

**IN THE SUPREME COURT OF PAKISTAN**

(Appellate/Original Jurisdiction)

**Present:**

MR. JUSTICE MUSHIR ALAM  
MR. JUSTICE UMAR ATA BANDIAL  
MR. JUSTICE QAZI FAEZ ISA  
MR. JUSTICE IJAZ UL AHSAN

**CIVIL APPEALS NO.1476 TO 1485 OF 2018**

(on appeal from the judgments/orders 25.09.2018 of the Islamabad High Court, Islamabad, passed in I.C.A.365/2017 In W.P.308/2016, I.C.A.366/2017 In W.P.309/2016, I.C.A.367/2017 In W.P.310/2016, I.C.A.368/2017 In W.P.2128/2015, C.M.A.3053/2018 In I.C.A.365/2017, C.M.A.3055/2018 In I.C.A.365/2017, I.C.A.22/2018 In W.P.308/2016, I.C.A.23/2018 In W.P.308/2016, I.C.A.24/2018 In W.P.308/2016)

**AND**

**C.M.A.10393/2018 and 7403/2019 in C.A.1476/2018,**  
**C.M.A.10950/2018 in C.A.1477/2018, C.M.A.10398/2018 in**  
**C.A.1480/2018, C.M.A.10951/2018 in C.A.1483/2018,**  
**C.M.A.10952/2018 in C.A.1484/2018 AND C.M.A.**  
**10953/2018 in C.A.1485/2018 AND CrI.O.P.166/2018 in**  
**CrI.O.P.7/2016** **AND**  
**CrI.M.A.2083/2018** **in** **CrI.O.P.166/2018**

**AND**

**WRIT PETITIONS NO.4270, 4723 OF 2016 AND WRIT**  
**PETITION NO.3594 OF 2018**

*Federal Government Employees Housing*

<i>Foundation (FGEHF), Islamabad</i>	<i>(In C.A.1476-1480/2018)</i>
<i>Sohail Ahmed Mian</i>	<i>(In C.A.1481/2018)</i>
<i>Najma Siddiqi</i>	<i>(In C.A.1482/2018)</i>
<i>Manzar Hafeez Mian &amp; others</i>	<i>(In C.A.1483/2018)</i>
<i>Khizer Hayat Khan &amp; others</i>	<i>(In C.A.1484/2018)</i>
<i>Ms. Sameera Yasin &amp; other</i>	<i>(In C.A.1485/2018)</i>
<i>Supreme Court Bar Association</i>	<i>(In Cr.O.P. 166 /2018)</i>
<i>Noor Elahi Chuhan &amp; others</i>	<i>(In WP 4270/2016)</i>
<i>Multi Professional Cooperative</i>	<i>(In WP 4723/2016)</i>
<i>Nazeer Hussain Chuhan etc</i>	<i>(In WP 3594/2018)</i>

**...Appellant(s)/Petitioner(s)**

**VERSUS**

<i>Malik Ghulam Mustafa &amp; others</i>	<i>(In C.A.1476/2018)</i>
<i>Malik Bashir Ahmed (since deceased)</i>	
<i>through. LRs &amp; others</i>	<i>(In C.A.1477/2018)</i>
<i>Zulfiqar Hussain &amp; others</i>	<i>(In C.A.1478/2018)</i>
<i>Malik Dad &amp; others</i>	<i>(In C.A.1479/2018)</i>
<i>Muhammad Sabir &amp; others</i>	<i>(In C.A.1480/2018)</i>
<i>Malik Bashir Ahmed &amp; others</i>	<i>(In C.A.1481-1482/2018)</i>
<i>Federal Government of Pakistan,</i>	
<i>Through its Secretary, Cabinet</i>	
<i>Division, Islamabad &amp; others</i>	<i>(In C.A.1483-1485/2018)</i>
<i>Amer Ali Ahmed and others</i>	<i>(In Crl.Org. P. 166/18)</i>
<i>Chief Commissioner, Islamabad, etc.</i>	<i>(In WP 4270/2016)</i>
<i>Federation of Pakistan &amp; others</i>	<i>(In WP 4723/2016)</i>
<i>Land Acquisition Collector, ICT</i>	<i>(In WP 3594/2018)</i>

**...Respondent(s)**

For the Appellant(s):	Mr. Mansoor Ahmed, ASC
(in CAs 1476 to 1479/18)	Syed Rifaqat Hussain Shah, AOR
(in CAs 1477 & 1480/18):	Sardar Muhammad Aslam, ASC
In CA 1481/18:	In person
In CA 1482/18:	In person
In CA 1483-1485/18:	Mr. Shah Khawar, ASC
IN CMA 10950/18:	Mr. Khushdil Khan Malik, in-person
In CMA 10951-10953/18:	Nemo
In CMA 10393, 10398/18:	Syed Razaqat Hussain Shah, AOR
In CMA 7403/2019:	Syed Iqbal Hashmi, ASC
	Ch. Akhtar Ali, AOR
In CMA 9756/19:	Syed Zulfiqar Abbas Naqvi, ASC
In CMA 9210-9213	
& CMA 9835/19:	Mr. Sajeel Sheryar Swati, ASC

In CrI.O.P 166/18: Mr. Rasheed A. Rizvi, Sr.ASC  
 Mr. Hamid Khan, Sr. ASC  
 Mr. Amanullah Khan Kanrani, ASC  
 Mr. Syed Qalb-i-Hassan, ASC  
 Mr. Mehmood A. Sheikh, AOR  
 Syed Razaqat Hussain Shah, AOR  
 Ms. Shireen Imran, ASC  
 Mr. Liaqat Ali Tareen, ASC  
 Mr. Aurangzeb Asad Khan, ASC  
 Mr. Shamim-ur-Rehman, ASC  
 Mr. Ehsan Qadir Sial, ASC

In Cr.O.P 166/18: Mr. Naeem Bokhari, ASC  
 (for Private Respondents) Ch. Akhtar Ali, AOR  
 & for Petitioners  
 (in W.Ps 4270/16, 4723/16  
 & 3594/18)

On Court Notice: Mr. Niaz Ullah Niazi, AG Islamabad

For CDA: Ch. Riasat Ali Gondal, ASC  
 Raja Abdul Ghafoor, AOR

For Federation: Mr. Sajid Ilyas Bhatti, Addl. AGP

For Private Respondents: Syed Feisal Hussain Naqvi, ASC

in CAs 1476-1480/18: Ch. Hassan Murtaza Mann, Adv.

Dates of Hearing: 15<sup>th</sup>, 16<sup>th</sup>, 20<sup>th</sup>, 21<sup>st</sup>, 22<sup>nd</sup>, 23<sup>rd</sup> May, 2<sup>nd</sup>,  
 7<sup>th</sup>, 10<sup>th</sup>, 23<sup>rd</sup> October, 12<sup>th</sup>, 25<sup>th</sup>  
 November of 2019 and 7<sup>th</sup>, 9<sup>th</sup>, 13<sup>th</sup>, and  
 14<sup>th</sup> of January, 2020.

## **JUDGMENT**

**MUSHIR ALAM, J.**— Since the issue involved in all these cases is almost identical, therefore, we find it expedient to decide the titled cases together through this common judgment.

### **Facts**

1. Facts forming matrix of the proceedings in hand are that on 20.01.2014, the Senate Committee on Housing and Works recommended that Sector F-14 be allocated by Capital Development Authority (herein referred to as **CDA**) to Federal Government Employees Housing Foundation (herein referred to as **FGEHF**) [(converted into authority under *Federal Government Employees Housing Authority Act, 2020* during the pendency of proceedings], the appellant herein, for preparing a housing scheme. After meetings and deliberations, the CDA and **FGEHF** agreed to initiate a housing scheme in Sector F-14 with mutual collaboration. Accordingly, Secretary Ministry of Housing and Works initiated a summary on 06.01.2015 regarding acquisition of land for the **FGEHF** in Sector F-14 and some parts of Sector F-15 in Islamabad Capital Territory (**ICT**). The Prime Minister approved the summary on 01.05.2015 and notifications under **Section 4** and later under **Section 17** of the Land Acquisition Act of 1894 (herein referred to as **LAA, 1894**) were issued by the Commissioner **ICT** on 20.05.2015 and 04.12.2015 respectively. On 29.09.2016, a development contract was awarded to the Frontier Works Organization (FWO). Then an award was announced by the Collector on 15.11.2016 regarding land in F-14. The Commissioner **ICT** issued a notification regarding land in F-15/3 & F-15/4 on 15.06.2017. The Collector then announced the award for land situated in revenue estates of Tarnol and Jhangi Syedan in **ICT** in favor of **FGEHF** on 06.07.2017. The land owners/natives of the area challenged the above said notifications and the awards in writ jurisdiction before the learned Islamabad High Court, Islamabad,

which were allowed vide judgment(s)<sup>1</sup> dated 23.10.2017. The judgment(s) were challenged through Intra-Court Appeals No. 364/2017 to 368/2017, 412/17-415/17, 417/17, 22/18-24/18, 306/08 and 307/18, which was maintained through the common impugned judgment(s) dated 25.09.2018.<sup>2</sup>

2. The Appellant/**FGEHF**, Islamabad (since succeeded by *Federal Government Employees Housing Authority*), have, with the leave of the Court, filed Civil Appeals No.1476 to 1480/2018, assailing the judgment rendered by learned Division Bench of the Islamabad High Court, Islamabad, passed in the Intra-Court Appeals noted above whereby not only the acquisition proceedings carried out under the **LAA, 1894** but, also all the actions and orders relating to acquiring of land for the appellant in Sectors F-14 and F-15, Islamabad (*subject sectors*) were declared illegal, void and without jurisdiction and as such notifications impugned in writ petitions were also set aside. The impugned judgment held that the land within Islamabad Capital Territory can only be acquired by the Capital Development Authority under the provisions of the Capital Development Authority Ordinance, 1960 (herein referred to as the **CDAO, 1960**), which being special and later law, has precedence over the **LAA 1894**, which was held to be general in nature. The Learned bench further directed that *‘the land owners and owners of built up properties who have received the payment through Land Acquisition Collector to return the amount within (3) three months from the date of judgment through pay orders’*. The Appellant was left with discretion to recover the amount paid for their own purposes, to the private parties/contractors, through their own mechanism and or legal process. Lastly, **CDA** was held to be entitled *“to implement the master phased program as provided in section 11 and 12 of the **CDAO, 1960** and develop Sectors F-14 and F-15 as per their own decision in consultation with the Federal Government, if so required”*.

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<sup>1</sup> Since reported as Malik Bashir Ahmed v. Federal Government of Pakistan (PLD 2018 Islamabad 68)

<sup>2</sup> Reported as FGEHF and others v. Malik Ghulam Mustafa and others (PLD 2019 Islamabad 1)

3. The Appellants, in Civil Appeals No.1481 to 1485/2018, being serving and retired Government servants, are the allottees of plots/land in *Subject Sectors*. The Appellants have also assailed the judgment of the learned Division Bench of the Islamabad High Court and claimed their respective plots/land as they have already deposited the requisite amount since long with the Appellant in lieu of their allotted plots.

4. Persons considering that they may be prejudiced by order that may be passed in instant proceedings have made applications to be added as party. Such persons fall in two categories, the first being serving and retired federal government employees, who have been offered plots (CMA 10950, 10951, 10952 & 10953/2018 filed by the allottee/federal government employees) and second category of persons are the land owners, whose land is subject matter of acquisition, who have also filed (CMA No. 7403/2019, 9210-9213, 9835/19 & 9756/19) applications to be added as party as it is claimed that unless they are made party and heard, they will be seriously prejudiced. All such persons were aware of the acquisition proceedings, and some also made applications before the Islamabad High Court, some have directly approached this Court. All such persons claim to have interest in the outcome of the instant proceedings, either as allottee or as land owner, and all such persons have interest common to persons already represented by eminent counsels. Without entering into much debate as to such persons, being necessary or proper party, at this stage of proceedings, in order to do complete justice<sup>3</sup>, we consider it expedient to hear all such persons without formally adding them as party to the respective appeals or petitions, to avoid delay in the matter. Such course is acceptable to all such parties and it would also meet the ends of justice<sup>4</sup>. However C.M.A.10393 (in CA 1476/18) and CMA 10398/18 (in CA 1480), moved by the FGEHF, Appellant, to add CDA as party is allowed. CMA 35/19 (in CA 1477/18) to bring legal heirs of Respondent No.1 on record is granted, subject to all just exceptions; amended title may be filed and

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<sup>3</sup> Multiline Associate v. Ardeshir Cowasjee PLD 1995 SC 423 (para 11)

<sup>4</sup> Federation of Pakistan v Muhammad Aslam 1997 SCMR 607

taken on record. All other CMAs seeking permission to bring additional documents on record, file reports and or compliance etc. are granted, subject to all just exception and, disposed of accordingly.

5. The land owners and residents of the locality, whose land has been acquired, have also filed Writ Petitions No.4270 & 4723 of 2016 and 3594 of 2018 before the learned Islamabad High Court, challenging the very acquisition of the land for the purposes of, *inter alia*, developing a housing society for lawyers etc. However, on 27.12.2018, while hearing of Criminal Original Petition No.166/2018, at the request of their counsel and land owners present in Court, subject Writ Petitions were requisitioned from the concerned High Court so that the same may be considered along with Civil Appeals No.1476/2018 etc.

6. The Supreme Court Bar Association of Pakistan (herein referred to as the **SCBA**), through its President, filed Criminal Original Petition No.166/2018, which is an off shoot of Cr.O.P 41/17 seeking implementation of the order of this Court dated 10.08.2018 (*arising out of C.P 38/2013 SCBA v Amer Ali Ahmed Chief Commissioner Islamabad*) with regard to a settlement arrived at between the office bearers of the **SCBA** and the FGEHF & other government functionaries relating to issuance of Notification under section 4 and 17(4), decision of objections under section 9 and issuance of Award under Section 11 of the **LAA, 1894**. According to learned ASC for the SCBA, Mr. Rasheed Rizvi, settlement arrived at by and between the Respondents in Cr.O.P 166/18 has not been complied with. He also opposed Cr.MA No. 2083/18

7. Mr. Nazir Hussain Chohan represented by Mr. Naeem Bukhari, Senior ASC, has filed Cr.MA No. 2083/18 in Cr.O.P No. 166/2018 seeking setting aside of Order dated 10.8.2018 passed on Cr.O.P 41/2017 (which is an off shoot of CP 38/2013 filed by SCBA) as noted above, Cr.O.P No.166/2018 and Cr.MA No. 2083/18 will be attended separately.

## **I. Judgment of the Honorable Islamabad High Court:**

### **General Overview:**

8. The learned bench of the Islamabad High Court considered all the facts in detail from paragraph 1 to 9, including the issuance of Notification by the Additional Deputy Commissioner Revenue under Section 4, 6 and 17 of the **LAA, 1894** dated 20.5.2015 which was later converted into the amended notification dated 02.12.15. The relevant portion of the same has been reproduced below:

*"WHEREAS, it appears to the Land Acquisition Collector, Islamabad District Islamabad that the land is likely to be taken for Federal Government Employees Housing Foundation, under the administrative Control of Ministry of Housing and Works; Government of Pakistan for its expense for public purpose namely for launching housing scheme in Sector F-14 as well as contiguous area of F-15 prior to G. T. Road falling in Zone-1 for the Federal Government Employees in villages Tarnol, Mara Sumbal Akku, Mara Sumbal Jaffar, Thalla Syedan and Jhangi Syedan, Tehsil and District Islamabad. It is hereby notified that the land in the locality described below is likely to be acquired for the above purpose. (Emphasis supplied)."*

9. The learned bench then elaborately explains the Scheme of Sector F-14 & 15 in paragraph 14 to paragraph 16 when the notification by the Commissioner later culminated into an Award dated 15.06.2017 in respect of land situated in Sector F-14 (measuring 7003 Kanals & 10 Marlas) namely Moza Tarnol, Jhangi Syedan, Thallah Syedan, Mehra Sumbal Akku, and Mehra Submal Jaffar. The second award was issued by the Land Acquisition Collector vide notification dated 28.9.2017 for land situated in F-15/3 & 4 (measuring 300 Kanals) falling in Moza Tarnol and Jhangi Syeda.

10. In paragraph 17 to 22, the Learned Bench considered the principles of interpretations enunciated by apex court as to general and special law and then compared LAA, 1894 to CDAO, 1960. In paragraph 23 to, arrive at the conclusion that: "we are also of the view that CDA Ordinance, 1960 is purpose specific law to cater the requirement of new capital of Pakistan and such kind of enactment provides a complete mechanism in itself, which has no nexus with the Land Acquisition Act, 1894." It was further held that FGEHF, should have invoked the CDAO, 1960 and not LAA 1894 for the acquisition of



land, and the things were not done in the manner required by law, to buttress the conclusion, learned bench relied on *Muhammad Anwar etc. v Mst Ilyas Begum etc*<sup>5</sup>.

## **II. Reasoning of the IHC**

### **i. Intent and Purpose of the Legislation:**

11. The learned bench, to discover the intent and purpose of the impugned legislation, examined the contemporary provisions of both the statutes. In *paragraph 24* of the impugned judgment, learned bench placed reliance on the case of *Syed Mehmood Akhtar Naqvi vs. Federation of Pakistan*<sup>6</sup> to hold that:

*“no provision should be rendered meaningless and there was no scope of placing unnatural interpretation on the meaning of language used by the legislators, especially when the language of legislative provision was clear, it was not the duty of the Court to either to enlarge the scope of legislation or the intention of the legislators.”*

It was further concluded that:

*“It is also settled that in case of conflict, preference is to be given to the new law and the implied repeal of earlier law could be inferred only when there was enactment of a later law which had the power to override the earlier law, and was totally inconsistent with the earlier law and when there are two laws, the earlier and the later law, could not stand together, therefore, later laws abrogate the earlier contrary laws.”*

For the conclusion so arrived at reliance was placed on the judgments rendered in the cases of *Lahore (Inland Revenue) RTO v M/s Almakdi International*<sup>7</sup>, and *Tanveer Husain v. Division Superintendent Pakistan Railways*<sup>8</sup>.

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<sup>5</sup> PLD 2013 SC 255

<sup>6</sup> PLD 2012 SC 1089

<sup>7</sup> 2013 PTD 2125

<sup>8</sup> PLD 2006 SC 249

**ii. Public Purpose under the CDAO, 1960:**

12. In *paragraph 25 to paragraph 27* of the impugned judgment, it was held that **Section 11** and **Section 12** of the **CDAO, 1960** provided for the larger purpose of the development of **ICT** and the acquisition of land for development of specified area, which shall be done under **Section 22** of the **CDAO, 1960**. It was further held that that the requirements enunciated within **Section 4** of **LAA, 1894** had been applied by implication within **Section 22** of **CDAO, 1960**. Although, the term “*public purpose*”, originally provided under **Section 4** of **LAA, 1894**, was not defined under the **CDAO, 1960**, the latter provides for a different scheme for the acquisition of land as mentioned above. Given the existence of the larger purpose within the **CDAO, 1960**, it was held that the acquisition of land under the **LAA, 1894** for public purpose is not acceptable. It was further mentioned that the ‘*public purpose*’ needs to be seen in the light of the ‘*general interests of the community*’ as opposed to the ‘*particular interest of the individual*’. Therefore, it was held that “*it is not permissible to take land of one and give it to another in private interest*”. Reliance was placed on *Ghulshan Hussain etc. v Commissioner (Revenue), Islamabad, etc.*<sup>9</sup>, *Smt. Somavant and Others v. The State of Punjab and Others*<sup>10</sup>, *Suo Moto Case No. 13 of 2007*<sup>11</sup>.

13. In *paragraph 28*, the learned bench then relied on the English saying “*you cannot rob Paul to pay Peter*” to further elaborate how the interests of the general community must be furthered instead of the interests of the individual for ‘*public purpose*’ as only the community of Federal Government servants are the beneficiaries under the objectives of the Federal Government Employees Housing Foundation and not the general community at large. Reliance was placed on *Muhammad Akbar v. Commissioner Rawalpindi*<sup>12</sup>, *Dr Nasim Javaid v. Lahore Cantt. Cooperative Society Ltd*<sup>13</sup>.

