1990 S C M R 1379

[Supreme Court of Pakistan]

**Present: Ajmal Mian, C. J., Muhammad Bashir Jehangiri,
Memoon Kazi, Ch. Muhammad Arif and Munir A. Sheikh, JJ**

**AL-JEHAD TRUST through Habibul Wahab Al-Khairi,
Advocate and 9 others --- Petitioners
versus
FEDERATION OF PAKISTAN through Secretary,
Ministry of Kashmir Affairs, Islamabad and 3 others --- Respondents**

Constitutional Petitions Nos. and 17 of 1994, decided on 28th May, 1999.

(Petitions under Article 184(3) of the Constitution of the Islamic Republic of Pakistan).

(a) Constitution of Pakistan (1973)-

---- Art. 184(3) --- Territories of Pakistan ... Constitutional petition before Supreme Court under Art. 184 (3), Constitution of Pakistan (1973) --- Executive authority of the State in the exercise of its sovereign power, has the right to say as to which territory it has recognised as a part of its State and the Courts are bound to accept such position --- If the Courts felt any doubt with regard to the status of such a territory then it was incumbent upon them to make a reference to the averment and to accept its opinion --- Courts, however, will have jurisdiction in a case in which the Government unconstitutionally wants to cede a portion of the territory, which is admittedly a part of the territory of Pakistan to a foreign country.

(b) Constitution of Pakistan (1973)---

---- Art. 184(3) --- Constitutional petition before Supreme Court of Pakistan under Art. 184(3), Constitution of Pakistan --- Maintainability --- Questions were as to whether the people of Northern Areas had the right to invoke fundamental rights under the Constitution and that Federation was not discharging its Constitutional duty by denying the fundamental rights to the people of Northern Areas, such questions being of public importance relating to enforcement of fundamental rights contained in Chap. 1 of Part II of the Constitution Supreme Court had the competence to entertain Constitutional petition under Art. 184(3) of the Constitution.

(c) Constitution of Pakistan (1973)---

---- Arts. 9, 10, 11, 12, 13, 14, 21, 22 & 24---Articles 9, 10, 11, 12, 13, 14, 21, 22 & 24 do not make any distinction between a citizen and non-citizen as these Articles speak of "a person".

(d) Constitution of Pakistan (1973)---

---- Arts. 15, 16, 17, 18, 19, 20, 23 & 25 --- Articles 15, 16, 17, 18, 19, 20, 23 & 25 can be pressed into service by a citizen only.

(e) Constitution of Pakistan (1973)---

---- Arts. 1, 2A, 17 & Part 11, Chap. 1 --- People of Northern Areas are citizens of Pakistan, for all intents and purposes and like other citizens have the right to invoke any of the fundamental rights and liable to pay taxes and other levies competently imposed --- Said people are also entitled to participate in the governance of their area and to have an independent judiciary to enforce, inter alia, the fundamental rights --- Supreme Court directed the Federation of Pakistan to initiate appropriate administrative/legislative measures, with a period of six months from 28-5-1999 to make necessary enactments in the Constitution relevant statute/statutes/order/orders/rules/notification/notifications, to ensure that the people of Northern Areas enjoy their fundamental rights, namely, to be governed through their chosen representatives and to have access to justice through an independent judiciary, inter alia, for enforcement of their fundamental rights guaranteed under the Constitution.

It is not understandable on what basis the people of Northern Areas can be denied the fundamental rights guaranteed under the Constitution. There are two categories of fundamental rights, namely, the first category consists of:

(i) Article 9 (pertaining to security of person)

(ii) Article 10 (relating to safeguards as to arrest and detention of person)

(iii) Article (slavery, forced labour, etc. have been prohibited under it)

(iv) Article 12 (relating to protection against retrospective punishment)

(v) Article 13 (pertaining to protection against double punishment and self-incrimination).

(vi) Article 14 (relating to inviolability of dignity of man, etc.).

(vii) Article 21 (pertaining to safeguards against taxation for purposes of any particular religion).

(viii) Article 22 (relating to safeguards as to educational institutions in respect of religion etc.).

(ix) Article 24 (pertaining to protection of property rights).

The above Articles do not make any distinction between a citizen and non-citizen as they speak of "a person".
Whereas under the second category the following Articles fall;

(i) Article 15???????????????? (relating to freedom of movement etc.)
(ii) Article 16???????????????? (pertaining to freedom of assembly)
(iii) Article 17???????????????? (relating to freedom of association)
(iv) Article 18???????????????? (pertaining to freedom of trade, business or profession)
(v)Article 19???????????????? (relating to freedom of speech etc
(vi) Article 20???????????????? (pertaining to freedom to profess religion and to manage religious institutions).
(vii) Article 23 (relating to provision as to property)
(viii) Article 25 (pertaining to equality of citizens).

The above Articles can be pressed into service by a citizen only

Most of the Pakistani statutes have been made applicable to Northern Areas including Citizenship Act. The people of Northern Areas are citizens of Pakistan, for all intents and purposes. The distinction between the two categories of the fundamental rights of the Constitution is not material. They, as the citizens of Pakistan, like any other citizen have the right to invoke any of the above Fundamental Rights, but they are also, liable to pay taxes and other levies competently imposed.

Even under the Universal Declaration of Human Rights, to which Pakistan is signatory, human beings have some basic fundamental rights irrespective of their origin or status. In this behalf reference may be made to Articles, 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 13, 15 and 21 of the Universal Declaration of Human Rights.

