2000 Y L R 85

[Lahore]

Before Muhammad Naseem Chaudhri, J

NOOR MUHAMMAD ---Petitioner

Versus

S.H.O., POLICE STATION KLUR KOT, DISTRICT BHAKKAR and 4 others---Respondents

Writ Petition No. 1915 of 1998, decided on 3rd November, 1999.

(a) Penal Code (XLV of 1860)---

----S.216---Constitution of Pakistan (1973)-- Art.199---Constitutional petition-- Allegation of harbouring a proclaimed offender-- Harassment of the petitioner and his family by the police---Father of such proclaimed offender had prayed for a direction to the police to act in accordance with law, not to harass him and his family members by launching illegal raids through trespassing his house, making their movements limited by making them sit in the police station, to humiliate them and penalize them by interfering in their privacy or to injure their dignity in any manner whatsoever for the alleged misdeeds of his son for which he and his family members were not responsible-- Father, according to police (respondents), was an accused in a case registered under S.216, P. P. C: for having harboured and concealed his son who was a proclaimed offender in a murder case and that police had the authority to proceed in the matter-- Allegation against father was that his son (absconder) was seen taking meals with him at a- "Chap " of "Abadi "---Father could not be expected to have provided meals openly to his son about whom he had got published a notice of disinheritment in a daily newspaper---Such type of allegation against the petitioner did not come within the ambit of the words "harbour" or "conceal" as used in S. 216, P. P. C. ---Police, thus, was out to harass the father and his family members to put pressure for the surrender of the absconding accused and in this regard the taking of the father and his family members to police station and adopting third degree methods could not be ruled out---Police were consequently restrained from harassing and insulting the father and his family members in any manner with respect to the offences/misdeeds committed by the son, the absconder---Constitutional petition was accepted accordingly.

(b) Criminal Procedure Code (V of 1898)---

----Ss.47 & 48---Search of place and procedure where ingress not obtainable-- Permission is to be obtained to enter a house properly and according to the situation and it is after the refusal of the occupants to let the police enter the premises for the arrest of the absconding accused that the authority is notified, demand for admittance is made and thereafter in case of refusal doors and windows of the house can be broken open and even at that time the females of the house have to be provided the opportunity to withdraw before the doors, windows are broken open to arrest the accused.

Khutba-tul-Hajja-tul-Wida; Al- Qur'an: Surah Al-Noor, Verses 27, 28; Sahee-Al-Bokhari, Vols. VIII, IX by Dr. Muhammad Mohsin Khan and Riaz Hussain v. S.H.O., Police Station City, Jhang PLD 1998 Lah. 35 ref.

(c) Practice and procedure---

----Where a power is given to do a certain thing in a certain way, the thing must be done in that way or not at all---Other methods of performance are necessarily forbidden.

(d) Penal Code (XLV of 1860)---

----S.216---Constitution of Pakistan (1973), Arts.4, 9, 14 & 25---Equality of citizens--Offender alone being responsible for the offence, police was not competent to enter the house of a fugitive from law wherein he was not present/living while his nears and dears were putting up who had no concern with the occurrence and not liable for the occurrence.

All citizens are equal before the law and are entitled to equal protection of the law. If some member of the family has shown disrespect to the rule of law by committing any offence of ordinary, sensational or heinous nature that does not mean that other family members can be put to the ordeal of facing dishonour, disrespect and harassment in the alleged manner. In this regard the kind words of the Holy Prophet (p.b.u.h.) contained in the last Sermon (Khutba-tul- Hajja-tul-Wida) have to be referred to that "henceforth, the offender himself will be responsible for the offence; no son will be charged for the father's crime and no father will be punished for the crimes committed by the son". Consequently the police is not competent to enter the house of a fugitive from law wherein he is not present/living while his nears and dears are putting up who have no concern with the occurrence and not liable for the occurrence.

Last Sermon (Khutba-tul-Hajja-tul- Wida) ref.

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

----Art.4---Right of individuals to be dealt with in accordance with law---Police has no authority to humiliate the citizens---To enjoy the protection of law and to be treated in accordance with law is the inalienable right of every citizen---Police officers have not been given unbridled authority to humiliate and ridicule the citizens without any iota of evidence against them---To call a person to police station without factual and legal justification, make him to sit there against his will, prima facie, amounts to wrongful confinement and action needs to be taken against the police.

(f) Penal Code (XLV of 1860)---

----S.216---Criminal Procedure Code (V of 1898), S.54---Allegation of harbouring a proclaimed offender---Police has no unfettered powers to arrest any person without warrant and to enter any premises for such purpose---General impression to the contrary is not well founded.

The general impression amongst the Police Officers is that any person can be arrested by them without warrant. It is generally expressed by some of the autocratic Police Officers that they can arrest any person under section 54 of the Code of Criminal Procedure without warrant and fir that matter they can enter/get ingress in any premises. Legally it is not so, which stands projected by the aforesaid statutory provisions. Some times the male, female, old, young relatives of the absconding accused are arrested, removed under section 54 of the Code of Criminal Procedure whose arrest is not shown in the Daily Diary and out of them some are even crippled or eliminated. The habeas petitions are filed and unnecessary expenses of imposed litigation have to be borne. To maintain the balance in the social set-up and in the larger interest of the citizens the unfettered powers cannot be allowed to be used by the Police or the Executive/Political Authorities at whose command also they have to proceed in the aforesaid illegal and unauthorized manner.

(g) Penal Code (XLV of 1860)---

----Ss.76, 77, 78, 79, 80 to 88, 92, 100 & 103---Homicide, its classification and categories detailed.

Homicide is the killing of human being by a human being. Homicide is of three categories; it may be premeditated, involuntary, or voluntary.

Homicide is either lawful or unlawful.

Lawful homicide or simple homicide includes several cases falling under the General Exceptions contained in Chapter .IV of the Pakistan Penal Code. Lawful homicide may be divided, for the sake of convenience, into (1) excusable homicide and (2) justifiable homicide. "Excusable homicide" includes the following cases:--

(a) Where the death is caused by accident or misfortune and without any criminal intention or knowledge in the doing of a lawful act in a lawful manner by lawful means and with proper care and caution (section 80, P.P.C.).

(b) When the death is caused by a child or a person of unsound mind or an intoxicated person (sections 82, 83, 84 and 85 of P.P.C.).

(c) Where the death is caused intentionally by an act done in good faith, for the benefit of the person killed when (i) he, or if a minor or lunatic, his guardian, has expressly or impliedly consented to such an Act (sections 87 and 88, P.P.C.) or (ii) where it is impossible for the person killed to signify his consent, or where he is capable of giving consent and has no guardian from whom it is possible to obtain consent in time for the thing to be done with benefit (section 92, P.P.C.).

"Justifiable homicide" includes the cases where the death is caused--

(a) by a person who is bound, or by a mistake of fact, in good faith, believes himself bound by law (section 76, P.P.C.);

(b) by a judge when acting judicially in the exercise of any power which is, or which in good faith he believes to be given to him by law (section 77, P.P.C .);

(c) by a person acting in pursuance of the judgment or order of a Court of Justice (section 78, P.P.C.). The execution of a lawful sentence of death do not constitute a legal offence;

(d) by a person who is justified or who by reason of a mistake of fact, in good faith, believes himself to be justified by law (section 79, P.P.C.);

(e) by a person acting without any criminal intention to cause harm, and in good faith, for the purpose of preventing or avoiding other harm to person or property (section 81, P.P.C.);

(f) where the death is caused in exercising the right of private defence of person or property (sections 100 and 103, P. P. C.).

"Unlawful homicide" is also known as "culpable homicide". Culpable homicide under the provisions of Pakistan Penal Code would be murder if the act by which the death is caused is done with the intention of causing death, or secondly, if it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused, or thirdly, if it is done with the intention of causing bodily injury to any person and the bodily injury intended to be

inflicted is sufficient in the ordinary course of nature to cause death, or fourthly, if the person committing the act knows that it is so imminently dangerous that it must, in all probability, cause death or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid.

(h) Constitution of Pakistan (1973)---

----Art.9---Security of person---Extra judicial killing---Law cannot be illegally stretched to eliminate the persons without trial.

God has bestowed life to a person as a trust (Amanat) and breach of trust (Khianat) has not been allowed by Him. This is the reason that suicide through any form, viz. self-immolation, taking of poison, hanging, firing etc. etc. has strictly been prohibited and declared as "Haraam". Suicide is a sin. If one cannot murder himself i.e. is not allowed to commit breach of trust regarding his own life by committing suicide, how he can commit "Khianat" in other's life through murder/extra judicial killing while no policeman is injured or receives any scratch. Law cannot be illegally stretched to eliminate the persons without trial. Rather the law can be used for the betterment of the mankind and not to eliminate the citizens and eclipse the moral, legal values.

(i) Criminal Procedure Code (V of 1898)---

----S.167---Police Rules, 1934, Appendix No.25.58(1)---Remands to police custody--Instructions quoted.

(j) Constitution of Pakistan (1973)---

----Art.9---Security of person---Extra judicial killings---Strategy employed by police in eliminating persons without trial discussed.

(k) Constitution of Pakistan (1973)---

----Art.9---Police Act (V of 1861), S.4-- Extra judicial killings---Duty of District Magistrate---District Magistrate who has the control of the administration of Police throughout the local jurisdiction of the District, has also to play his positive role to maintain the check and balance, who can pass the order for holding of judicial inquiry or registration of murder case with respect to extra judicial killings and thereafter the law can be set in motion and the investigation can be conducted under 5.156, Cr. P. C. Aziz Ahmad Malik for Petitioner.

Syed Zulfiqar Ali Bokhari, Asstt. A.-G., Punjab for Respondents.

Date of hearing: 2nd November, 1999.

JUDGMENT

One Abdus Sattar is the son of Noor Muhammad writ petitioner. Abdus Sattar was involved in a murder case. After full-fledged hearing he was convicted and sentenced to life imprisonment. Abdus Sattar filed an appeal before the High Court whose sentence was suspended on statutory ground and he was admitted to bail. Abdus Sattar is said to have committed another murder who is required by the S.H.O. Police Station Klur Kot, District Bhakkar as an accused of this case. According to Noor Muhammad petitioner he got published a citation of disinheritment with respect to his son Abdus Sattar in Daily Nawa-i-Waqt, Lahore on 3-7-1997 and got himself disassociated with him and severed his relations thereof. According to him he and other family members have no concern with his son Abdus Sattar and his misdeeds. Noor Muhammad petitioner filed this writ petition on 4-2-1998 against the S.H.O., Police Station Klur

Kot, District Bhakkar, Deputy Superintendent of Police, Klur Kot Circle, District Bhakkar, Superintendent of Police, Bhakkar, Deputy Inspector-General of Police, Sargodha Range, Sargodha, Inspector-General of Police Punjab, Lahore (respondents Nos. l to 5) wherein he voiced the grievance to the effect that in spite of the fact that he has no connection with his son Abdus Sattar about whose misdeeds he was not liable, the respondents-police were continuously bent upon terrorising, disgracing and creating havoc upon him and his family which was violative of the Constitution 1973, the law of the land and against the law of civilized society as well as the teachings and preaching of Islam. According to the petitioner in violation of the Police Rules, 1934 he and his family members are called to the police station, kept in habeas and are tortured mentally who even are threatened to be murdered in fake police encounter which have become an order of the day. According to him they are disgraced publicly by making them sit in the police station and giving them the shoe-beatings. He maintained that even according to sections 47 and 48 of the Criminal Procedure Code the procedure for the search of a place for the person sought to be arrested has been given and even for the breaking open of Zanana legal protection to the womenfolk involving the Chaddar and Chardewari' is provided' yet the house is trespassed and it has become~ a common practice with the police to enter forcibly and to repass the houses of the people and to torture the innocent inmates of the houses while the record of the police is always silent. The petitioner averred that he and his family members were facing the same miseries at the hands of the police which is supposed and designated to be a disciplined institution/force and which is not proceeding in accordance with law. He maintained that according to the Islamic Law as enunciated in the Holy Qur'an and Sunnah, the Constitution of the Islamic Republic of Pakistan, 1973 and statutory law no one can enter in the house of others without prior permission, no one can be murdered/assessinated without any reason and without the order of a Qazi; but the Police is always bent upon threatening to murder, in Police-staged encounters, the innocent family members of the accused and that the extra-judicial killings are on the increase. The petitioner referred to "Khutba-tul-Hajja-tul - Wida" wherein our Holy Prophet Muhammad (peace be upon him) very kindly expressed that "no one would be responsible for the crime of the other; the son will not be liable for father's crime and the father will not be punished for the crime committed by the son"; while the respondents were out to ignore and violate the aforesaid kind and illuminating words. He maintained that without a search warrant the police could not enter his house while using auto-ladder fitted in the police vehicle and to the disrespect and disgrace of the womenfolk in the house and other family members and that the police was violating the privacy of his home. He alleged that the police, Police Station Klur Kot arrested him on 13-9-1997 without any arrest warrant or without registration of a criminal case against him. He maintained that he was arrested from Pull-111, Sargodha from the gate of Market Mosque when he was going to offer his ' Maghrib' prayers and in this regard he referred to affidavits, fourteen in number of different persons, attached with this petition. He pleaded that he was taken to Police Station Klur Kot on 14-9-1997 and a case under section 216, Pakistan Penal Code was registered against him allegedly for harbouring his aforesaid son Abdus Sattar. He denied the aforesaid fact on the ground that his son did not visit his house whom the refuge was never afforded by him. He maintained that he was admitted to bail but from 14-9-1997 onwards the police had raided his house illegally twenty times without any entry in the official record who abused and insulted him, his wife and his three young daughters. He maintained that the police has no authority to trespass his house at any time and at its discretion being against Shariah, teachings of the Holy Prophet and the law of the land as he and his family members are not responsible for the acts and misdeeds of his son Abdus Sattar. He alleged that two days before the Eid-ul-Fitr he was taken to Police Station Klur Kot by local police wherefrom he was released later on after receiving the illicit gratification and that due to highhandedness of the police he was not in the position to effect the Rukhsati' of his daughter whose marriage was scheduled to take place on 25-2-1998.

2. With the aforesaid background Noor Muhammad writ petitioner prayed that the respondent-police may be directed to act in accordance with law, not to harass him and his family members by launching illegal raids through trespassing his house, making their movements limited by making them to sit in the Police Station, to humiliate them'-and to penalize them by effecting interference in their privacy or to injure their dignity in any manner whatsoever for the alleged misdeeds of his son Abdus Sattar for which he and his family members are not responsible.

3. In the circumstances of the matter I called for the comments from the Superintendent of Police, Bhakkar as well as the Inspector-General of Police, Punjab, Lahore. I particularly mentioned in the relevant order that the comments to be prepared by the Inspector-General of Police Punjab, Lahore shall be gone through by him and shall be signed by him. I had to pass the order because the aforesaid type of working of the Punjab Police is being brought to the notice of the Lahore High Court, Lahore in large number of cases wherein the nears and dears as well as the other relatives, acquaintances of the fugitive from law generally complain about their involvement in false cases thereof and showing disgrace, disrespect to them as well as causing of harassment and torture with threats of killings without legal and factual justification.