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<sup>9</sup> 2000 YLR 1711

<sup>10</sup> AIR 1963 SC 151

<sup>11</sup> PLD 2009 SC 217

<sup>12</sup> PLD 1976 Lah 747

<sup>13</sup> PLD 1983 Lah. 552

**iii. Federal Government Employees Housing Foundation as a Private Enterprise:**

14. In *paragraph 29*, the learned bench then builds on the proposition regarding public purpose with respect to the *FGEHF*, as a company established with a specific objective, which does not cover private individuals as the *FGEHF* can only provide housing to its members by remaining within the scope of its objectives. This is to be categorized as a private interest only to be exercised in favor of the members of the *FGEHF*. Reliance was placed on *Muhammad Ishaq etc. v. Govt. of Punjab etc*<sup>14</sup>. Therefore, it was held that:

*”when they use the state machinery with their limited objective under the Companies law, their entire working has to be seen in the light of their objective only and the purpose for which the land was acquired was too limited to hold that the same would be used for public purpose”*

15. In *Para 26, 29, 30 and 35* of the impugned judgment, the learned bench concurred with the single judge that the land was acquired under the **LAA, 1894** and not under the **CDAO, 1960**. The learned bench, relying on the arguments of the private respondents, further agreed with the single judge that the **FGEHF**, being a private enterprise, and a juristic person, any land acquisition, if at all was permissible, should have been under the **CDAO, 1960**. The *FGEHF* was treated as a company, no different than a land developer, society, and therefore, not permitted to initiate any land acquisition proceedings in any part of **ICT**.

**iv. Enactment of Law to Qualify as an Exception within Art. 24(3) of the Constitution, 1973.**

16. In *Para 29* of the impugned judgment, it was also ruled that certain exceptions are provided under sub-article (3) of Article 24 (*wrongly quoted as Clause 3 of Article 4*) of the Constitution, “.....*that for acquisition of any property under any one of the exceptions, a law has to be enacted. It follows, therefore, that in any case, without specific*

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<sup>14</sup> 2002 SCMR 1652

*law, no person can be deprived of from his property or the possession taken by the government.”* Reliance was placed on *Nazim F Haji, Chief Citizen Police Liaison Committee Karachi v. Commissioner Karachi*<sup>15</sup>.

**v. Property Rights within the Constitution, 1973**

17. The learned bench also relied on **Article 24** of the Constitution, in extenso within paragraph 30 to, draw a conclusion that “*in accordance with law*” as referred in the *Article* is **CDAO, 1960** and acquisition of land for the Appellant was considered to be for self-serving benefit of its member, do not figure out under the scheme of the **CDAO, 1960** for which reliance was placed on *Suo Moto Case No. 13 of 2009*<sup>16</sup>.

**vi. Determination of Public Purpose:**

18. The learned bench, in Paragraph 30 of the impugned judgment, recognized that determination of *public purpose* objectively is domain of the Government and is subject to judicial review. Reliance was placed on *Messer Eden Developers Pvt. Limited Pakistan v. Government of Punjab etc.*<sup>17</sup>.

**vii. Regulatory Capture:**

19. Learned bench of IHC, from paragraph 31 to 34, viewed the acquisition of land for the Appellant in concert with **CDA** authority as a ‘*regulatory capture*’, and not in *public interest*. For this conclusion, reliance was placed on *Barrister Sardar Muhammad v. Federation of Pakistan*<sup>18</sup>, *Lahore Development Authority v. Mrs. Imran Tiwana*<sup>19</sup>, *Muhammad Ashraf Tiwana v. Pakistan*<sup>20</sup>, and *Mrs. Imran Tiwana v.*

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<sup>15</sup> PLD 1993 Kar. 79

<sup>16</sup> PLD 2011 SC 619

<sup>17</sup> PLD 2017 Lah. 442

<sup>18</sup> PLD 2013 Lah 343

<sup>19</sup> 2015 SCMR 1739

<sup>20</sup> 2013 SCMR 1159

*Province of Punjab*<sup>21</sup>. The learned Bench also heavily relied on *The Murree Brewery Co Ltd. V. Pakistan through Secretary to Govt. of Pakistan, Works Division*<sup>22</sup>.

20. In Paragraph 33 of the impugned judgment, the learned Division bench extensively dilated upon purported illegalities and irregularities committed by **CDA** and considered various provisions of the **CDAO, 1960**, *Islamabad Land Disposal Regulations 2005 (ILDR, 2005)*, and *ICT Zoning Regulations 1992, inter-alia*, and read them to exclusion of the **LAA 1894**. The learned bench further viewed that acquisition of land in Sector F-14 under the **LAA, 1894**, at the behest of *FGEHF*, is in violation of ILDR, 2005. No agency other than the **CDA** can acquire land in the *Specified Area* which comprised of five (5) Zones

**viii. State Largesse:**

21. In paragraph 34, of the impugned judgment it was opined that acquisition of land should have been routed under the **CDAO, 1960**, and concept of State largesse has been flouted. It was further held that the land could only be acquired under *Article 173 of the Constitution*. The Appellant, a company registered with SECP, is no different than any other land developers (since given status of authority under **FGEHF Authority Act, 2020**). Any permission or NOC extended by the CDA Board or Authority were held to be illegal and void. It was concluded that acquisition of land within Islamabad Capital Territory is within the domain of **CDA Ordinance**, in terms of Article 24 Constitution of Pakistan, read with Article 173, and application of any other law and procedure stands excluded. Land in specified areas could only to be utilized in accordance with **Section 11** and **Section 12** of the **CDAO, 1960**. Therefore, the learned bench held that the Notification under **Section 4** of the Land Acquisition Act was “*illegal and void.*”

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<sup>21</sup> PLD 2015 Lah. 522

<sup>22</sup> PLD 1972 SC 279

### **III. Leave Granting Order**

22. In the back drop of above factual and legal matrix, leave was granted in C.A. No.'s 1476 to 1485/2018 *vide* order dated 06.12.2018 *inter-alia* to consider whether:

1. *Capital Development Authority (CDA) under the Capital Development Authority Ordinance, 1960 (the Ordinance) has exclusive jurisdiction to acquire land and it excludes acquisition under the Land Acquisition Act, 1894 (the Act);*
2. *The provisions of the Ordinance exclude those of the Act with respect to acquisition of land for a public purpose;*
3. *Acquisition for a housing scheme for Federal Government Employees and allied group constitutes a valid public purpose;*
4. *Acquisition under the Act becomes State largesse under Article 173 of Constitution of the Islamic Republic of Pakistan, 1973 read with Section 16 of the Act, and*
5. *In view of the alternate and efficacious remedy available under Section 18 of Act, the constitutional petitions before the learned High Court were not maintainable.*
6. *In the meantime, the operation of the impugned judgment is suspended. Any acquisition would be subject to the final decision of the instant cases and any construction raised from today onwards shall be at the risk and cost of the person(s) doing so.*

We have extensively heard the arguments of all the learned Counsels for the parties and heard some of the parties present in persons as well, perused the record with the assistance of all the learned Counsels and parties in person.

### **IV. Judgment of the Supreme Court:**

23. In order to consider the points of determination, as noted in leave granting order, regarding which of the two competing or comparable statutes in the field (*i.e.* **LAA, 1894** or **CDAO 1960**), and if some of the provisions in **CDAO, 1960**, essentially relating to land acquisition, have precedence over the provisions of **LAA, 1894** or otherwise. The principles to adjudge which of the statutes and provisions of which of the competing statutes are to be given

preference, are to have dominance in repealing, or overriding effect, over the other becomes quite challenging.

## **I. The Applicability of the *Land Acquisition Act, 1894* within ICT**

### **a. LEGISLATIVE ORIGIN OF THE LAA, 1894:**

24. The State of Pakistan inherited ***The Land Acquisition Act, 1894*** as a colonial legacy. It was enacted with an object to acquire any land needed by the Government for public purpose and for the Companies. *“It provides complete indemnity to the owner and no property is to be acquired without proper and adequate compensation”*<sup>23</sup>. The present controversy is confined only to the acquisition for public purpose.

25. The ***LAA, 1894*** provides an elaborate procedure and mechanism for the acquisition and vesting of land, determination, payment of compensation, inquiring into measurement, value claims, award(s) by the collector, and hearing of objections as to adequacy and apportionment between the claimants. In addition, it also provides the complete hierarchy for adjudication of objections relating to the adequacy, or otherwise, of compensation<sup>24</sup> leading up to the Supreme Court<sup>25</sup>.

26. The ***LAA, 1894***, remaining a colonial legacy, is still retained in statute books by India and Pakistan alike. It was given protection under the ***Government of India Act, 1935***<sup>26</sup>, which was succeeded by the ***Indian Independence Act, 1947***<sup>27</sup>. It was then adapted vide ***Governor General’s Order No.20 of 1947***, also known as ***Pakistan Adaptation of Existing Pakistan Laws Order 1947***<sup>28</sup>,

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<sup>23</sup> PLD 2010 SC 719 (Paragraph 5). WAPDA v Hira Begum (1972 SCMR 138).

<sup>24</sup> Section 18 of LAA, 1894

<sup>25</sup> Section 54 of LAA, 1894

<sup>26</sup> See Article 292 and 293

<sup>27</sup> See Section 18

<sup>28</sup> See Section 54(2)

eventually finding its way into the **Constitution of Pakistan 1956**<sup>29</sup>. The **Constitution of Pakistan 1962**<sup>30</sup> also shielded the **LAA, 1894** and it was finally adopted by the **Constitution of Pakistan, 1973**<sup>31</sup>.

27. Pursuant to **Section 1(2)** of the **Central Laws (Statute Reforms) Ordinance 1960**,<sup>32</sup> the **LAA, 1894** was amended to make it applicable to whole of Pakistan. On 30<sup>th</sup> March 1970, by virtue of **Section 4** of the **Province of West Pakistan (Dissolution) Order 1970**<sup>33</sup>, the province of West Pakistan was dissolved and four Provinces, Islamabad Capital Territory (ICT) and Centrally Administered Tribal Areas were created. As per **Article 19** of the aforementioned **Order of 1970** which stated that

*“all existing laws shall continue in force, so far as applicable and with necessary adaptation, until altered or repealed or amended by the appropriate Legislature or other competent authority”.*

28. The Legal Implication of the **Presidential Order 1 of 1970** was considered in the case of *Islamabad Club v. Punjab Labour Court etc.*<sup>34</sup> wherein it was held that

*“Under the Interim Constitution of 1972 and the 1973 Constitution the Federal Capital of Islamabad has continued to be a distinct territory under federal administration, but no specific provisions seem to have been made for its governance, with the result that the previous arrangements have to continue. The result of these successive legal instruments in that the laws, which were applicable to the territory of Islamabad before the dissolution of the Province of West Pakistan, and the designation of Islamabad as federally administered area would continue to operate as existing laws, until repealed or altered by the competent Legislature.”*

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<sup>29</sup> See Article 224

<sup>30</sup> See Article 225

<sup>31</sup> See Article 268

<sup>32</sup> PLD 1960 Central Statutes 238 “(a) The Province of East Pakistan and Province of West Pakistan and; (b) Such other States and territories as/or may become included in Pakistan whether by accession or otherwise ...”

<sup>33</sup> PLD 1970 Central Statute 218

<sup>34</sup> PLD 1981 SC 81



29. In order to remove any doubts, as to applicability of **LAA, 1894** in Islamabad Capital Territory (**ICT**), and in exercise of legislative competence conferred under the enabling provisions and Constitutional mandate<sup>35</sup>, as noted herein, the **Federal Laws (Revision and Declaration) Ordinance No. XXVII of 1981**<sup>36</sup> was enacted on 8<sup>th</sup> July 1981 which enlisted<sup>37</sup> laws in the *IV<sup>th</sup> Schedule* vide item 9<sup>38</sup> thereof; **Sections 3, 9, 14, 43, 45, 47, and 54** were substituted and amended to make **LAA, 1894** compatible in its application to **ICT**. Only certain provisions of the **LAA, 1894**, and not the entire Act, were amended in order to clarify its application to the **ICT**. This action manifest that the **LAA, 1894** was applicable to **ICT** at all times and, any doubts as to its applicability were legislatively removed by virtue of the Ordinance enacted.

30. The reinforcement of the **LAA, 1894**, with necessary substitution and amendment, was made during currency of **CDAO 1960** is a clear manifestation of the intention of the Federal Legislature that **LAA, 1894** applies with full force in **ICT** and is not eclipsed by the provisions of **CDAO 1960** as held in para 24 of the impugned judgment. Thus, merely because the **CDAO, 1960** was enacted later would not be the sole determining factor to give it dominance or overriding effect over the **LAA, 1894**. In the case reported as *Abdul Ghani & another v Province of Baluchistan and another*<sup>39</sup>, the learned division bench of the Balochistan High Court, while examining the applicability of **LAA, 1894** with competing provisions of 'land acquisition' contained in the '*Baluchistan Acquisition of Land (Housing and Development Schemes in Rural Areas) Act XVIII of 1974*', in held as follows<sup>40</sup>:-

“12. The next question which crops up is as to whether the promulgation of the *Baluchistan Acquisition of Land Act of 1974* would repeal the *Central Act of 1894* (or) not by its own force. According to the provision of sub-Article (1) of Article

<sup>35</sup> Oer Article 142 (d)

<sup>36</sup> PLD 1982 CS 10

<sup>37</sup> Under Section 5

<sup>38</sup> PLD 1982 CS 113

<sup>39</sup> PLD 1982 Q 63

<sup>40</sup>PLD 1982 Q 63. Para 12 at Page 67.

*268, the repeal should be express and unless that is done expressively the Central Act would continue to remain in force as an existing law under Article 268(1) of the Constitution. This argument of Advocate General further finds support from the fact that the Provincial Act, was an Act of limited application when it was introduced. It only applied at that time to Housing and Development Schemes in rural area and later to urban areas as well. With this limited application it could not mean to repeal the Pakistan Land Acquisition Act of 1894 even by implication....”*

**b. THE TESTS WITHIN THE CONSTITUTION TO ADJUDGE THE CONSTITUTIONALITY OF LAW:**

31. To determine the repeal, overriding effect, repugnancy, vires, intra-vires or otherwise of any competing or comparable statutes, or analogous provisions contained therein, several litmus tests, tools of interpretations, and legal doctrines are applied. These accessories of interpretation are harvests of long drawn jurisprudential expositions and judicial interpretational wisdom culled by the superior courts. The tests to determine the validity of legislation are applied, inter-alia, on the touchstone of Constitution, legislative competency, limitation and distribution of legislative authority between Federal and Provincial legislature, doctrine of occupied field, pith and substance, special and general law, earlier and later law, delegated and subordinate legislation, directory or mandatory enactment or provisions, effect of *obstante* or *non-obstante* provisions in any enactment or otherwise. These are some of the illustrative and non-exhaustive tools of interpretation and doctrines applied by the superior courts to adjudge the legitimacy, vires, ultra-vires, repeal, overriding, or supremacy of one statute over the other. When the conflict between two or more competing or comparable statutes by the same, or contemporaneous, legislature is to be resolved, it becomes all the more challenging to decipher the real intentions of the legislature and dominance of one statute or its provisions over the other. As noted above, the foremost tool of interpretation of any statute is the Constitution which sets the ‘gold standard’ to adjudge constitutionality, repugnancy, and validity and, vires of any legislative instruments or, provisions contained therein.

32. In the succeeding paragraphs, we will apply litmus test as to the legitimacy, or otherwise, of the **LAA, 1894** as provided for in the **Articles 8, 24, 227** and other enabling provisions of the Constitution, 1973. In addition to the Constitutional filter, other tools such as legislative history, statement of object, and the preamble of a statute are important tools in deciphering intention, legitimacy, repugnancy, validity, and overriding or dominance of competing statutes, or provisions contained therein, which is relevant in the instant case. In order to appreciate the rival contentions of the parties we have examined the legislative origin, history, object, purpose and preamble of **LAA, 1894** and **CDAO, 1960**.

c. THE TEST WITHIN ARTICLE 8

33. **Article 8** sets down a twofold *gold test* to adjudge the constitutionality of any pre and post 1973 Constitutional regime of laws. **Sub-Article (1)** of **Article 8** of the Constitution, 1973 provides that any law enacted prior to the 1973 Constitution is to be filtered through the lens of fundamental rights to earn legitimacy. For convenience, it has been reproduced below:

*“any law or any custom or usage having force of law, in so far it is inconsistent with the fundamental rights shall, to the extent of such inconsistency be void.”*

Whereas, **Sub-Article (2)** of **Article 8** attends to, post 1973 Constitution, legislative regime. It restrains the Federal and Provincial Government “*not to make any laws which takes away or abridges the (fundamental) rights so conferred*”. Any breach of such constitutional restraint is visited by invalidation to the extent that such invalidation infringes fundamental rights.

**d. THE TEST WITHIN ARTICLE 227(1)**

34. First part of **Article 227(1)**, read with **Article 268(3)**, further requires all “*existing laws*” [i.e. per **Article 268(7)** that existed immediately before the date the Constitution of 1973 “*came into force*”<sup>41</sup>], shall be whittled down per the injunction of Islam as laid down in Quran and Sunnah. A similar restraint is placed on legislative authority of either of the Legislatures under the second part of **Article 227(1)** within the 1973 Constitutional regime, which forbids that no laws could be framed in breach of Islamic Injunction, however, the only caveat is that ‘*personal laws*’ applicable on *non-Muslim citizens* are not liable to be filtered through the regime of Islamic injunctions<sup>42</sup>.

35. In the plethora of cases adjudicated by the Courts, the **LAA, 1894** has been held to be in conformity with **Article 24 (2)** of the Constitution, 1973. One may refer to *Muhammad Ishaq v. Government of Punjab*<sup>43</sup>, under which the **LAA, 1894** was found to be per the injunction of Quran and Sunnah as ordained under **Article 227** of the Constitution 1973. One may also see the five-member Bench decision in the case of *Hafiz Muhammad Amin v. Islamic Republic of Pakistan and others*<sup>44</sup> where the laws relating to compulsory Land Acquisition were held to be validly made, having constitutional protection, and cannot be held ultra-vires by the court. The Federal Shariat Court, in the case cited as *Islamization of Laws*<sup>45</sup>, not only held the **CDAO, 1960**, barring provisions freezing of compensation, to be in accordance with **Article 24** of the Constitution, 1973 but other laws relating to Land Acquisition were also held to be validly made.

36. It may be observed that not only the **LAA, 1894** but the **CDAO, 1960** falls within the category of “*existing law*” that enjoys constitutional protection under **Article 268(1)** and, irrespective

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<sup>41</sup> See Article 265(2)

<sup>42</sup> See Article 227 (3) *ibid*

<sup>43</sup> 2002 SCMR 1652

<sup>44</sup> PLD 1981 FSC 23, at page 41

<sup>45</sup> PLD 1985 FSC 221 at pages 242-243, 263

whether such (*existing*) laws have been adapted as required under sub-Article (3) and (4) thereof or not, the courts, under the constitutional dispensation, are required to enforce such (*existing*) laws in accordance with the provisions of Constitution. The assumption of the learned Division Bench that the LAA, 1894 has no constitutional backing, in view of discussion herein, cannot be sustained.

**e. THE APPLICATION OF THE *LAA, 1894* IN ICT:**

37. In the present situation the ***LAA, 1894*** continued in full force and effect as a Federal legislation by virtue of **Article 268(1) & (7)** of the Constitution, 1973 as an “*existing law*”, meaning thereby that all laws in force in Pakistan, or any part thereof, or having extraterritorial validity immediately before commencing day i.e. 14 August, 1973<sup>46</sup>, will continue to enjoy the protection under the Constitution. Consequently, the ***LAA, 1894***, which is protected as Federal Law, was amended from time to time by all the Provinces by virtue of the power devolved under the successive Constitutions of Pakistan, as noted above and, by the Parliament to the extent of *Islamabad Capital Territory*<sup>47</sup>. As discussed earlier in paragraph 29, the applicability of ***LAA, 1894*** in Islamabad Capital Territory was due to the relevant amendments made to the ***LAA, 1894*** by the enactment of **The Federal Laws (Revision and Declaration) Ordinance No. XVII of 1981**<sup>48</sup>. Therefore, the affirmation of the ***LAA, 1894*** being applicable to ***ICT***, after the enactment of ***CDAO, 1960***, serves as conclusive evidence that the legislature was cognizant of the earlier enactment, yet chose to contemporaneously apply the ***LAA, 1894*** to the ICT. Needless to say that ignorance cannot be attributed to the legislature. Hence, the conclusion arrived by the learned bench in paragraph 24 of the impugned judgment cannot be sustained.