The Fundamental Rights enshrined in the Constitution in fact reflect what has been provided in same of the Articles of Universal Declaration of Human Rights. Supreme Court, while construing the former, refer to the latter if there is no inconsistency between the two with the object to place liberal construction as to extend maximum benefits to the people and to have uniformity with the comity of nations.

The people of Northern Areas are entitled to parii6pate in the governance of their area and to have an independent judiciary to enforce inter alia, the Fundamental Rights.

The people of the Northern Areas have not been allowed to exercise their right to govern through their chosen representatives, inter alia, in terms of Article 2A of the Constitution.

The people of Northern Areas have been denied their fundamental right to have access to justice through an independent judiciary as envisaged by the Constitution.

Direction/direct ions to take administrative actions /measures required by the Constitution can be issued against the Federation, but no direction can be issued to the Legislature to legislate a particular law. However, a direction can be issued to the Federation to initiate administrative and legislative measures for complying with the mandate of the Constitution.

Supreme Court, therefore, at the most can direct that the proper administrative and legislative steps should be taken to ensure that the people of Northern Areas enjoy their rights under the Constitution.

The Northern Areas have a Chief Court, which can be equated with a High Court provided it is manned by the persons of the status who are fit to be elevated as Judges to any High Court in Pakistan. Its jurisdiction is to be enlarged as to include jurisdiction to entertain Constitutional petitions inter alia to enforce the fundamental rights enshrined in the Constitution and to provide right to approach a higher forum through a petition for leave to appeal and/or by way of an appeal against orders/judgments of the Chief Court. The same require amendments in the Notification No.11-2/17/94 dated 17-11-1994, issued by the Federal Government and/or the Constitution/statute/statutes/order/ orders/rules/notification/notifications.

Supreme Court directed the Federation to initiate appropriate administrative/legislative measures within a period of six months from 28-5-1999 to make necessary amendments in the Constitution/relevant statute/ statutes/order/orders/rules/notification/notifications, to ensure that the people of Northern Areas enjoy their fundamental rights, namely, to be governed through their chosen representatives and to have access to justice through an independent judiciary, inter alia, for enforcement of their fundamental rights guaranteed under the Constitution.

The Emergence of Pakistan written by Chaudhry Muhammad Ali former Prime Minister of Pakistan; Malik Muhammad Misken and 2 others v. Government of Pakistan through Secretary, Kashmir Affairs and Northern Affairs Division, Islamabad and 10 others PLD 1993 Azad J&K 1; Federation of Pakistan through the Secretary, Ministry of Kashmir Affairs and Northern Affairs Division, Islamabad v. Malik Muhammad Misk6en and 8 others PLD 1995 SC (AJ&K) 1; Superintendent, Land Customs, Torkham v. Zewar Khan and others PLD 1969 SC 485; Sardar Farooq Ahmed Khan Leghari and others v. Federation of Pakistan and others PLD 1999 SC 57; Mian Muhammad Nawaz Sharif v. President of Pakistan and others PLD 1993 SC 473; Government of Balochistan v. Azizullah Memon PLD 1993 SC 341; Al-Jehad Trust through Raeesul Mujahideen Habib-ul-Wahab-al-Khairi and others v. Federation of Pakistan and others PLD 1996 SC 324; Mahmood Khan Achakzai and others v. Federation of Pakistan and others PLD 1997 SC 426; Mehram Ali and others v. Federation of Pakistan and others PLD 1998 SC 1445; Shakoor Muhammad and another v. The State 1983 SCMR 542 and Sharaf Faridi and 3 others v. The Federation of Islamic Republic of Pakistan through Prime Minister of Pakistan and another PLD 1989 Kar. 404 ref.

(f) Constitution of Pakistan (1973)---

---- Part II, Chap. I (Arts. 8 to 28) & Art. 184(3) --- Constitutional petition before Supreme Court under Art. 184(3) of the Constitution --- Interpretation of Fundamental Rights by Supreme Court --- Fundamental Rights enshrined in the Constitution in fact reflect what has been provided in some of the Articles of Universal Declaration of Human Rights --- Supreme Court, while construing the Fundamental Rights may refer to the Articles of the Universal Declaration of Human Rights, if there is no inconsistency between the two with the object to place liberal construction as to extend maximum benefits to the people and to have uniformity with the comity of nations

Sardar Farooq Ahmed Khan Leghari and others v. Federation of Pakistan and others PLD 1999 SC 57 ref.

(g) Constitution of Pakistan (1973)---

---- Art. 184(3) ... Constitutional petition before Supreme Court under Art. 184(3) of the Constitution --- Issuance of direction by the Supreme Court- Scope--?Direction/directions to take administrative actions/measures required by the Constitution can be issued against the Federation, but no direction can be issued to the Legislature to legislate a particular law --- Direction, however, can be issued to the Federation to initiate administrative and legislative measures for complying with the mandate of the Constitution.

Sharaf Faridi and 3 others v. The Federation of Islamic Republic of Pakistan through Prime Minister of Pakistan and another PLD 1989 Kar. 404 and Government of Sindh through Chief Secretary to Government of Sindh, Karachi and others v. Sharaf Faridi and others PLD 1994 SC 105 ref.

Habibul Wahab al-Khairi, Advocate Supreme Court and Kh. Imtiaz M. Khan, Advocate-on-Record for Petitioners (in C. P. No. 11 of 1994).