4. Mr. Jehanzeb Barki, Inspector- General of Police, Punjab, Lahore sent the comments signed and obviously read by him wherein it is contained that Abdus Sattar son of Noor Muhammad writ petitioner is a proclaimed absconder and that Noor Muhammad was arrested on account of harbouring his absconding son. He assured that no harassment shall be extended to Noor Muhammad petitioner against whom a case under section 216, Pakistan Penal Code has been registered which is pending before the Area Magistrate. The Superintendent of Police, Bhakkar as well as the S.H.O., Police Station Klur Kot, District Bhakkar submitted their separate comments/report wherein they took up the stand that Abdul Sattar son of Noor Muhammad was a fugitive from law who is involved in a murder case registered at Police Station Klur Kot. They expressed therein that the information was imparted by Ahmad Nawaz complainant of murder case of F.I.R. No. 150 registered on 18-6-1997 under section 302, Pakistan Penal Code at Police Station Klur Kot that Noor Muhammad (writ petitioner) and his son Abdus Sattar (absconder) were found sitting together and taking meals at Chah Gulbazvala within the area of Police Station Klur Kot and that on its basis F.I.R. No. 216, dated 14-9-1997 was registered under section 216, Pakistan Penal Code at Police Station Kalur Kot against Noor Muhammad writ petitioner. According to the said respondents-Police officers thereafter the raid was conducted at the place the writ petitioner harboured his son which remained futile and that the petitioner was arrested from "Chandni Chowk" M.M. Road on 16-9-1997 who was found guilty and challaned to face the trial under section 216, Pakistan Penal Code. The causing of harassment to petitioner and his family members was denied. However the undertaking was given that no illegal activity shall be extended in future to the petitioner and his family members. It was asserted that the writ petition was filed without legal or factual justification.

5. I have heard the learned counsel for the petitioner as well as the learned Assistant Advocate-General and gone through the record before me. Learned counsel for the petitioner laid the emphasis that the petitioner and his family members are not liable for the misdeeds of his son Abdus Sattar who has become a fugitive from law and whom he has disinherited through the publication of Notice, dated 3-7-1997 in daily Nawa-i- Waqat Lahore. He added that for the crime allegedly committed by his said son the police cannot degrade, insult and humiliate other relatives by calling them to police station and disgracing them by adopting third degree methods. He continued that threats for murder in false police encounter were made to the petitioner, his wife and daughters whereby they had lost the confidence and were panic striken who at present luckily are alive without any damage. According to him the police has coined the method of extra- judicial killings whereby the accused and their relatives are being killed/eliminated without resort to judicial process whereby even after death penalty

awarded by the Court of competent jurisdiction the appeals are maintainable before the High Court and Supreme Court and that the false police encounters have no blessings from the religious commands and the law of the land which are rather negation of rule of law provided by the Constitution, 1973 and statutory law. He maintained that the police registered F.I.R. No. 216, dated 14-9-1997 under section 216 Pakistan Penal Code on the information of the complainant of the murder case that petitioner's son Abdus Sattar was seen having meals with him at Chah Gulbazvala, which was simply false, while the police itself did not take any step for the arrest of the absconder accused and that if the aforesaid type of information/allegation is given the weight then one or more cases can be registered daily against the petitioner and other family members on the information of the complainant of the murder case which would be naked source of harassment and disgrace. According to him registration of F.I.R. No. 216 was the outcome of mala fides and such a free hand may not be allowed to the police. On the contrary learned Assistant Advocate General argued that Noor Muhammad writ petitioner is the accused of Crime Case No. 216 registered on 14-9-1997 under section 216, Pakistan Penal Code and the Police had the authority to proceed in the matter as he harboured and concealed his son Abdus Sattar, a proclaimed offender. He expressed that the denial of the police about the unnecessary harassment may be considered enough and Noor Muhammad was rightly arrested. He referred to the under taking of the police to the effect that the writ petitioner and his family shall not be harassed. He added that there was no occasion to murder the petitioner and his family members and the apprehension is simply irrelevant. He maintained that a case under section 216, Pakistan Penal Code can be got registered by a person from the public, if the information is imparted to the police that any person has harboured or concealed any fugitive from law. My view is that the reasoning adopted by the learned counsel for the petitioner has to prevail. Generally cases under section 216, Pakistan Penal Code are registered, but the absconder accused is not arrested. The police would show that the absconder accused made good his escape in the presence of the contingent of police which is enough to falsify this type of allegation. Rather it casts lurking suspicion on the working of the police as it is not possible that an absconder accused would run away in the presence of the police officials especially when there is no encounter. This type of allegation or the one expressed by the respondent-police in the comments about the imparting of information by the complainant of the murder case that absconder accused was seen taking his meals with his father is adopted to justify the police to involve the relatives of the absconder accused to put the pressure upon him to surrender as the third degree methods are adopted and employed on the nears and dears in this regard. The framers of law (i.e. section 216) made the same bailable and obviously the wisdom behind is to restrain the police from working in an autocratic manner as the accused can be admitted to bail by the police and if produced before the Court, by it immediately as o1 right of the accused as contemplated under section 496 of the Code of Criminal Procedure. It shall have also to be analysed as to whether taking of meals at Chah Gulbazwala by the absconder accused with his father (writ petitioner) allegedly seen by the complainant of the murder case comes within the purview of the words harbour or conceal as used in section 216, Pakistan Penal Code. The dictionary meanings of the word "conceal" are: keep secret, to hide complete or carefully, act or state of hiding. The dictionary meanings of word harbour are: place of safety, or refuge or shelter, asylum. It is not narrated in the comments/report submitted by the respondents (police) that in whose house the absconder accused was having the meals at Chah Gulbazwala. It is a matter of common knowledge that on one named Chah there are many houses of one Abadi. It cannot be expected that Abdus Sattar being absconder accused would be provided meals openly by his father about whom he has got published a notice of disinheritment in daily Nawa-i-Waqat, Lahore on 3-7-1997 while this writ petition was filed on 4-2-1998. Further there being not specification of the house in the comments/report wherein the meals were taken by Abdus Sattar absconder in the company of his father Noor Muhammad writ petitioner, the allegation of harbouring and concealment can well be termed to be anomalous and prima facie without substance. Thus it can be expressed that the aforesaid type of allegation made by the

complainant of the murder case does not come within the ambit of the words harbour or conceal used in section 216, Pakistan Penal Code. The S.H.O., Police Station Kalur Kot, District Bhakkar seems to have proceeded in routine for wrongful gain to put the pressure on Abdus Sattar absconding accused for his surrender as the petitioner and other female members of the family shall be humiliated and disgraced.

6. The only irresistible conclusion which can be drawn from the aforesaid state of affairs and discussion would be that the contention of the writ petitioner is correct that all has been done to harass him and other family members to put the pressure for the surrender of the absconding accused Abdus Sattar. In this regard the taking of the petitioner and his family members to Police Station Klur Kot and adopting third degree methods cannot be ruled out. Consequently the respondents are restrained from harassing and insulting the petitioner and his family members in any manner with respect to the offences/misdeeds committed by Abdus Sattar absconder.

7. In the circumstances it is proper to examine case F.I.R. No. 216 registered on 14-9-1997 under section 216, Pakistan Penal Code at Police Station Klur Kot, District Bhakkar. The Judicial File and Police File shall be requisitioned from the concerned quarters regarding which the separate order has been passed for compliance by the office.

8. It is important to note that the learned counsel for Noor Muhammad writ petitioner canvassed that such type of allegations/assertions are being raised/made by the public against the police in different matters and it is in the fitness of the things that some authoritative view is enunciated by this Court. I agree with him. I feel that it is a matter wherein complete analysis, appreciation and dissection is made because the same would be a source of protection and convenience for the citizens being that of public interest litigation. It is a common complaint these days that without any hesitation, without legal justification and just in routine the police has made it a practice to enter the houses of the citizens and in such like cases the family of the absconder accused is vexed and taxed by making entry in the house without permission under the garb that the absconding accused is present there. Even the females are insulted by putting different questions to them. Practically the family members viz. children, old or young, males or females, married or unmarried etc. are called at the police station who are made to sit there in a disgraceful manner upon whom the insult is showered by different third degree methods who are also administered shoe-beatings publicly and in the police station. Even the threats of murder in fake police encounters are issued and rather the accused or his relatives are also eliminated in staged encounters also termed/known as State Justices Method. Muss fuss emanates amongst the citizens against such type of working of the police which is creating big gulf between the public and the police which is not a happy sign towards the maintenance of positive texture of the society being against discipline whereby the respect of the UNIFORM of the Police Department is diminishing and decreasing which fact is also proving to be a conspicuous cause for the worsening of the law and order situation. Further the damage to the image and prestige of the Police Department done in this manner becomes incalculable. I would express the view that the litigation of every type including the one in hand is not the luxurious hobby of the citizens wherein sufficient fee is paid to the learned advocate(s) and the amount has to be spent on the preparation of the brief or making the journey etc. etc. It is only and only at the time when the shoe pinches the wearer that such type of writs are filed. Without prejudice it can safely be expressed that the nefarious acts/misdeeds of a disobedient member of a family should not be a source of inconvenience, harassment and insult to the other family members and that also at the hands of the Disciplined Force of Police.

9. Justice in one sense or the other lies at the foundation of every human society, however, more or less civilized it may be. Justice has not to be provided by the Courts only. The scale of justice has also to be kept in the correct manner by all the pillars and Departments of the State. In the criminal administration the correct and fair

investigation is the foundation of justice. If any Department does not act in accordance with law and plays the part in the negative manner, the Judiciary has to play the important role in the Constitutional jurisdiction. Islam signalized a momentous development in the affairs of mankind. Clashes of interests lead to actions that disturb the social balance. To bring the society back into a state of equilibrium, some sort of machinery has to be evolved for administration of justice, which primarily aims at maintaining a balance between the rights of individuals or groups. Obviously the Judiciary has to play its role at such a juncture. With this background I have thought it proper to tackle the dispute in hand and to give my findings keeping in view the religious commands, moral values as well as the Constitutional and statutory safeguards provided to the citizens of Pakistan.

10. I feel that it is matter wherein complete analysis, appreciation and dissection of the matter is made because the same would be source of protection and convenience to the petitioner and the general public/citizens. This judgment shall also project as to how the idea of good governance was ignored, violated and shattered before or after the institution of this writ petition during the month of February, 1998. It is the proper stage to express that good governance can materialize, if there is respect for the law of the land.

11. The separate homeland ----Pakistan-- was desired and achieved by the Muslim with the background of Islamic Ideology through multifarious sacrifices of migration, life, honour, economy etc. According to Article 2 of the Constitution of the Islamic Republic of Pakistan, 1973 "Islam shall be the State religion of Pakistan. " Article 2-A of the Constitution, 1973 provides that the principles and provisions set out in the Objectives Resolution reproduced in the Annexure have been made the substantive part of the Constitution and shall have effect accordingly. The Objectives Resolution was inserted by Presidential Order No. 14 of 1985. The aforesaid Annexure (Article 2-A) is being reproduced in toto as under for the emergence of the true picture:---

"CONSTITUTION OF PAKISTAN

ANNEX

(ARTICLE 2-A)

The Objectives Resolution

(In the name of Allah, the most Beneficent the most Merciful.)

Whereas sovereignty over the entire universe belongs to Allah Almighty alone and the authority, which He has delegated to the State of Pakistan, through its people for being exercised within the limits prescribed by Him is a sacred trust;

This Constituent Assembly representing the people of Pakistan resolves to frame a Constitution for the severeign independent State of Pakistan;

Wherein the State shall exercise its powers and authority through the chosen representative of the people;

Wherein the principles of democracy, freedom, equality, tolerance and social justice as enunciated by Islam shall be fully observed;

Wherein the Muslims shall be enabled to order their lives in the individual and collective spheres in accordance with the teachings and requirements of Islam as set out in the Holy Qur'an and Sunnah;

Wherein adequate provision shall be made for the minorities to profess and practise their religious and develop their cultures;

Wherein the territories now included in or in accession with Pakistan and such other territories as may hereafter be included in or accede to Pakistan shall form a Federation wherein the units will be autonomous with such boundaries and limitations on their powers and authority as may be prescribed;

Wherein shall be guaranteed fundamental rights including equality of status, of opportunity and before law, social, economic and political justice, and freedom of thought, expression, belief, faith, worship and association, subject to law and public morality;

Wherein adequate provision shall be made to safeguard the legitimate interest of minorities and backward and depressed classes;

Wherein the independence of the Judiciary shall be fully secured;

Wherein the integrity of the territories of the Federation, its independence and all its rights including its sovereign rights on land, sea and air shall be safeguarded;

So that the people of Pakistan may prosper and attain their rightful and honoured place amongst the nations of the world and make their full contribution towards International peace and progress and happiness of humanity."

12. Our beloved country ---PAKISTAN- is an Islamic State and not a secular State. Islam is the State Religion of Pakistan in view of Article 2 of the Constitution of the Islamic Republic of Pakistan under Article 31 of the Constitution, steps shall be taken to enable the Muslims of Pakistan individually and collectively, to order their lives in accordance with the fundamental principles and basic concepts of Islam and to provide facilities whereby they may be enabled to understand the meaning of life according to Holy Qur'an and Sunnah. Further State shall endeavour, as respects the Muslims of Pakistan to make the teachings of Holy Qur'an and Islamyiat compulsory, to promote unity and the observance of the Islamic moral standards to secure the proper organization of Zakat, Ushr, Auqaf and mosques. Under Article 40 the State shall endeavour to preserve and strengthen fraternal relations among Muslim countries based on Islamic Unity. Only a Muslim not less than the age of 45 can be elected as the President of Pakistan under Article 41(2). Under Article 91 there shall be cabinet of Ministers with the Prime Minister (at present obviously the Chief Executive) as its head, to aid and advise the President in the exercise of his functions. According to the pro forma of Oath to be administered to the said office only a Muslim can contest and be elected as a Prime Minister of Pakistan. According to Article 203-C the Federal Shariat Court of Pakistan has been constituted which under Article 203-D has been empowered either of its own motion or on the petition of a citizen of Pakistan or the Federal Government or the Provincial Government, examine and decide the question whether or not any provision of law is repugnant to the Injunctions of Islam as laid down in the Holy Qur'an and the Sunnah of the Holy Prophet (p.b.u.h.). Under Article 203-F(3) Shariate Appellate Bench has been constituted in the Honourable Supreme Court of Pakistan to hear the appeals against the judgments of the Federal Shariate Court. According to Article 227 all existing laws shall be brought in conformity with the Injunctions of Islam as laid down in the Holy Qur'an and Sunnah. Under Article 228 the Council of Islamic Ideology has been constituted which has the jurisdiction to make recommendations as to ways and means of enabling and encouraging the Muslims of Pakistan to order their lives individually and collectively in all respects in accordance with principles and concepts of Islam as enunciated in the Holy Qur'an and Sunnah, to advise as to whether a proposed law is or not repugnant to the Injunctions

of Islam, to ring existing laws according to Injunction of Islam. In the Third Schedule of the Constitution, 1973 are published the approved pro formal about the Oaths of Office of the President the Prime Minister (and both have to be Muslims), Federal Minister or Minister of State, the Speaker of National Assembly or Chairman of Senate, Deputy Speaker of National Assembly or Deputy Chairman of Senate, Member of National Assembly or Member of Senate, Governor of Province, Chief Minister or Provincial Minister, Speaker of a Provincial Assembly, Deputy Speaker of a Provincial Assembly and Member of a Provincial Assembly. All of them have to individually solemnly swear in addition to other undertakings that he will strive to preserve the Islamic Ideology which is the basis for the creation of Pakistan and that he will preserve, protect and defend the Constitution of the Islamic Republic of Pakistan: According to the relevant pro forma of the oath of office of Auditor-General of Pakistan, Chief Justice of Pakistan or Chief Justice of a High Court or Judges of the Supreme Court or a High Court and the Chief Election Commissioner each of them has to solemnly swear to discharge the duties and perform the functions in accordance with the Constitution of the Islamic Republic of Pakistan in addition to other undertakings. In the pro forma about the oath of office of the Chief Justice or Judges of the Federal Shariate Court each of them has to solemnly swear to discharge the duties and perform the functions to the best of ability and faithfully in accordance with law. While taking Oath of each of the aforesaid office all have to pray "May Allah Almighty help and guide me (Ameen)".

