divisional Magistrates, Special Executive Magistrates, and Magistrates of the First, Second and Third Class, were classified as Magistrates. Section 10 Cr.P.C., which empowered the Provincial Governments to appoint District Magistrate and Additional District Magistrates was omitted among other provisions. Significantly, the proviso to section 28 which empowered the Executive Magistrates to try offences mentioned in Chapters VIII, X, XIII and XIV of the Pakistan Penal Code, 1860 and the proviso to sub-section (2) of section 29 Cr.P.C., which empowered

the Executive Magistrates to try offences punishable with imprisonment for a term not exceeding three years, were also omitted. Precisely, the whole structure of executive magistracy and the powers vested therein stands omitted through the 1st Amendment Ordinance.

19. The 1st Amendment Ordinance was promulgated on 13.08.2001 and as per sub-section (2) of section 1 thereof, it had to come into force on fourteenth day of August, 2001. Surprisingly, on 30.08.2001, another Ordinance i.e. the Code of Criminal Procedure (Amendment) Ordinance, 2001 (hereinafter the **"2nd Amendment Ordinance"**) was promulgated. Through sub-section (2) of section 1 of the 2nd Amendment Ordinance, retrospective effect to its provisions was given i.e. from the fourteenth day of August, 2001 (the day on which the 1st Amendment Ordinance had to come into force). Furthermore, through section 2 of the 2nd Amendment Ordinance, sub-section (2) of section 1 of the 1st Amendment Ordinance was amended in the manner that to the extent of Islamabad Capital Territory, its provisions shall come into force on such date as the Federal Government may, by notification in the official gazette, specify. More than twenty three years have lapsed since promulgation of the 2nd Amendment Ordinance; however, the Federal Government has not yet issued the requisite notification for enforcement of the provisions of the 1st Amendment Ordinance.

20. The provisions of Article 175(3) of the Constitution are clear and unambiguous. It provides that judiciary shall be separated progressively from the Executive within fourteen years from the commencing day. The period of fourteen years stipulated by the legislature for separation of judiciary from the executive has already lapsed on 14.08.1987. The legislature while stipulating the time period for complying with the provisions of Article 175(3) of the Constitution was cognizant of the administrative exigencies involved in the matter and therefore a period of fourteen years was granted to complete the

formalities. However, it is the indifference demonstrated by organs of the State towards a constitutional provision, due to which judicial powers are still exercised by the executive after lapse of more than 35 years beyond the stipulated period. The delay caused in separating the judiciary from the executive beyond the stipulated time period is unconstitutional and thus cannot be condoned. Furthermore, it would amount to amending a constitutional provision through an executive or judicial measure. The Supreme Court in *Azizullah Memon's* case, supra, has held that the period stipulated in Article 175(3) of the Constitution has expired in 1987 and from then onwards, irrespective of the fact whether steps have been taken or not, judiciary stands separated and does not and should not seek aid of executive authorities for its separation.

21. Independence of judiciary and its separation from the executive is not a technical term nor can the provisions of Articles 175(3), 202 and 203 be circumvented. It is the constitutional mandate that wherever there is exercise of judicial power, for determination of rights and liabilities of citizens under the constitution and/or law, such exercise of power shall be exercised (i) by a forum which completely independent from the executive [Article 175(3)], (ii) such exercise of judicial power shall be subject to the rules of procedure framed by the concerned High Court [Article 202] and (iii) such forum shall be subject to the supervisory jurisdiction of the concerned High Court [Article 203]; except the Tribunals created under Constitutional provisions. Absence of even one element as contemplated in the Constitution (Articles 175(3), 202 & 203) would render such exercise of judicial function unconstitutional. It may also be noted that the purpose of the referred constitutional provisions cannot be defeated merely on the ground that appeals/revisions against orders of the executive magistrates lie to the Court of Sessions or the High Court, as such remedies are available to aggrieved persons only if the same are provided under the applicable law. The rights to life and liberty and due process guaranteed under

Articles 9 and 10A of the Constitution are linked directly to the establishment of a court trying a citizen for commission of an offence. If establishment of a court itself is against the provisions of the Constitution i.e. Articles 175(3), 202 and 203, it cannot ensure protection of the rights to life and liberty and due process.

22. In the Islamabad Capital Territory, the powers of executive magistrates are conferred upon the officers of ICT Administration, who are members of occupational groups constituted by the Federal Government. They are civil servants and the terms and conditions of their service are governed under provisions of Civil Servants Act, 1973 and the rules/regulations made thereunder. They are posted and transferred by the executive at their own without consultation or intervention of this Court. Their performance is evaluated by the superior executive officers. They are promoted by the Boards constituted by the Federal Government under the respective service rules. They are controlled and supervised directly by the Provincial/Federal Government. By virtue of conferment of powers under Cr.P.C., inter alia, under sections 28, 29 and 37 thereof, they try and convict citizens alleged to have committed offences falling under Chapter VIII, X, XIII and XIV of the Pakistan Penal Code, 1860 and offences entailing punishment of imprisonment for less than three years. They record statements under section 164 Cr.P.C. and conduct identification parades. Their only eligibility to be conferred with such powers is their pay scales and posting in the ICT Administration.