Sh. Muhammad Naeem, Advocate Supreme Court and Imtiaz M. Khan, Advocate-on-Record for Petitioners (in C. P. No. I I of 1994).

Ch. Muhammad Farooq, Attorney-General for Pakistan and Ch. Akhta Ali, Advocate-on-Record for Respondent No.1 (on Court's Notice).

Date of hearing: 12th May, 1999

JUDGMENT

AJMAL MIAN, C.J.---By this common judgment, we intend to dispose of the above two Constitution Petitions, which have been filed directly in this Court under Article 184(3) of the Constitution of the Islamic Republic of Pakistan, 1973 (hereinafter referred to as the Constitution), by Al-Jehad Trust and residents of Northern Areas seeking various reliefs prayed for therein. It may be advantageous to reproduce the reliefs prayed for in the above Constitution Petitions:--

RELIEFS PRAYED FOR IN CP 11 of 1994
RELEIEFS PRAYED FOR IN C.P. 17 of 1994

"It is, therefore, respectfully prayed that the Fundamental Rights under the Constitution of Pakistan Article 184(3) be enforced and keeping in view the declaration of Human Rights, the Constitutional Status of the people of Northern Areas be declared and being citizen of Pakistan be given full participation in the Federation of Pakistan. The litigant public be given the right to appeal, review, revision before the Supreme Court of Pakistan. The Provincial Government status be given. Any other efficacious remedies which this Honourable Court deem fit and necessary be also granted." ,

2. It may be observed that in order to understand the controversy at issue, an extract may be quoted from the book "The Emergence of Pakistan" written by Chaudhry Muhammad Ali, former Prime Minister of Pakistan, describing the position of Northern Areas at pages 281, 282, 297 end 298, quoted in the judgment of the High Court of Azad J&K, in the case of Malik Muhammad Miskeen and 2 others v. Government of Pakistan through Secretary, Kashmir Affairs and Northern Affairs Division, Islamabad and 10 others (PLD 1993 Azad J&K 1 relevant at page 48), which reads as follows:--

"Kashmir or to give its full name, the State of Jammu and Kashmir, is the northernmost part of the Indo-Pakistan Sub-continent. Its area of 84,471 square miles was the biggest of any_ State in India. Its international boundaries with Tibet, China, Afghanistan and, but for a small intervening strip, with Russia, give it great strategic importance. Owing to its mountainous character the State was sparsely populated except in the beautiful valley of Kashmir. The total population of the State, according to the 1941 census, was about 4,000,000 of whom 77 per cent. were Muslims. The Muslims were in a majority in every Province of the State; there was a 93 per cent. Muslims population in the Kashmir Province; 61 per cent. in Jammu Province; and almost 100 per cent. in the northern region of Gilgit. In Ladakh, which adjoins Tibet, there was a small Buddhist population...(Pages 281 and 282).

While these discussions between the Government of India and Pakistan were proceeding a local revolution occurred in Gilgit in the far North of Kashmir. The area is mountainous and its only communications with the rest of the State are two high passes that are snowbound in winter. The population is almost wholly Muslim. although Gilgit formed part of the State of Jammu and Kashmir, it was administered by the British Government of India through a political agent. When Independence was declared, the area was retroceded by a Dogra Governor. When the unexpected news of the Meharaja's accession to India reached Gilgit, the people were outraged and decided to throw off the Maharaja's yoke.

On October 31, the Hindu Governor was taken into custody by the Gilgit Scouts, and on November 2, the Pakistan flag was hoisted amidst popular acclaim. In response to a request to take over the administration, the Pakistan Government flew a representative to Gilgit on November 14. A little later, the Rulers of Hunza and Nagir, which are comprised -in the Gilgit Agency, requested accession to Pakistan, Since then, the whole area has been administered by the Pakistan Government and has remained outside the arena of conflict in Kashmir. (Pages 297 and 298).

In the above report in the case of Malik Muhammad Miskeen, it has been stated that at present Gilgit, Baltistan and former Frontier Illaqas are designated as "Northern Areas".

The Frontier Illaqas have been stated to comprise Hunza, Nagar, Punial, Yasin, Kuh, Ghizar, Ishkoman, Chilas.

3. It may be pertinent to state that a writ petition was filed in the High Court of Azad Jammu and Kashmir by two residents of Northern Areas in which inter alia Government of Pakistan and Government of Azad Jammu and Kashmir were arraigned as the respondents. It was inter alia prayed that Government of Azad Jammu and Kashmir be directed to assume the administrative control of Northern Areas and to annex it with the administration of Azad Jammu and kashmir. The writ petition was allowed through the above judgment in the case of Malik Muhammad Miskeen and 2 others (supra) in the following terms:

204. We accordingly accept the petition and direct:----

(i) (a) the Azad Government to immediately assume the administrative control of the Northern Areas and to annex it with the administration of Azad Jammu and Kashmir;

(b) the Government of Pakistan to provide an adequate assistance and facility to the Azad Government in attainment of the said objective.

(ii) the residents (State Subjects) of the Northern Areas shall enjoy the benefit of the fundamental rights conferred by the Act, 1974. They shall be provided representation in--

(i) the Government

(ii) the Assembly

(iii) the Council;

(iv) the Civil services-, and

(v) other national institutions, in due course of law

(iii) Azad Government shall take steps to establish administrative and judicial set-up in the Northern Areas within the framework of the Interim Constitution Act.