13. The frame of the Constitution of the Islamic Republic of Pakistan, 1973 is based on Islamic Ideology and no Article of the Constitution or any section of any codified law can be against the Injunctions of Islam. With this background a question arises as to how the Qur'anic verses and the Ahadith of the Holy Prophet (p.b.u.h.) can be ignored with respect to the grievance of Noor Muhammad petitioner voiced through the filing of this writ petition.

14. The Holy Prophet Muhammad (s.a.w.) very kindly expressed in the 'Khutba-tul-Hajja-tul-Wida' as under:

> "I am leaving in your midst some thing which if you held it fast will not let you go astray and it is the Book of Allah. Beware of exaggeration in religious matters. People before you have perished because of it."

15. Sunnah of Holy Prophet Muhammad (p.b.u.h.) is one of the sources of Muslim Law which comprises the sayings and actions of the Holy Prophet (p.b.u.h.). The Sunnah is the Commentary on the Holy Qur'an. As such the kind words of the Holy Prophet (s.a.w.) narrated through 'Khutba-tul-Hajja-tul-Wida' are also to be followed by the Muslims in letter and spirit.

16. At this proper stage it shall have to be seen as to whether any disobedient, indisciplined and accused person can make liable his family for his acts/misdeeds/crime. In the Comments/Report the Police Officers have not mentioned any fact against the petitioner or his family members or any act of the petitioner or his family members to make them liable for any offence or misdeed allegedly committed by Abdus Sattar accused of the murder case who is the son of Noor Muhammad writ petitioner. I feel honoured to express that our Holy Prophet Muhammad (peace be upon him) in his last Sermon commonly known as ' Khutba-tul-Hajja-tul- Wida' has very kindly expressed as under for the guidance of the man kind:

> "Henceforth the offender himself will be responsible for the offence; no son will be charged for the father's crime and no father will be punished for the crime committed by the son."

17. I have to express my confirmed belief that no Muslim can and should dare disobey the aforesaid sermon of our Holy Prophet Muhammad (p.b.u.h.) out of which the

aforesaid portion has been quoted, not to speak of- that the same is violated. I make bold in expressing that the disobedience of tire aforesaid sermon has to be curbed with iron. hand. We all have religiously been taught as under:

> "Stop the vice by your hands (force) and if not possible, then orally challenge him to desist and if you cannot do this much, at least denounce in your heart. This is sign of weak faith (Emaan)".

18. It is necessary to record that even under the statutory laws of our country only and only the accused himself is responsible for the offence committed by him and no near and dear, friend can be made to sail with the accused in the same boat. It is simply surprising that the innocent are made to suffer without any fault on their part. What a pity?

19. Now I take up the matter about the entry of the police in the house of the petitioner without permission of inmates who admittedly, as expressed in the comments/report submitted by the Police Officers, are not the accused of the murder case.

20. Asking permission to enter a house or a dwelling place is necessary as Islam sets great value on the privacy of home life. Privacy is the state of being let alone. It means freedom from human interference by any means. Going into the houses of others without permission is strictly forbidden in Islam. The home of a person is meant for rest, solace and peace. Sudden entry into the homes of others leads to many afflictions and creates psychological problems particularly for females and minors who feel insecure for all the times and simply go on pondering over the irony of fate. It is necessary to record that some times even the cattle, tractor and other household articles of the family are removed without preparation of memo. of recovery which are either misappropriated or, handed over to others without any writing to the detriment of the owner(s). The household articles are also damaged.

21. Sanctity of privacy has been enjoyed and ensured by the Holy Qur'an to the extent that entry into a house without permission is forbidden as laid down in verses 27 and 28 of Surah Al-Noor.

Verse 27.

> "Oye who believe! Enter into houses other than your own without first announcing your presence and invoking peace upon the folk thereof. That is better for you, that ye may be heedful."

Verse 28

> "And if ye find no one therein, still enter not until permission hath been given. And if it be said unto you; Go away again, then go away, for it is purer for you. Allah knoweth what ye do".
>
> **Al-Qur'an, 24: 27-28**

22. These Qur'anic verses contain simple social injunction, which, if acted upon, is calculated to save the society from trouble, suspicion and slander-mongering. It puts a stop to possible scandals and preserves the privacy of the houses, which ought not be disturbed and intruded upon.

23. At this stage the Sunnah of our Holy Prophet Muhammad (p.b.u.h.) has to be referred to, which is a source of Shariah. It comprises the sayings and actions of the Holy Prophet Muhammad (p.b.u.h.) as well as the agreements entered in his presence with his blessings. The Sunnah is the treasury of wisdom, which is at once a commentary on the Holy Qur'an and compliments to its teachings. Holy Qur'an gives aims while Sunnah provides the ways. The authority of Sunnah can be sure and

definite. The Holy Prophet (p.b.u.h.) established law and order in the uncivilized country and gave them balanced Constitution and law which gave a workable system of Government bestowing the fundamental rights for the individuals and for the people as a whole. The Holy Prophet Muhammad (p.b.u.h.) guaranteed definite rights to individuals, which are inviolable. Rule of law and equality of all before law secured the position of persons against possible aggression or tyranny on the part of the persons in authority. Hazrat Muhammad (p.b.u.h.) was sent to earth to establish the role of God and a system both just and good so that it is a source of restoration of happiness, solace and satisfaction in the minds of mankind. The love for the Holy Prophet (p.b.u.h.) showers the harmony and beauty which pervade all things. The Ahadeeth of the Holy Prophet Muhammad (p.b.u.h.) have been collected by the companions and disciples of the time and are there in black and white for our guidance. On the subject and dispute in hand I feel honoured to reproduce as under some of the Ahadith from Saheeh-Al-Bokhari, Volumes VIII and IX by Dr. Muhammad Mohsin Khan, Islamic University Al-Madinah-Al Munawarah:

(I) **"262. Narrated Abu Sa id Al. Khurdi (**r.a),. While I was present in one of the gatherings of the Ansar, Abu Musa came as if he was scared, and said, "I asked permission to enter upon Umar three times, but I was not given the permission, so I returned." (When Umar came to know about it) he said to Abu Musa, "Why did you not enter?" Abu Musa replied, "I asked permission three times, and I was not given it so I returned, for Allah's Apostle (s.a.w.) said, "If anyone of you asks the permission to enter thrice, and the permission is not given, then he should return." Umer said, "By Allah! We will ask Abu Musa to bring witnesses for it." (Abu Musa (r.a) went to a gathering of the Ansar and said), "Did anyone of you hear this from the Prophet (s.a.w.)?" Ubai-bin-Ka'b (r.a) said, "By Allah, none will go with you but the youngest of the people (as a witness)" I (Abu Said) (r.a.) was the youngest of them, so I went with Abu Musa (r.a.) and informed Umar (r.a.) that the Prophet (s.a.w.) had said so.

(See Hadith No. 227; Vol. III).

(II) (14) CHAPTER. If a man is invited, should he ask permission to enter at his arrival?

Abu Huraira (r.a.) said that the Prophet (s.a.w.) said, "(The invitation) in itself is his permission. "

(III) 263. Narrated Abu Huraira (r.a.) I entered (the house) alongwith Allah's Apostle (s.a.w.) There he found milk in a basin. He said; "O Aba Hirr! Go and call the people of Suffa to me." I went to them and invited them. They came and asked permission to enter, and when it was given, they entered.

(See Hadith No. 459 for details).

(IV) 26. Narrated Abu Huraira (r.a.), that he heard Allah's Apostle (s.a.w.) saying, "We (Muslims) are the last (to come) but (will be) the foremost (on the Day of Resurrection)." And added, "If someone is peeping (looking secretly) into your house without your permission, and you throw a stone at him and destroy his eyes, there will be no blame on you. "

(V) 27. Narrated Yahya (r.a.): Humaid said, "A man peeped into the house of the Prophet (s.a.w.) and the Prophet (s.a.w.) aimed an arrow head at him to hit him." I asked, "Who told you that?" He said, "Anas-bin-Malik," (r.a.)

(See Hadith Nos. 258 and 259, Vol. 8)

(VI) 39. Narrated Abu Huraira (r.a): Abul Qasim (s.a.) said, "if any person peeps at you without your permission and you poke him with a stick and injure his eye, you will not be blamed."

(VII) 38. (a) Narrated Anas (r.a.): A man peeped into one of the dwelling places of the Prophet (s.a.w). The Prophet (s.a.w.) got up and aimed a sharp-edged arrow head (or wooden stick) at him to poke him stealthily.

(VIII) 38. (b) Narrated Sahl-bin-Sa'd As Sa'di (r.a.). A man peeped through a hole in the door of Allah's Apostle's (s.a.w.) house, and at that time, Allah's Apostle (s.a.w.) had a Midri (an iron comb or bar) with which he was rubbing his head. So when Allah's Apostle (s.a.w.) saw him, he said (to him), "If I had been sure that you were looking at me (through the door), I would have poked your eye with this (sharp iron bar)". Allah's Apostle (s.a.w.) added: "The asking for permission to enter has been enjoined so that one may not look unlawfully (at what there is in the house without the permission of the people). "

(IX) 39. Narrated Abu Huraira (r.a.). Abdul Qasim (s.a.) said, "If any person peeps at you without your permission and you poke him with a stick and injure his eye, you will not be blamed."

24. It would be proper to insert one episode mentioned in Mukarraam-ul-Akhlaq Laabi Biqar Muhammad-Bin-Jaffar-Al- Khalaiti recorded in the case-law printed as "Riaz Hussain v. S.H.O., Police Station City, Jhang" (PLD 1998 Lah. 35):

"Hazrat Umar (r.a.) heard the singing voice from a house one night who entered the same by scaling over the wall. He also saw a lady and wine there. He uttered that be (the person) considered that he would show disobedience to God and would not be known? That person replied to the Amir-ul-Mominin (r. a.) not to proceed in haste as in case he had committed one sin he (Umar Ibni Khataab r.a.) committed three: First; that of spying. Secondly; entry in the houses is permitted from doors and he scaled over the wall and thirdly; God had ordained not to enter the houses unless permission had been given while no permission had been obtained. On that Umar (r.a.) admitted his mistake and did not proceed against that person who rather got the undertaking from him (person) to follow the right path."

25. The aforesaid incident has projected that even the Ruler, obviously Police in the instant case, cannot enter/trespass the house of any person and that before entry permission must be procured from the persons living therein.

26. Another story is told of Umar-ibn-al Khataab (r.a.) who when told that Abu Mihjan al-Thaqafi was drinking wine in his home with some of his companions, went to see. But when he entered the house; he found that Abu Mihjan was only one man, whereupon Abu Mihjan said, "This is forbidden unto you. God forbade you from spying."

27. These examples establish the principle under Islamic Law that man's inviolability must be protected.

28. In view of what has been expressed above the Muslims in Pakistan have to individually and collectively enable their lives in accordance with the teachings and requirements of Islam as set out in the Holy Quran and Sunnah. In the light of the aforesaid Constitutional provisions; the aforesaid reproduced words of God in verses 27 and 28 of the Surah Al-Noor in Holy Quran and the aforesaid Ahadeeth have to be followed by every Muslim of every walk of life for all the times at all the places and

obviously by every citizen of Islamic Republic of Pakistan belonging to any creed, religion, tribe, pillar of the State and every Department.

29. At this stage it would be proper to express that entry in the house of a stranger/citizen by the Executive Authorities including the members of the Police Force has been streamlined by different codified provisions of law. Chapter VII of the Code of Criminal Procedure deals with the processes to compel the production of documents and other movable property and for the discovery of the persons wrongfully confined. Part B of Chapter VII ibid deals with Search Warrants. Section 96 deals with the issuance of Search Warrants in case the documents, letters and telegrams, mentioned in sections 94 and 95 are to be produced/recovered.. Section 98 relates to the search of house suspected to contain stolen property forged documents etc. Section 100 relates to the search for person wrongfully confined. Section 102 deals with persons incharge of closed place to allow the search. These provisions project that Search Warrants have to be issued by the competent Courts and obtained by the Police/Executive Authorities about the aforesaid types of search on the basis of relevant Search Warrants. Even under Article 22 of the Prohibition (Enforcement of Hadd) Order, 1979 the house cannot be entered and searched without any Search Warrant to be issued by the competent Magistrate, Collector, Prohibition Officer for the search of any intoxication. Same is the provisions under Article 20 of the Control of Narcotic Substances Act, 1997 according to which the Search Warrant is to be issued by the Special Court for search of a house when narcotic is alleged to have been kept/stored in a house and the same is to be recovered. According to Notification No. F.19(1)/96,A.III, dated 26-8-1997 issued by the Ministry of Law, Justice, Human Rights and Parliamentary Affairs, Government of Pakistan the Special Courts shall comprise the Sessions Judge posted in a District of the Province of Punjab. Section 103 of the Code of Criminal Procedure provides that the search of the house is to be made by the police in the presence of two or more respectable persons of the vicinity and the occupant of the house may attend the proceedings. The wisdom behind is that sanctity stands attached to the privacy of the occupant of the dwelling and search of every type is to be made in the presence of the citizens according to the manner incorporated in the aforesaid procedural law.

30. It is on the ground, stand and assertion that the absconding accused/fugitive from law is present and hiding himself in a house, owned/possessed by a stranger or a relative; that the police takes the liberty as of legal right/competence to enter the house without a search warrant. In this regard sections 46 to 49 of the Code of Criminal Procedure are generally invoked and banked upon by the members of the Police Force/Executive Authorities which are being reproduced as under: ---

> "46. **Arrest how made.**---(1) In making an arrest the police officer or other person making the same shall actually touch or confine the body of the person to be arrested, unless there be a submission to the custody by word or action.
>
> (2) Resisting endeavour to arrest police officer. If such person forcibly resists the endeavour to arrest him or attempts to evade the arrest, such police officer or other person may use all means necessary to affect the arrest.
>
> (3) Nothing, in this section gives a right to cause the death of a person who is not accused of an offence punishable with death or with transportation for life.
>
> 47. **Search of place entered by person sought to be arrested**.
>
> If any person acting under a warrant of arrest, or any police officer having authority to arrest, has reasons to believe that the person to be arrested has entered into, or is within, any place, the person residing in, or being in charge of, such place shall, on demand of such person acting as aforesaid or such

police officer, allow him free ingress thereto, and afford all reasonable facilities for a search therein.

48. **Procedure where ingress not obtainable.** ---If ingress to such place cannot be obtained under section 47 it shall be lawful in any case for a person acting under a warrant and in any case in which a warrant may issue, but cannot be obtained without affording the person to be arrested an opportunity of escape, for a police officer to enter such place and search therein, and in order to effect an entrance into such place, to break open any outer or inner door or window of any house or place, whether that of the person to be arrested or of any other person, if after notification of his authority and purpose, and demand of admittance duly made, he cannot otherwise obtain admittance;

Breaking oven zenana: Provided that, if any such place is an apartment in the actual occupancy of a woman (not being the person to be arrested) who, according to custom, does not appear in public such person or police officer shall, before entering such apartment, give notice to such woman that she is at liberty to withdraw and shall afford her every reasonable facility for withdrawing, and may then break open the apartment and enter it.