23. Judiciary acts as an independent arbiter of disputes between citizens and between citizens and the State. Such disputes would require the court to apply its independent judicial mind after taking into account all questions of law and facts and render binding judgment. A person presiding over a court, who by virtue of the applicable rules and regulations is answerable exclusively to the executive, is susceptible to being influenced from those wielding

power and influence. Judicial freedom is fundamental to the concept of the rule of law. Every word of the Constitution carries meaning and purpose. The purpose of separation of judiciary from the executive is to demonstrate that whenever there is a dispute, it shall be adjudicated and decided by an independent and impartial forum. And, the Constitution then itself provides for a scheme to achieve independence and impartiality of such a forum under Article 202 and 203 thereof.

24. The crux of the above discussion is that, the conferment of judicial powers upon the executive magistrates under Cr.P.C. i.e. inter alia, under sections 28, 29 and 37 thereof, their ouster from the supervisory jurisdiction of this Court and handing over their administrative control and supervision to the executive is contrary to Articles 175(3), 202 and 203 of the Constitution and the judgments of the Supreme Court referred to above, the same is, therefore, held to be unconstitutional. The legislature has already performed its role by promulgating the 1st Amendment Ordinance, however, it has delegated the authority to the Federal Government to designate the date on which its provisions shall come into force through the 2nd Amendment Ordinance. More than twenty three years have lapsed since promulgation of the 1st and 2nd Amendment Ordinances, however, the Federal Government has failed to issue the requisite notification. Despite filing a comprehensive report, the Ministry of Law and Justice failed to explain the delay or mention the reasons for not issuing the requisite notification. Causing delay in enforcing the provisions of the 1st Amendment Ordinance, which has been promulgated by the legislature according to the spirit of the Constitution, can neither be condoned nor protected. Each day which passes without issuance of the notification for enforcement of the provisions of the 1st Amendment Ordinance is contribution by the Federal Government in violation of the provisions of Articles 175(3), 202 and 203 of the Constitution.

25. For what has been discussed above, it is held and declared as follows.-

- (a) The period of fourteen years stipulated in Article 175(3) of the Constitution has lapsed in 1987. It is held that the delay occasioned in complying with the referred provision of the Constitution beyond the permissible period is unconstitutional, let alone extending further time to any organ of the State to take measures for separating judiciary from the executive.
- (b) Through the 2nd Amendment Ordinance, enforcement of the provisions of 1st Amendment Ordinance have been made conditional to issuance of a notification by the Federal Government specifying a date for enforcement of its provisions. It is alarming that despite lapse of more than 23 years, the Federal Government failed to issue the requisite notification. The Federal Government is directed to issue the notification pursuant to section 2 of the 2nd Amendment Ordinance forthwith.
- (c) Until a notification is issued by the Federal Government pursuant to section 2 of the 2nd Amendment Ordinance, the Executive Magistrates are restrained from passing final judgments/orders in trials pending before them. After enforcement of the provisions of the 1st Amendment Ordinance, the material/files relating to criminal trials shall be transmitted by the Executive Magistrates to the respective Sessions Judges which shall accordingly be entrusted to competent judicial magistrates for further proceedings in accordance with law.

- (d) It is declared that within the Islamabad Capital Territory, judicial power can only be exercised by courts in accordance with the provisions of Articles 175(3), 202 and 203 of the Constitution and other enabling constitutional provisions and the exercise of judicial power in contravention of such constitutional provisions would be unconstitutional and nullity in the eye of law.
- (e) This order shall operate prospectively and shall not affect the past and closed transactions under the *de facto* doctrine.

26. Before parting it is necessary to observe that this order may cause inconvenience and difficulties to the administration in Islamabad Capital Territory, however, as held by the High Court of Balochistan in the case of Malik Toti Khan¹⁵ that the argument of inconvenience, cannot be allowed to override the Constitutional provisions guaranteeing fundamental rights to the citizens of Pakistan. The remedy lies with the executive itself and the legislature. And, for such inconvenience only and only the Federal Government can be blamed, which despite lapse of more than 23 years of promulgation of the 1st Amendment Ordinance failed to enforce its provisions through issuance of a notification in pursuance of section 2 of the 2nd Amendment Ordinance.

(ARBAB MUHAMMAD TAHIR)
JUDGE

Announced in the open Court on _____

JUDGE

Lugman Khan/*

Approved for reporting.

¹⁵ Malik Toti Khan v. District Magistrate (PLD 1957 Quetta 1)