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<sup>46</sup> see Article 260

<sup>47</sup> See Article 142(b) of the Constitution of Pakistan, 1973

<sup>48</sup> PLD 1982 CS 10

**f. IGNORANCE OF EARLIER LAW CANNOT BE ATTRIBUTED TO THE LEGISLATURE**

38. Needless to say, that Legislature is presumed to know the ‘existing laws’, judicial pronouncements, and general principle of law<sup>49</sup>. The Legislature must be presumed to know the facts and conditions rendering a statute expedient and beneficial<sup>50</sup>. In a case from the American Jurisdiction where the Congress subjected specific categories of ticket sales to taxation but failed to cover another category, either by specific or by general language, the Court refused to extend the coverage. To do so, given the “*particularization and detail*” with which the Congress had set out the categories, would amount to “enlargement” of the statute, rather than “construction” of it<sup>51</sup>. Relatedly, “[w]here Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of a contrary legislative intent.”<sup>52</sup>

39. In a judgment reported as *State of M.P v. Kedia Leather & Liquor and others*<sup>53</sup>, the Indian Supreme Court, while attending to doctrine of implied repeal, held that there is a presumption against repeal by implication and the reason of this rule is based on the theory that the legislature, while enacting a law, has the complete knowledge of existing laws on the same subject matter. Therefore, when the legislature does not provide a repealing provision, the intention is clear not to repeal the existing legislation. However, the presumption of

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<sup>49</sup> NS Bindra’s Interpretation of Statutes Tenth Edition by Lexis Nexis, Page 235.

<sup>50</sup> Raval & Co. v. Ramachandran AIR 1967 Mad 57, at page 69.

<sup>51</sup> *Iselin v. United States*, 270 U.S. 245, 250 (1926). See also *Lamie v. United States Trustee*, 540 U.S. 526, 537 (2004) (courts should not add an “absent word” to a statute; “there is a basic difference between filling a gap left by Congress’ silence and rewriting rules that Congress has affirmatively and specifically enacted”). Obviously, the line between the permissible filling in of statutory gaps and the impermissible adding of statutory content may be indistinct in some instances, and statutory context, congressional purpose, and overriding presumptions may tip the scales. For example, the Court made no mention of the “absent word” rule in holding that a reference to “any entity” actually meant “any private entity” in the context of preemption. *Nixon v. Missouri Municipal League*, 541 U.S. 125 (2004) (preemption of state laws that prohibit “any entity” from providing telecommunications service. Does not preempt a state law prohibiting local governments from providing such service).

<sup>52</sup> *Andrus v. Glover Const. Co.*, 446 U.S. 608, 616-17 (1980) (citing *Continental Casualty Co. v. United States*, 314 U.S. 527, 533 (1942)

<sup>53</sup> (2003) 7 SCC 389

implied repeal can be rebutted. Repeal is inferred by necessary implication when the provisions of the later law are so inconsistent with, or repugnant, to the provisions of the earlier law that the two cannot stand together<sup>54</sup>. Although, if the two can be read together and some application can be made of the words in the earlier Act, repeal will not be inferred. The necessary questions to be asked are; (i) Whether there is direct conflict between the two provisions; (ii) whether the legislature intended to lay down an exhaustive Code in respect of the subject matter replacing the earlier law and (iii) whether the two laws occupy the same field. The doctrine of implied repeal, based upon the theory that the legislature, which is presumed to know the existing law, did not intend to create any confusion by retaining conflicting provisions and, therefore, when the court applies the doctrine, it does no more than give effect to the intention of the legislature by examining the scope and the object of the two enactments and by a comparison of their provisions.

40. From what has been discussed above, the ignorance of *existing laws*, judicial pronouncement, and judicial interpretation of law by the highest judicature of the State cannot be attributed to the legislature. Thus, it could be said that the legislature was fully cognizant that **LAA, 1894**, being *existing law*, deals exhaustively and elaborately with acquisition of land for ‘*Public Purpose*’ and *Companies*, against consideration and under law, yet the legislature still chose to enact **CDAO, 1960**, and in its wisdom provided *Chapter VI* of the **CDAO, 1960** for acquisition of land, but only for object and purpose of *planning and development* of Islamabad Capital Territory<sup>55</sup>. The legislature felt it necessary for the **CDAO, 1960** to be bestowed with the power to acquire land for the effective implementation of *planning and development* of Islamabad Capital Territory so the authority may not necessarily have to fall back to the **LAA, 1894** for the acquisition land for the purpose of the Ordinance.

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<sup>54</sup> Ibid. Paragraph 14.

<sup>55</sup> Preamble, CDAO, 1960.

41. It may be observed that in Pakistan both the Federal and Provincial legislatures, in its wisdom, have promulgated numerous legislative instruments for the purpose of '*planning and development*' of various cities falling in their respective legislative territory. We have noted that these statutes have either wholly or partially adopted the land acquisition mechanism provided for in the **LAA, 1894** either by reference, adaptation or explicitly excluded the applicability of **LAA, 1894** in the legislature's sole wisdom and prerogative. The intention of the legislature, as to adoption by reference or otherwise, exclusion or giving the special enactment overriding effect over other comparable statute can be ascertained by a cursory reading of such special statute (Various special statutes providing for '*planning and development*' of cities and region for illustrative purposes are discussed in succeeding paragraph 65). Therefore, the **CDAO, 1960** does not override the provisions of the **LAA, 1894** for Islamabad Capital Territory but each legislation dwells within the extent of its own unique purpose.

42. In the light of discussion made herein, the **CDAO, 1960** was examined, which revealed that the legislature did not completely exclude the application of **LAA, 1894** in Islamabad Capital Territory, for *Public Purpose* and for *Acquisition by Companies*. The conspicuous absence of a '*non-obstante*' or *overriding* clause in **CDAO, 1960** manifests the intention of the legislature that each of these contemporaneous statutes to exist side by side and operate in their respective domain. It is not the case of any of the party that there is a competing claim of acquisition of land, under respective statute either for *public purpose*, under **LAA, 1894**, or for the *Development and Planning* of ICT, under the **CDAO, 1960**. Therefore, it was not considered appropriate in present proceedings to dilate as to which set of proceedings for competing acquisition of land may have preference over the other.



43. In order to determine the amount of compensation to be awarded for the land acquired, the criteria to consider matters with respect to the same is provided for under **S.23** of the **LAA, 1894**. Whereas, the matters to be neglected in determining the amount of compensation are provided for under **S.24** of the **LAA, 1894**.

44. After the 18<sup>th</sup> Constitutional amendment<sup>56</sup>, land acquisition has become a provincial subject which has led to the creation of diverging legislative regimes<sup>57</sup>. Each legislation provides for different parameters for compensation which creates disparity. In order to alleviate such disparity, other jurisdictions, such as India, have enacted the **Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013**, whereby, a uniform compensation mechanism exists for the entire State and the compensation afforded to the land owners, whose land is acquired under the exercise of Eminent Domain for public purpose, is significantly greater. It is desirable that one uniform compensation mechanism should also be adopted by the parliament of Pakistan by conducting a similar exercise to bring forth an identical, or more beneficial, legal regime to recompense land owners for the compulsory acquisition of their land. We also observe that the scheme of compensation provided under the **Land Acquisition Act, 1894** remains a remnant of colonial times that should have been timely amended to cater to our evolving socio-economic circumstances. Therefore, such overhaul becomes necessary in light of the shortcomings of the current scheme of land acquisition with respect to compensation and matters incidental thereto.

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<sup>56</sup> See Paragraph 44 of this Judgment for more detail

<sup>57</sup> Some of which are detailed in paragraph 65 of this judgment

**g. APPLICATION OF DOCTRINE OF OCCUPIED FIELD, PITH AND SUBSTANCE, AND INCIDENTAL ENCROACHMENT ON THE FACTS**

45. When two or more competing laws or provisions contained therein, are seemingly similar or overlapping, then legislative intent of the parliament may be discernible from examining the Preamble, legislative history, doctrine of pith and substance, incidental encroachment, and occupied field to adjudge their co-existence in their respective domain or for one to nudge out and claim dominance over the other. The superior courts have expounded such doctrines, amongst others, as interpretive techniques, which are used to adjudge the predominance and constitutionality of a statute or of any provision contained therein. This court has examined the circumstances warranting applicability of such doctrines to outcast **LAA, 1894** and **CDAO, 1960** or provisions in competition. In the case of *Shama Textile v. Province of Punjab*<sup>58</sup> this court has set down the rule to apply the doctrine of occupied field, pith and substance, and incidental encroachment. The relevant portion is reproduced below:

*“The doctrine of occupied field is a concomitant of the larger doctrine of pith and substance, incidental encroachment. Under the doctrine of pith and substance, with all its concomitants, postulates for its applicability on a competition between Federal legislation and Provincial legislation and it would be erroneous to invoke the doctrine where there is no such competition, merely because a Provincial law conflicts with another law which has not been passed by the Federal Legislature but deals with a matter in the Federal List. Similar is the case where a Federal Statute provides that the provincial Government may extend the operation of a law to any part of the Province and the legislation is brought into operation by the Provincial Government, the law does not lose its Federal Character and does not become invalid when it comes into conflict with another Federal law.” (Underlined to add emphasis)*

46. Thus, it could be seen that *doctrine of occupied field*, which is auxiliary to the larger *doctrine of pith and substance*, and *incidental encroachment*, may be invoked by the courts to determine the extent of

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<sup>58</sup> 1999 SCMR 1477 at page 1495

legitimacy only in cases where the competing statutes or any of the provisions contained therein are by different tiers of legislature. In the case at hand, both the **LAA, 1894** and the **CDAO, 1960** are the Federal Statutes and it is not a case of competition between the federal or provincial tier of the legislature. Therefore, it would be an exercise in futility to invoke the *doctrine of pith and substance, incidental encroachment, or occupied field* where there is no legislative competition between the federal and provincial tier of statutes.

## II. The Legislative Intent of the Parliament in CDAO, 1960

### a. LEGISLATIVE COMPETENCE

47. Where legislative instruments in competition, one promulgated by the Federal and the other by the Provincial legislature, or any provisions contained therein, are pitched against each other, the test to determine the legislative supremacy or dominance is comparatively simple and provided by **Article 141** and **Article 142** of the Constitution, 1973 which clearly demarcates the legislative edges, competency and supremacy test. In case of conflict between Federal and Provincial enactments, privilege of overriding supremacy is conceded to the Parliament/Federal legislature under **Article 143**. Where one or more Provincial Assemblies, through resolution, authorizes the Parliament to pass law in respect of a *residuary subject*, in such event, power to repeal and amend such law is exclusively retained by such Provincial legislature(s)<sup>59</sup>.

### b. THE EXCLUSIVE DOMAIN OF THE FEDERATION FOR THE SUBJECT OF 'LAND ACQUISITION' OVER ISLAMABAD CAPITAL TERRITORY

48. The Federal Legislature exercises such jurisdiction in respect of matters enumerated in the *Federal Legislative List (FLL)*. All other left over matters/subjects are secured by the Provincial Legislature in constitutional parlance referred to as *residuary subjects*.

<sup>59</sup> Government of Sindh v Dr. Nadeem Rizvi 2020 SCMR 1 (para 16 (v), para 20)

The Parliament (by 2/3<sup>rd</sup> majority of both the houses)<sup>60</sup>, through the **Constitution (Eighteenth Amendment) Act X of 2010**, negotiated and redefined the legislative territory of the Federal and Provincial Legislature. Pakistan has migrated from two lists to one in the Federal Legislative List (**FLL**), which reserves subjects/entries exclusively for the Parliament to legislate. Although the *Concurrent List*, which gave the Parliament and the Provincial legislature contemporaneous or overlapping jurisdiction, has been done away with, the current scheme envisages a minuscule overlapping concurrent legislative domain confined to three subjects/entries i.e. criminal law, criminal procedure and evidence<sup>61</sup>.

49. It could be seen that by virtue of successive constitutional instruments, as succeeded by Constitution 1973, the ‘*legislative subject or entry*’ of “*land acquisition*” was neither covered by the Federal Legislative List nor the Concurrent Legislative List. Even when the concurrent list was done away with under the **Constitution (Eighteenth Amendment) Act X of 2010**, it did not alter the status of the subject of ‘*Land Acquisition*’, which remained as a ‘*residuary*’ or ‘leftover subject,’ as it remained uncovered under the ‘*Federal Legislative List*’. Therefore, by the operation of **Article 142(c)**, read with **Article 268** of the Constitution of 1973, the Provincial Assembly alone is endowed with the legislative competence to pass new legislation, or alter, repeal, and amend the ‘*existing laws*’ that had fallen within its legislative domain or competence of the respective provincial legislature by virtue of such laws being a ‘*residuary subject*’.

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<sup>60</sup> See Article 238 & 239

<sup>61</sup> Article 142(b)

50. The status of Islamabad Capital Territory (ICT), under **Article 1(2)** of the 1973 Constitution, is classified as a territory that is clearly distinguishable from the territory of the Provinces. The relevant extract of **Article 1 (2) is** been reproduced below for perusal.

*“1. The Republic and its territories.-*

*(1) Pakistan shall be Federal Republic to be known as the Islamic Republic of Pakistan, hereinafter referred to as Pakistan.*

*(2) The territories of Pakistan shall comprise:-*

- a) the Provinces of Baluchistan, the Khyber Pakhtunkhwa, Punjab and Sindh;*
- b) the Islamabad Capital Territory, hereinafter referred to as the Federal Capital;*
- c) (c) the Federally Administered Tribal Areas; and*
- d) such States and territories as are or may be included in Pakistan, whether by accession or otherwise.”*

51. The Constitution of Pakistan, 1973 not only makes specific provision for the exclusive legislative domain in respect of “*residuary subjects*” (i.e. subjects/entries left out of Federal Legislative List) over the respective provincial territories of the provincial assembly by virtue of **Article 142(c)**, but it also recognizes the exclusive domain of the Federal legislature over “*residuary subjects*” in respect of territories or areas ‘*not included in any province*’ by the operation of **Article 142(d)** which includes Islamabad Capital Territory. Given the nature of Islamabad Capital Territory under **Article 1(2)**, only the Federal Legislature is empowered with the exclusive domain to legislate in areas not forming part of a territory of any province as enumerated in **Article 142(d)**. It becomes evident that only the Federation itself has the exclusive domain to legislate on all matters that are, in their nature, ‘*residuary subjects*’, including ‘land acquisition’, with respect to *ICT*.

### III. The Conflict between Special Law and General Law

52. The learned bench of the Islamabad High Court, in paragraph 21 to 24, of the impugned judgment, stressed on the principle of general and special law, earlier law and later law, doctrine of implied repeal, and the nature of **LAA 1894**, a general law and **CDAO, 1960**, a special law, held

*‘that there is conflict between the two enactments and could not stand together; therefore special law which was enacted later would not only have precedence but abrogate the earlier contrary law<sup>62</sup>.*

As will be discussed in the succeeding paragraphs, the conclusion drawn that provisions of ‘land acquisition’ contained in the **CDAO, 1960** abrogates provisions of land acquisition in the *LAA, 1894* cannot be sustained.

#### a. PROPERTY RIGHTS WITHIN THE CONSTITUTION OF PAKISTAN, 1973

53. **Articles 4, 23, 24, 152, 172, 173** and **253** of the Constitution of Pakistan, 1973 deals with various aspects of property rights, interests and concomitant limitations.

Article 4 guarantees that:

*‘no action detrimental to life, liberty, body, reputation or ‘property’ of any person shall be taken except in accordance with law.*’

Article 23 provided that:

*‘Every citizen shall have the right to acquire, hold and dispose of property in any part of Pakistan, subject to the Constitution and any reasonable restrictions imposed by law in the public interest.*’

Sub Article (1) of Article 24 *ibid* further hold the out assurance:

*‘that no person shall be deprived of his property save in accordance with law’*

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<sup>62</sup> Paragraph 24 of Impugned judgment

Sub Article (2) further reassures that:

No property shall be compulsorily acquired or taken possession of with a caveat

(a) save for a public purpose, and

(b) save by the authority of law, which provides

(c) for compensation therefore and either fixes the amount of compensation or specifies the principles on and the manner in which compensation is to be determined and given.

The expression “*save by authority of law*” in this Article provides for acquisition in accordance with law, which in the present case is **the Land Acquisition Act, 1894** as it is in conformity with all the attendant limitations.

54. **Article 253(1)** endows the *Majlis-e-Shora (Parliament)* to prescribe a maximum limit as to property, or any class thereof, which may be owned, held, or possessed by any person. Any law, which allows a person to own or possess beneficially an area of land greater than which, immediately before the commencing day<sup>63</sup>, he could have lawfully owned or possessed beneficially, was held to be void<sup>64</sup>. **Clause (b) of sub-Article (1) of Article 253**, gives legislative competence to the Parliament to legislate, empowering the Federal or Provincial Government, directly or *through corporations controlled by any of such Government, to carry on any trade, business, industry, or service as may be specified in such laws either wholly, partially or to the exclusion complete or partial of other person or by corporation controlled by any such Government.*

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<sup>63</sup>14 August, 1973 per Article 265 (2) of the Constitution

<sup>64</sup> Land Reform, Act 1972, and Hydrogenated Vegetable Oil Industries (Control and Development) Ordinance 1973 owes its legitimacy under Article 253 (1) of the Constitution

**b. THE ABSENCE OF A ‘NON-OBSTANTE’ OR OVERRIDING CLAUSE IN **CDAO, 1960****

55. The observation of the learned bench in para 24 of the impugned judgment is that:

*“It is settled that in case of conflict, preference is to be given to the new law, and the implied repeal of earlier law could be inferred only when there was enactment of later law, which had the power to override the earlier law, and was totally in consonance with the earlier law and when there are two laws, the earlier and later law, could not stand together, therefore, later laws abrogate the earlier laws.”*

**i. Distinguishing the Cases relied upon by the learned bench**

56. The propositions of law appears to have been drawn from precedent law cited as *The Lahore (Inland Revenue)*<sup>65</sup>, *Tanveer Husain*,<sup>66</sup> which though is correct, however, applying the same on the facts and circumstances of the present case to infer that the **LAA, 1894** stands superseded by **CDAO, 1960** is not a correct deduction.

57. In the case of *Lahore (Inland Revenue) supra*, rival provisions contained in the **Income Tax Ordinance 1979** and the **Income Tax Ordinance, 2001** were under consideration. In the case of *Tanveer Husain (supra)*, the period of limitations to file the appeal contained in the rival statutes i.e **Civil Servant Act, 1973** and similar provisions in **Removal from Service (Special Powers) Ordinance 2000** were under question. The cases are quite distinguishable.

58. Learned Counsel for the Respondents has relied upon *Syed Murshad Shah etc v. FIA*<sup>67</sup>, *Muhammad Mohsin Ghuman v. Government of Punjab*<sup>68</sup>, and *LG HQ Frontier Corp etc. v. Ghulam*

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<sup>65</sup> 2013 PTD 2125

<sup>66</sup> PLD 2006 SC 249

<sup>67</sup> 2017 SCMR 1218

<sup>68</sup> 2013 SCMR 85



*Hussain*<sup>69</sup>, to urge that when two competing laws are in field, then the later law prevails. Said cases were relied upon in paragraph 21 of the impugned judgment with approval. We have examined and note that the under lying principles in cited cases were missed by the learned bench.