49. **Power to break teen doors and windows for purposes of liberation**.--- Any police officer or the person authorized to make an arrest may break open any outer or inner door or window of any house or place in order td liberate himself or any other person who having lawfully entered for the purpose of making an arrest, is detained therein."

31. At this stage it would be proper to refer to the right of the police to invoke the provisions of the aforesaid sections 48 to 49 of the Code of Criminal Procedure, 1898. The main grievance of the public, as also voiced in this writ petition, is that it has become a practice that the police enter any house on the assumption that without any search warrant the house can be searched under the aforesaid section 47/48 of the Code of Criminal Procedure to arrest the accused required by the police. In my view this is rough and wrong interpretation of the said codified procedural law. The said sections 47 and 48 provide that on reasonable information such power can be exercised but sufficient time must be granted to the female inmates to withdraw there from (Zanana place) and obviously keeping in view their honour and prestige.

32. It is to be conspicuously noted with all the seriousness that the demand is to be made by the Police to enter a house under section 47 of the Code of Criminal Procedure. Further according to section 48 of the Code of Criminal Procedure **it is after notification of his authority and purpose and demand of admittance duly made by the Police who cannot otherwise obtain admittance** that the outer or inner door or window of any home or place can be broken open to effect the entrance into such place for the arrest of the accused person(s). The meanings of word Demand according to Concise Oxford Dictionary are "**request made as of right or pre-emptorily, thing so asked, urgent claim.**" Thus it can safely be expressed that demand is polite. Interpreting within the above-said campus both sections 47 and 48 of the Code of Criminal Procedure provide that demand shall have to be made by the Police Officer from the persons residing in a house for free ingress to apprehend/arrest an accused. It is after the notification of his authority and purpose and demand of admittance duly made that the outer or inner door or windows can be broken by the Police to enter the premises to arrest the accused subject to the condition that a female not being the accused present therein shall be afforded the opportunity/chance to retire there from the relevant premises. I would express that even in the Code of Criminal Procedure enforced on 1st July, 1898 the sanctity was attached to the privacy of a person validly occupying the premises to be searched. **In the aforesaid manner the demand is to be made i.e. permission is to be obtained to enter a house properly and according to the situation. It is after the refusal of the occupants to let the**

police enter the premises for the arrest of the absconding accused that the authority is notified, demand for admittance is made and thereafter in case of refusal; doors, windows of the house can be broken oven and even at that time the females of home have to be provided the opportunity to withdraw before the doors, windows are broken open to arrest the accused. Thus in sections 47 and 48 of the Code of Criminal Procedure it is clearly provided that the entry is to be made through the door after obtaining the permission and in case of denial the authority to break open the door, window can be exercised which means that the act of spying cannot be performed and the occupants cannot be surprised as is generally done by the police. It would be proper and informative to refer to section 49 of the Code of Criminal Procedure according to which a police officer who has lawfully entered the house for the purpose of making an arrest of an accused is detained therein is competent and authorised to break open any outer or inner door or window of any house or place in order to liberate himself or any other person. Thus the lawful entry shall play the legal role and steal the eminence about the entitlement/authority of the police for the use of, power in this regard as well. It follows that the police officer has to enter lawfully and not in an illegal manner by scaling over the walls or immediately breaking open the doors, windows without notice/demand as contemplated under sections 47 and 48 of the Code of Criminal Procedure. At this stage it is proper to refer to maxim "A communi observantia non est recedendum" i.e. "where a thing was provided to be done in a particular manner, it had to be done in that manner and if not so done same would not be lawful." I would express that it is well -recognized rule of construction that where a power is given to do a certain thing in a certain way the thing must be done in that way or not at all. Other methods of performance are necessarily forbidden. This being the position the Police cannot **trespass the houses, dwelling places** and make the entry therein illegally i.e. according to unlawful methods. Keeping in view the cumulative effect of the aforesaid analysis of the statutory provisions and discussion, it can safely be interpreted that the **Police as the representative of the Ruler** cannot enter the house without making the demand of admittance in the house and if the inmate(s) of the house refuse in the matter the police can use the force for breaking open the doors)/window(s). However, if the entry is not in a lawful manner as projected above the same would not confer the right to the police to liberate themselves in the afore manner provided under section 49 of the Code of Criminal Procedure who can be detained therein and apprehended as the accused for trespassing the house, dwelling and against whom the criminal legal proceedings can be initiated by invoking section 154 of the Code of Criminal Procedure and investigation, started under section 156 ibid by setting the law into motion. However, the grievance generally voiced against the police is that no sanctity is provided to Chaddar and Chaar Diwari. These sections do not empower the police to enter the house through stretched Auto Ladders and scaling over the walls without making demands to enter the house through doors and by insulting, humiliating the male, female occupants authorized to use the premises. I would record that no free hand can be given to the police to misuse the provisions of sections 47 and 48 of the Code of Criminal Procedure according to its whimsical hypothesis in the Islamic Republic of Pakistan.

33. It would be proper to record that the Code of Criminal Procedure was enforced on 1-7-1898 in English language during the British Rule. It would not be out of place to express that even at that time for the enforcement of the procedural law more than a century before the provisions in the said sections 47 and 48 were incorporated for the protection of "Chaddar and Char Devari" about which the credit is being taken these days for the last about two to three decades by the Executive Authorities including the police having the political patronage. After one century the aforesaid law has not been changed. Pakistan is an Islamic State wherein better values are expected to be maintained. Our Constitution, 1973 provides the safeguard of the honour and prestige of the citizens. Under Article 4 of the Constitution, 1973 "to enjoy the protection of law and to be treated in accordance with law is the inalienable right of every citizen, wherever he may be and of every person for the time being within Pakistan. " It is

provided in Article 9 that no person can be deprived of life or liberty save in accordance with law. According to Article: 14 of the Constitution, 1973 the dignity of man and, subject to law, the privacy of home, shall be inviolable and no person will be subjected to torture for the purpose of extracting evidence. It has been provided in Article 25 of the Constitution, 1973 that all citizens are equal before the law and are entitled to equal protection of the law. If some member of the family has shown disrespect to the rule of law by committing any offence of ordinary, sensational or heinous nature that does not mean that other family members can be put to the ordeal of facing dishonour, disrespect and harassment in the alleged manner. In this regard the aforesaid kind words of the Holy Prophet (p.b.u.h.) contained in the last Sermon (Khutba-tul-Hajja-tul-Wida) have to be again referred to that "henceforth", the offender himself will be responsible for the offence; no son will be charged for the father's crime and no father will be punished for the crimes committed by the son". Consequently the police is not competent to enter the house of a fugitive from law wherein he is not present/living while his nears and dears are putting up who have no concern with the occurrence and not liable for the occurrence.

34. The home of a person is the best shelter and place of peace for him and against the provisions of law-no person can be vexed while he is staying therein. Even the birds also reach their homes/nests in the evening. The peace of the home cannot be disturbed by the police or by any stranger. Nobody can enter therein without permission. It is commonly expressed and observed that "East or West, Home is the Best". In one's home, to enjoy privacy is the right of the inmates. We take this to mean freedom from human interferes by any means, but there are other elements of equal importance: protection from physical harm and restraint, freedom from direction and peaceful enjoyment of one's surroundings. Arbitrary arrest at home interferes with peaceful enjoyment and involves direction which also is an invasion of privacy and the same cannot be allowed without factual, legal and formal justification as expounded supra.

35. At this stage it would be illuminating to refer to the words of the Right Honourable Alfred Denning one of the Lords Justices of his Majesty's Court of Appeal in England published in the Journal title as "Freedom under the Law" by Stephen and Sons Limited, 1949. The relevant portion at page 103 is reproduced as follows:---

> "The problem before us today is not so clear-cut. It is more subtle, as is to be expected in a more complex society; but it is in principle the same, and it must be solved by the Courts and not by a civil war. For today the executive have great powers over the lives and property of every one of us. No one will dispute that the powers exist, for Parliament has granted them, but the question is what remedy the Courts provide if they are misused or abused.
>
> **<u>An Englishman's house is his castle</u>.**
>
> Let us consider, then, the power to enter a man's house against his will; for this is a power which has been greatly extended of late. It is a power which we must watch with care, because next to our personal freedom, we value most the freedom of our homes. An Englishman's house is his castle' we say; and our feelings about it were well summed up by the great Earl of Chatham when he said "The poorest man may in his cottage bid defence to all the forces of the Crown. It may be frail---its roof may shake---the wind may blow through it---the storm may enter---the rain may enter---but the King of England cannot enter---all his force dares not cross the threshold of the ruined tenement". These proud words take their legal origin from Magna Carta, when King John promised that no free man should be diseased of his free tenement except by the law of the land. The freedom of an Englishman's house was there put on an equal footing with his personal freedom. "

36. The aforesaid positive words cannot be ignored as no free man should be deprived of the comfort of his very tenement except the law of the land, which in such-like cases are flagrantly being violated through transgression of authority by the Police Officers. Legally the freedom of a house is on an equal footing with the freedom of a person. It can, therefore, safely be deduced that if the Right Honourable Alfred Denning of United Kingdom believes in the aforesaid type of golden ideas why the same should not be adopted and followed in Pakistan and why much importance in negative form is granted to sections 47 and 48 of the Code of Criminal Procedure enforced on 1-7-1898 during British Rule and can be amended in accordance with the religious commands of Islam, if not deleted or omitted.

37. However, no law allows to the police to interfere or bypass the codified law. It would be proper to record that about the infringement of right, suffice it to express and observe that it is equipped with inherently inbuilt fetters rendering it subservient to reasonable restrictions imposed by law. If it is the duty of any acquaintance or a relative of fugitive from law not to give shelter to the absconding accused, it is also the duty of the police not to enter in an autocratic manner the house on the basis of the figment of the brain coupled with the power/authority being enjoyed as reproduced supra: At this stage it can be expressed that in a hot pursuit of a fugitive from law/absconder the police can enter the house of any person without demand of admittance i.e. without permission wherein the fugitive from law enters and intends/desires to obtain the shelter. In that eventuality no objection is made or raised by the inmates who may be even the close relatives of the absconding accused. Rather the help is provided and the cooperation is extended to the police whenever such an occasion arises. Even the persons of the vicinity not only take part alongwith the police officials towards the success of such a hot pursuit, the hold and brave acts of the members of the Police are approved and appreciated who have to perform their duty at the risk of their lives as the persons affecting the hot pursuit of the fugitive from law may have to face the firing at the hands of the said type of accused causing injuries or even death.

38. Section 100 of the Pakistan Penal Code is relevant in the matter according to which the right of private defence of the body extends to causing death or any other harm to the assailant if the offence which occasions the exercise of the right be of any of the descriptions enumerated therein which are six in number and according to the description enumerated as sixthly "An assault with the intention of wrongfully confining a person under the circumstances which may reasonably cause him to apprehend that he be unable to have recourse to the public authorities for his release". Further under section 101, Pakistan Penal Code, if the offence be not of any of the descriptions enumerated in the last preceding section (i.e. section 100, Pakistan Penal Code) the right of private defence does not extend to the voluntary causing of death to the assailants but does extend under the restrictions mentioned in section 99, Pakistan Penal Code to the voluntary causing to the assailant of any harm other than death. In the instant case in the comments the Police Officer has expressed that he has no intention to harass the petitioner and his family members. However, the filing and pendency of this writ petition at the instance of Noor Muhammad petitioner is not a part of luxurious litigation who by incurring the expenses of the writ petition had to spend the amount to maintain the dignity and honour of the family which fact is also relevant to give weight to the grievances voiced through the filing of this writ petition. As such it can safely be expressed that there was no justification on the part of the respondent S.H.O. to enter the house of the petitioner as alleged by him and to shower insult on his family who has transgressed his authority. It shall not be out of place to record that it has become a common feature that at the direction of the Police Officers the subordinates and particularly the Police Constables cross the limits by trespassing the houses of the citizens as is in the present case. They trespass the houses of the citizens without any search warrant. As projected above under the Islamic Law and according to the Code of Criminal Procedure as well as the Pakistan Penal Code without factual justification, without authority, without getting the permission of the

occupant through the making of demand of admittance (entry) or without a search warrant no stranger including a Police Officer can enter the house of any person. The Police Officers should keep in mind that the citizens are showing the restraint and broad mindedness in such matters of the transgression of authority on their part. Otherwise, as expressed above if any stranger including the member of the police force is confined in the house who is beaten or injured in such circumstances projected in this writ petition, the inmates of the house/dwelling place would not be committing any offence. These are the days when the police should know that the people are becoming right conscious and the violation of legal and human rights shall not be tolerated by the citizens any more. Such a working of the police not only offends the law, the same is also volatile of the religious commands, legal ethics and human rights. Such type of police working is breeding up thread amongst different groups/community/persons of country on one side and the Police on the other side and it is one of the reasons that law and order situation is worsening. In such like cases the. working of some of the officers/ officials of the police Department is tarnishing its name as well as the working of the Executive as a whole.

39. The fact about the presence of the absconding accused in the house is not mentioned in the case-diary and at its own whims and choice the entry is made in the house of his relatives, friends as well as nears and dears. The odd hours are chosen to enter in the house. Some times the walls are scaled over. On some occasion the iron auto-ladder, which can be stretched, is used to enter the house through boundary wall to the annoyance of occupants. The womenfolk are not allowed to retire keeping in view the statutory provision incorporated in section 48 of the Code of Criminal Procedure and the custom, practice of the family. In such state of affairs at times some mischief mongers, though impersonation in police uniform, trespass the houses and commit the dacoities when the neighbours do not dare to meddle in the matter lest the police may not feel offended and/or they may not be injured/killed. The result is that it plays havoc with the fortune of the family. In such circumstances it can be expressed that the aforesaid type of working of the police is also responsible for worsening the law and order situation. It is also breeding up hatred amongst different groups/communities on the one side and the police on the other side which is not a happy sign keeping in view the individual and collective patriotic feelings. I am, therefore, tempted to express that the right to shelter is not a state charity nor condescending grace but basic share, as of right, in the happiness of humanity. Rather shelter is the root of happiness. The State, accordingly, is under a Constitutional mandate to create conditions in which fundamental rights guaranteed to individuals/citizens could be enjoyed by all. Thus this Constitutional Court is in a safe position to watch and pass/issue the writ in favour of the aggrieved party which is none else than the petitioner. The virtues and working of the Constitution are based on those who are called upon to work it and happen to be a good lot. It means that the police shall have to avoid such a working in the larger interest of the Nation.

40. The Police have coined the method for putting the pressure upon the absconding accused for surrender by showing their entry in the house(s) of his relative(s) on the ground of his presence therein who is shown to have made good his escape even though strong contingent of Police is said to be present. A case under section 216, Pakistan Penal Code is registered to justify their action simply to vex the concerned relatives involved in the criminal case. They are arrested, but are not bailed out even though the said section 216, Pakistan Penal Code is bail-able as their arrest is not shown in the Daily Diary of the Police Station in violation of section 44 of the Police Act, 1861. The parents, brothers, sisters etc., are pressurized and tortured in illegal, absurd and obnoxious manners. However, an important aspect is ignored by the police that disobedient sons, brothers of the type of Abdul Sattar absconding accused of the murder case are source of insult, degradation and inconvenience to the family where many problems creep up and ooz out due to their being outlaws. Even the sisters of the fugitives from law are divorced by their respective spouse. The engagements of the sisters and brothers are broken, unfolded. If the family is educated the brothers and

sisters studying in the educational institutions or pursuing respectable profession(s) have to face the sarcastic rebukes who even feel the difficulty to sit in the social gatherings and thus cannot find a respectable place in the society. On the one hand the petitioner stands ruined due to the bad habits of his accused son Abdus Sattar while on the other hand he alongwith other family members is being subjected to cruel and illegal treatment of the Police who, as such, is entitled to the discretion of this Constitutional Court.