However, the above judgment was set aside by the Supreme Court of Azad Jammu and Kashmir through a judgment in the case of Federation of Pakistan through the Secretary, Ministry of Kashmir Affairs and Northern Affairs Division, Islamabad v. Malik Muhammad Miskeen and 8 others (PLD 1995 SC (AJ&K) 1), for the following reasons:

"To summarise, in the light of what has been stated, the conclusion which we reach is that Northern Areas are a part of Jammu and Kashmir State, but are not a part of Azad Jammu and Kashmir as defined in the Interim Constitution Act, 1974. We have also reached the conclusion that the High Court of Azad Jammu and Kashmir did not possess the necessary jurisdiction to issue a writ against the Government of Pakistan for handing over the control of the Northern Areas to Azad Jammu and Kashmir. Accordingly both the above-titled appeals are accepted and the impugned judgment of the High Court is vacated with the result that the writ petition filed in the High Court stands dismissed. In view of the circumstances of the case, no order is made as to the costs. "

4. It may be pointed out that from the above-referred two reports, it is evident that the people of Northern Areas have been agitating for their rights. There seems to be no factual controversy. It is an admitted position that the Northern Areas have been administered by the Government of Pakistan since 1947 after the creation of Pakistan. According to the above-quoted extract from the above book of late Chaudhry Muhammad Ali, former Prime Minister of Pakistan, the Northern Areas remained outside the arena of conflict in Kashmir. The above position has also been affirmed in the Fourth Year, Security Council, Official Records wherein in para. 274 the following observation appears:

"274. When it drafted the 13 August Resolution the Commission did not consider the Northern Areas in the same light as it did Western Kashmir. However, by January, 1949 Pakistan undeniably held military control over the Northern Areas; the area was administered by local authorities, not those of the Jammu and Kashmir Government, with the assistance of Pakistan officials. The spirit of the 13 August Resolution had to be observed. Its underlying principle was the withdrawal of forces from the State: the reduction, not the extension of military activities. It contemplated, and expressly stated, that the Indian Government would maintain within the lines existing at the moment of the ceasefire those forces of its Army which in agreement with the Commission were considered necessary to assist local authorities in the observance of law and order. "

5. It appears that even the Government of Pakistan in its written statement has not denied the above factual position. It may be pertinent to reproduce paras. 3 and 4 of the memo. of petition in Constitution Petition No. 11 of 1994 and paras. 3 and 4 of the Written Statement of the Government of Pakistan, which read as follows:-----

Paras. 3 and 4 of the memo. of petition in CP 11/94.

'By January, 1949, Pakistan undeniably held military control over the Northern Areas; the area was administered by local Authorities, not of Jammu and Kashmir Government, with the assistance of Pakistan officials.'

'the civil and political administration of the Gilgit Agency must henceforth be regarded as de facto responsibility of the Pakistan Government, and all matters relevant to the security and law and order in that area must be viewed in the light of this responsibility. "
Paras. 3 and 4 of the Written Statement of the Government of Pakistan.

?3. That the contents of paragraph No.3 of the Petition are admitted as correct.

4. That the contents of paragraph No.4 of the Petition are admitted as correct."

5. In support of the above Constitution Petition No. 11 of 1994, Mr. Habibul Wahab Al-Khairi, learned counsel for the petitioners has urged, as under:

(i) That the Northern Areas is part of the territory of Pakistan in terms of Article I of the late Constitutions of 1956 and 1962, Article 2 of late Interim Constitution of 1972, and Article I of the Constitution.

(ii) That since the people of Northern Areas are Pakistani, they cannot be denied their Fundamental Rights to participate in the Government, to have access to an independent judiciary for enforcement of their Fundamental Rights guaranteed under the Constitution. ?

6. Sh. Muhammad Naeem, learned counsel for the petitioners in Constitution Petition No. 17 of 1994, has reiterated the above contentions of Mr. Habibul Wahab At-Khairi. He also submitted that on account of denial of Fundamental Rights to the people of Northern Areas there is political unrest which is not in the interest of the country.

7. On the other hand Ch. Muhammad Farooq, learned Attorney-General has urged as under:

(i) That this Court cannot determine the question whether the Northern Areas is part of Pakistan, particularly keeping in view that a plebiscite is to be held under the United Nations inter alia Resolution of 13-8-1948 in the Jammu and Kashmir State including the Northern Areas for determining to which country, i.e.' Pakistan or India, they wanted to cede.

(ii) That this Court cannot grant any relief to the petitioners for want of -jurisdiction.

(iii) That the Government of Pakistan has already taken steps to provide self-Government rule and independent judiciary inasmuch as under Northern Areas Council Legal Framework Order, 1994 (hereinafter referred to as the Order) a Council for Northern Areas-has been constituted which is to be elected and a Chief Court has been established under notification dated 17-11-1994.

8. We may take up the first submission of the learned Attorney-General, namely, that this Court cannot decide the question, whether the Nofthern Areas is part of Pakistan or not. In support of his above submission he has referred to the case of Superintendent Land Customs, Torkham v. Zewar Khan and others (PLD 1969 SC 485), in which this Court while dealing with a case of seizure of truck containing foreign made cloth on the Highway between Torkham and Landi Kotal by the Customs Authorities made the following observation on the above question:

"The executive authority of the State has in the exercise of its Sovereign power the right to say as to which territory it has recognised as a part of its State and the Courts are bound to accept this position. Indeed this was the principle that was given statutory effect in section 4 of the Foreign Jurisdiction Act, 1890 and section 6 of the Governor-General's Order No.5 of 1949. If the Courts felt any doubt with regard to the status of such a territory then it was incumbent upon them to make a reference to the Government and to accept its opinion."