59. In the first mentioned case of *Syed Murshad Shah etc*, the matter concerned a customer of a bank involved in financial impropriety. This Court resolved the conflict as to the primacy of law, stuck between **Banking Companies Ordinance, 1962** read with **Federal Investigation Agency Act, 1972, Banking Companies (Recovery of Finance) Ordinance 2001, Financial Institution (Recovery of Finance) Ordinance 2001 (FIO, 2001)**, and **Offences in Respect of Banks (Special Courts) Ordinance, 1984**. It was held that where there is conflict between competing laws, ultimately question of relativity between two or more of the statute on common subject matters and where the two conflicting law contain overriding clause, generally the legislation later in time will prevail. Such presumption was, however, held not to be automatic. A host of other factors including object, purpose and policy of both statutes and the legislature's intention as expressed by the language employed therein to determine which of the two was to prevail.

60. In the second case of *Mohsin Ghuman Surpra*, the **Police Order 2002** was pitched against the **Punjab Civil Servant Recruitment (Relaxation of Upper Age Limit) Rules 1976**. The general law as well as the special law contained a 'non-obstante' clause. The Court opined that the special statute overtakes the general law even if the general law contained a non-obstante clause. The case is quite distinguishable as the **CDAO, 1960**, while special law, does not contain a non-obstante clause to override the provisions of **LAA, 1894** for land acquisition.

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<sup>69</sup> 2004 SCMR 1397

61. It was noted in the case of *LG HQ Frontier Corp etc. v. Ghulam Hussain*, both the competing laws i.e. **Frontier Corp Ordinance 1959** and **Removal from Services (Special Power) Ordinance, 2000** were couched in negative terms or in such affirmative terms, which unequivocally involve negative ramifications, that proved fatal to the earlier enactment. In all the three cases noted above, ‘*overriding*’ and ‘*non-obstante*’ clauses gave supremacy over both general as well as special law, which were earlier in time. None of the cases supports the case of the private Respondents.

62. Hence, the conclusion of the learned bench in para 23 of the impugned judgment cannot be sustained, as the **CDAO, 1960** neither contains an ‘*overriding*’ nor a ‘*non-obstante*’ clause that may nudge out **LAA, 1894** from its applicability in *ICT*. Having examined both the enactments, we are also of the view that **CDAO, 1960** is purpose specific law that caters to the requirement of ‘*planning and development*’ of the new capital of Pakistan and such kind of enactment provides a complete mechanism in itself, which is a self-contained enactment, having no dependency for the acquisition of land on the **LAA, 1894**, unlike similar statutes catering for *planning and development* of major and developing cities as discussed in succeeding paragraph 66.

63. No arguments strong enough have been put forth to show that the **CDAO, 1960** could override the provisions of the **LAA, 1894**. In absence of overriding or superseding or ‘*non-obstante*’ provision within the **CDAO, 1960**, we see no reason strong enough as to why the **CDAO, 1960** should override the provisions of the **LAA, 1894** as held by the learned Bench in the impugned judgment. In conclusion, as stated above, the legislations are merely overlapping and there appears to be no conflict between both the statutes. There is no apparent reason as to why these statutes cannot exist coextensively as each of them caters to a different object and purpose.

**ii. Construing the words of the CDAO, 1960 in their natural, ordinary, or popular meaning**

64. The provisions of **CDAO, 1960**, are to be considered in their natural, ordinary or popular meaning, not containing a non-obstante clause. The **CDAO, 1960** also does not explicitly exclude the application of **LAA, 1894** over ICT, as compared to other legislations of similar nature (as noted in succeeding paragraph 66). The literal rule further lends support that the **CDAO, 1960** is not the only legislation to be used in *ICT* for acquisition of land, which can be invoked in furtherance of the main purpose of the legislation i.e for *planning and development*' as held in the case of *Murree Brewery Co Ltd. v. Pakistan through Secretary to Govt. of Pakistan, Works Division*<sup>70</sup>.

**iii. The Legislature adds a 'non-obstante' clause where the intention is for the legislation to have an overriding effect:**

65. One may instructively refer to the **Punjab Development of Cities Act, 1976**, which, by virtue of its **Section 24**, makes the Act, applicable notwithstanding provisions of **LAA, 1894**. In addition, the **Punjab Acquisition of Land (Housing) Act, 1973**, per **Section 3**, enables it's provisions to apply notwithstanding anything contained to the contrary in **LAA, 1894** or any other law for the time being in force. Furthermore, **Section 25** of the **Lahore Development Authority Act, 1975** also contained a notwithstanding clause. **Baluchistan Acquisition of Land (Housing and Development Scheme) Rural Areas Act, 1974**, **Hyderabad Development Authority Act, 1976** contained no provision overriding **LAA, 1894** in either enactment. As per **Section 49** of the **NWFP Urban Planning Ordinance, 1978**, provisions of the same would apply notwithstanding anything contained to the contrary in the **LAA, 1894** or any other law for the time being in force. **Section 15** of the **Baluchistan Costal Development Authority Act, 1998** states that where the Authority is of the opinion that any land needed for any scheme or other public purpose cannot be acquired under **Section 14**, such land may be

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<sup>70</sup> PLD 1972 SC 279

acquired in accordance with **LAA, 1894. Gwadar Development Authority Act, 2003**, through **Section 39**, makes provisions of **LAA, 1894** by explicit reference applicable. Lastly, **New Murree Development Authority Act, 2004**, through **Section 7(c)**, has the power to acquire property, both moveable and immovable, and **Section 25** of the same confers an *overriding* effect over provisions of any other law, but surprisingly, unlike other statutes on the subject, the Act of 2004 does not give manner and procedure of acquisition of land. Cited statutes are amongst many on the subject, relatable to ‘city or region specific development’, some of the statute import, some adopt by reference, and some override applicability of not only the **LAA, 1894**, but any other laws too. During the pendency of the case, the Foundation has been transformed into the Authority the under **Federal Government Employees Housing Act, 2020** which contains a non-obstante clause essentially overriding the **CDAO, 1960**, implication of such change and up gradation of legal status of foundation to that of the Authority will be dealt with separately.

66. As noted earlier, **CDAO, 1960** is a purpose specific legislation “*providing for making all arrangements for the planning and development of Islamabad within the frame work of a regional plan*”. The **CDAO, 1960**, as already noted above, does not contain any exclusionary or overriding clause barring the applicability of **LAA, 1894**, meaning thereby that, while enacting any statute, some of the matters covered by the purpose specific statute of **CDAO, 1960** may touch upon some of the aspects, which, in fact, are elaborately covered by other statutes and both the statute can coextensively exist and operate in their respective domain. The Respondents were not able to convincingly demonstrate that **CDAO, 1960**, under given set of circumstances, overrides the **LAA, 1894** for ICT. However, the planning and development is still the domain of the CDA and it still maintains the authority to conduct such planning and development of any land that is acquired under the **LAA, 1894** for public purpose.

**IV. Enactment of Law to Qualify as an Exception within Article 24 of Constitution:**

67. Indeed, it was rightly concluded by the learned Division Bench, (in para 29 of the Impugned Judgment) that for the purpose of *acquisition of any property* or depriving any person of a property, such exercise of authority need to be backed by law. The learned bench, in a truncated manner, relied upon exceptions carved out in terms of **sub-article (3) of Article 24**, where a Constitutional shield is provided to laws framed for the acquisition of different category of property i.e

- a) *for preventing danger to life, property or public health*
- b) *property which has been acquired by, or come into the possession of, any person by any unfair means, or in any manner, contrary to law*
- c) *enemy property or evacuee property*
- d) *for limited period, either in the public interest or in order to secure the proper management of property or for the benefit of its owner*
- e) (i) *providing education and medical aid to all or any specified class of citizen*  
(ii) *housing and public facilities*  
(iii) *providing maintenance to those who, on account of unemployment, sickness, infirmity or old age, are unable to maintain themselves,*
- f) *any existing law or any law made in pursuance of Article 253.*

68. The learned Division Bench of the Islamabad High Court, relying on **sub-article (3) of Article 24**, (*wrongly quoted as Clause 3 of Article 4*), concluded that no persons could be deprived of his property without any authority or backing of law, is indeed correct. To draw support, the learned bench relied upon a judgment in the case of *Nazim F Haji, Chief Citizen Police Liaison Committee Karachi v. Commissioner Karachi etc.*<sup>71</sup> In the cited case, the action of the Government of Sindh, whereby private vehicles were being requisitioned without any compensation in favor of law enforcement agencies, such as the police, was eventually challenged in the court of law. When it was challenged, the Government of Sindh defended the action relying on *Section 42* of

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<sup>71</sup> PLD 1993 Kar. 79

the **Code of Criminal Procedure 1898** which *inter-alia* obligates the public to assist the Magistrate and the Police for prevention or suppression of breach of law. The learned bench of the Sindh High Court rightly deprecated such practice of the Police and held that **Section 42 Cr.P.C** does not authorize the requisition of private vehicles and there is no law on the subject that complies with **Article 24** of the Constitution, 1973 for the requisition of private Vehicle in public interest against compensation. Although, such law is enacted in the Indian part of Punjab<sup>72</sup>. We fail to understand how the learned bench has relied on the aforementioned case in the current circumstances, let alone how it advances the case of the Respondents.

69. The legislative history, Constitutional, as well as legislative protection, of the **LAA, 1894**, including its applicability on *ICT* have been thrashed out in detail in the above mentioned paragraphs. The legitimacy of the **LAA, 1894** in the current legislative scheme has already been discussed and established. Hence, the **LAA, 1894** is covered under the exception contained in **Article 24 (2)**, which need no further elaboration. To assume that the land acquisition in the case at hand is without any legal backing is too naive an opinion, which cannot be sustained.

70. The learned bench concluded that the **LAA, 1894** has no constitutional blessing within **Art. 24** and assumed that is, in fact, the **CDAO, 1960** that fits within the scheme of **Article 24**. As discussed in the preceding paragraphs, the **CDAO, 1960** and the **LAA, 1894** had each qualified under the tests provided in **Article 8** and **Article 227** of the Constitution. We have noted that all statutes, some of which are referred herein above in paragraph 65, that provide for the acquisition of *any class of property*, have provisions to discharge municipal function. Such discharge of municipal functions, along with executing a scheme for '*planning and development*' in area of respective

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<sup>72</sup> Punjab Requisitioning and Acquisition of Movable Property, Act, 1978

jurisdiction, can enable these statutes to qualify under the exceptions contained in **sub-clause (ii) of clause (e) to Sub-Article (3) of Article 24** of the Constitution for the purposes of land acquisition. The same has been reproduced below:

*“(3)Nothing in this Article shall affect the validity of*

*(e) any law providing for the acquisition of any class of property for the purpose of-*

*(ii) providing housing and public facilities and services such as roads, water supply, sewerage, gas and electric power to all or any specified class of citizens”*

71. While previously the **CDAO, 1960**, under **S.15A**, catered for municipal functions, they have since been sliced away pursuant to the mandate of **Article 140A** of the 1973 Constitution and such municipal functions are now conferred on the Authority established under **Islamabad Local Government Act, 2015**. Therefore, the possibility has now arisen where the **CDAO, 1960** may no longer even qualify under the exception contained in **sub-clause of (ii) of Clause (e) to Sub-Article (3) of Article 24** of the Constitution for the purposes of land acquisition. Since this was not an issue before us, we have refrained from attending to it.

**a. THE EXCEPTION UNDER ARTICLE 24(2)**

72. Perhaps it would have been appropriate if the learned bench, prior to venturing into the exceptions contained in **sub-article (3) of Article 24**, had examined the exception contained in **sub-article (2) of Article 24**. The same has been reproduced below for convenience sake.

*“(2) --- Protection of Property Rights*

*No property shall be compulsorily acquired or taken possession of save for a public purpose, and save by the authority of law which provides for compensation therefore and either fixes the amount of compensation or specifies the principles on and the manner in which compensation is to be determined and given.”*

73. The exception contained in **sub-article (2)** of **Article 24** is relevant to determine the validity of actions taken the **LAA, 1894**. Once a declaration is issued under **S.6 (3)** of the **LAA, 1894**, it is conclusive evidence that the land is needed for either public purpose or for a company, unless it is shown to be in colorable exercise of jurisdiction as was in the case of *Murree Brewery*<sup>73</sup>. In fact, the validity of law under **clause (e) (ii)** of **sub-Article (3)** of **Article 24** is now conferred on the **FGEH Authority Act 2020** due to the municipal functions entrusted to it under **S.3(4)** of the Act.

74. **Article 172** deals with the vesting of ownerless and other properties like mineral, oil and natural gas in the Provincial and Federal Government respectively, or jointly, as the case may be. **Article 173(1)**, defines the limit of executive authority of the Federation and a Province, subject to any Act of appropriate legislation with regard to the grant, sale, disposition, or mortgage of any property; This Article also governs the purchase or acquisition of property either on behalf of the Federal Government or the Provincial Government, as the case may be, and the making of a contract. In terms of **Sub-Article (2)** of **Article 173**, *'all property acquired for the purposes of the Federation or of a Province, as the case may be'* shall vest in the Federal Government or in the Provincial Government as the case may be. The learned bench erred in holding (see paragraph 34 and 35 of the impugned judgment) that the acquisition for public purpose, could only be undertaken in exercise of authority under **Art. 173**, read with **CDAO, 1960**, and not **LAA, 1894** mandated under **Art. 24**. As noted, herein, objectives and purpose of the two articles are entirely different.

75. The objectives and purpose of the two articles are entirely different. **Article 24(2)** provides for the acquisition of privately owned property, for a public purpose, against compensation. Whereas, **Article 173(2)**, as noted above, concerns where the acquisition of the property is *"for the purposes of the Federation or of a Province"*. The

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<sup>73</sup> PLD 1972 SC 249



learned bench did not consider the correlation of **sub-article (2)** of **Article 24** with **S.6** of the **LAA, 1894** that led to an erroneous conclusion. Resultantly, it becomes imperative to delve into the legislative origin of **Article 24** and the principle it embodies to form a better understanding regarding the power of the State to acquire land under the umbrella of '*public purpose*'.

## V. Eminent Domain:

76. The power of '**Eminent Domain**' is a proprietary aspect of sovereignty and is inseparable from it.<sup>74</sup> It is an inherent attribute of a sovereign State and the manifestation of the sovereign authority of '*Eminent Domain*' can be traced to **Article 24** of the **Constitution of Pakistan, 1973**. It vests within the State, or its delegated instrumentality, to expropriate private property for public use, and or for company against adequate, or reasonable, compensation payable to the owner of property<sup>75</sup>.

77. The doctrine of '*Eminent domain*' is founded on two maxims which can be traced back to the work of Roman orator, writer, and statesman, *Marcus Tullius Cicero's*<sup>76</sup> and '*De Legibus*'<sup>77</sup>. The first of these maxims is "*salus populi est supreme Lex* (i.e regard for the public welfare is the highest law) and the second is "*necessitas publica major est quam private*" (i.e public necessity is greater than private necessity)". The term "*eminent domain*" was then coined from the legal treatise "*De jure belli ac pacis*" (*On the Law of War and Peace*), authored by the Dutch jurist *Hugo Grotius* in 1625, which used the term '**Dominium Eminens**' (*Latin for supreme ownership*)<sup>78</sup>.

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<sup>74</sup> Fauji Foundation v. Shamimur Rehman PLD 1983 SC 457

<sup>75</sup> For an elaborate discussion, see American Jurisprudence, 2d Vol 26, pp 638-39 para1, and Sooraram Pratap Reddy & Ors. v. Deputy Collector, Ranga Reddy & Ors. (2008 (9) SCC 552), Para 47

<sup>76</sup> Period of work ranging from 106 BCE- 43 BCE

<sup>77</sup> Period of work is estimated between February 45 and November 44 - Encyclopedia Britannica

<sup>78</sup> Nowak, John E.; Rotunda, Ronald D. (2004). Constitutional Law (Seventh ed.). St. Paul, MN: Thomson West. p. 263. ISBN 0-314-14452-8

a. EMINENT DOMAIN ORIGIN IN THE US CONSTITUTION.

78. Tracing the constitutional history, the concept of *Eminent Domain* received first recognition and manifestation in the **5<sup>th</sup> Constitutional Amendment** (1791) in the **Constitution of United States, 1789**, whereby it incorporated that ‘*No person can be deprived of life liberty or property without due process of law*’ and limits of the authority of the State from taking private property for public use without “just compensation”. The Fifth US Constitutional amendment provided the basis of Eminent Domain in the United States. While originally Eminent Domain vested only within the Federal Government, the US Supreme Court, in the case of ***United States v. Jones***<sup>79</sup>, approved that such powers could be legislatively delegated by the State to municipalities, government subdivisions, or even to private persons or corporations, when they are authorized to exercise the functions of public character<sup>80</sup>. The Power of Eminent Domain of a State and its delegated authority is now considered as one of the pivotal attribute of all modern Constitutions of the nation States.

b. THE PRINCIPLE OF EMINENT DOMAIN IN SUBCONTINENT

79. The said principles have also been accepted and applied in India in the cases reported as *Charanjit Lal Chowhury v Union of India and others (1950)*<sup>81</sup>, and *State of Bihar v. Kameshwar Singh*<sup>82</sup>. The Indian Supreme Court examined the constitutionality of the provisions of **LAA, 1894** pitched against the rights to property and applied the doctrine of *Eminent Domain* to rule in favor of the **LAA, 1894**.

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<sup>79</sup> 109 U.S. 513 (1883)

<sup>80</sup> See *Chicago, B & Q Railroad Co v. Chicago* 166 U.S 226 (1897)

<sup>81</sup> 1 SCR 869

<sup>82</sup> AIR 1952 SC 252 = (1952)1 SCR 899

80. The Constitution of Pakistan, 1973 is no exception to applying the principles of Eminent Domain. The concept of Eminent Domain can be attributed to **Article 9**<sup>83</sup> read with **Article 24(1)**<sup>84</sup> of the Constitution of Pakistan, which are in *pari matretia* to **V<sup>th</sup> American Constitutional** Amendment. As noted above, **sub-Article (2) of Article 24** regulates exercise of sovereign authority or *Eminent Domain of State* over private property is subjected to three concomitant limitations. *Firstly*, that no person can be deprived of his property except in accordance with law, meaning thereby that, no property could be acquired through executive orders and actions. *Secondly*, a person could only be deprived of his property for public purpose. *Thirdly*, that acquisition of property of a person must be against compensation. **Sub-Article (3) of Article 24** gives constitutional protection to various laws dealing with acquisition of different types of property for variety of purposes and objectives.

81. Several Land Acquisition legislations were considered in a large number of cases from the perspective of legislative domain and the right to property, as guaranteed under the constitution and Eminent Domain enjoyed by a State authority as discussed herein. Such legislation was also viewed through lens of Islamic Injunction<sup>85</sup>. In case reported as *Hafiz Muhammad Ameen v. Islamic Republic of Pakistan and others*<sup>86</sup>, a five member bench held:

*“Since Article 24 in its clause (2) provides that any law of compulsory acquisition will have to provide for compensation, clause (4) was added to provide protection to laws covered by clause (3)”*

They further held that the:

*“power of Court was taken away to declare invalid law for acquisition of any class of property for certain purposes....”*

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<sup>83</sup> No person shall be deprived of his life or liberty save in accordance with law

<sup>84</sup> No person shall be deprived of his property save in accordance with law

<sup>85</sup> Article 227 of The Constitution of Pakistan, 1973

<sup>86</sup> PLD 1981 FSC 23 at page 41

82. Another manifestation of *Eminent Domain*, in addition to **Art. 24**, over a Province find its place in **Article 152**, which sanctions acquisition of land situated in a Province, at the direction, on behalf of, and at the expense of the Federal Government, for any purpose with respect to which the *Parliament (Majlis-e-Shoora)* has power to make law. **Article 152** also provides for the transfer of land owned by a Provincial Government to the Federal Government by agreement. In case of disagreement between the two Governments, the dispute is to be resolved by the Arbitrator to be appointed by the Chief Justice of Pakistan<sup>87</sup>.