41. would be glossing over an important aspect of the matter in hand by expressing that a person, male or female, cannot be detained in any police station or at some other place unless he or she is required in a cognisable and non-bail-able offence whose arrest is to be shown in the Daily Diary of the Police Station under section 44 of the Police Act, 1861 and under Rule 22.49(h) of the Police Rules, 1934. However, the arrest is not shown even though due to a wrong entry in the Daily Diary a police officer can be dismissed under Rule 22.50 (para. 1) of the Punjab Police Rules, 1934. Under section 491 of the Code of Criminal Procedure the High Court has been empowered to issue the direction of the nature of a habeas corpus and pass the order that the person within the limits of its appellate criminal jurisdiction be brought up before the Court to be dealt with according to law and also that a person is illegally or improperly detained in public or private custody within such limits be set at liberty. Under Article 199(l)(b)(i) the High Court may on the application of any person make an order directing that a person in custody within the territorial jurisdiction of the Court be brought before it so that the Court may satisfy itself that he is being held in custody without lawful authority or in an unlawful manner. Section 100 of the Code of Criminal Procedure empowers any Magistrate of the First Class or any Sub-Divisional Magistrate to issue search warrant about the recovery of any person whose confinement amounts to an offence who after recovery shall be produced before the concerned Magistrate and who may make such order as in the circumstances of the case seems proper. Thus without any legal justification no person can be detained by the police as agitated in the instant matter as neither petitioner and family members are named in any F.I.R. nor their names have been mentioned in the daily diary of Thana. It is a matter of common knowledge that illegal detention of the citizens by the police has become an order of the day. In spite of the legal restraint/check the police is travelling on the same path with good speed. These days the police, whose duty is to protect the life and liberty of the citizens and claim to be Mohafiz, is itself usurping the same and has become a source of inconvenience for them which type of grievance has been voiced through the filing of this writ petition. To deprive a person of his liberty is a serious matter being violative of law, justice and fair play to which an exception has to be taken. All the citizens in urban or rural areas are entitled to the protection of this Court. Thus the petitioner and his family members cannot be asked to attend the police station due to the misdeed/offence committed by his son Abdus Sattar who was fugitive from law at the time of the bringing of this writ petition.

42. Blackening of the faces of the accused and their family members/relatives, making them to ride on donkeys, getting their head, beard, eyebrows, eye lashes etc. shaved, their old and young male and female members to sit in police station, their mis handling creating shock-wave awful condition, taking off their shoes and making them to stand for hours in cold as well as in scorching heat according to the available season, dragging them out bare-footed with their hands cuffed and handkerchief inserted in the mouth etc. etc. are some of the other degrading methods adopted by the police through transgression of authority which are not permissible by religious commands, law of the land and norms of legal ethics as well as human rights. The aforesaid degradation of the human-beings are offences in the criminal field for which private complaints in terms of section 190 of the Code of Criminal Procedure can be filed and even civil suits for recovery of damages can be instituted. However, the important and ticklish question to be posed is as to who can dare do so? The police is a disciplined force to which training is imparted and the aforesaid type of recalcitrant and autocratic attitude is criticized and objected to by the innocent aggrieved victims. Such a working of the

police cannot be termed to be in accordance with the Injunctions of Holy Quran, Sunnah of the Holy Prophet (p.b.u.h.), dignity of a man and according to the public conscience. Is it really Islamic in Islam which is the State Religion of Islamic Republic of Pakistan having the Constitution, 1973 with the aforesaid Islamic background wherein and whereby Islamic Ideology has to be preserved and followed?

43. It is the will, discretion of the citizens to contact the Police Officers, posted in a Police Station or their Superior Police Officers for the redressal and removal of their difficulties. The police may summon the person(s) whenever any matter is referred for report, viz; like the issuance of licence of fire-arm/establishment of 'Sarai', cinema, holding of funfair etc. etc. as provided by the relevant Rules incorporated in the Police Rules, 1934. The power to investigate the criminal cases is incorporated in Chapter XXV of the Police Rules, 1934 Volume Ill. The Investigating Officer can join any concerned person in the investigation to reach at the true, right conclusion as his fair and impartial investigation in terms of section 4(1)(1)/160 to 166 of the Code of Criminal Procedure, 1898 is the foundation of justice to be administered by the Court. For the purpose of the emergence of the true picture in the matter the relevant rule 25.2 is reproduced as under:---

"25.2 **Powers of Investigation Officers**.-- (1) The powers and privileges of a police officer making an investigation are detailed in section 160 to 175, Criminal Procedure Code.

An Officer so making an investigation shall invariably issue an order in writing in Form 25.2(1) to any person summoned to attend such investigation and shall endorse on the copy of the order retained by the person so summoned the date and time of his arrival at, and the date and time of his departure from, the place to which he is summoned. The duplicate of the order shall be attached to the case diary.

(2) No avoidable trouble shall be given to any person from whom enquiries are made and no person shall be unnecessarily detained.

(3) It is the duty of an Investigation Officer to find out the truth of the matter under investigation. His object shall be to discover the actual facts of the case and to arrest the real offender or offenders. He shall not commit himself prematurely to any view of the facts for or against any person."

44. As expressed above the Investigating Officer can summon any person concerned with the occurrence/case to join the investigation and in this regard he has to summon the person through a summons/notice. He cannot act and proceed in an autocratic manner as being projected in this judgment which revolves around the common complaint of the citizens in the matter. In Chapter XXV of Police Rules, 1934 the specimen of the pro forma to summon any person during the investigation has been provided/incorporated, which has made out that on the whims of a Police Officer, without reasons, no person can be summoned by the police. Even the date, time for appearance and time for departure after conclusion of investigation to his extent has to be mentioned/noted therein, a copy of which has to be provided to that person. The specimen of the relevant pro forma is being reproduced as under for proper appreciation of the subject in hand:--

Police Rules, 1934

INVESTIGATION

FORM NO. 25.2 (1)

ORDER TO REQUIRE ATTENDANCE

AT INVESTIGATION UNDER

SECTIONS 160 AND 175,

CRIMINAL PROCEDURE CODE

NAME Son of Caste
Resident of

Whereas the presence of the aforesaid person is necessary for the purpose of enquiry into the offence reported to have been committed under section at Police Station; therefore the said person is hereby directed to appear before the undersigned at (place hour date) there to give such information relating to the said alleged offence as he may possess.

Signature and Designation of issuing

Police Officer.

Date Hour

Note:---

.....mentioned in this order attended on at and was permitted to leave on at.

Dated_____. _____

Signature and Designation of issuing

Police Officer. "

45. The aforesaid rule '25.2 and pro forma provided in Police Rules, 1934 have made out as to how a police officer/Investigating Officer has to involve himself in the investigation of a case who has to give paramount consideration to the convenience of the concerned 'persons' mentioned there in the rule who have to be summoned by him. He cannot vex any person through his removal by unlawful methods. However, it was pointed out that family members of the absconding accused, Abdus Sattar, were insulted, humiliated by forcible removal, making them to stand and to remain present in the Thana and that some of them were belaboured as well as given the shoe -beating publicly. It is unfair, illegal and against moral ethics. It is a common complaint during these days that the police has adopted the practice of beating with shoes, sticks, slaps in pubic and police stations the other relatives of the absconding accused. Law of our land does not give this authority. Even the accused cannot be given the shoe-beating or belaboured in public or secretly. If during such an illegal practice some injury is caused to the victim the police is criminally liable. Sections 337-Q to 337-U of the Pakistan Penal Code deal with the "Arsh" about different organs of body. Section 337-V, Pakistan Penal Code covers the "Arsh" regarding uprooting of hair which in my view also includes shaving all the hair of the head, beard, moustaches eyebrows, eye lashes or any part of the body. The "Arsh" is to be determined according to the yardstick provided in the aforesaid sections which is to be paid by any accused who may be member of the public or the public servant including the police.

46. To enjoy the protection of law and to be treated in accordance with law is the inalienable right of every citizen of Pakistan under Article 4 of the Constitution, 1973. The Police Officers have not been given unbridled authority to humiliate and ridicule the citizens without any iota of evidence against them. To call a person to Police

Station without legal and factual justification, make him to sit there against his will, prima facie amounts to wrongful confinement and action needs to be taken against the police.

47. It is also proper to refer to section 54 of the Code of Criminal Procedure which reads as under:---

"54. **When Police may arrest without warrant.**---(1) Any police officers may, without an order from a Magistrate and without a warrant, arrest---

firstly, any person who has been concerned in any cognisable offence or against whom a reasonable complaint has been made or credible information has been received, or a reasonable suspicion exists of his having been so concerned;

secondly, any person having in his possession without lawful excuse, the burden of proving which excuse shall lie on such person, any implement of house-breaking;

thirdly, any person who has been proclaimed as an offender either under this Code or by order of the Provincial Governments;

fourthly, any person in whose possession anything is found which may reasonably be suspected to be stolen property and who may reasonably be suspected of having committed an offence with reference to such things;

fifthly, any person who obstructs a police officer while in the execution of his duty, or who has escaped, or attempts to escape from lawful custody;

sixthly, any person reasonably suspected of being a deserter from the armed forces of Pakistan;

seventhly, any person who has been concerned in, or against whom a reasonable complaint has been made or credible information has been received or a reasonable suspicion exists of his having been concerned in, any act committed at any place out of Pakistan which, if committed in Pakistan, would have been punishable as an offence and for which he is, under any law relating to extradition or otherwise, liable to be apprehended or detained in custody in Pakistan;

eighthly, any released convicted committing a breach of any rule made under section 565, subsection (3):

ninthly, any person for whose arrest a requisition has been received from another police officer, provided that the requisition specifies the person to be arrested and the offence or other cause for which the arrest is to be made and it appears there from that the person might lawfully be arrested without a warrant by the officer who issued the requisition."

48. The general impression amongst the Police Officers is that any person can be arrested by them without warrant. It is generally expressed by some of the autocratic Police Officers that they can arrest any person under section 54 of the Code of Criminal Procedure without warrant and for that matter they can enter/get ingress in any premises. Legally it is not so, which stands projected by the aforesaid statutory provisions. Some times the male, female, old, young relatives of the absconding accused are arrested, removed under section 54 of the Code of Criminal Procedure whose arrest is not shown in the Daily Diary and out of them some are even crippled or eliminated. The habeas petitions are filed and unnecessary expenses of imposed litigation have to be borne. To maintain the balance in the social set-up and in the larger interest of the citizens the unfettered powers cannot be allowed to be used by the

Police or the Executive/Political Authorities at whose command also they have to proceed in the aforesaid illegal and unauthorized manner.

49. During the arguments learned counsel for Noor Muhammad petitioner expressed the apprehension regarding extra- judicial killing. Even though this complaint of the petitioner has not materialized and there is no killing of any person in the instant matter; yet it is in the interest of justice that the aspec3 about the authority and competence of the police to eliminate/kill any person, without submitting the case to the Ruler (i.e. the **JUDICIARY** as one pillar of the State) is also considered, analysed, dissected and determined.

50. Homicide is the killing of human being by a human being. Homicide is of three categories; it may be premeditated, involuntary, or voluntary.

51. Homicide is either lawful or unlawful.

52. Lawful homicide or simple homicide includes several cases falling under the General Exceptions contained in Chapter IV, of the Pakistan Penal Code. Lawful homicide may be divided, for the sake of convenience, into (1) excusable homicide and (2) justifiable homicide. "Excusable homicide" includes the following cases:--

(a) Where the death is caused by accident or misfortune and without any criminal intention or knowledge in the doing of a lawful act in a L lawful manner by lawful means and with proper care and caution (section 80, P.P.C.).

(b) When the death is caused by a child or a person of unsound mind or art intoxicated person (sections 82, 83, 84 and 85 of P.P.C.).

(c) Where the death is caused intentionally by an act done in good faith, for the benefit of the person killed when (i) he, or if a minor or lunatic, his guardian, has expressly or impliedly consented to such an act (sections 87 and 88, P.P.C.) or (ii) where it is impossible for the person killed to signify his consent, or where he is capable of giving consent and has no guardian from whom it is possible to obtain consent in time for the thing to be done with benefit (section 92, P. P. C.).

"Justifiable homicide" includes the cases where the death is caused--

(a) by a person who is bound, or by a mistake of fact, in good faith., believes himself bound by law (section 76, P.P.C.);

(b) by a judge when acting judicially in the exercise of any power which is, or which in good faith he believes to be given to him by law (section 77, P. P. C .);

(c) by a person acting in pursuance of the judgment or order of a Court of Justice (section 78, P.P.C.). The execution of a lawful sentence of death do, not constitute a legit offence;

(d) by a person who is justified or who by reason of a mistake of fact, in good faith, believes himself to be justified by law (section 79, P.P.C.);
(e) by a person acting without any criminal intention to cause harm, and iri good faith, for the purpose of preventing or avoiding other harm to person or property (section 81, P. P. C.);

(f) where the death is caused in exercising the right of private defence of person or property (sections 100 and 103, P.P.C.).

53. "Unlawful homicide" is also known as "culpable homicide". Culpable homicide under the provisions of Pakistan Penal Code would be murder if the act by which the

death is caused is done with the intention of causing death, or secondly, if it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused, or thirdly, if it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, or fourthly, if the person,, committing the act knows that it is so imminently dangerous that it must, in all probability, cause death or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid.

54. The State punishes the culprits in order to achieve four ends namely; reformative, retributive, deterrent and preventive. In other words, the accused are punished so that they are reformed, the complainant's vengeance is wreaked, the accused are put behind the bars or disabled for some time and are prevented from the commission of the offence and lastly the society including the accused is deterred from repeating the commission of an offence. Both personal and public sentiments demand that the person, who has made others suffer unjustly, should himself be made to suffer in return The principal object of punishment, however, is the prevention of offences.

55. Article 9 of the Constitution, 1973 being relevant has to be referred to, according to which the person shall be deprived of liberty or life save in accordance with law. At the time of advent of our religion Islam and coming into power Holy Prophet Muhammad (p.b.u.h.) gave the judgments about the disputes brought before him who even referred the matters to his companions (r.a.) for decisions who also gave the judgments. During the lifetime of the Holy Prophet (p.b.u.h.), the Qazis (Judges) were also appointed who performed the functions of administration of justice. The aforesaid aspect has made out at the Executive of time had no exclusive authority to decide the disputes. Even if one person used the authority of Executive and Judicial powers simultaneously, the cases/disputes were resolved through Judicial authority, powers and functions anti not by Executive authority. The Holy Quran and Sunnah is the source of law. Keeping in view this background, the Constitution of the Islamic Republic of Pakistan, 1973 has to be referred to according to which Islam is the State religion and the affairs of the State are to be run by its established three pillars, viz. Parliament, Judiciary and Executive. In fact the purpose of a Constitution is not merely to create the organs of the State, but to limit their authority, because if no limitation was imposed upon the authority of the organs there will be complete oppression resulting in chaos. The Legislature has to frame the law, the judiciary has to interpret the law and administer the justice and Executive has to enforce the same. Thus according to our Constitution the criminal case or civil suit cannot be decided without submitting the same to the Ruler who is none else than the Judiciary. The criminal cognisable cases including the murder cases are reported to the police. The investigation is conducted. Due to the prima facie existence of the charge, the challan is submitted before the Court. The trial is concluded. In case of conviction or acquittal the appeal/revision is provided. The death penalty is confirmed by the High Court. The matter can be taken up to the Honourable Supreme Court of Pakistan. In cases relating to offences affecting the human body and human life (mentioned under Chapter XVI of the Code of Criminal Procedure), the mercy for remission or commutation of the sentence(s) can be preferred before and disposed of by the Provincial Government, Federal Government or the President under section 402-C of the Code of Criminal Procedure; but it is with the consent of the victim or as the case may be, of his heirs; that the aforesaid authorities can suspend, remit or commute any sentence recorded under the aforesaid Chapter YVI ibid. The death penalty is executed in Jail premises in the presence of the Jailor, Executive Magistrate 1st Class, Medical Officer and heir(s) of the deceased. At that relevant time of execution of capital punishment, Police has no role to play. That is the prescribed procedure as to how the future of the accused as condemned prisoner/convict is decided. However, sometimes the law is taken in its own hands by the Police. The grievance/complaint of the public/affected party. is that the accused or their relatives are allegedly driven to deserted areas who are directed to unlock the handcuffs and to

run in the darkness for becoming fugitive while during that process the accused is shown to have been killed in an encounter. This ingredient of violence had become a routine matter in our Province till the recent past.