9. The legal position enunciated in the above-quoted extract seems to be correct. We would not, therefore, like to comment on the above first contention of Mr. Habibul Wahab Al-Khairi, as it is not necessary to go into the above question. However, we may observe that the Court will have jurisdiction in a case in which a Government unconstitutionally wants to cede a portion of the territory, which is admittedly a part of the territory of Pakistan to a foreign country.

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 6overnment is situated within the territory over which this Court admittedly has jurisdiction, the above Constitution Petitions are maintainable. It cannot be deemed 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.

11. Reverting to the above second contention of Mr. Habibul Wahab Al-?Khairi, it may he pertinent to quote para-. 10 to 14 from the Written Statement of the Federation, which read as follows:--

10. That the maxim of Qui approabate non reprobate' applies here in that he who approbates cannot reprobate. The people of Northern Areas admittedly take full advantage of one part i.e. civic amenities applies here in health, education transport, communications, law and order enforcement etc.), issuance of Pakistan Identity, Cards and Passports, they are at par with other people of Pakistan with regard to the allocation of scats in educational institutions and Federal jobs, and they are defendant against foreign aggression--and reject another part viz., refusal to pay taxes and or deny the sovereignty of Pakistan.

11. The Pakistan exercises de jure administration in the Northern Areas. Assuming, though not conceding, this to be untenable, then the doctrine of de facto administration applies here. Even otherwise, under Public International Law, Pakistan has exercised a continuous effective occupation of the Northern Areas for the past 'fifty years. Throughout the material period, Pakistan has had the intention and the will to act as sovereign, and, there has been an effective and continuous display of State authority. The International community generally and the United Nations Organization in particular recognise the same.

12. That since Pakistan is sovereign in the Northern Areas and expends huge amounts for the betterment of the people and on lubricating a vast administrative machinery (Judiciary and Executive), it also has the inalienable right to regulate such laws which may be deemed appropriate to earn revenues.

13. That there is no Constitutional 6r legal obligation to extend the Northern Areas representation in Majlis-e-Shoora.

14. The Institutions of Northern Areas act as a de facto executive, a de facto judiciary and a de facto legislature. Therefore, their acts are valid.

12. The perusal of the above-quoted paras. of the Federation's Written Statement indicates that it is an admitted position that the people of Northern Areas have the citizenship of Pakistan, inasmuch as they have been issued Pakistani Identity Cards and Passports. They have reserved seats in Pakistani educational institutions and the Federal Government etc. It has also been admitted that the Federation exercises de jure administration in the Northern Areas. In the alternative, it has been pleaded by the Federation that the doctrine of de facto administration applies and the Pakistan has been exercising a continuous effective occupation of the Northern Areas for the past fifty years with the intention to act as sovereign. It has also been pleaded that the international community generally and the United Nations Organisation in particular, recognises the above position.

It may also be pointed out that most of the Pakistani statutes have been made applicable by the Government of Pakistan to the Northern Areas through various notifications issued from time to time commencing from 1947 to 1999. the Pakistan Citizenship Act, 1951 (Adaptation) Order, 1981 was made applicable to Northern Areas on 20-6-1979 and 30-9-1981 vide notification by the Deputy Secretary, Kashmir Affairs/Northern Areas.

13. In the above background, it is not understandable on what basis the people of Northern Areas can be denied the fundamental rights guaranteed under the Constitution. it will not be

out of context to point out that there are two categories of fundamental rights, namely, the first category consists of:

(i) Article 9 (pertaining to security of person).

(ii) Article 10 (relating to safeguards as to arrest and detention of person).

(iii) Article 11 (slavery, forced labour, etc. have been prohibited under it).

(iv) Article 12 (relating to protection against retrospective punishment).

(v) Article 13 (pertaining to protection against double punishment and self? incrimination).

(vi) Article 14 (relating to inviolability of dignity of man, etc.)

(vii) Article 21 (pertaining to safeguards against taxation for purposes of any particular religion).

(viii) Article 22 (relating to safeguards as to educational institutions respect of religion etc.)

(ix) Article 24 (pertaining to protection of property rights).

The above Articles do not make any distinction between a citizen and non-citizen as they speak of "a person".

Whereas under the second category the following Articles fall

(i) Article 15???? (relating to freedom of movement etc.)

(ii) Article 16??? (pertaining to freedom of assembly),

(iii) Article 17?? (relating to freedom of association)

(iv) Article 18?? (pertaining to freedom of trade, business or profession)

(v) Article 19??? (relating to freedom of speech etc.)

(vi) Article 20?? (pertaining to freedom to profess religion and to manage religious institutions).

(vii) Article 23 (relating to provision as to property).

(viii) Article 25 (pertaining to equality of citizens).

The above Articles can be pressed in to service by a citizen only.

14. Since most of the Pakistani statutes have been made applicable to Northern Areas including Citizenship Act as stated above, we are of the view, that the people of Northern Areas are citizens of Pakistan, for all intents and purposes. The above distinction between the two categories of the above fundamental, rights of the Constitution is not material. They, as the citizens of Pakistan, like any other citizen have the right to invoke any of the above Fundamental Rights, but they are also liable to pay taxes and other levies competently imposed.