83. In essence, the principle of Eminent Domain provides for the acquisition of land by the State for a Public Purpose or for company in exchange for compensation. The State, exercising their authority under Eminent Domain, has rightfully acquired such property by issuing notification **S.6** of the **LAA, 1894**, which is treated as “*conclusive evidence that the land is needed for public purpose or for the company as the case may be*”<sup>88</sup>

84. In order to ascertain the inherent powers of a State to exercise Eminent Domain, either itself or through its instrumentality/agent, the deduction of the nature of the Federal Government Employees Housing Foundation becomes necessary. The learned bench did not look into the nature of *FGEHF*, and assumed it to be entity under **Section 2(e)** of the **LAA, 1894**. The true nature of the *FGEHF* as either a *corporate entity* in common parlance or an instrumentality/agency of government would further clarify if the Foundation could exercise Eminent Domain as an instrumentality/agency of the government.

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<sup>87</sup> for further discussion one may see Iftikhar Hussain Shah v. Pakistan through Secretary, Ministry of Defence, Rawalpindi 1991 SCMR 2193

<sup>88</sup> Section 6 (3) LAA, 1894

## VI. NATURE OF FGHEF:

85. On 2.10.2019, Mr. Faisal Hussain Naqvi, learned counsel for the private Respondents, in C.A 1476 to 1480 of 2018, brought to the notice of the Court that **Federal Government Employees Housing Foundation** has been established through an Act of Parliament, which has superseded the FGEHF. Such fact was taken note of to examine its implication. Later **FGEHA Act, 2020** was brought to our notice. While the Foundation is now an ‘authority’ due to the Act, 2020, we will nonetheless examine the legal implications of the ‘Foundation’ in the given set of circumstances.

### a. DISTINGUISHING THE CASES RELIED UPON BY THE ISLAMABAD HIGH COURT

86. In the case *Ghulshan Hussain etc. v Commissioner (Revenue), Islamabad, etc.*<sup>89</sup>, the learned division bench treated Federal Government Employees Housing Foundation as an agency of the Government and relied on the cited case of *Fauji Foundation v. Shamimur Rehman*<sup>90</sup> and cited a passage, which is relevant for the purpose of present controversy and, in fact, supports the Petitioner Foundation’s case

*“Once the public purpose is evident, the means for executing the project is for the law giver alone to determine as to how purpose may better be served as through an agency of private enterprise or through department of government, it is not open to court to give its own opinion on matter of which lawgiver is the judge.”*

87. We fail to understand how case of *Muhammad Ishaq etc. v. Govt. of Punjab etc.*<sup>91</sup>, (para 29 of Impugned judgment) is helpful to the Respondents. In the referred cases, this court held that the *Co-operative Society fall within the definition of Company as defined under Section 2 (e) of the LAA, 1894*, and acquisition of land for the need of

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<sup>89</sup> 2000 YLR 1711

<sup>90</sup> PLD 1983 SC 456

<sup>91</sup> 2002 SCMR 1652

company need not be for public purpose. The referred case is of no help to the Respondents, as the learned bench presumed that the Petitioner having been registered as Foundation under **Section 42** of the **Companies Ordinance, 1984** in the attire of a “company” is a company within the meaning of **Section 3(e)** of **the LAA, 1894**. While, in fact, the Foundation was indeed registered under **S.42** of the **Companies Ordinance, 1984**, but not as a commercial or trading entity. Instead, it was registered as a service provider, a non-trading not for profit entity, and as an instrumentality of the State and, therefore, it’s comparison with a trading company for profit, is not justified.

**b. THE TEST FOR INSTRUMENTALITY/AGENCY LAID DOWN BY THE APEX**

88. In order to determine the exact nature of the *FGEHF*, we will be relying on the jurisprudence of this Court where it has previously examined instrumentalities/agencies performing functions in connection with the affairs of the Federation or a province. It may be observed much before the status of *FGEHF* was examined by this court, the test to determine whether functions entrusted to an organization are the functions of a state, or otherwise, was laid down in the case of *Salahuddin and 2 others v. Frontier Sugar Mills and Distillery Ltd*,<sup>92</sup> The same has been reproduced below:

*‘What is meant by the phrase "performing functions in connection with the affairs of the Federation or a Province" It is clear that the reference is to governmental or state functions, involving, in one form or another, an element of exercise of public power. The functions may be the traditional police functions of the State, involving the maintenance of law and order and other regulatory activities; or they may comprise functions pertaining to economic development, social welfare, education, public utility services and other State enterprises of an industrial or commercial nature. Ordinarily, these functions would be performed by persons or agencies directly appointed, controlled and financed by the State, i.e., by the Federal Government or a Provincial Government. However, in recent years, there has been manifest a growing*

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<sup>92</sup> PLD 1975

*tendency on the part of Government to create statutory corporations for undertaking many such functions, particularly in the industrial and commercial spheres, in the belief that free from the inhibiting effect of red tapism, these semi-autonomous bodies may prove snore effective, flexible and also profitable. Inevitably, Government retains effective control over their functioning by appointing the heads and other senior officers of these corporations, by regulating their composition and procedures by appropriate statutes, and by finding funds for financing their activities.'*

*'The primary test must always be whether the functions entrusted to the organization or person concerned are indeed functions of the State involving some exercise of sovereign or public power; whether the control of the organization vests in a substantial manner in the hands of the government; and whether the bulk of the funds is provided by the State. If these conditions are fulfilled, then the person, including a body politic or body corporate, may indeed be regarded as a person performing functions in connection with the affairs of the Federation or a Province; otherwise not.'*

**i. Exercise of Sovereign or Public Power by the Organization:**

89. Given the aforementioned test, the **Rules of Business 1973**, elaborately lay down the rules and manner how a Federal and Provincial Government functions and regulates their business through the Federal or Provincial Secretariat. The occupational work of each secretariat is distributed amongst several Divisions. As Per **Rule 4** under the **Rules of Business, 1973** each of the Divisions of the Federal Government are further branched into several sub-divisions, flanked by 'Attached Departments', which is then further devolved into 'working units', or sections, and any such agencies or offices as the Prime Minister or chief Minister may determine. Each Secretariat carries on assigned business and activities, through various instrumentalities, agency of juridical, and administrative embodiment.

90. The List of Ministries and Divisions that the Federal Secretariat shall comprise of is provided in **Schedule I**<sup>93</sup> of the **Rules of Business, 1973**. Entry #11 in **Schedule I** pertains to the 'Ministry of Housing and Works' with the attached division of 'Housing and

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<sup>93</sup> Rule 3(1) of the Rules of Business, 1973

Works'. The business of 'Ministry of Housing and Works' is as distributed is mentioned in Schedule II<sup>94</sup> in the **Rules of Business, 1973**. Upon perusal, Serial #14, Entry No. 2 elaborates one of the businesses it transact is reproduced below

*'2. Provision of Government owned office accommodation and **residential accommodation, policy for acquisition, requisitioning and hiring of office and residential accommodation for officers and staff of Federal Government.**'*

91. The learned bench also relied on the Memorandum of Association of the *FGEHF*, in paragraph 13 of the impugned judgment, to illustrate the complete objective concept, wherein the primary object was provided in **Clause III(a)** reproduced hereunder:

*"III(a). To eradicate shelterlessness in the Federal Government employees and to make and assess as far as possible each of them have a house at the time of his retirement or earlier and his dependents in case of death before retirement, on such terms and the Board of Governors may determine.*

*(b). To initiate, launch, sponsor and implement housing schemes for Federal Government employees on ownership basis in Islamabad, the provincial capital and other major cities of Pakistan."*

92. The purpose that was being carried out by the **Federal Government Employees Housing Foundation** was one that fell within the powers of the Division of the Ministry of Housing and Works as noted above. The fact that the Chairman of the Board of Governors for the Foundation was the Minister of Housing and Works also further lends to the fact that the Foundation exercised functions allocated to the Ministry of Housing and Works under the **Rules of Business, 1973**.

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<sup>94</sup> Rule 3(3) of the Rules of Business, 1973



**ii. The control of the organization vests in a substantial manner in the hands of the government:**

93. The learned bench themselves acknowledged, in paragraph 12 of the impugned judgment, that the members of the Former Foundation were members of the executive belonging to various ministries, including the Ministry for Housing and Works. The relevant paragraph has been reproduced below:

*‘The Federal Government Employees Housing Foundation while incorporating its Articles of Association referred the concept of membership which is only opened to the Federal Government employees, approved by the executive committee. The management system referred in the said Articles is based upon the Executive Committee, comprising of Secretary (Housing and Works) as Chairman and Joint Secretary (Housing and Works) as a Vice Chairman, along with five members who are Financial Advisor (Ministry of Finance), Joint Secretary (Cabinet Division), D.G. Public Works Department, Deputy Secretary Admin (Works Division), and CSD (P&EC). The FGEHF has its Board of Governors comprising of Chairman, who is Minister for Housing and Works with four members including Secretary Interior, Secretary Establishment Division, Secretary Finance and Secretary Housing and Works. The Board and its Executive Committee are the decision maker in the FGEHF.’*

94. The aforementioned reproduction conclusively establishes that the control of the former foundation vested solely in the hands of the government as the Board and its Executive Committee were the decision makers in the FGEHF. Therefore, the control of the organization, in its entirety, vested within the hands of the government.

**iii. The bulk of the funds is provided by the State**

95. Given that the foundation is conducting the affairs of the government, it is the State itself that allocates funds for financing the operation, salary of all its Board members, who are Civil Servants and for the staff and activities of the Foundation.

c. AFFIRMATION BY THE SUPREME COURT OF THE TEST LAID DOWN IN SALAHUDDIN V. FRONTIER SUGAR MILLS AND DISTILLERY LTD.

96. The exact nature of the *FGEHF* was examined by this Court in detail in the case reported as *FGEHF v. Muhammad Akram*<sup>95</sup>, wherein leave was granted *inter alia* to consider whether the allotment of plot claimed by a Civil Servant in the housing scheme of the **FGHF** fell within the terms and condition of service so as to attract the jurisdiction of Federal Service Tribunal. This court, in order to resolve the right of a civil servant to invoke appropriate jurisdiction, examined true character and status of the **FGHF**. This Court examined the manner, intent and purpose of establishing *FGEF* in detail at page 1088 observed

*“This is correct that Housing Foundation was neither a statutory body nor is performing sovereign function rather by its character, it is functioning as an agency of ministry of Housing and Works, Government of Pakistan and is enjoying the status of an official body of the said ministry. Housing Foundation as per its declared objects and purpose, has undertaken the function of establishing the project for providing residential houses to the Federal Government Employees as a welfare institution without any financial gain. The Housing Foundation is not as such being financed from public exchequer but its affairs are being fully managed and controlled by machinery of the State and its functionaries are being paid from public exchequer. The Housing Foundation is operating the capital area and after acquiring land in the capital territory of Islamabad through Land Acquisition Collector under the Land Acquisition Act, 1894, has prepared the housing Scheme for allotment of residential plots to Federal Government Employees.”*

In succeeding paragraph at page 1090 it was further reiterated

*The Housing Foundation thus by virtue of object and purpose has acquired the status of an official organization in the form of a company incorporated under the Companies Ordinance 1984 which is functioning under the direct control of Ministry of Housing and Works, Government of Pakistan, as its official wing and is recognized as an agency of the Federal Government”.*

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<sup>95</sup>2002 PLC (CS) 1655= 2002 PLD SC 1079

In the following paragraph at page 1091 it was further reaffirmed,

*“FGHF having acquired the role of agency of Federal Government was working for the benefit of employees of Federal Government including the employees of Institutions, Corporations, and Organizations controlled by the Federal Government and would stand on different footing to that of a private companies incorporated under the Companies Ordinance, 1984”*

97. Even otherwise during pendency of instant appeals and Petitions **FGEHF**, has been transformed into a Statutory Authority through *Federal Government Employees Housing Act, 2020*, which Act has received the assent of the President on 14 January 2020 and the Act was published in the official Gazette on 15 January 2020. The **2020 Act** has unequivocally cleared the ambiguities elaborated upon in this judgment. The relevant provisions have been analyzed in paragraphs 115 to 122.

#### **X. Public Purpose Justified for a particular segment of society**

98. The Indian Supreme Court in the case of *Ratilal Shankarabhai and others v. State of Gujrat and others*<sup>96</sup> held that ordinarily, the Government is the best authority to determine whether the purpose in question is a public purpose or not. Furthermore, the declaration made by it under **Section 6** is conclusive evidence of the fact that the land in question is needed for a public purpose as in *Smt. Somavanti v. State of Punjab*<sup>97</sup>. The decision lays down that conclusiveness in **S.6(3)** of the **LAA, 1894** must necessarily attach not merely to a 'need' but also to the question whether the purpose was a public purpose.

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<sup>96</sup> AIR 1970 SC 984 in Paragraph 7.

<sup>97</sup> see *Smt. Somavanti v. State of Punjab* 1963 AIR SC 151 = 1963 SCR (3) 774

99. Invariably, in all the cases so relied on by the learned bench, ‘*public purpose*’ for a segment of society was held to be a public purpose. The foundational case on the subject is *Ministry of Works Government of Pakistan v Muhammad Ali*<sup>98</sup> wherein Cornelius, J., speaking for the majority of the bench, held that the *acquisition of land for residence of Government servant is a public purpose*. None of the case cited by the learned bench supports the case of the Respondents. The appropriate portion has been reproduced below:

*‘The provision of residences is not by itself a matter falling outside the concept of a "public purpose" provided that it is part of a scheme for making general provision of that character. Secondly, the provision of residences for a particular class of persons, even though it may operate so as to provide a particular residence for a particular member of that class is also not excluded from the meaning of the expression "public purpose", nor does it make any difference whether the residences are for completely unprivileged persons like coolies, or for those enjoying the patronage of Government in the capacity of officers And the further conclusion which emerges from these decisions is that the provision of such residences may be included within the meaning of the expression, "public purpose" in the case of coolies because of the benefit to a whole class, and in the case of public servants for the reasons stated by their Lordships of the Judicial Committee, because of the public benefit which accrues from the fact of Government being assisted in maintaining the efficiency of its servants.’*

100. The dicta laid down by Cornelius, J. was recently upheld by a three-member bench of this court in the case of *Younus Habib v. Imranur Rashid and others*<sup>99</sup> wherein it was held that the acquisition of land for a housing society is recognized as a public purpose.

101. The scope of ‘public purpose’ was further extended in the case titled *Pakistan through the Secretary, Ministry of Defence v. Province of Punjab and Others*<sup>100</sup>, wherein it was held that even the construction of shops in a market would be considered to be a public purpose even if profit is earned. The judgment serves as substantive evidence that ‘*public purpose*’ is justified even when specific classes of

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<sup>98</sup> PLD 1960 SC 60

<sup>99</sup>2018 SCMR 705

<sup>100</sup> PLD 1975 SC 37

people, such as the shopkeepers in the cited case, are benefitted notwithstanding the fact that the Cantonment Board was earning a profit on such allocation. The relevant extract has been reproduced for convenience sake

*“Thus if in a market so constructed shops are let out on rent, or some fee is levied as a toll in the market place would not render the purpose merely the earning of profit; but it would still be a public purpose being discharged by the Cantonment Board in performance of the duties imposed upon it by Section 116 of the Cantonments Act. The levy of the fee or rent would merely be incidental and would neither deprive the property of its true character nor alter the user of the property from a public purpose to merely profit-making.*

*I have no cavil with this enunciation and if a property is really used for a public purpose then the fact that a fee is levied for the user of such property would not render the user a non-public purpose, Thus, for instance, the provision of slaughter houses at which a fee is charged for slaughtering cattle will not render the slaughter-house a merely profit-making concern. It would still remain a premises used for a public purpose”*

102. The concept of ‘public purpose’ was further enlarged to include welfare funds to serving personnel, ex-servicemen, and their families who also represented a specified class of people in the five-member judgment of this court titled *Fauji Foundation and another v. Shamimur Rehman*<sup>101</sup>

*“The next question whether the retrieving of G.H.Q welfare funds and the charitable purposes such as those in which the appellant is engaged fall within the concept of "public purpose" or "public welfare". Just as the recovery of government dues cannot but be for public purpose as those not only belong to government but also to the entire people of the country, similarly retrieving of G. H. Q Welfare Funds which are also public funds and committed to the welfare of the serving personnel and ex-servicemen and their families, would also be for a public purpose on account of their purport and beneficial use by a large segment of population as against the private interest of an individual.*

*All the enumerated items are without doubt purposes involving benefit to a large community of the population and in that view of the matter relatable to public purpose or public welfare. This view seems to gain support further from the use*

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<sup>101</sup> PLD 1983 SC 457

*of expression "any advancement of any other object of general public utility" which necessarily connotes some beneficial advantage and service to the public"*

103. The judgments used by the learned bench are authorities that essentially contradict their own argument. We will venture to show how a select few of these authorities are essentially contradictory of their own stance on how public purpose is not justified in this case. The case of *Ghulshan Hussain and another v. Commissioner (Revenue) Islamabad*<sup>102</sup> provided a set of circumstances, which if fulfilled, would satisfy the threshold for 'public purpose' with respect to the functions discharged by the Federal Government Employees Housing Foundation (FGHEF). The learned bench has considered the cited case in isolation and has been unsuccessful in applying the principle enumerated. The relevant portions of the cited case are reproduced below:

*"18. The Foundation, in the light of the definition of "public interest", unless includes all the employees of the Federal Government inside or outside Islamabad and all those persons who are discharging functions in connection with the affairs of the Federation such as employees of the National Assembly, Election Commission of Pakistan, Supreme Court of Pakistan, the employees of High Court discharging function at Rawalpindi Bench of Lahore High Court, Federal Shariat Court and the autonomous Bodies, Corporations, Institutions, Government or semi-Government Organizations which are directly or indirectly discharging the functions under the control of the Federal Government, Doctors, Engineers, Lawyers and Educationist, who in any manner are connected with the Federal Government and Federation in public or private sectors are bonafidely running their affairs in Islamabad, such-like Journalists, the acquisition of land for a Housing Scheme exclusively for the benefit of a limited class of civil servants will not be the "public interest". Similarly, the senior members of the Armed Forces who having completed their service are at the verge of their retirement or being in the retirement tenure or retired are discharging their function at their Headquarters in Islamabad and Rawalpindi are also entitled to be given representation in the Housing Scheme of Housing Foundation like the members of the superior judiciary. Thus, the Housing Foundation without extending the benefit of the scheme to the public and private sectors on the basis of a reasonable classification and ratio by including people from every walk of life in official or semi-official position cannot*

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<sup>102</sup> 2000 YLR 1711

*justifiably acquire land for the benefit of only the employees of Federal Government as such employees are not definable as a Community for "public purpose".*

104. The learned bench then concluded that the ‘public purpose’ would be justified as long as the entire classes of employees in connection with the federation are benefitted by the housing scheme. It is further evident upon perusal of paragraph 24 of the cited case

*“24. The acquisition of land for a Housing Scheme introduced by the Housing Foundation for public utility in the form of an Agency like Capital Development Authority under the control of Federal Government and if such scheme is executed in the benefit of public-at-large and is not confined to a limited class, it will definitely advance the spirit of Constitution. Therefore, the acquisition of the land by the Housing Foundation for the benefit of all the above referred categories of persons can be for the "public purpose" and the same will not be in violation of **Article 24** of the Constitution, which does not prevent establishment of Housing Colonies in the public interest.”*

105. The learned bench then relies on the case of *Muhammad Ishaq and Others v. Government of Punjab and others*<sup>103</sup> in Paragraph 29 of the impugned judgment to hold that

*‘... any scheme prepared by the FGEHF for providing housing facility to its members has to be seen as a private interest for those members only and their status is of a society for the purposes of housing scheme... However, when they use the state machinery with their limited objective under the Companies law, their entire working has to be seen in the light of their objective only and the purpose for which the land was acquired was too limited to hold that the same would be used for public purpose’*

106. The principle that land used for housing societies qualifies as a ‘public purpose’ was also affirmed by this Court in *Younus Habib and others v. Imranur Rashid and others*<sup>104</sup>. The dicta laid down by the cited judgment, read with *Ghulshan Hussain and another v. Commissioner (Revenue) Islamabad* (supra), denotes that the acquisition of land by the FGEHF was no longer for a specified class of

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<sup>103</sup> 2002 SCMR 1652

<sup>104</sup> 2018 SCMR 705

Federal Government employees but now included every employee in connection with the affairs of the Federation. Therefore, the opinion of the learned bench of the High Court cannot be maintained regarding ‘*public purpose*’ not being justified.