56. I have to express that in the recent past the accused under police custody were being killed by the police without trial which is commonly known as "Extra-Judicial Killing". Legally all citizens are equal in the eye of law and are entitled to equal protection of law under the Constitution, 1973. No citizen can be condemned/killed unless convicted by a Court of competent jurisdiction and the convict has a right to appeal in the High Court and the Supreme Court. With respect to the extra-judicial killings the news is generally got published in the Print Media and read by the public that the accused persons were being escorted by the police for the recovery of some incriminating article or the pointedness of some place of occurrence during the investigation of some case when his accomplices/relatives attacked the convoy police vehicle to get them released and the accused died in the ensuing encounter. No scratch is found on the body of the Police Officers. No mark of firing is seen on the police vehicle. The accused even thought chained/fettered are found dead at the spot. Ii cannot simply be understood as to how it is possible that every time the fettered person(s) get killed, but not an injury/scratch is received by any Police officer or by the persons arriving there to get released the helpless, handcuffed person(s) and no mark of firing is seen on the vehicle.

57. The persons who arrive and attack/effect firing simply make good their escape and the matter is dropped. The fake/staged encounters organized by the police are not accepted by the citizens and I would express that the same are rather not acceptable. It is said that extra judicial killings are committed to gain out of turn promotions and to earn the medals which is not being taken in good taste by the citizens. The news published in the newspapers is read and fades from the minds and memory after some days. However, extra judicial killings cannot and should not be taken lightly and an exception must be taken thereto. Rather the political personalities approved such a working and showered the laurels on the police officials showing the disputed feats for the reasons best known to them. It has to be expressed that it is the proper time that the police authorities are made conscious and careful and also advised to abstain from the aforesaid type of working which is practically performed by it which is also the complaint of the citizens. Thus it is the right time that the Government warns the policemen to refrain from torturing innocent people and be prepared for stern action. In the eyes of law an accused is innocent, unless convicted. The trial of the accused is to be conducted and he cannot be eliminated in the aforesaid "Quick Fix Manner". It can safely be observed that no accused is devoid of the justice of the Court before which the case is to be submitted for trial and decision.

58. It is a matter of common knowledge that whenever and wherever there is an allegation against a Police Officer about the killing/murder of a person-known as extra-judicial killing-----the F.I.R. is immediately registered by the Police, according to their own whims to the exclusion of the stand of the affected party and in case the concerned patty/aggrieved party is desirous to get registered the F.I.R. the plea is taken by the police that the First Information Report about the occurrence had already been registered, the second First Information Report cannot be recorded and the concerned party may contact the concerned police to get recorded its version. I am tempted to express that all this is done to save the skin of the Police Officers/officials against whom the allegation of violation of law, i.e. commission of murder (extra judicial killings) is made. Practically an F.I.R. wherein the police is not involved is not registered with that much promptness and speed as is done in a matter wherein a member of the police forces is/are the accused according to the version of the heirs/relatives of the deceased. The grievance of the public is that the F.I.R. is not registered against the police and if it is registered then challan is not submitted as false and tainted investigation is conducted by the fellow police officers and invariably the accused are declared as innocent. In this respect an Independent Agency comprising

retired Judges, retired Army Officers and retired Bureaucrats shall have to be constituted for the correct and forceful investigation which is the foundation of administration of justice.

59. Our Holy Prophet Muhammad (p.b.u.h.) has professed the infliction of legal punishments impartially by discarding the distance and class of rich, noble and the weak people. Following Hadith is reproduced in this context: ---

> "778. Narrated Aisha (r.a.); Usama approached the Prophet (s.a.w.) on behalf of a woman (who had committed theft). The Prophet (s.a.w.) said, the people before you were destroyed because they used to inflict the legal punishments on the poor and forgive the rich. By Him in Whose Hand my soul is if Fatima (the daughter of the Prophet (s.a.w.) did that (i.e., stole), I would cut off her hand. "

60. Who is Fatima (r.a.) and what is her status. She is the daughter of Holy Prophet Muhammad (p.b.u.h.). She is the wife of Ali al-Murtaza (r. a.) She is the respected mother of Hazrat Hassan (r.a.), Hazrat Hussain (r.a.) She is the Head of females in the Heaven. Thus the Holy Prophet (p.b.u.h.) expounded the theory of equality before law.

61. The Holy Prophet (s.a.w.) has also said as under: ---

> "Do unto others that you would have been done unto you. "

62. Even though the aforesaid bacon of light has the perennial nature which is to be necessarily followed and acted upon, yet the aforesaid type of brutalities and injustice were carried out and without prejudice it can be expressed that political patronage was responsible about this type of conduct of the Police which took itself above the law of the land. It can safely be expressed that it had become an order of the day, violative of Article 25(1) of the Constitution, 1973 expounding the theory of equality of citizens which reads that "All citizens are equal before law and are entitled to equal protection of law"

63. Legally if there is an allegation of murder of a person his close relatives/heirs/one of the eye-witnesses of the occurrence have the right that the First Information Report about the murder of the deceased is recorded in the Register of F.I.Rs. maintained under Rule 5, Chapter XXIV of the Police Rules, 1934 and the defence version of the killer (accused) has to be taken, recorded during the investigation under sections 4(1)(L)/162 of the Code of Criminal Procedure which is to be proved during the trial. Legally the Investigating Officer cannot assume the role of a Judicial Officer. The correct legal position has been expressed above even though the poor, ineffective relatives of the victim have to keep quiet who can also file a private criminal complaint in terms of section 190 of the Code of Criminal Procedure, but remain inactive and disinterested. After all the State power has the upper hand:

64. God the Greatest has bestowed life to a person as a trust (Amanat) and breach of trust (Khianat) has not been allowed by Him. This is the reason that suicide through any form, viz. self-immolation, taking-of poison, hanging, firing etc. etc. has strictly been prohibited and declared as 'Haraam". Suicide N is a sin. If one cannot murder himself i.e. is not allowed to commit breach of trust regarding his own life by committing suicide, how he can commit "Khianat" in other's life through murder/extra judicial killings while no policeman is injured or receives any scratch. Law cannot be illegally stretched to eliminate the persons without trial. Rather the law can be used for the betterment of the 4 mankind and not to eliminate the citizens and eclipse the moral, legal values.

65. It is also happening so, as superior police officers not only defend the subordinates, they also prompt them in the matter. They do not restrain them. I would quote without being disrespectful, that they may chastise/admonish or even administer beatings to

their children, kids for their betterment and good future; they do not check their betterment and good future; they do not check their subordinates from going astray end thus lower the prestige of the Department which is not happy sign as the same is widening the gulf between the public and the police. If we see the. meanings of words public and servant individually in the Dictionary and later on read together as public servant, we can well express as to how the public is helpless before the public servants in such-like episodes. It is recorded that too much familiarity breeds contempt and too much hatred is the foundation of crisis.

66. There is nothing more inviolable, sacred than man's life. Quranic verses are numerous in this respect. The Holy Quran commands that Believers should not kill the Believers intentionally. Some statements of Allah, the most High, are being reproduced as follows in this context: ---

"178. Ye who believe!
The law of equality
Is prescribed to you
In cases of murder:
The free for the free,
The slave for the slave,
The woman for the Woman.
But if any remission
Is made by the brother
Of the slain, then grant,
Any reasonable demand,
And compensate him
With handsome gratitude.
This is a concession
And a Mercy
From your Lord.
After this whoever
Exceeds the limits
Shall be in grave penalty.

(2.178)

93 If a man kills a Believer
Intentionally, his recompense
Is Hell, to abide therein
(For ever): and the wrath
And the curse of God
Are upon him, and
A dreadful penalty
is prepared for him.

(4.93)

48 We ordained therein for them:
"Life for life, eye for eye,
Nose for nose, ear for ear,
tooth for tooth, and wounds
Equal for equal." But if
Any one remits the retaliation
By way of charity, it is
An act of atonement for himself.
And if any fail to judge
By (the light of) what God
Hath revealed, they are

(No better than) wrong-doers.
(5.48)

68 Those who invoke not,
With God, any other god,
Nor slay such life as God
Has made sacred, except
For just cause, nor commit
Fornication;-----and any that does
This (not only) meets punishment.
(25.68)

67. About the aforesaid verses 25.68 Abdullah Yousaf Ali; the great Scholar, has expressed the opinion that "Here three things are expressly condemned: (1) false worship, which is a crime against God; (2) the taking of life, which is a crime against our fellow-creatures; and (3) fornication, which is a crime against our self-respect, against ourselves. Eve 'ry crime is against God. His creatures, and ourselves; but some may be viewed more in relation to one than to another. The prohibition against taking life is qualified; "except for just cause"; e.g. in judicial punishment for murder, or in self -preservation, which may include not only self-defence in the legal sense, but also the clearing out of pests, and the provision of meat under condition of Halal; see n. 698 v. 5".

68. In furtherance thereof verse 5.5 is reproduced as under:

5. They ask thee what is
Lawful to them (as food).
Say: Lawful unto you
Are (all) things good and pure;
And what ye have taught
Your trained hunting animals
(To catch) in the manner
Directed to you by God;
Eat what they catch for you.
But pronounce the name
of God over it; and fear
God; for God is swift
In taking account.

(5.5)

69. Following is the opinion of Abdullah Yusaf Ali in this regards:

> "698. In the matter of the killing for meat, the general rule is that the name of the true God should be pronounced as rite in order to call our attention to the fact that we do not take life thoughtlessly but solemnly for food, with the permission of God, to whom we render the life back. "

70. What to talk of the killing of a person without legal justification by any person including the members of Police the Al-Mighty God has provided the general rule for the pronouncement of His Name in the matter of slaughter for food so that the life is not taken thoughtlessly. What a quantum of care has been ordained by God, the most High?

71. According to AI-Quran "he who kills a human being unjustly has not killed only an individual, but has killed humanity". That is to say, he violated that social self which is the essence of humanity. Individual physical life has to be respected and secured, but is

to be sacrificed when its preservation would stand in the way of the realisation of the social or the spiritual-self.

72. Following are some of the Ahadith pertaining to unjustified/Extra-Judicial Killings which are meant to explain the practical implications of the verses of the Holy Quran on the subject: ---

(I) "4. **Narrated Abdullah (r.a.):** The Prophet (s.a.w.) said, "The first cases to be decided among the people (on the Day of Resurrection) will be those of bloodshed."

(II) 2. **Narrated Ibn Umar (r.a.):** Allah's Apostle (s.a.w.) said, "A faithful believer remains at liberty regarding his religion unless he kills somebody unlawfully. "

(III) 1. **Narrated Abdullah (r.a.)**: A man said, "O Allah's Apostle: Which sin is the greatest in Allah's Sight?" The Prophet (s.a.w.) said, "To set up a rival unto Allah though He Alone created you." The man said, "What is next?" The Prophet (s.a.w.) said, "To kill your son lest he should share your food with you." The man said, "What is next?" The Prophet (s.a.w.) said, "To commit illegal sexual intercourse with the wife of your neighbour." So Allah Almighty revealed in confirmation of this narration:---

"And those who invoke not with Allah, any other God, Nor kill such life as Allah has forbidden except for just cause nor commit illegal sexual intercourse And whoever does this shall receive the punishment."

(25.68)

(IV) 3. **Narrated 'Abdullah bin 'Umar (r.a)**: One of the evil deeds with bad consequence from which there is no escape for the one who is involved in it is to kill someone unlawfully.

And if anyone saved a life (from death)'
(5.32)

Ibn 'Abbas (r.a.) said, "Anyone who regards killing prohibited unless for a reasonable cause (then it is as if) he saved the life of all mankind."

(V) 6. **Narrated 'Abdullah (r.a.):** The Prophet (s.a.w.) said, "No human being is killed unjustly, but a part of responsibility for the crime is laid on the first son of Adam who invented the tradition of killing kmux6enng) on the earth. (It is said that he was Qabil).

(VI) 7. **Narrated 'Abdullah bin 'Umar (r.a.)**: The Prophet (s.a.w.) said, "After me (i.e. after my death), do not become disbelievers, by striking (cutting) the necks of one another.

(VII) 8. **Narrated Abu Zur'a-bin-'Amr bin-Jarir (r.a.):** The Prophet (s.a.w.) said during Hajjat-al-Wada, "Let the people listen to me. After me, do not become disbelievers, by striking (cutting) the necks of one another."

(VIII) 9. **Narrated 'Abdullah-bin-Amr (r.a.)**: The Prophet (s.a.w.) said, "Al-Kaba' it (the biggest sins) are: To join others (as partners) in worship with Allah, to be undutiful to one's parents," or said, "to take a false oath." (The subnarrator, Shu'ba is not sure) Mu'adh said: Shu'ba said, "Al-kaba'ir (the biggest sins) are: (1) Joining others as partners in worship with Allah, (2) to take a false oath (3) and to be undutiful to one's parents, 'or said, "to murder (some one unlawfully."

(IX) 10. **Narrated Anas-bin-Malik (r.a.):** The Prophet (s.a.w.) said, "The biggest of Al-Kaba'ir (the biggest sins) are: To join others as partners in worship with Allah, (2) to murder a human being, (3) to be undutiful to one's parents, (4) and to make a false statement," or said, "to give a false witness".

(X) 12. **Narrated Ubada-bin-As-Samat (r.a.)**: I was among those Naqibs selected leaders) who gave the Pledge of allegiance to Allah s Apostle (s.a.w.). We gave the oath of allegiance, that we would not join partners in worship besides Allah, would not steal, would not commit illegal sexual intercourse, would not kill a life which Allah has forbidden, would not commit robbery, would not disobey (Allah and His Apostle), and if we fulfilled this Pledge we would have Paradise, but if we commit any one of these (sins) then our case will be decided by Allah.