15. We may also observe that even under the Universal Declaration of Human Rights, to which Pakistan is a signatory, human beings have some basic fundamental rights irrespective of their origin or status. In this behalf reference may be made to Articles 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 13, 15 and 21 of the Universal Declaratiorr of Human Rights which read as follows:

Article 1

All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

Article 2

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other

opinion, national or social origin, property, birth or other status.

Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

Article 3
Everyone has the right to life, liberty and security of person

Article 4

No one shall be held in slavery or servitude; slavery and the salve trade shall be prohibited in all their forms.

Article 5

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. ,

Article 6

Everyone has the right to recognition everywhere as a person before the law.

Article 7

All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

Article 8

Everyone has the right to an effective remedy by the competent National Tribunals for acts violating the fundamental rights granted him by the Constitution or by law.

Article 9

No one shall be subjected to arbitrary arrest, detention or exile

Article 10

Everyone is entitled in full equality to a fair and public hearing by an independent and impartial Tribunal, in the determination of his rights and -obligations and of any criminal charge against him.

Article 13

Everyone has the right to freedom of movement and residence within the orders of each State.

Everyone has the right to leave any country, including his own, and to return to his country.

Article 15

Everyone has the right to a nationality.

No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.

Article 21

Everyone has the right to take part in the Government of his country, directly or through freely chosen representatives.

Everyone has the right of equal access to public service in his country.

The will of the people shall be the basis of the authority of Government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

16. The Fundamental Rights enshrined in our Constitution in fact reflect what has been provided in some of the above-quoted Universal Declaration of Human Rights. It may be observed that this Court while construing the former may refer to the latter if there is no inconsistency between the two with the object to place liberal construction as to extend maximum benefits to the people and to have uniformity with the comity of nations. Somewhat above approach was adopted in the case of Sardar Farooq Ahmed Khan Leghari and others v. Federation of Pakistan and others (PLD 1999 SC 57) relevant at page 191), wherein the following observations were made:

"It may also be pointed out that the above views run-counter to the Fundamental Rights guaranteed by the Constitution and the aforesaid International Covenants of Civil and Political rights, European Convention on Human Rights and American Convention on Human Rights. In my view, a distinction is to be made between an emergency which is imposed when a country is engaged in an actual war or is subjected to actual external aggression and when the same is imposed on account of imminent danger thereof for the purpose of suspension of fundamental rights and continuation of the emergency. In the former case, the above Latin maxim inter artna silent leges (i.e. when there is an armed conflict, the law remains silent) or that the national success in the war is to be ensured in order to escape from national plunder or enslavement even if the personal liberty and other rights of the citizens are scarified as observed by Lord Atkinson in the case of King v. Halliday (1917 AC 260) would be applicable. But in the latter case the rule of proportionality is to be followed as propounded by some of the eminent authors and adopted under above Article 4 of the International Covenants of Civil and Political Rights. Article 15 of the European Convention- of Human Rights, 1967 i.e. a public emergency permits a State to take derogatory measures in derogation of the covenants subject to the condition that the rule of proportionality is observed meaning thereby, that then derogatory steps/actions should be to the extent required by the exigencies of the situation provided such measures are not inconsistent with their other obligations under the international law. "

The above Articles of the Universal Declaration of Human Rights even, otherwise have relevance to the case in hand keeping in view the factum that the status of the Jammu and Kashmir State is to be determined through plebiscite under the auspices of the United Nations which has sponsored the above Universal Declaration of Human Rights.

17. Having held that the people of Northern Areas have the right to invoke the Fundamental Rights enshrined in the Constitution like other citizens of Pakistan, we may observe that this Court while construing Article 17 of the Constitution in the case of Mian Muhammad Nawaz Sharif v. President of Pakistan and others (PLD 1993 SC 473), has inter alia held that the right to form .a political party and to be a member of a political party enshrined in clause (2) there, does not culminate upon winning of the elections, but is a continuous political process, which includes the right of the petitioner to remain as a Member of the National Assembly or as the Prime Minister till the time the life of the Assembly or tenure of the Prime Minister ship is terminated lawfully in accordance with the provisions of the Constitution.

18. It may further be observed that this Court while construing various provisions of the Constitution, particularly relating to the Judiciary, has held that the right of "Access to justice to all" is a fundamental right, which right cannot be exercised in absence of independent judiciary providing impartial, fair and just adjudicatory framework i.e. judicial hierarchy. In this behalf reference may be made to the cases of Government of Balochistan v. Azizullah Memon (PLD 1993 SC 341), Al-Jehad Trust through Raeesul Mujahideen Habib-ul?Wahab Al-Khairi and others v. Federation of Pakistan and others (PLD 1996 SC 324), Mahmood Khan Achakzai and others v. Federation of Pakistan and others (PLD 1997 SC 426), and Mehrarn Ali and others v. Federation of Pakistan and others (PLD 1998 SC 1445). It will suffice to quote the following extract from the above last case:

"(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. "

19. It may also be observed that the Preamble to the Constitution, which has now been incorporated as Article 2A inter alia provides that the State shall exercise its powers and authority through the chosen representatives of the people, wherein the principles of democracy, freedom, equality, tolerance and social justice, as enunciated by Islam, shall be fully observed. It also enjoins that the independence of the judiciary shall be fully secured.