107. In *Sooram Pratap Reddy and others v. District Collector, Ranga Reddy Dist and others*<sup>105</sup>, the Indian Supreme Court stated that “*public purpose*” includes any purpose wherein even a fraction of the community may be interested or by which it may be benefited. As such Special Economic Zones (SEZs), mines, shopping malls, factories, dams, and other large-scale projects have been facilitated by expropriation of land under the Land Acquisition Act.

#### **XI. You cannot rob Paul to pay Peter:**

108. The learned division bench of the Islamabad High Court equated the land acquisition exercise with taking property of one and giving it to other and drew strength from English saying ‘*to rob Paul to pay Peter*’ and relied upon some cases to mentioned in para 25 of the impugned judgment. We have gone through all the cases so cited. In fact all the cases so cited support the case of the Petitioner foundation, the case of *Muhammad Akbar (supra)*, cited with approval in *Dr. Nasim Javaid* case (*supra*), does not approve of the concept relied on by the Islamabad High Court. The appropriate portion has been reproduced below

*‘... taking land of one to be given to other. One cannot rob Peter to pay Paul, it may be Robin Hood Philosophy not part of law and is barred by Fundamental Law i.e Constitution of Pakistan, which only permits acquisition of land for Public Purpose’*<sup>106</sup>

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<sup>105</sup> (2008)9 SCC 552

<sup>106</sup> PLD 1976 Lah. 747 at Para 13



## **XII. Regulatory Capture:**

109. The learned Bench of the Islamabad High Court invoked the “Economic Theory of Regulation” propounded by Nobel Laureate of 1982, George J. Stigler<sup>107</sup>. The doctrine is recognized as “*regulatory capture*”, which proclaims that interest groups and other political participants use the regulatory and coercive powers of government to shape laws and regulations in a way that is beneficial to them.

110. In a case where the Punjab Local Government was rendered non-functional, by delaying elections of local bodies, and one of the mega projects was undertaken by Lahore Development Authority, the matter, when taken to Lahore High Court, the non-holding of election of local bodies was viewed critically and considered by three member Bench of the Lahore High Court to be regulatory capture of municipal functions in *Imrana Tiwana v Province of Punjab*<sup>108</sup>.

111. When the matter came for consideration up before this court in *Lahore Development Authority v. Imrana Tiwana*, it was held that

*“The doctrine applies where a statutory body setup to regulate a group is then manned by the persons from that group to defeat the regulations. It would not apply where the Regulated includes the government because inevitably appointments to such regulatory bodies have to be made by the Government. Government can defeat the legislative intent by not appointing persons to such bodies or by making appointment of such persons who will act only under its dictation, the power to appoint has to be exercised in a fair manner and the exercise of authority by appointee has to be transparent in public interest and non-arbitrary”<sup>109</sup>*

The result is that an agency, charged with acting in the public interest, instead acts in ways that benefit the industry it is supposed to be regulating.

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<sup>107</sup> The Theory of Economic Regulation. The Bell Journal of Economics and Management Sciences, Vol. 2 No. 1 (Spring 1971), pp. 3 – 21. George J. Stigler.

<sup>108</sup> PLD 2015 Lah. 522.

<sup>109</sup> 2015 SCMR 1735. Paragraph 85.

112. On the current facts of the case, the learned bench, in paragraph 31 of the impugned judgment, has definitively concluded that the CDA made a regulatory capture. The relevant extract has been reproduced below

*“In our humble view the entire working of the appellant/FGEHF and the CDA authorities in combination of other public officials made a regulatory capture which occurred when a regulatory agency, created to act in the public interest instead advance the commercial or special concern of interest group that dominated the industry or sector it was charged with regulating. Regulatory capture was a form of Government failure and it occurred when special interest, typically an industrial group, persuaded Government actors to exercise the coercive powers of the state in ways that were not in the public interest i.e. the interest of the industry group diverged from the public interest, the Government choose the former over the later.”*

113. The CDA was established as a public service provider and not as a regulatory Authority. CDA is essentially responsible for making all arrangement for the *planning and development of Islamabad*, within the framework of regional development plan<sup>110</sup>. In addition, the municipal services earlier entrusted to the CDA in 1966 under Act 22 of 1966<sup>111</sup> were withdrawn and entrusted to Islamabad Local Government<sup>112</sup>. The *FGEHF* is registered under **Section 42** of the **Companies Ordinance 1984**; It is merely a non-trading, not for profit entity that is created for the betterment or service to the society generally or any segment of society particularly. It is under the Ministry of Housing and Works and performs one of its functions assigned to Housing and Works Division. It may be observed neither, the CDA nor, the *FGEHF* are the regulatory authority, none regulate any sector of business or, commercial activities of commercial bodies rather both are service providers.

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<sup>110</sup> Preamble, Section 11 to 21 of the CDAO, 1960.

<sup>111</sup> S.15-A of the CDAO, 1960.

<sup>112</sup> Islamabad Local Government Act, 2015.

114. The learned bench has also concluded, in paragraph 34 of the impugned judgment that the State functionaries have failed to perform their lawful duties on a required standard after due care and caution which amounts to regulatory capture. We cannot endorse the conclusion drawn by the learned bench. The present set of circumstances do not warrant the application of the doctrine of ‘*regulatory capture*’ as a state functionary, the CDA, is executing its statutory function, which does not include regulating any group of trade or business, let alone, being manned by a person from any of such commercial group or entity it is regulating. CDA and or FGEHF fail the test of regulatory capture laid down in the case of *Imrana Tiwana*.

### **XIII The Federal Government Employees Housing Authority Act, 2020**

#### **a. EEFFECT OF ENACTMENT OF FEDERAL GOVERNMENT EMPLOYEES HOUSING AUTHORITY ACT, 2020, DURING PENDENCY OF INSTANT APPEALS AND PETITIONS**

115. During hearing and pendency of instant appeals, the *FGEHF*, has been translated into an Authority through Federal Government Employees Housing Authority Ordinance on 12th July, 2019 which later graduated into ***FGEHA Act, 2020*** as published in the official Gazette on 15 January 2020. In the case of *Karan Singh and others v Bhagwan Singh*<sup>113</sup>, Indian Supreme Court held that the subsequent act came into force during pendency of appeal, rights and remedies by operation of law to be governed under new law. In another case reported as *Ramjilal & Ors. Etc. Vs. Ghisa Ram*<sup>114</sup>, Indian Supreme Court, under Section 57 of the ***Indian Evidence Act***<sup>115</sup>, took judicial notice of all the laws in force in the territory of India.

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<sup>113</sup> [1996] 7 SCC 559

<sup>114</sup> 1996 SCALE (2) 401

<sup>115</sup> Corresponding Provision in Pakistan is Article 112 of Qanoon-e- Shahadat Order, 1984

116. Thus in case in hand, this Court has taken judicial notice of the **Federal Government Employees Housing Society Act, 2020** passed by the Parliament on 15<sup>th</sup> January, 2020 as brought to the notice of the court. None of the parties took any exception to the new legislative regime leading to land acquisition by the Authority for the purpose and object set out in the preamble of the Act, 2020. Accordingly, we took notice of the change in law as regard acquisition of land subject matter of present controversy. Examining the Act, 2020, it is noted that, it contains an elaborate procedure for enquiry, acquisition of land, payment and determination of compensation, vesting of property on issuance of notification and, right of appeal and all other incidental and ancillary matter relating to acquisition of land.

117. Under **Section 3** thereof, the former Federal Government Employees Housing Foundation is now a body corporate having perpetual succession and is also a local authority in the “*specified area*”<sup>116</sup>.

118. In terms of **Section 5(2)(e)**, the Board of the Authority is empowered

*“to impose and vary development charges, transfer fee, services charges, toll, tax or other charges in respect of any land or building within any scheme in the specified area”.*

119. By virtue of **Section 24(a)**:

*“all assets, rights, powers, authorities, and privileges, and all property, moveable and immoveable, bank balances, bank accounts, reserve funds, investments and all other interest and rights in or arising out of such property and all liabilities and obligations of whatever kind of the Foundation established before commencement of this Act, shall stand transferred to and vested in the Authority”*

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<sup>116</sup> Defined under **Section 2(n)** to “means all lands owned, purchased, acquired or procured by or vested in or leased to the Foundation under any law before the commencement of this Act and such other land as may be purchased or procured or acquired or vested in or leased to the Authority in Islamabad Capital Territory or other parts of Pakistan;”

120. All acts and action of the FGEHF award of the contracts etc. are now also protected by virtue of deeming clause contained in **Section 24(a)** and further by virtue of **Section 29** which reads as follows;-

*“All acts done or taken by the Foundation, before the Commencement of this Act, shall be deemed to have been validly done or have been taken under this Act to the extent they are consistent with the provisions of this Act”*

121. The Act, 2020 contains ‘non-obstante’ clause<sup>117</sup> which has an overriding effect. The same is reproduced below:

*“32. Relation of this Act with other laws–*

*(1) The provisions of this Act shall have effect not in derogation of the Pakistan Penal Code 1860, Code of Criminal Procedure 1898 (Act V of 1898), Code of Civil Procedure 1908 (Act V of 1908), Qanun-e-Shahadat 1984 (P.O. 10 of 1984) and Land Acquisition Act, 1894 (1 of 1894)*

*(2) Subject to subsection (1), the provisions of this Act shall have effect notwithstanding anything contained in any other law for the time being in force.*

122. The recent enactment of the Act, 2020 substantiates the fact that where the Parliament intend for the law to have overriding effect, the words of the statute, in their natural, ordinary, or popular sense, will clearly declare so. It is not the duty of the Court to either enlarge or curtail the scope of the legislation or the intention of the legislators, the latter of which was done so by the learned bench by concluding that the **CDAO, 1960** had an overriding effect over the **LAA, 1894** when no such intention of the legislature could be deciphered, either on the basis of legislative history of both the enactments as made applicable in *ICT*, and in absence of ‘non obstante’ clause in either of the statutes discussed elaborately. The Act, 2020 leaves no ambiguity regarding the status of the Authority under the current constitutional regime and simultaneously grants immunity to any prior actions undertaken by the now Authority, previous Foundation, due to the inclusion of the deeming clause as mentioned herein above.

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<sup>117</sup> S.32(2) of Federal Government Employees Housing Act, 2020

**XIII. Conclusion:**

123. For the foregoing reasons, the first and second question regarding the jurisdiction of the CDA to acquire land to the exclusion of the **Land Acquisition Act, 1894** has been answered in the negative in paragraph 62-63. The third question regarding the acquisition for a housing scheme constituting a valid public purpose has been answered in the affirmative in paragraph 98-107. The fourth question regarding the Acquisition under the **LAA, 1894** becoming a State Largesse under **Art. 173** of the Constitution have been answered in the negative as in paragraph 75. The fifth question regarding the constitutional petitions not being maintainable, was not argued by any of the parties, very fact that contentious matters has been argued and dilated by the High court as well attended to by this Court, we do not deem appropriate to delve into such controversy and leave it to be addressed in some appropriate proceedings.

124. In view of the forgoing discussion and determination of points noted in the leave granting order dated 6.12.2018, Civil Appeals No. 1476 to 1485 of 2018 stand allowed. Impugned consolidated judgments dated 04.7.2018 in Intra Court Appeals No. I.C.A.365/2017, I.C.A.366/2017, I.C.A.367/2017, I.C.A.368/2017 I.C.A.365/2017, I.C.A.365/2017, I.C.A.22/2018, I.C.A.23/2018 and I.C.A.24/2018 are set aside, consequently, consolidated judgments dated 23.10.2017 rendered in W.P. No. 2128/2015, W.P No. 3496/2015, and W.P No's 308 to 310/2016 are also set aside, resultantly all the Writ Petitions noted herein stand dismissed.

**XIV. CrI.O.P 166 of 2018**

125. CrI.O.P. P 166 of 2018 has been filed by the SCBAP. It arises out of Order dated 23.09.2014 passed in C.P. No. 38 of 2013, (*SCBAP vs. Amer Ali Ahmed Commissioner Islamabad and other*) whereby the SCBA sought implementation of the Directive No. 3059 and No. 3060 issued by the Prime Minister Secretariat, dated 13.11.2012, making a commitment for the allotment of land to the

members of the legal fraternity. The Petition proceeded and, ultimately, pursuant to issuance of Notification under **Section 4** of the **LAA, 1894** on 23.09.2014, it was disposed of as not pressed. From the record, it appears that the notification was later withdrawn, which led to the filing of CrI.O.P No. 12 of 2015. It appears that a fresh notification for the land acquisition was again issued on 29.04.2015. Consequently, the CrI.O.P No. 12 of 2015 was withdrawn on 30.04.2015. For inaction on the part of Petitioner Foundation and concerned authorities, several Criminal Miscellaneous Petitions were filed from time to time and it seems that CrI.O.P. No. 41 of 2017 came up before the Bench for non-compliance of orders made from time to time in various proceedings arising out of C.P. No. 38 of 2013. It is matter of record that during pendency of Cr.O.P 41 of 2017 a settlement was arrived at between the SCBAP, Collector Land Acquisition, and Director-General of the Foundation, wherein it was stipulated that the requisite notification under the **LAA, 1894**, having been issued, and objection, if any, were to be decided within the stipulated period followed by the award. The amount lying with the Appellant Foundation, submitted by the SCBAP, was to be credited to the Land Acquisition Collector, ICT. In view of such agreement reached between the parties, the CrI.O.P. 41 of 2017 stood dismissed on 10.08.2018.

126. Presently, we are confronted with CrI.O.P. 166 of 2018, which is a sequel of successive proceedings arising out of C.P. No. 38 of 2013, made by the SCBAP from time to time seeking implementation of various directives, assurances by the authorities concerned and lastly commitment made through agreement reached between the parties and recorded in the order dated 10.8.2018, and to draw contempt proceedings against all those responsible to make compliance of assurance held out in agreement as reproduced in order dated 10.8.2018.

127. Since a statement has been made by Mr Rizvi, learned ASC, for the SCBA, that the amount, as claimed by the FGEHF and the Collector Land Acquisition, has been deposited by the SCBAP, the learned Counsel for the Appellant and learned DAG assures that the agreement by and between the parties shall be honored. Mr. Rizvi, learned ASC, is satisfied with the assurance made on behalf of the authorities concerned. In this view of the ***matter Crl.O.P No. 166 of 2018*** does not call for any further action, and is accordingly disposed of.

#### **XV. CMA No. 2083 of 2018**

128. Nazar Hussain Chohan and Seven (7) others have filed CMA No. 2083 of 2018 whereby they seek to be added as a party to the proceedings and be allowed to assist this Court, further direction to the Islamabad to decide W.P No. 4270/16 and W.P 3594/18 in accordance with law and lastly, alternatively prayed that order dated 10.8.2018 passed in Cr.O.P 41/2017 be withdrawn and settlement dated 10.8.2018 be set-aside. Mr. Naeem Bukhari learned Sr. Counsel for the Petitioners in the noted application has assailed the proceedings and orders noted herein on the ground, *inter-alia*, that the land owners were not heard while disposing off C.P. No. 38 of 2013 and series of Cr.O.P's arising there from and while taking on record settlement dated 10.8.2018 and treating the same as an order of the Court. He contends that the land owners are prejudiced by such directions of this Court under which their land has been acquired.

129. Mr. Rasheed Rizvi, learned ASC for the Petitioner/SCBAP, and so also Mr. Mansoor Ahmed, learned Sr. ASC, for the Foundation, contends that originally C.P. No. 38 of 2013 was disposed off on assurance of the authority concerned that the directives of the Prime Minister noted above would be complied with and later on a settlement was arrived at between the parties, which, do not speak of any particular land. According both the learned counsels, remedy against any acquisition of land, if any of the Petitioners lies elsewhere and not



in collateral proceedings. It was further argued that in the garb of listed application Petitioners cannot be allowed to seek review of the order dated 10.8.2018 as no fee for seeking review has been filed as required under the **Supreme Court Rules, 1980**, even otherwise, review is barred by time. On such grounds the application is liable to be dismissed.

130. Having heard the argument of all the contesting parties and perused the record. Contention of Mr. Rashid Rizvi, and Mr. Mansoor Ahmed learned Sr.ASC, is correct that there is no order of this Court whereby any direction to acquire any particular land was issued. The SCBAP has sought compliance and implementation of the directive of the then Prime Minister of Pakistan, which was complied with, and it was up to the authority concerned to make compliance with the directive of the Prime Minister in the manner it may deem expedient. It may further be observed that whenever any property is acquired, in exercise of authority conferred, and Notifications under **S.4, S.6, and S.17 of the LAA, 1894** are issued, the parties interested and aggrieved have a right to object to such acquisition and/or challenge the award and determination and apportionment of compensation. We are informed that numerous land owners have already invoked the remedy against such acquisition. In this view of matter we are not persuaded by the contention of Mr. Naeem Bokhari, learned ASC that any directions were issued for acquisition of any particular land. It is the sole prerogative of the authorities to acquire land and the person so interested and aggrieved by such acquisition may avail of the remedy as provided under the relevant acquisition proceedings/laws. As regard his challenge to the applicability of CDAO, 1960 and inapplicability of LAA, 1894 in Islamabad, have been attended elaborately in preceding paragraphs need no further elaboration. Therefore, **CMA No. 2083 of 2018** does not merit any consideration and is accordingly dismissed.

131. Since a statement has been made by Mr. Rizvi learned ASC for the SCBA, that amount as claimed by the *FGEHF* and the Collector Land Acquisition, has already been deposited by the SCBAP, and the learned Counsel for the appellant and the DAG, assures that the agreement by and between the parties shall be honored Mr. Rizvi, learned ASC, is satisfied. In this view of the matter ***Crl.O.P No. 166 of 2018*** does not call for any further action, stands disposed of.

#### **XVI. Writs Called:**

132. While hearing the subject Civil Appeals, as requested by Mr. Naeem Bukhari, learned Sr.ASC vide Order dated 27.12.2018, W.P No. 4270/2015, 4723/2016 and 3594/2018 pending in Islamabad High Court were called for consideration and disposal. We have noted that under *Article 186A* of the Constitution, 1973, this Court “*may, if it considers it expedient to do, in the interest of justice, to transfer any case, appeal or other proceedings pending before any High Court to any other High Court*”.

133. We have noted that unlike Indian Constitution<sup>118</sup>, **Article 186A** of the Constitution, 1973 does not confer any jurisdiction in this Court to, call any case, appeal or other proceedings pending before any High Court for the purposes of hearing and deciding the same itself, though such record and proceedings may be call for perusal and examination. Though, Mr. Naeem Bukhari, learned senior ASC, prayed for and consented to such course. It is a settled position in law that jurisdiction on court cannot be conferred even by consent; unless it is

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<sup>118</sup> Article 139A Constitution of India Transfer of certain cases

“Where cases involving the same or substantially the same questions of law are pending before the Supreme Court and one or more High Courts or before two or more High Courts and the Supreme Court is satisfied on its own motion or an application made by the Attorney General of India or by a party to any such case that such questions are substantial questions of general importance, the Supreme Court may withdraw the case or cases pending before the High Court or the High Courts and dispose of all the cases itself. Provided that the Supreme Court may, after determining the said questions of law return any case so withdrawn together with a copy of its judgment on such questions to the High Court from which the case has been withdrawn, and the High Court shall on receipt thereof, proceed to dispose of the case in conformity with such judgment”

so conferred by or under Constitution and or law<sup>119</sup>. We, therefore, deem it proper to return all the three Writ Petitions to the Islamabad High Court, which shall be deemed to be pending.

134. Lastly, we also appreciate the research carried out by Mr. Ahmad Hassan, Law Clerk and acknowledge his assistance rendered in the completion of this case.