(XI) 14. **Narrated Al-Ahnaf-bin Oais:** I went to help that man (i.e. Ali), and on the way I met Abu Bakra who asked me, "Where are you going?" I replied, "I am going to help that man." He said, "Go back, for I heard Allah's Apostle (s.a.w.) saying, "If two Muslims meet each other with their swords then (both) the killer and the killed one are in the (Hell) Fire." I said, O Allah's Apostle! It is alright for the killer, but what about the killed one?" He said, "The killed one was eager to kill his opponent. "

It is noteworthy that during the custodial killing being carried out by the police the "Killed Person(s)" are never desirous and eager to murder the police officials as they are fettered/chained and thus helpless:

(XII) 17. **Narrated Abdullah (r.a.)**: Allah's Apostle (s.a.w.) said, "The blood of a Muslim who confesses that none has the right to be worshipped but Allah and that I am His Apostle, cannot be shed except in three cases: In Qisas for murder, a married person who commits illegal sexual intercourse and the one who reverts from Islam (apostate) and leaves the Muslims. "

(XIII) 21. **Narrated Ibn' Abbas (r a):** The Prophet (s.a.w.) said, "The most hated persons to Allah are three: (1) a person who deviates from the right conduct, i.e., an evil doer, in the Haram (sanctuaries of Mecca and Medina); (2) a person who seeks that traditions of the Pre-Islamic Period of Ignorance, should remain in Islam, (3) and a person who seeks to shed somebody's blood without any right. "

(XIV) 49. **Narrated Abdullah-bin- Amr (r.a.):** The Prophet (s.a.w.) said, "Whoever killed a Mujahid (a person who is granted the pledge of protection by the Muslims) shall not smell the fragrance of Paradise though its fragrance can be smelt at a distance of forty years (of travelling). "

(XV) 16. **Narrated Anas-bin-Malik (r.a.):** A girl wearing ornaments, went out at Medina. Somebody struck her with a stone. She was brought to the Prophet (s.a.w.) while she was still alive. Allah's Apostle (s.a.w.) asked her, "Did such-and-such person strike you?" She raised her head, denying that. He said for the third time, "Did so-and-so strike you?" She lowered her head, agreeing. Allah's Apostle (s.a.w.) then sent for the killer and killed him between two stones.

It is to be recorded that Sunnah is a source of Shariah and a commentary on 2ur'an and compliment to its teaching. Thus he (p.b.u.h.) guaranteed definite right of life 0 the individuals which is inviolable. This Hiadith is an example of the rule of law that the Holy Prophet (p.b.u.h.) himself gave the judgment and passed the order as a Judge/Ruler about capital punishment of the accused who was executed.

(XVI) 11. **Narrated Usama-bin-Zaid-bin Haritha (r.a.):** Allah's Apostle (s.a.w.) sent us (to fight) against Al -Huraqa (one of the sub-tribes) of Juhains. We reached those people in the morning and defeated them. A man from the Ansar and I chased one of their men and when we attached him, he said, "None has the right to be worshipped but Allah.". The Ansari refrained from killing him but I stabbed him with my spear till I killed him. When we reached (Medina), this news reached the Prophet (s.a.w.) He said to me, "O Usama you killed him after he had said, "None has the right to be worshipped but Allah?" I said, O" Allah's Apostle (s.a.w.) He said so in order to save himself." The Prophet (s.a.w.) said "You killed him after he had said, "None has the right to be worshipped but Allah." The Prophet (s.a.w.) kept on repeating that statement till I wished I had not been a Muslim before that day.

(Sahee-AI-Bokhari, Vols. VIII-IX)

73. Minds are mesmerised by the grandeur and dignity of the Statutory laws while the Quranic Verses and Sunnah of our Holy Prophet Muhammad (p.b.u.h.) are being ignored clearly conspicuously and intentionally----which are of immortal character. Article 227 read with Article 2A of the Constitution, 1973 enjoin that all State laws and acts of State functionaries have to be examined on the touch stone of Holy Quran and Sunnah. Whenever they appeared to be in conflict and repugnant they have to be struck down by the Courts of the country.

74. With respect to the custodial killing of one Tahir Nafees alias Prince on 22-2-1998 a learned Single Bench of the Lahore High Court passed the order on 26-5-1999 on the writ petition filed by Mst. Ghazala Aziz, mother of the deceased, for the registration of a murder case against Abid Boxer S.-I./S.H.O., Police Station Factory Area, Lahore, Ibrar Hussain Rizvi, S.-I. and six others Police officials. The aforesaid order, dated 26-5-1999 was assailed in Intra Court Appeal No. 640 of 1999 which was dismissed in limine by a learned Division Bench of this Court headed by my learned brother Mian Allah Nawaz, J. who made the following observations about the extra -judicial killings:---

> "It is hardly necessary to reiterate that our State is governed by a Constitutional dispensation embodied in the Constitution of Pakistan, 1973; that this Constitution guarantees the rule of law, defines and clearly enumerates the powers of various structural institutions of State. It is also true that Police is one of the most important law-enforcing agency of State. It weilds the coercive power of this State. The fundamental function of it is to prevent and detect the crimes. This institution is disciplined under the Police Act and is divisible into two senior and subordinate hierarchy. It ensures the security of its citizens to uphold the supremacy of law. Should this institution resort to custodial killing? We have no doubt to say that if the Police agency is permitted to do so this will tantamount to flagrant deviance from its charter and duties. This agency cannot, in our view, resort to custodial/extra -judicial killing of accused on the name of saving the society from their clutches. This will tantamount to destruction of objective for which this agency is created and will lead to a rule of Jangal instead of rule of law by various institutions of State. In this context whatever has been stated above we are inclined to hold that recording of statement of Ghazala Aziz and registration of case against delinquent officials is not only within the parameters of law rather it is consistent with the fundamental character of police as law enforcing agency. In this view of the matter and considered from every angle, we find that the decision of the learned Single Judge is eminently correct, just and does not suffer from any legal or jurisdictional defect calling for interference. For the aforesaid reasons, this Intra-Court appeal is found to be devoid of any merit and is accordingly, dismissed in limine. "

75. I would incorporate an episode relevant to the custodial killing by referring to the hangman who informed the king that the noose does not fit the condemned man. What should he do? The hangman asked. No problem, the King said, find a man whom the noose fits and hang him. That was King's raw Justice, life for a life. It was irrelevant whether the person hanged had committed the murder.

76. The episode may be doubtful; yet can never be taken in good taste anywhere.

77. Every body shall have to keep in mind that the Institutions are known and recognized by their traditions and not personal likings and disliking as well as autocratic and brutal thoughts and deeds that the people of an Institution share among themselves. Aristotle written in ' Nicomacbian Ethics that "any one can become angry, that is easy, but to be angry with the right person, to the right degree, at the right time for the right purpose and in the right way, that is not easy."

78. When supremacy of law is ignored, justice and fair-play vanish total commitment to rule of law is must to achieve political and economic stability. There cannot be two opinions that rule of law is sine qua non for good governance of a country and for its economic progress. When a citizen encroaches upon a legal right of a fellow citizen, he is guilty of breach of rule of law, he maintained.

79. The problem of the common man is more of economic. His prime concern is to feed his children, how to pay utility bills and how to survive as a human being. He is fed up with the political slogans and confrontation of political leadership which has lost credibility in his opinion. It is only the economic situation which can prove fatal for the Government if it goes out of control. If with this background he has to face the brutalities at the hands of the police, no body can save this country from the wrath of the citizens. The police shall have to believe in and act for the rule of law as good governance cannot materialize without showing respect to the law of the land wherein there is no place for the custodial killings.

80. Justice as described by the Oxford Dictionary implies: "right and fair behaviour or treatment, also laws based on the principles of justice". In whatever way we may try to implement its principles, it will always stand for right and fair behaviour towards people. Justice demands that all citizens are provided with education, wealth is distributed fairly, and nobody is exploited. Justice should be reflected in people's welfare, their economic and moral development and well-being. Citizens should feel sure that the law is there for their protection and not harassment. In the aforesaid perspective liberty and life of the citizens cannot be disturbed, eclipsed by the police by trespassing their houses, damaging the property, removing the same and unjustified killings.

81. The man in the street expects that the police would round up the suspect without delay, probe the crime swiftly and professionally, gather all the evidence and then submit the case before the competent Court for trial. The whole concept of swift justice collapses irrevocably if there was even one weak link in the chain. The police, the prosecutors and the Court shall have to perform their respective duties diligently, honestly and expeditiously to make the concept of swift justice practicable and successful. However, how the concept of speedy justice could be achieved, if the police would act in such an illegal and brutal manner? The impugned "Quick Fix" solutions have no blessing from the law of the land. This brand of crime control strategy, notably by eliminating rivals of their pay masters cannot be approved by religious commands, the Constitution of Pakistan, 1973 and the statutory laws as well as countersigned by this Court and the subordinate Courts of general and special jurisdiction.

82. Epitomise the mockery the authorities had made of themselves in the name of law-enforcement. In civilized countries, no matter how serious the offence, painstaking

investigation precedes any arrest. A very dangerous dimension to this proclivity to "act first, think later" had been added by the licence-to-kill allowed to the Police till the recent past by the Political authorities. The customary probes into encounter killings' and false arrests are seen as the crude cover-ups that they are. But when political favourites are propelled into key positions and licensed to deliver without fear of accountability they can only justify their existence with performances of the kind witnessed in the Punjab in the recent past through custodial killings.

83. A Judge is condemned if he acquits the not guilty. A Judge is condemned if he convicts the guilty. A Judge is condemned for haste if he passes judgments expeditiously. A Judge is condemned for denial of justice if the verdict is delayed. How uncharitable of those who sit in judgment on the judges: How defenceless the judges who cannot defend their judgments, who cannot appeal against the extra judicial judgments against their judgments:

84. The persons at the helm of affairs got this extra-judicial killings performed by their subordinates up to the rank of Sub- Inspector/Inspector Police without having any fear of God in their heart of hearts for which they shall have to account for at the appropriate time-----The Day of Judgement. May God forgive. They ignored the dictates of Almighty God as well as the kind sayings and deeds of our Holy Prophet Muhammad (peace be upon him). The Caliph Umer (May God bless him) took the responsibility of the death of the dog dying of hunger on the bank of the river. Here the persons in authority closed their eyes towards the menace of extra -judicial killings in large number and kept deaf ears to the hue and cries of the affectees. The family members of the persons meeting the custodial death including minors, old persons and females have been left in the larch. The police cannot be granted the authority of eliminating the citizens at their own whims in violation of Article 9 of the Constitution of Pakistan, 1973 wherein it is provided that no person shall be deprived of life or liberty save in accordance with law. There are complaints that at the askance of the some persons on monetary considerations their adversaries and antagonists have been killed by the police. We all should consider these matters with all the seriousness for the betterment of the law and order situation especially when extra -judicial killings have not brought the positive results in the relevant matters. The political patronage was provided to show the authority of the persons in power that it was too harsh in the matters of administration of the Province and on the other side there was panic, sense of deprivation in the minds of the citizens. Little brooks make the river. The aforesaid type of objectionable working offending religious commands, the law, violative of legal ethics brought bad name to the Government and eroded its prestige while the intelligential gave every type of margin like silent spectator.

85. If this type of working of the Police is approved then some day a member or group of the public annoyed with the working of any public servant including Police etc. etc. may take the law in his hands and wipe him out by killing him at his own whims and assessment that the police officer is a source of inconvenience causing disturbance in the society. That would obviously and practically be a source of initiation and, thereafter, enhancement of administrative chase and anarchy which has to be nipped and eclipsed at every cost from the country.

86. One has to shiver in body by the idea that growing Police encounters may be cause for the aggrieved families or for the outlaws even to organize and launch a counter-drive to stop the police on-slaughts in Punjab. The gang of notorious criminals may target the police officials involved in what they believe were fake encounters not only to take revenge but also kill the police morale. It is the truth that no motive is greater than the revenge. Most of the outlaws and proclaimed offenders are convinced that if they are arrested they would face the fatal fate, Street Justice Method, without trial and, therefore, why not take the initiative to put the Police on the defensive. The training camps are operating in the country and the neighbouring states. The head of collusion would be unfortunate day. It would be hard for the police to find anything to

boost their morale. As such it is right, high time for the Police to abandon the role of Judge and Executor, because this could lead to a very chaotic situation.

87. Generally the accused to be eliminated are taken to deserted places on the grounds of pointedness of the places of occurrence or recovery of incriminating material. This authority is invoked under Article 40 of the Qanun-e-Shahadat Order, 1984. However, with respect to the first ground/reason for taking the accused, suffice it to express that the fact that the accused had pointed out the place where he killed the deceased to the Police Officer could not be said to be the discovery of a fact for the purpose of the attraction of Article 40 ibid. Further it simply looks unbelievable that before the reaching of the accused with the Police to a particular place he is eliminated by his own person(s). In some cases of removal of some relatives of the accused the habeas corpus petitions are filed and the defence plea is taken that they have not been arrested and confined; but the relatives of the alleged detenu raise the hue and cry that they have been killed by the Police and in fact their whereabouts are no more known afterwards. The arrest of those persons is not shown in the Daily Diary of the Police Station as contemplated under section 44 of the Police Act, 1861 and under Rule 49(h), Chapter XXII of the Police Rules, 1934. It is known to all that some of the convicts and under-trials i.e." the prisoners were removed from Jails and Judicial Lock-Ups in illegal and unauthorised manner and were eliminated. Obviously such a working cannot be adopted without the permission and encouragement of the superiors and high-ups as well as without political patronage. All such type of killings offend the law of the land and Constitution, 1973 which are violative of legal ethics and human rights. Rather the pity is that no positive results could be achieved.

88. Sometime the genuine complaint is made that a convict undergoing the sentence or as under-trial prisoner being tried in Court premises or in jail in the case(s) is joined in investigation in some other case registered earlier or after his remittance to Jail or Judicial Lock-Up as the case may be who is taken away to a Special Court or a Magistrate by the Police. His physical remand is granted in routine. He is killed under custody and the same episode that the efforts to rescue him was made by, his friends etc., when he lost his life, is repeated. A prisoner, convict or under-trial, cannot be interrogated without an order in writing from the District Magistrate addressed to the Superintendent of Jail. In this regard Rule 14.21 from the Police Rules, 1934 is reproduced as under:---

THE POLICE RULES, 1934

DISCIPLINE AND CONDUCT

CHAPTER XIV

14.21.(1)---Powers to enter jails:

Gazetted police officers may enter Jails at the discharge of their duty.

(2) Subordinate police officers may enter jails only for the purpose of conducting operations for the identification of prisoners.

When entering jails such officers shall be in proper uniform.

(3) No police officer is allowed to interrogate a prisoner without an order in writing from the District Magistrate addressed to the Superintendent of Jail.

Officers deputed for this purpose shall not be below the rank of Assistant Sub-Inspector."

89. According to Rule 7, Chapter 27 of the Lahore High Court Rules and Orders, Volume III "the District Magistrates should see that all lock-ups within the Districts are efficiently managed, that prisoners confined therein are properly cared for and that rules are duly observed". Thus, the permission to interrogate a prisoner in some separate/ independent case in jail can be permitted by the District Magistrate and not by any other Magistrate or trial, Court. It is after the interrogation of the prisoner that if need be, an order is passed by and procured from a Magistrate or the Special Court to fetch the accused for production before that Magistrate/ Special Court to obtain the physical remand as ~ contemplated under section 167 of the Code of Criminal Procedure for joining the accused in the investigation.

90. According to Rule XVII forming part of the "Rules regulating the management of and control over Judicial Lock-Up and treatment of under-trial prisoners" printed in Chapter 27 of the Lahore High Court Rules and Order, Volume III, the prisoners are received or taken out under the orders of the Magistrates and obviously the trial Courts. The aforesaid Rule XVII is reproduced as under: ---

XVII. Prisoners received or taken out under orders of Magistrates

(1) Under-trial prisoners shall not be received into or removed from a Judicial Lock-up except on the written order of a Magistrate

The order should be made on the prescribed form of warrant. Whenever a prisoner is sent out of the Lock-up, the officer-in-charge should, after making the necessary endorsement, send the warrant with him to the Magistrate for the purpose of having the return endorsement made thereon by the Magistrate, as noted on the form "

91. Obviously the aforesaid type of written order has also to be passed by the Court of Session comprising the Sessions Judge and the Additional Sessions Judges under his administrative control in respect of the matters/cases pending before them and fixed on a date. Likewise all the Special Courts on the criminal side also proceed accordingly.