20. Keeping in view the above judgments of this Court in the cases of Mian Muhammad Nawaz Sharif (supra), Azizullah Memon (supra), Al-Jehand Trust (supra), Mahmood Khan Achakzai (supra) and Mehrain Ali (supra), and the above Articles 2A and 17 of the Constitution, the people of Northern Areas are entitled to participate in the governance of their area and to have an independent judiciary to enforce inter alia the Fundamental Rights.

21. It may be stated that para. 6 of the Order (i.e. Northern Areas Council Legal Framework Order) envisages election of twenty-four members, including the Vice-Chairman and the Advisers, six each from Gilgit, Diamer and Baltistan Districts and three each from Ghizer and Ghanchi Districts. But the above Council cannot be equated with an elected Government of a Province, which is evident from the functions of the council defined in para. 17 of the order, which reads as follows:---

17. Functions of the Council.----Subject to the responsibilities of the Government of Pakistan under the UNCIP Resolutions, and the Orders and directions as may be issued by it, and subject to such financial limitations as it may impose from time to time, the following shall be the powers and functions of the Council, namely--

(a) to make the laws with respect to the municipal functions as may be specified by the Government of Pakistan;

(b) to suggest improvements in matters concerning administration of the Northern Areas;

(c) to advise the Provincial Government on local bodies

(d) to assign priorities for development schemes and to decide the inclusion or exclusion of a scheme in the Five-Year Plan and the, Annual Development-Programme;

(e) to review the progress of work of various development programmes schemes and projects;

(f) to accord approval to development schemes costing not more than one hundred million rupees (non-recurring);

(g) to perform and exercise all powers and functions which may be exercised and performed by a Local Council in Pakistan."

22. It is evident from the above-quoted para. 17 that the Council is entrusted with the functions of a local Government. In this view of the matter, it cannot be concluded that the people of the Northern Areas have been allowed to exercise their right to govern the rough their chosen representatives inter alia in terms of? Article 2A of the Constitution.

23. As regards the Judiciary, it appears that under Notification No.'E-II- 1/172-1, dated 15-11-1992 issued by the Ministry of Interior and Frontier Region and Kashmir Affairs, the post of District And Sessions Judge for the Northern Areas (Gilgit and Baltistan) was created for the period commencing from the date of above notification expiring on 3175-1973. It further seems that through notification dated 30-4-1976, a Judicial Commissioner was appointed by the Federal Government for the Northern Areas with the appellate power and other inherent powers of a High Court as defined under section 266,'Cr.P.C. It appears that the above position continued till the constitution of the Chief Court through Notification No.11-2/17/94, dated 17-11-1994 in supersession of previous notification of appointing Judicial Commissioner. The aforesaid notification reads as follows:

NOTIFICATION

In pursuance of decision of the Federal Cabinet in Case No.169/9 of 1994, dated the 25th April, 1994, and in supersession of Kashmir Affairs and Northern Affairs Division's Notification No.E.Il-1/28/72, dated the 3rd December, 1977, the Government of Pakistan is pleased to-----

(a) constitute a Chief Court for Northern Areas consisting of,

(1) Mr. Justice (Retired) Muhammad Ishaq Khan, Chairman former Judge of Peshawar High Court.

(2) Mr. Muhammad Khurshid Khan, District and Sessions Member-Judge, Northern Areas.

(3) Mr. Muzaffar H Malik former Judicial Member-II Commissioner, Northern Areas.

(b) direct that the Court of Judicial Commissioner shall, on constitution of the Chief Court, cease -to function and all cases pending in the Court of Judicial Commissioner shall stand transferred to the Chief Court; and

(c) order that all employees of the Court or Judicial Commissioner shall, on cessation of the Court of Judicial Commissioner, transferred as employees of the Chief Court with the same terms and conditions as were applicable to them before such transfer.

2. The Chief Court, Northern Areas, shall exercise all powers and perform all functions which were being performed by the Court of the Judicial Commissioner being the highest Court of judicature in the Northern Areas.

3. This Notification shall come into force with immediate effect. "

It may further he observed that under para. 2 of the above notification it has been provided that the Chief Court, Northern Areas, shall exercise all powers and perform all functions which were being performed by the Court of the 'Judicial Commissioner being the highest Court of judicature in the Northern Areas, which includes appellate jurisdiction against orders/judgments of subordinate Courts. However, the above Chief Court does not have Constitutional jurisdiction, nor there is any forum of appeal against the judgment/order of the Chief Court. In this regard reference may be made to the case of Shakoor Muhammad and another v. The State (1983 SCMR 542), in which it has been held by this Court that the Court of Judicial Commissioner for Northern Areas is not a High Court and, therefore, appeal from its judgments, decrees or final orders or sentences passed does not lie to the Supreme Court under Article 185 of the Constitution. It is, therefore, patent that the people of Northern Areas have been denied their fundamental right to have access to justice through an independent judiciary as envisaged by the Constitution and enunciated by this Court inter alia in the case of Mehram Ali (supra).