*Judge*

*Judge*

*Judge*

*Judge*

Islamabad

Announced in Open Court on 8<sup>th</sup> October, 2020

*Judge*

*Approved for Reporting*

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<sup>119</sup> Article 175 (2) of the Constitution 1973

**Qazi Faez Isa, J.** This case is about the compulsory acquisition of thousands of *kanals*<sup>1</sup> of land (**‘the Land’**) in the area of the Islamabad Capital Territory (**‘Islamabad’**). The Land was acquired by the Federal Government Employees Housing Foundation (**‘the Foundation’**)<sup>2</sup> in terms of the Land Acquisition Act, 1894<sup>3</sup> (**‘the Land Acquisition Act’**). After the acquisition of the Land, the Foundation submitted its layout plans to the Capital Development Authority<sup>4</sup> (**‘CDA’**) which were approved by the CDA Board<sup>5</sup>. The Land (less the area consumed in roads, utilities, etcetera) was delineated and earmarked into residential plots for allotment to government servants and advocates of the Supreme Court (**‘the allottees’**). The acquisition cost of the Land and its development cost is borne by the allottees; no amount is spent from the public exchequer by the Foundation or CDA.

2. **Land Acquisition Act:** The Land Collector within whose jurisdiction the Land is situated directed the Foundation to deposit the tentative cost of the Land and it was so deposited. Thereafter, the Collector issued the requisite notices which were published in the official gazette; the *‘Preliminary Notification’* dated 20 May 2015 followed by the *‘Declaration that land is required for a public purpose’* notification dated 4 December 2015, respectively under sections 4 and 6 of the Land Acquisition Act. The Collector made and issued awards under section 12 of the Land Acquisition Act, respectively Award dated 15 November 2016 and Award dated 15 June 2017. The said Awards determined the amount payable to the owners of the Land, that is, the market price of the Land, the additional compensation of fifteen per cent<sup>6</sup> on account of the compulsory acquisition and six per cent

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<sup>1</sup> One *kanal* of land is equal to 605 yards or 505 meters.

<sup>2</sup> Incorporated as an ‘association not for profit’ under section 42 of the Companies Ordinance, 1984 and in the Companies Ordinance, 2016, which used to be section 26 of the earlier Companies Act, 1913 and now is section of 42 the Companies Act, 2017. The Foundation was converted into a statutory organization by the Federal Government Employees Housing Authority Act, 2020, Act No. IV of 2020, enacted on 15 January 2020, published in Gazette of Pakistan, Extraordinary, Part I, on 15 January 2020.

<sup>3</sup> Land Acquisition Act, 1894, Act No. I of 1894.

<sup>4</sup> Set up under section 4 of the Capital Development Authority Ordinance, 1960, Ordinance No. XXIII of 1960, published in Gazette of Pakistan, Extraordinary, 27 June 1960 (PLD 1960 Central Statutes 375).

<sup>5</sup> On 6 July 2017.

<sup>6</sup> Section 23(2) of the Land Acquisition Act, 1894.

annual interest<sup>7</sup>. An award made by the Collector is subject to challenge before a referee judge<sup>8</sup> and then on appeal before the High Court<sup>9</sup>.

3. **Impugned Judgments:** Some of the land owners challenged the acquisition proceedings by invoking the Islamabad High Court's constitutional jurisdiction under Article 199 of the Constitution of the Islamic Republic of Pakistan (**the Constitution**). The challenge was made on a number of grounds<sup>10</sup>. It was alleged that the acquisition of the Land was not for a 'public purpose' and since the Land was situated in Islamabad its acquisition could only take place under the Capital Development Authority Ordinance, 1960<sup>11</sup> (**the CDA Ordinance**). The learned Chief Justice of the Islamabad High Court *vide* judgment dated 23 October 2017 allowed the petitions because, in his opinion, the said acquisition was not for a *public purpose* and because CDA, under the CDA Ordinance, had exclusive jurisdiction to acquire the Land as it was situated in Islamabad. The Foundation and some of the allottees challenged the judgement of the learned Single Judge by filing Intra Court Appeals<sup>12</sup> (**ICAs**) before a Division Bench of the Islamabad High Court but their appeals were dismissed by judgment dated 25 September 2018. In the ICAs, the findings of the learned Single Judge regarding *public purpose* and CDA's exclusive jurisdiction were upheld and it was further held that the Land Acquisition Act was not applicable.
4. The Foundation and some of the allottees filed petitions for leave to appeal<sup>13</sup> before this Court and leave was granted on 6 December 2018<sup>14</sup>. The learned Mushir Alam, J, has mentioned the facts, laws and precedents in considerable detail. I am in respectful agreement with his lordship's conclusions. However, I have dilated upon certain relevant and necessary matters in this additional note.
5. Mr. Mansoor Ahmed, the learned counsel representing the Foundation, submitted that Article 24(2) permits compulsory acquisition of private

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<sup>7</sup> Section 34 of the Land Acquisition Act, 1894.

<sup>8</sup> Section 18 of the Land Acquisition Act, 1894.

<sup>9</sup> Section 54 of the Land Acquisition Act, 1894.

<sup>10</sup> Writ Petition Nos. 308, 309 and 310 of 2016 and 2128 and 3496 of 2015.

<sup>11</sup> Ordinance No. XXIII of 1960, published in Gazette of Pakistan, Extraordinary, 27 June 1960 (PLD 1960 Central Statutes 375).

<sup>12</sup> ICA Nos. 364 to 368 of 2017 and 22 to 24 of 2018.

<sup>13</sup> Civil Petition for Leave to Appeal Nos. 4449 to 4453, 4468, 4469 and 4482 to 4484 of 2018.

<sup>14</sup> The leave granting order is reproduced in paragraph 22 of Mushir Alam, J's judgment.

property provided it is for a *public purpose*, done under the authority of law and a mechanism for determining compensation is provided, and that these three conditions were met; the acquisition was for a public purpose; was made under the Land Acquisition Act and, therefore, was made pursuant to the authority of law; and, the compensation payable to the landowners was determined by the Collector by applying the stipulated mechanism in terms of the Land Acquisition Act. The learned counsel submitted that the CDA Ordinance was applicable only in respect of land situated in Islamabad and was required for the use or purpose of the CDA. And, in this case the Land was not acquired by CDA, nor could it have been, since it was not required by CDA and/or for the use or purpose of CDA. The learned Deputy Attorney General representing the Federation and Senior Counsel Sardar Muhammad Aslam representing CDA, who sadly passed away after the judgement was reserved, had supported the appellants and adopted the submissions of the learned Mr. Mansoor Ahmed. On the other hand, Messrs Naeem Bukhari and Feisal Hussain Naqvi relied on the impugned judgments and reiterated the submissions made before the High Court and the reasons which prevailed with the learned Judges of the High Court.

6. **Acquisition of Private Property for ‘Public Purpose’:** Article 24(2) of the Constitution permits the compulsory acquisition of land provided it is for ‘*public purpose*’<sup>15</sup> and that the acquisition is pursuant to, ‘*the authority of law which provides for compensation therefor and either fixes the amount of compensation or specifies the principles on and the manner in which compensation is to be determined and given*’<sup>16</sup>. I am in respectful agreement with the learned Mushir Alam, J<sup>17</sup> that the Constitution permits compulsory acquisition if three conditions are met; firstly, the acquisition must be for public purpose; secondly, the land must be acquired pursuant to some law; and, thirdly, such law must provide for the determination of compensation and its disbursement. The Land in these cases was acquired pursuant to the Land Acquisition Act, a law which provides a detailed mechanism for the determination and payment of compensation, hence, the stipulated second and third conditions are met. The first condition - whether the Land was acquired for *public purpose* - remains to be considered. Public purpose is not specifically defined in the Constitution

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<sup>15</sup> Article 24 (2) of the Constitution of the Islamic Republic of Pakistan.

<sup>16</sup> Article 24 (2) of the Constitution of the Islamic Republic of Pakistan.

<sup>17</sup> Paragraph 80 of his lordship’s judgment.

but it may be gathered from Article 24(3)(e). Article 24(3) commences by stating that, ‘*Nothing in this Article shall affect the validity of*’ compulsory acquisition and then lists six categories from (a) to (f). Clause (ii) of the fifth category (e), reproduced hereinbelow, is relevant and applicable:

- (3) Nothing in this Article shall affect the validity of-
  - (e) any law providing for the acquisition of any class of property for the purpose of-
    - (ii) **providing housing** and public facilities and services such as roads, water supply, sewerage, gas and electric power **to all or any specified class of citizens;** (emphasis added)

*Providing housing* is specifically mentioned in Article 24(3)(e)(ii). Therefore, land which is compulsorily acquired for *providing housing* is for a *public purpose* and government/civil servants and lawyers, are a *specified class of citizens*.

7. **Housing is a Public Purpose:** The learned Judges of the High Court did not consider the scope of Article 24(2) of the Constitution. They also overlooked Article 24(3)(e)(ii) of the Constitution which stipulates that *providing housing* is a *public purpose*. The following precedents have categorically determined that housing is a *public purpose*. The term *public purpose* in the context of land acquisition has been interpreted in a number of decisions. The impugned judgments mention that these precedents were cited, but they were not considered. In the case of *Pakistan v Muhammad Ali*<sup>18</sup>, this Court held that:

It will be sufficient for me to refer firstly to the Land Acquisition Act, 1894, which employs the expression “public purpose” in a very wide sense, and restrains the powers of the Government to acquire private property compulsorily. The Act does not define the expression “public purpose” exhaustively... It is obvious that the omission to define “public purpose” exhaustively is intentional, for it is impossible to place any limit upon the purposes which, in the light of the exercise of governmental power over large territories and populations, in respect of the multifarious activities which go into the establishment and operation of a thorough system of administration, would fall within the meaning.<sup>19</sup>

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<sup>18</sup> PLD 1960 Supreme Court 60.

<sup>19</sup> Ibid, Cornelius, J, page 67H.

This Court went on to hold that providing housing was a public purpose:

[P]rovision of residences is not by itself a matter falling outside the concept of a “public purpose” provided that it is part of a scheme for making general provision of that character. Secondly, the provision of residences for a particular class of persons, even though it may operate so as to provide a particular residence for a particular member of that class is also not excluded from the meaning of the expression “public purpose”, nor does it make any difference whether the residences are for completely unprivileged persons like coolies, or for those enjoying patronage of Government in capacity of officers.<sup>20</sup>

Recently in the case of *Yunus Habib v Imranur Rashid*<sup>21</sup> it was held that, ‘[T]he acquisition of land for a housing society is recognized as a public purpose’<sup>22</sup>. In *Zafeer Gul v NWFP Province*<sup>23</sup> a Division Bench<sup>24</sup> of the Peshawar High Court determined that, ‘land acquired by WAPDA Coopreative Housing Society for construction of residential colony would fall under the definition of “public purpose”<sup>25</sup> by relying on the decisions in *Pakistan v Muhammad Ali* (mentioned above) and on a number of Indian authorities<sup>26</sup>. In the case of *Ch. Nazir Ahmad v Province of Punjab*<sup>27</sup>, it was held, that, Article 24(3)(e)(ii) ‘of the Constitution makes it clear and obvious that the individual can be deprived of his property for the purposes of providing housing to a specified class of citizens and any law or act in this behalf will not offend against the fundamental right granted under Article 24’<sup>28</sup>. In *Suo Motu Case No. 13 of 2019*,<sup>29</sup> this Court held that the Fundamental Right to life<sup>30</sup> includes shelter<sup>31</sup>. Therefore, the Land, which was acquired to provide housing was acquisition for a *public purpose*. Reference may also be made to the *Principles of Policy* and the *Objectives Resolution*.

<sup>20</sup> Ibid, Cornelius, J, page 69.

<sup>21</sup> 2018 SCMR 705.

<sup>22</sup> Ibid, Saqib Nisar, J, page 724F.

<sup>23</sup> 2001 CLC 1853.

<sup>24</sup> Comprising of Mian Shakirullah Jan (as he then was) and Talat Qayyum Qureshi, JJ.

<sup>25</sup> Ibid, 1858C.

<sup>26</sup> Including, *R. L. Arora v State of Uttar Pradesh* (AIR 1962 SC 764), *Anand Kumar v State of Madhya Pradesh* (AIR 1963 Madhya Pradesh 256), *Veeraraghavachariar v Secretary of State for India* (AIR 1925 Madras 837).

<sup>27</sup> 2007 CLC 107.

<sup>28</sup> Ibid, Shaikh Azmat Saeed, J, page 120.

<sup>29</sup> PLD 2011 Supreme Court 619

<sup>30</sup> Article 9 of the Constitution of the Islamic Republic of Pakistan.

<sup>31</sup> PLD 2011 Supreme Court 619, 646.



8. **Principles of Policy:** The *Principles of Policy*<sup>32</sup> enumerate the aspirations of the nation<sup>33</sup>. Securing the well-being of the people, raising their standard of living and providing housing are amongst the nation's declared objectives. Article 38(a) and (d) of the *Principles of Policy* respectively stipulate:

38. The State shall-

- (a) **secure the well-being of the people**, irrespective of sex, caste, creed or race, by **raising their standard of living**, by preventing the concentration of wealth and means of production and distribution in the hands of a few to the detriment of general interest and by ensuring equitable adjustment of rights between employers and employees, and landlords and tenants; (emphasis added)
- (d) **provide basic necessities of life, such as food, clothing, housing**, education and medical relief, for all such citizens, irrespective of sex, caste, creed or race, as are permanently or temporarily unable to earn their livelihood on account of infirmity, sickness or unemployment; (emphasis added)

To provide *housing* is a basic necessity of life, it also 'secure[s] the well-being of the people' and raises 'their standard of living'; these principles reiterate that providing housing is a public purpose. 'It is the responsibility of each organ and authority of the State, and of each person performing functions on behalf of an organ or an authority of the State, to act in accordance with those Principles'.<sup>34</sup> The President and Governors are required to prepare and lay respectively before Parliament and the Provincial Assemblies reports on 'the observance and implementation of the Principle of Policy'<sup>35</sup>. And, discussion on these reports has to take place in Parliament and the Provincial Assemblies. The requirement of preparing such reports and submitting them for discussion amongst the elected representatives of the people suggests that these reports constitute a performance audit of the Federal and Provincial Governments.

9. **Objectives Resolution:** Reference may also be made to the preamble of the Constitution which reproduces the *Objectives Resolution*<sup>36</sup> and which

<sup>32</sup> Chapter 2, Constitution of the Islamic Republic of Pakistan.

<sup>33</sup> Ibid, Article 31 to 40.

<sup>34</sup> Ibid, Article 29(3).

<sup>35</sup> Ibid.

<sup>36</sup> With slight changes.

is a ‘*substantive part of the Constitution and shall have effect accordingly*’<sup>37</sup>. The Objectives Resolution calls for the provision of ‘*social justice, as enunciated by Islam*’ and guarantees ‘*social, economic and political justice*’. To acquire land in order to provide it to those in need of housing, after compensating the owners, does not detract from the objective of *social justice* as enunciated in Islam, and it constitutes *social justice* as understood in common parlance.

10. **Significance of Principles of Policy and the Objectives Resolution:** The Principles of Policy and the Objectives Resolution reflect the aspirations of the people and are guiding lights for the nation. In *Benazir Bhutto v Federation of Pakistan*<sup>38</sup>, which was decided by an eleven-member Bench, the Principles of Policy were said to, ‘*occupy a place of pride in the scheme of the Constitution*’ and categorized as ‘*the conscience of the Constitution, as they constitute the main thrust of the commitments to socio-economic justice*.’<sup>39</sup> A similar sentiment was expressed in *Employees of the Pakistan Law Commission v Ministry of Works*<sup>40</sup>, describing them and the Objectives Resolution as inspirational provisions which ‘*invigorate the entire Constitution*’<sup>41</sup> and achieve ‘*democracy, tolerance, equality and social justice*’<sup>42</sup>. More recently in *Lahore Development Authority v Imrana Tiwana*<sup>43</sup> it was said that the Objectives Resolution and the Principles of Policy, ‘*can be used to understand and interpret the chapter on Fundamental Rights in its proper context*’<sup>44</sup>.
11. **Incorrect Premise:** The learned Single Judge had premised his findings on a number of misconceptions which were: ‘*the land is being acquired for the distribution of State largess*’<sup>45</sup> [sic], the Land ‘*vests in the Government*’<sup>46</sup>, ‘*loss*’ would be ‘*suffered by the people of Pakistan*’<sup>47</sup> and it constitutes ‘*plunder*’<sup>48</sup>. The Land, which was acquired and which was to be distributed

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<sup>37</sup> Article 2A of the Constitution of the Islamic Republic of Pakistan, which instead of mentioning the ‘Preamble’ of the Constitution referred to ‘*the Objectives Resolution reproduced in the Annex*’.

<sup>38</sup> PLD 1988 Supreme Court 416.

<sup>39</sup> Ibid, p. 489 per Muhammad Haleem, CJ.

<sup>40</sup> 1994 SCMR 1548.

<sup>41</sup> Ibid, p. 1552.

<sup>42</sup> Ibid.

<sup>43</sup> 2015 SCMR 1739.

<sup>44</sup> Ibid, paragraph 32D.

<sup>45</sup> Judgment dated 23 October 2017, paragraph 29.

<sup>46</sup> Ibid, paragraph 49.

<sup>47</sup> Ibid, paragraph 47.

<sup>48</sup> Ibid, paragraph 49.

amongst the allottees was not State or public land, therefore, *the people of Pakistan* did not suffer a loss as a consequence of the acquisition. The Land was privately owned and was acquired from its owners who were to be compensated in accordance with the law; to categorize such acquisition as *plunder* was unjustified. The two learned Judges of the High Court hearing the ICAs did not correct these misconceptions.

12. **CDA Ordinance or the Land Acquisition Act:** The impugned judgement of the learned Single Judge alludes to, and the learned Judges of the Division Bench held that, the applicable law in respect of the acquisition of the Land was the CDA Ordinance because the Land was situated in Islamabad. They also reasoned that since the CDA Ordinance is a special law applicable to Islamabad, therefore, the CDA Ordinance, and not the Land Acquisition Act, applies. The learned Mr. Mansoor Ahmed referred to a number of earlier land acquisitions<sup>49</sup> undertaken by the Foundation in Islamabad all of which were under the Land Acquisition Act. He also referred to section 5 read with the Fourth Schedule of the Federal Laws (Revision and Declaration) Ordinance, 1981<sup>50</sup> which had amended the Land Acquisition Act in its '*application to the Islamabad Capital Territory*' and contended that, despite the promulgation of the CDA Ordinance in 1960, the Legislature had specifically accepted, in 1981, that the Land Acquisition Act was still applicable to the Islamabad Capital Territory. The learned Judges of the High Court also did not consider this. Significantly, the CDA Ordinance does not contain an overriding or *non-obstante* clause nor vests exclusive jurisdiction in CDA with regard to land acquisition in Islamabad.

13. **Compulsory Acquisition by CDA:** Section 25 of the CDA Ordinance enables CDA to compulsorily acquire land, but this power is, '*Subject to the other provisions of this Ordinance, the rules made thereunder*' and land by CDA can only be acquired '*for the purposes of this Ordinance*'. Sections 11 to 15 of the CDA Ordinance mention the activities that CDA may undertake in the Specified Areas<sup>51</sup>. Land can be compulsorily acquired by CDA when

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<sup>49</sup> (1) 6,330 *kanals* in 1999 in Sector G-13; (2) 831 *kanals* in 2005 in Sector G-14/1, 2, 3 and (3) 831 *kanals* in 2009 in Sector G-15/3.

<sup>50</sup> Ordinance XXVII of 1981, Gazette of Pakistan, Extraordinary, Part I, 8 July 1981 (PLD 1982 Central Statutes 10, 11 and 113).

<sup>51</sup> Defined in section 2(p) of the Capital Development Authority Ordinance, 1960, which is such areas as may from time to time be, '*included therein by the Federal government notification in the official gazette*'.

it is required by CDA for its own use and/or purposes. In the case of *Murree Brewery Co. Ltd. v Pakistan*<sup>52</sup> (**the Murree Brewery case**) ‘buildings standing on about 16 acres of land’ were sought to be compulsorily acquired by CDA under the CDA Ordinance for the, ‘Provision of Office Accommodation for the President’s Secretariat’. This Court, after examining in detail the provisions of the CDA Ordinance and the power of CDA to compulsorily acquire land thereunder, held, that CDA did not have, ‘unlimited and undefined power to acquire all land within the Specified Areas. Any acquisition within these areas must have a reasonable reference to the purpose of the Ordinance, and must be carried out strictly in accordance with its provisions’<sup>53</sup>. The *Murree Brewery* case which involved compulsory acquisition under the CDA Ordinance rather than under the Land Acquisition Act, held that the land situated in Islamabad which CDA sought to acquire it could not do so. The learned Single Judge noted that the learned counsel representing the Foundation relied on the *Murree Brewery* case<sup>54</sup> but his lordship neither applied nor distinguished it. The learned Judges hearing the ICAs also referred to the *Murree Brewery* case and quoted therefrom<sup>55</sup> without realizing that it had held that when land was required for the use and/or purpose of CDA it could be compulsorily acquired under the CDA Ordinance. Since the Land in question was not required for the use and/or purpose of the CDA it could not have been acquired under the CDA Ordinance, but only under the Land Acquisition Act.