92. The physical remands are granted by the Special Judges/the Area Magistrate or in his absence by the Duty Special Judge/Duty Magistrate under section 167 of the Code of Criminal Procedure which must be allowed specifying the days, maximum fifteen in number, with all the seriousness containing cogent reasons and not in routine. The Instructions mentioned in Appendix No. 25.58(1) (remands to police custody) of the Police Rules, 1934 are not adhered to giving free hand to the police facilitating custodial killings. Appendix 25.58(1) is of much importance which is reproduced as follows: ---

THE POLICE RULES, 1934

INVESTIGATION

APPENDIX N0. 25.58(1)

REMANDS TO THE POLICE CUSTODY

CHAP XXV.

(1) Before making an order of remand to police custody under section 167 of the Code of Criminal Procedure, the Magistrate should satisfy himself that--

(1) there are grounds for believing that the accusation against the person sent up by the police is well founded;

(2) there are good and sufficient reasons for remanding the accused to police custody instead of detaining him in magisterial custody.

In order to form an opinion as-to the necessity or otherwise of the remand applied for by the police, the Magistrate should ascertain what previous similar orders (if any) have been made in the case, and the longer the accused person has been in custody the stronger should be the grounds required for a further remand to police custody.

The accused person must always be produced before the Magistrate when a remand is asked for.

(2) The following principles are laid down for the guidance of Magistrates in the matter of granting remands, and Sessions Judges are required to see that they are carefully applied:

(i) Under no circumstances should an accused person be remanded to police custody unless it is made clear that his presence is actually needed in order to serve some important and specific purpose connected with the completion of the enquiry. A general statement by the officer applying for the remand that the accused may be able to give further information should not be accepted.

(ii) When an accused person is remanded to police custody the period of the remand should be as short as possible.

(iii) In all ordinary cases in which time is required by the police to complete the enquiry, the accused person should be detained in magisterial custody.

(iv) Where the object of the remand is merely the verification of the prisoner's statement, he should be remanded to magisterial custody.

(v) A prisoner, who has been produced for the purpose of making a confession and who has declined to do so, or has made a statement which is unsatisfactory from the point of view of the prosecution, should in no circumstances be remanded to police custody.

(3) In any case when an accused person is remanded to police custody, the reasons must be recorded in the order of remand."

93. If the physical remand is granted by a Magistrate a copy of the order has to be forwarded to the Sessions Judge under section 167(4) of the Code of Criminal Procedure who can suo moto review the same under section 439-A of the Code of Criminal Procedure. However, if the physical remand is granted by a Special Court or an Executive Magistrate not under the administrative control of the Sessions Judge, he need not send a copy of the order to him.

94. The Special Courts and - the Magistrates should note that utmost precautions are to be adopted with all the seriousness and physical remand of a convict or as under trial prisoner confined in jail in some other case must not be granted in routine and carelessly, otherwise they can also be held responsible/liable if any extra -judicial killing is effected afterwards by the Police.

95. The Police has coined the strange type of method that the accused were being taken for the recovery of incriminating article(s) or pointedness of the place of offence/murder. In many cases within the statutory period of 24 hours of arrest the accused including the convicts and under-trials were eliminated/killed. In the way some unknown persons are told to have surprised the Police. Neither the vehicle is hit as it is not damaged, nor the Police is injured nor the invaders are injured, but the accused are found as dead. In most of the cases the citizens from the area come

forward and say that the encounter was false and the victims were made to run who received the injuries on the back. No autopsy is made known to the public. No inquest as required under section 174 of the Code of Criminal Procedure is prepared in some cases. No Judicial Inquiry is got conducted by the District Magistrate in some of the custodial killings under section 176 of the Code of Criminal Procedure. On the contrary the Police Officers were decorated and promoted. The officers recruited as Assistant Sub -Inspectors or Sub-Inspectors or Inspectors have been promoted to the rank of Inspectors, Deputy Superintendents of Police and Superintendent of Police within a period of less than a decade. Some have been decorated with Shoulder Promotion. They belong to influential families or related to superior officers in Police or other Departments or the Political Circles at their back who made their names in custodial killings. What a pity? All of them forget that they have to face the Day' of Judgement. Rather it is becoming an order of the day that even the adversaries are being got eclipsed in fake encounters and there are stories that all was done for monetary considerations at the askance of their pay masters. There were various public complaints that the aforesaid group of Police officers minted/grabed huge amounts by issuing the threats of elimination to different rich persons who had no option but to submit to their commands and demands. Hence it is the high time to urge the police to abandon the role of Executor and Judge, because this could lead to a very chaotic situation.

96. If some stranger(s) killed the person under the custody of the Police or has taken him away there from and, thus, Police has not protected the accused under custody, are not police officers legally liable for negligence as well as under sections 223, 225, 225-A and 225-B, Pakistan Penal Code? However, it is a fact that no action is taken, initiated against the Police accused of it or against the persons surprising the Police escorting the accused. Rather the chapter is closed which obviously arises the lurking suspicion about the correctness, bona fides of such episodes of custodial killings.

97. It is in the fitness of things to touch the point of accelerated/out of turn promotions. Chapter XIII of the Police Rules, 1934 pertains to the promotion of the Police Officials. Rule 13.17 - deals with Annual Confidential Reports which reads as under: ---

"THE POLICE RULES, 1934

PROMOTIONS

CHAPTER XIII

13.17.---(1) Superintendents shall prepare and submit annually to the Deputy Inspector-General, after obtaining the District Magistrate's remarks thereon, reports in Form 13.17 on the working of all Upper, Subordinates serving under them. These reports shall be submitted to reach the Deputy Inspector-General on or before 15th January.

(2) Reports shall be of three kinds, A, .B and C, and shall be marked as such:---

> **A reports:** Reports in which for special reasons it is recommended that promotion be given irrespective of seniority.
>
> **B reports:** Reports in which it is recommended that promotion be given in the ordinary course of seniority.
>
> **C reports:** Reports in which it is recommended that the officer be passed over for promotion or that the taking of departmental action on general grounds of inefficiency or unsatisfactory conduct be considered.

In ' A' and ' C' reports detailed reasons must be given for the recommendations made.

98. A perusal of the aforesaid Rule 13.17 has made out that in the Annual Confidential Report which is sent to the Competent Authority by 15th of January every year, the recommendations for out of turn/accelerated promotions have to be made and it is not provided that at the whims of the Political Authorities, as has happened in the recent past, the out of turn promotion shall be awarded immediately on the happening of extra judicial killings. It speaks of the political patronage in such type of custodial killings. Even otherwise accelerated promotion can be appreciated if there is the real encounter and desperate persons have been arrested or even killed during the encounter due to the bravery of the Police Official(s). Without prejudice I would express that the killing of a person chained and fettered, and physically helpless in the strict sense, cannot be termed to be an act of valour and bravery. Rather the aforesaid extra -judicial killings created a sense of deprivation as well as insecurity amongst the citizens. Such frequent occurrences shattered the idea of good governance. It can safely be expressed that only the culture of competence, if established can root out corruption, mismanagement and nepotism. The Senior officials were ignored and a group of Juniors became renowned and took pride for the commission of such-like disputed feats who not only succeeded in saving their skins but also got out of turn promotions and obviously due to political patronage. However, where there is genuine encounter the matter can be recommended for conferment of Medals and out of turn/accelerated promotions according to rules. According to Rule 13.19 Special Promotion can be awarded to recipients of Police Medals conferred by the Federal Government. In the light of the Rules incorporated in Chapter XV of the Police Rules, 1934 the cash awards and Commendation Certificates can also be granted. However, it can safely be expressed that the custodial killings of the past have not been liked, approved by the citizens and, thus, the accelerated promotions in lieu of the same have not been viewed with commendation even though the same are being enjoyed by the benefited non-deserving Police Officials.

99. It is the proper stage to express that the District Magistrate has also to play his positive role to maintain the check and balance who can pass the order for the holding of Judicial Inquiry or registration of murder case with respect of extra- i judicial killings and, thereafter, the law can be set in motion and the investigation can be conducted under section 156 of the Code of Criminal Procedure. The administration of the police throughout the local jurisdiction of the **Magistrate of the District** is under his control and discretion. In this regard section 4 of the Police Act, 1861 is referred to which is reproduced as under: ---

POLICE ACT, 1861

4. **Inspector-general of Police, etc.**---The administration of the police throughout a general police-district shall be vested in an officer to be styled the Inspector-Generalof Police, and in such (Additional Inspector-General), Deputy Inspector-General and Assistant Inspector-General as the Provincial Government shall deem fit.

The administration of the police throuehout .the local iurisdiction of the Magistrate of the district shall, under the Qeneral control and direction of such Magistrate, be vested in a District Superintendent and such Assistant District Superintendents as the Provincial Government shall consider necessary."

100. My feeling is that the District Magistrate-has to remain vigilant within his Civil District who has to check such brutalities. However, the political patronage remained responsible for his indolence towards this conduct of the Police. If these injustices are not checked, the wrath of the citizens may play havoc. May God shower his blessings on all the citizens of Pakistan.

101. It is important and necessary to express that police is a disciplined force. At the time of the recruitment of the members of police the training is imparted and the foremost idea of maintenance of discipline is inculcated. The said training is for the purpose of convenience and betterment of the Society as all the Institutions in a Welfare State are for the welfare of its citizens. What do we live for, if it is not to make life less difficult for each other, but it involves the tremendous sacrifice. The Institutions have to give the citizens breathing space. The race for power revolving around autocratic attitude appear to have made those persons who bank upon the same as adopting the recalcitrant attitude, violative of law. Uncharted freedom and exercise of power have always degenerated into moral stagnation which brought about the decline of many a brilliant culture and civilization of the world. It was to ward off such a danger to the community and the individuals that our Holy Prophet Muhammad (peace be upon him) strictly exercised self-discipline with all its rig ours and hardships throughout the whole span of his (peace be upon him) glorious life. By keeping restrained within own limits according to the rule of law, physically and mentally, the sunshine of happiness in the dark and dismal lives of the citizens can be brought. The prevailing gloom of frustration revolving around custodial killings can hardly be mitigated if the Police is allowed to act in an indiscipline and autocratic mariner. No reforms, no improvement and for that matter, no discipline can be superimposed from without. Self-indiscipline is borne from within. It emanates and flows from the very heart where the reality of conviction, the truthfulness of principles and the verity of faith and believe have their habitation. The golden motto "Discipline, Faith and Unity" projected and propagated by the father of the nation, Quaid-e-Azam Muhammad Ali Jinnah, has to be referred to which cannot be ignored by all the citizens and Institutions of the country including the police. The need for discipline, personal and collective, of the type Quaid-e-Azam had exhibited all his life through his thoughts, conduct and behaviours has never been more pressing than it is today as the society is standing at the moral crisis of principles of law where norms of good conduct are ruthlessly disregarded. Codified laws, rules and regulations framed with a view to ensure the convenience and promote the honour and respect of general public are being violated at will. Respect for law and solicitude for others' rights have been cast to the winds, which is leading the nation away from patriotic thinking. The trend is that the pressure is either built by the police or through the police upon the adverse party, which is a source of enhancement of polarization in the social set-up. The Discipline is one of the basic pillars of national existence and without the same Faith and Unity cannot be achieved. Consequently it can be expressed that the self-discipline gives the best guarantee for a survival both individually and collectively and if this goal is attained the law and order situation can improve and the, Police can attain the high pedestal.

102. This is the proper stage to refer to Chapter XIV of the Police Rules, 1934 under the Caption "Discipline and Conduct". A sort of Code of Conduct is incorporated therein and if the same is followed seriously, positive results can be achieved whereby such type of disputed episodes cannot occur. In this regard Rule 14.4 is reproduced as under: ---

THE POLICE RULES, 1934

Chapter XIV

DISCIPLINE AND CONDUCT

> (14.4).---(1) Every police officer shall keep his temper thoroughly under control, shall act with courtesy of all occasions and shall not allow his composure to be disturbed by behaviour of others towards him.
>
> (2) A police officer defending himself, or lawfully enforcing his authority, shall act with calmness and shall use as little violence as possible.

(3) Police officers usually act individually in the execution of their duty. They should remember, therefore, that on the behaviour of each individual depends the reputation of the force and the degree to which the law-abiding section of the public will be willing to cooperate against law-breakers."

103. During the performance of the duty the public servants including the police have to proceed and tackle the situation according to the relevant prevalent circumstances. Even the right of self-defence can be exercised by the police while effecting the firing according to the situation. However, such an action and working is subject to the future scrutiny of the competent Court of law and no independent right as a Judge and Executor can be exercised by the police thereof.

104. While the litigants are mortal, the litigation is immortal. The wordly laws can be changed and altered. However, the basic Islamic Laws are of perennial nature which have to be followed in the mortal world and shall have the same force at the time of Resurrection/Day of Judgement. The fruits of good deeds of faithfuls and the punishments (dreadful penalty) for misdeeds/sins of wrongdoers have been ordained by the Almighty God in His Book---Holy Quran. If his creature repents and works righteous deeds, God, the Most High, shall change the evils of such persons in the good as God is Oft-Forgiving, Most Merciful. A note of warning is that of utmost necessity that if any person/citizen/civil servant gets himself scoot free arid .is not held liable during his service/life due to his own efforts or due to the defence and protection provided by others including the superior Officers, who also manage promotions, laurels, prizes to the favourites, that does not mean that at the time of Resurrection he shall not face the accountability---with respect to "Haqooq Allah" and "Haqooq-ul-Ebaad". It is commonly said that Boss is not always right, but the Boss is always a Boss. Keeping in view both the aforesaid sides it can well be expounded that commands for custodial killings and illegal orders of the superior officers need not be obeyed by the subordinates. The illegal ways adopted thereof by the Superiors and Juniors with political patronage cannot be approved by the law abiding citizens. Only God, the Most High, is the final Arbiter, the Knower, the Last Judge. At that most difficult and crucial time the commands ordained by God and the Sunnah of the Holy Prophet Muhammad (peace be upon him) shall be operative/effective. May God, who is of Forgiving, shower his Mercy on his creature in this world and on the Day of Judgement.

105. The fight between good and evil always continues. We should expose discrimination in the Society instead of accepting it. We should resist oppression and spread the message of humanity in the Society. We must note that there is vast difference between living standards of people in the society and this gulf is increasing day by day. The remedy is that we all should familiarize the nation with the difference between true and false and guide it towards a just and prosperous society. The Institutions can play a vital and positive role in this regard.

106. All what has been pointed out and expressed in this judgment is a deep-rooted disease and mere dressing it with bandages of knowledge would not cure it as the Deadly Diseases always require drastic remedies. The Constitution, 1973 places stress on democracy, equality, rule of law and enjoins upon the State the duty to eliminate all forms of exploitation. The State is under a Constitutional mandate to create conditions in which fundamental rights guaranteed to the individuals could be enjoyed by, all. It is a matter of common knowledge that coercion frightens, never refines; it wounds, never heals. To voice such a grievance the citizens have a constant companion--the Courts--armed with Law and Constitution. The rule of law cannot be mere star twinkling in the sky. The risk of our time invade our inner being and ideology of social justice, putting 'the greed of the fair above the need of the many. The framework of the Constitution, 1973 is to provide a decent standard of life to the people and especially provide the security from cradle to grave. It is only the education which equips the citizens to participate in achieving the objectives enshrined therein. We will make mistakes if we

go forward, but doing nothing will be the worst mistake. It is the high time where it can be expressed that the compassion is injected by the police in its working.

N.H.Q./N-1/L

Petition accepted.

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