24. The question, therefore, arises for consideration as to, what relief or reliefs this Court can grant in the instant Constitution Petitions, to ensure the fulfilment of the above Constitutional mandates, namely, that the people of Northern Areas should be governed through their chosen representatives and that they should have access to justice through an independent judiciary in order to enforce inter alia the Fundamental Rights guaranteed under the Constitution. The same would require amendments in the Constitution and in the relevant law. It may be pointed out that somewhat similar question arose before a Full Bench of the High Court of Sindh comprising one of us (Ajmal Mian, then C.J. of the said High Court) and six companion Judges in the High Court of Sindh in the case of Sharaf Faridi and 3 others v. The Federation of Islamic Republic of Pakistan through Prime Minister of Pakistan and another (PLD 1989 Karachi 404). The above controversy 'was dealt with in the majority judgment (6 to 1), as under:

"Since the various Federal 'and Provincial Governments after the enforcement of the Constitution in 1973 have failed to do what they were/are required to do under the Constitution, direction/directions under Article 199 can be issued to them to do the same, and similarly a prohibitory direction can also be issued not to do which is not permitted .by the Constitution. I may observe that in order to bring the existing laws in conformity with Articles 175 and 203 of the Constitution not only some administrative actions are required to be taken but also some legislative measures are needed. There seems to be no controversy that direction/direct ions to take administrative actions /measures required by the Constitution and/or any other law, can be issued against the Executive. However, it is a debatable point, whether a direction can be issued to the legislature to discharge its Constitutional obligation as to bring the existing laws in conformity with the provisions of the Constitution by legislating the required laws, but in my view, a direction can be issued to the Federal and Provincial Governments to initiate legislative measures for bringing the existing laws in conformity with the above Articles 175 and 203 of the Constitution,
I am inclined to hold that there is a marked distinction between a direction to the Legislature to legislate and a direction to the Executive to initiate the legislative measures to bring the existing laws in conformity with the provisions of the Constitution. The latter in my view is permissible."

25. It is apparent that direction/directions to take administrative actions/measures required by the Constitution can be issued against the Federation, but no direction can be issued to the Legislature to legislate a particular law. However, a direction can be issued to the Federation to initiate administrative and

legislative measures for complying with the mandate of the Constitution. After having held as above the Full Bench of the High Court of Sindh granted the following reliefs in the above Constitution Petition in which separation of judiciary from the executive was sought in terms of clause (2) of Article 175 of the Constitution:

" 12. I would, therefore, allow the above two petitions in the following terms:--

"(A) The respondent in the first petition i.e. respondent No.2 (i.e. the Province of Sindh) in the second petition is directed--

(i) to issue necessary notification in terms of subsection (2) of section 1 of Ordinance No.XII of 1972 for enforcing the provisions of the aforesaid Ordinance for bifurcating magistracy into Judicial Magistrates and Executive Magistrates and to place the Judicial Magistrates under the administrative control of the High Court within a period of six months;

(ii) to issue necessary Notification under sub-rule (2) of Rule 2 of the Sindh Civil Servants (Efficiency and Discipline) Rules, 1978 and Rule 4 of the Sindh Civil Services (Appointment, Promotion and Transfer) Rules, 1974, notifying the High Court as the Authority within a period of sixty days,

(iii) to initiate legislative measures within a period of six months in order to make necessary amendments in the West Pakistan Civil Courts Ordinance, 1962, Cr.P.C.. Sindh Civil Servants Act, 1973, Sindh Civil Servants (Efficiency and Discipline) Rules, 1973, the Sindh Civil Servants (Appointment, Promotion and Transfer) Rules, 1974, and in the other enactments to make the same in conformity with above Articles 175 and 203 of the Constitution,

(B) Respondent No. I (i.e. The Federation of Pakistan) in the second petition is directed to initiate all legislative/administrative steps/ measures to bring the existing laws relating or affecting the Judiciary in accord with Articles 175 and 203 of the Constitution within period of six months."

The above judgment has been upheld by this Court in the case of Government of Sindh through Chief Secretary to Government of Sindh, Karachi and others v. Sharaf Faridi and others (PLD 1994 SC 105).

26. It may be observed that since the geographical location of the Northern Areas is very sensitive because it is bordering India, China, Tibet and USSR, and as the above areas in the past have also been treated differently, this Court cannot decide what type of Government should be provided to ensure the compliance with the above mandate of the Constitution. Nor we can direct that the people of Northern Areas should be given representation in the Parliament as, at this stage, it may not be in the larger interest of the country because of the fact that a plebiscite under the auspices of the United Nations is to be held. The above questions are to be decided by the Parliament and the Executive. This Court at the most can direct that the proper administrative and legislative steps should be taken to ensure that the people of Northern Areas enjoy their above rights under the Constitution.

27. As regards the right to access to justice through an independent judiciary, it may be observed that the Northern Areas has a Chief Court can be equated with a High Court provided it is manned by the persons of the statute who are fit to be elevated as Judges to any High Court in Pakistan. Its jurisdiction is to be enlarged as to include jurisdiction to entertain Constitutional Petitions inter alia to enforce the Fundamental Rights enshrined in the Constitution and to provide right to approach a higher forum

through a petition for leave to appeal and/or by way of an appeal against orders/judgments of the above Chief Court. The same may require amendments in the aforesaid Notification No.II-2/17/94, dated 17-11-1994 referred to hereinabove in para.23, and/or the Constitution/statute/statutes/order/orders/rules/notification/ notifications.

28. We, therefore, allow the above petitions and direct the respondent Federation as under:

"To initiate appropriate administrative/legislative measures within a period of six months from today to make necessary amendments in the Constitution/relevant statute/statutes/order/orders/rules/notification/ notifications, to ensure that the people of Northern Areas enjoy their above fundamental rights, namely, to be governed through their chosen representatives and to have access to justice through an independent judiciary inter alia for enforcement of their Fundamental Rights guaranteed under the Constitution.

M.B.A./A-174/S?? Petitions allowed

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