14. **Compensation Amount:** The landowners (the contesting respondents) were not satisfied with the amount of compensation determined by the Collector and/or wanted a percentage of plots from the Land<sup>56</sup>. Therefore, these cases were adjourned a number of times on the parties’ request to enable them to explore the possibility of a compromise, but a compromise did not materialize. The Land Acquisition Act stipulates that compensation is determined by the concerned Collector. If either party is not satisfied with the Collector’s determination, the referee court and thereafter the High Court in its appellate jurisdiction may be approached. Since the High Court

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<sup>52</sup> PLD 1972 Supreme Court 279.

<sup>53</sup> Ibid, 290-291.

<sup>54</sup> Ibid, paragraph 6, page 17 of the Judgment.

<sup>55</sup> Ibid, paragraph 32, pages 35-6 of the Judgment.

<sup>56</sup> Capital Development Authority Land Acquisition and Rehabilitation Regulation, 2007, S.R.O. 304(1)/2008 published in the Gazette of Pakistan, Extraordinary, Part II, on 20 March 2008.

did not determine the matter of compensation it would be inappropriate to comment thereon, as it may affect the rights of either side.

15. **Allotment of Plots to Different Categories of Persons:** The learned Messrs Naeem Bukhari and Feisal Naqvi, representing the landowners, had raised concerns about the grant of plots at below market price to judges. Reference was also made to the judgement of Muhammad Nawaz Abbasi, J in the cases of *Ghulshan Hussain v Commissioner (Revenue), Islamabad*<sup>57</sup> (**'Ghulshan Hussain case'**) and *Federal Government Employees' Housing Foundation v Muhammad Akram Alizai*<sup>58</sup> (**'Federal Government Employees' Housing Foundation case'**). In the *Ghulshan Hussain* case land was acquired by the Foundation in Sector G-13 of Islamabad and the section 4 notification issued under the Land Acquisition Act was challenged. The Rawalpindi Bench of the Lahore High Court<sup>59</sup> held that the acquisition was *valid* and if the compensation determined by the Collector was unacceptable then the remedies provided under the Land Acquisition Act are to be availed; no exception can be taken to this. However, the learned Muhammad Nawaz Abbasi, J went on to unnecessarily observe that Judges of the Supreme Court, of the Lahore High Court working at Rawalpindi, of the Federal Shariat Court and '*senior members of the Armed Forces*' were entitled to receive plots from the Foundation. The *Federal Government Employees' Housing Foundation* case was an appeal against the decision of a Service Tribunal<sup>60</sup> and it was decided that, '*the allotment of residential plot in the housing scheme of Housing foundation cannot be claimed as terms and conditions of service by a civil servant*'; which to such extent cannot be faulted. And, once again the learned Muhammad Nawaz Abbasi, J repeated his earlier obiter observations made in the *Ghulshan Hussain* case with regard to judges' and *senior members of the Armed Forces*' entitlement to plots. These observations were without any basis, without considering the '*terms and conditions of service*' of judges (Article 205 of the Constitution) and the oath of judges. One threads a thorny path when it comes to self-interest. Decisions must accord with the Constitution and the law. Neither the Constitution nor any law entitles judges and *senior members of the Armed Forces* to receive land. It is trite, but needs restating

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<sup>57</sup> 2000 YLR 1711.

<sup>58</sup> PLD 2002 Supreme Court 1079.

<sup>59</sup> Before the establishment of the Islamabad High Court.

<sup>60</sup> Under Article 212(2) of the Constitution of the Islamic Republic of Pakistan.

that judges are not empowered to make law; they simply interpret it and if a law offends the Constitution they must strike it down or the offending part thereof.

16. **Judge's Remuneration and Terms and Conditions of Service:** Judges' entitlement to plots of land has been questioned, therefore, it needs to be addressed. Article 205 of the Constitution stipulates that, '*The Remuneration and other terms and conditions of service of a Judge of the Supreme Court or of a High Court shall be as provided in the Fifth Schedule*' of the Constitution. The Fifth Schedule comprises of two parts; the first attends to '*The Supreme Court*' and the second to '*The High Court*'. Both parts comprise of 6 clauses. Clause 1 mentions the monthly salary '*or such higher salary as the President may, from time to time, determine*'; clause 2 sets out the '*privileges and allowances ... as may be determined by the President*'; clause 3 deals with the '*pension payable*' to retired judges; clause 4, 5 and 6 respectively deal with the pension payable to the '*widow of a Judge*', when its payment to her stops and if the judge's children are entitled to the pension. None of these clauses state that judges are entitled to land. The last order issued by the President of Pakistan with regard to Judges was President's Order No. 03 of 2018<sup>61</sup>, which did not entitle judges to plots.
17. **Are Judges Entitled to Receive Plots?:** The Constitution and the law (presidential orders) do not entitle chief justices and judges of the superior courts to plots of land. The '*Supreme Court of Pakistan: Judicial Estacode*'<sup>62</sup> (**the Judicial Estacode**) also does not contain anything therein entitling chief justices and judges to plots of land. Likewise, the Manual of '*Pay, Pension and other Privileges*'<sup>63</sup> (**the Manual**), compiles the presidential orders, rules, and notifications regarding the pay, pension and privileges of judges, but the manual also does not contain anything entitling chief justices and judges of the superior courts to plots of land.

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<sup>61</sup> *Salary of Judges of the Supreme Court Order, 2018*, No.F.2(2)/2018-Pub., which raised the monthly salary of the Chief Justice of Pakistan to Rs. 931,204 and of every other Judge of the Supreme Court to Rs. 879,669.

<sup>62</sup> Published by Supreme Court of Pakistan, 2019.

<sup>63</sup> Compiled by the Librarian and Assistant Librarian of the Supreme Court, published by the Supreme Court of Pakistan, 2018, amended up to 22 April 2019.

18. **The Oath of Judges:** *'In all circumstances, I will do right to all manner of people, according to law, without fear or favour, affection or ill-will'* says the oath taken by chief justices and judges. Judges adjudicate disputes and ensure that the people are not deprived of their Fundamental Rights, which more often than not are enforced against the executive. The Federal and provincial governments, and organizations controlled or under them, are often arrayed as parties in cases. The aphorism that, *justice must not only be done but be seen to be done*, is undermined if people perceive that cases are not decided *without fear or favour*. The executive giving plots to judges constitutes a *favour*. The independence of the judiciary is a necessary concomitant to ensure its respect and credibility in the eyes of the people.
19. **Financial Independence of Judges:** The Constitution determines the terms and conditions of service of superior court judges and nothing can be subtracted therefrom or added thereto. The Constitution permits compulsory acquisition, however, it also sets out *the terms and conditions of service* of judges, and since the stipulated *terms and conditions* do not entitle judges to receive plots they are not entitled to receive plots from the Foundation or out of any compulsorily acquired land. The learned Messrs Naeem Bukhari and Feisal Naqvi are correct to state that judges are not entitled to receive plots. However, this argument cannot be extended to government servants or lawyers as mentioned above.
20. **Only a Single Plot may be Received:** In this case the Foundation had launched a scheme to allot plots to government servants and lawyers. The Land was acquired under the Land Acquisition Act. Those wanting a plot applied for it, paid its price and stood in the queue for his/her turn to receive it. A person's housing needs stand redressed on receiving a plot on which to build a house. Therefore, no one can be given, nor can they receive, more than a single plot. The Foundation, government or any organization controlled by the government cannot provide a second or additional plot. Moreover, without specific legal sanction, no one, including the Prime Minister, has the discretion to grant land, a house or an apartment to anyone.
21. **Plots for Junior Officers and Lower Income Staff:** When the Foundation, government or an organization controlled by a government launches a scheme to provide housing it would be appropriate to ensure that smaller

and cheaper plots are also made available to cater to the need of junior officers and lower income staff reflecting their percentage in government service because the Constitution does not distinguish between senior and junior officers and officials with regard to *service of Pakistan*. With regard to plots/lands the Constitution also does not distinguish between civilian and armed forces personnel, between junior and senior officers nor creates a special category of *senior members of the Armed Forces* (as per Muhammad Nawaz Abbasi, J).

22. **Plots and Land Grants to Members of the Armed Forces:** Different laws govern those employed in the Army<sup>64</sup>, Air Force<sup>65</sup>, Navy<sup>66</sup>, Rangers<sup>67</sup>, Frontier Constabulary<sup>68</sup>, Frontier Corps<sup>69</sup>, National Guards<sup>70</sup>, Coast Guards<sup>71</sup> and Airports Security Force<sup>72</sup>; the laws governing them do not provide that they be given residential plots, commercial plots or agricultural land nor permits them to receive the same. Nevertheless, senior members of the Armed Forces get plots and agricultural lands and continue to be given additional plots and agricultural lands as they rise up the ranks. In his 655-page book the brother of General Asif Nawaz<sup>73</sup> brings privileged, personal and scholarly insight into the Armed Forces of Pakistan<sup>74</sup>. General Mohammad Ayub Khan was preceded by two British officers<sup>75</sup> as Pakistan's Army Chiefs. When General Gracey was commanding Pakistan's Army General Mohammad Ayub Khan approached him with a request for a plot but he was rebuffed by the Army Chief; ironically a British officer preserved Pakistan's land from a son of the soil. The author mentions the grant of subsidized plots and other benefits<sup>76</sup> and states, '*Gradually, the mores of the military changed to make all such "sweetheart" deals acceptable*'<sup>77</sup>. Shuja Nawaz in his book under the chapter - '*United Pakistan: How to Break*

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<sup>64</sup> The Pakistan Army Act, 1952.

<sup>65</sup> The Pakistan Air Force Act, 1953.

<sup>66</sup> The Pakistan Navy Ordinance, 1961.

<sup>67</sup> The Pakistan Rangers Ordinance, 1959.

<sup>68</sup> The North-West Frontier Constabulary Act, 1915.

<sup>69</sup> The Frontier Corps Ordinance, 1959.

<sup>70</sup> The National Guards Act, 1973.

<sup>71</sup> The Pakistan Coast Guards Act, 1973.

<sup>72</sup> The Airports Security Force Act, 1975.

<sup>73</sup> The Chief of Army Staff of Pakistan, 1991-1993.

<sup>74</sup> Shuja Nawaz, *Crossed Swords - Pakistan, its Army, and the Wars Within*, Oxford University Press, Pakistan (2008).

<sup>75</sup> General Sir Frank Walter Messervy and General Sir Douglas Gracey.

<sup>76</sup> '*The Report of the Hamoodur Rehman Commission of Inquiry into the 1971 War*, (Lahore, Karachi, Islamabad: Vanguard) p. 291.'

<sup>77</sup> Shuja Nawaz, *Crossed Swords - Pakistan, its Army, and the Wars Within*, Oxford University Press, Pakistan (2008), p. 253.



up a Country' writes, 'the practice of multiple plots was to become common, giving rise to a new "Culture of Entitlement" that permeated both the military and civil bureaucracies and that would become embedded in Pakistan society'<sup>78</sup>. This Court in a different context<sup>79</sup> had castigated a Brigadier who was not satisfied with what he already had received, saying, 'It is high time that we should learn from history'<sup>80</sup> and quoted from an American classic<sup>81</sup> to express the Court's displeasure – 'The land fell into fewer hands, the number of the dispossessed increased and every effort of the great owners was directed at repression. The money was spent for arms, for gas to protect the great holdings, and spies were sent to catch the murmuring of revolt so that it may be stamped out.'

23. **Service of Pakistan:** The Constitution<sup>82</sup> defines the *service of Pakistan* as under:

"Service of Pakistan" means any **service, post or office in connection with the affairs of the Federation or of a Province**, and includes an All-Pakistan Service, **service in the Armed Forces** and any other service declared to be a service of Pakistan by or under Act of Majlis-e-Shoora (Parliament) or of a Provincial Assembly... [emphasis added]

Both civil service and armed forces personnel are in the *service of Pakistan*; the Constitution creates no distinction between them. Civil servants are employed in different departments of government doing what their respective mandates stipulate while armed forces personnel defend the country against external aggression and act in aid of civil power when called upon to do so<sup>83</sup>. The people of Pakistan pay for the services provided by each category. Those in the *service of Pakistan* can receive only that which the law sanctions. The terms and conditions of all those in the *service of Pakistan* are set out in the laws respectively applicable to them. Article 240 of the Constitution stipulates, that, 'Subject to the Constitution, the appointments to and the conditions of service of persons in the service of Pakistan shall be determined' by the Federation through an Act of Parliament and for those in the service of a province through an Act of the Provincial Assembly of the province.

<sup>78</sup> Ibid, p. 253.

<sup>79</sup> *Brigadier Muhammad Bashir v Abdul Karim* (PLD 2004 Supreme Court 271) which pertained to the Colonization of Government Lands (Punjab) Act, 1921.

<sup>80</sup> Ibid, per Javed Iqbal, J, p. 284.

<sup>81</sup> John Steinbeck, *Grapes of Wrath*, (1939). Steinbeck received the Nobel Prize for Literature.

<sup>82</sup> Article 260(1) of the Constitution of the Islamic Republic of Pakistan.

<sup>83</sup> Article 245 of the Constitution of the Islamic Republic of Pakistan.

24. **Equal Treatment:** The laws governing civil and armed forces personnel do not entitle them to receive residential plots, commercial plots or agricultural land. If residential plots, commercial plots and agricultural land are given to only one category in the *service of Pakistan*, that is to members of the armed forces, and the civilians in the *service of Pakistan* are disregarded, it constitutes discrimination and offends the Fundamental Right of equality<sup>84</sup>. However, the Foundation, a government or an organization controlled by a government may launch a housing scheme for the members of the Armed Forces, and when this happens they may apply for the allotment of a single plot for housing. But, they like every other applicant of such schemes will have to pay the requisite amount (not subsidized by the State), stand in queue and await their turn for allotment in terms of the applicable methodology. And, the plot which is allotted/granted must not be large because available land is finite and the list of beneficiaries is long, and keeps growing longer. The prevailing practice of granting State/public plots and land to members of the Armed Forces is contrary to the Constitution and the law. Laws can also not be enacted to enable such allotments/grants because if enacted these would violate the Constitution (Articles 24, 25, 205 and 227) and be *void*<sup>85</sup>. The Constitution does not permit self-enrichment and personal aggrandizement. *‘During the period of Hazrat Umar at one occasion such a situation had arisen with regard to some land and the Mujahideen demanded distribution of the said land to them but the Caliph refused to give the said land to the Mujahideen with the consideration that Islam strictly prohibits the establishment of an individual interest in the State property in preference to the public interest.’*<sup>86</sup>
25. **Pensions:** Those in the service of Pakistan retire at the age of 60, Chief Justice and Judges of the High Courts at the age of 62 and Chief Justice and Judges of the Supreme Court at the age of 65; by which age most, if not all, already have a place to call home; if they don’t, they will receive a sizeable monthly pension which they can use to rent a place. The amount to be spent in the current financial year 2020-2021 on pensions is

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<sup>84</sup> Article 25 of the Constitution of the Islamic Republic of Pakistan.

<sup>85</sup> Article 8 of the Constitution of the Islamic Republic of Pakistan.

<sup>86</sup> *Ghulshan Hussain v Commissioner (Revenue), Islamabad*, 2000 YLR 1711, 1727 and *Federal Government Employees Housing Foundation v Muhammad Akram Alizai*, PLD 2002 Supreme Court 1079, 1095.

470,000,000,000<sup>87</sup> rupees (four hundred and seventy billion rupees); of which 111,000,000,000 rupees (one hundred and eleven billion rupees) is to be spent on retired civilians and 359,000,000,000 rupees (three hundred and fifty-nine billion rupees) is to be spent on retired personnel of the Armed Forces. The annual cost of pension payments is almost equal to the cost of 'Running of Civil Government', which is 476,589,000,000<sup>88</sup> rupees (four hundred and seventy-six billion, five hundred and eighty-nine million rupees). The people of Pakistan pay these pensions despite having very little themselves. To serve the nation is a singular honour. When, in addition to receiving pensions, public lands are taken it is eminently unfair.

26. **Prebendalism:** A system which grants benefits to those holding official positions is referred to as a '*prebendal order*'<sup>89</sup>. In a prebendal order '*the strong exploit and abuse the weak*'<sup>90</sup> in a '*tenacious and self-enforcing mechanism*'<sup>91</sup>. The philosopher Thomas Hobbes described such yearnings as '*a perpetual and restless desire of power after power, that ceaseth only in death*'<sup>92</sup>. A prebendal order enriches the powerful elite. '*Prebendalism was sustained by a relatively narrow civil-military elite*'.<sup>93</sup> Dr. Richard Joseph in his seminal work<sup>94</sup> noted that those who use their offices to benefit and enrich themselves emulate a discredited feudal practice; his research revealed that prebendalism made it difficult to determine the true extent of public corruption.
27. **Indebtedness:** Pakistan is heavily indebted. The people pay astronomical amounts to service the accumulated debt. This financial year<sup>95</sup> 2,946,135,000,000 rupees (two trillion, nine hundred and forty-six billion, one hundred and thirty-five million rupees) will be paid to service debt<sup>96</sup>;

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<sup>87</sup> Government of Pakistan, *Federal Budget 2020-21*, (Finance Division, 12 June 2020) <[http://www.finance.gov.pk/budget/Budget\\_in\\_Brief\\_2020-21\\_English.pdf](http://www.finance.gov.pk/budget/Budget_in_Brief_2020-21_English.pdf)>.

<sup>88</sup> Ibid.

<sup>89</sup> A term coined by Dr. Richard Joseph (Professor Emeritus Northwestern University) in his book *Democracy and Prebendal Politics in Nigeria* (1<sup>st</sup> edition, Cambridge University Press, 1987).

<sup>90</sup> Professor (University of Oxford) Wale Adebawo and Professor (University of Kansas) Ebenezer Obadarte, *Democracy and Prebendalism in Nigeria - Critical Interpretations* (1<sup>st</sup> edition, Palgrave Macmillan, 2013) p. x.

<sup>91</sup> Ibid, p. viii.

<sup>92</sup> Thomas Hobbes, *Leviathan* (first published in 1651, Penguin 1985).

<sup>93</sup> P. Lewis, *From Prebendalism to Predation: the Political Economy of Decline in Nigeria* (1996) 34 *The Journal of Modern African Studies*, p. 79-103, 100.

<sup>94</sup> Dr. Richard Joseph, *Democracy and Prebendal Politics in Nigeria* (1<sup>st</sup> edition, Cambridge University Press, 1987).

<sup>95</sup> 2020-2021.

<sup>96</sup> Government of Pakistan, *Federal Budget 2020-21*, (Finance Division, 12 June 2020) <[http://www.finance.gov.pk/budget/Budget\\_in\\_Brief\\_2020-21\\_English.pdf](http://www.finance.gov.pk/budget/Budget_in_Brief_2020-21_English.pdf)>.

this astronomical amount does not include the repayment of a single dollar, sterling, yen, euro or rupee. And, the government continues to take more loans; piling debt upon debt, and adding billions to debt servicing. Debt-servicing is the single largest component of the Federal expenditure. Children, their unborn children and the unborn children of the unborn are born into poverty, and will remain impoverished till death. In this dire situation giving away the one asset that the people do have, their land, is inexplicable.

28. **Precedents on Land Conferrals:** The judiciary and the armed forces of Pakistan are patterned on the British model. Land is not given away to judges and to the members of the armed forces in Britain, in the United States of America nor in any commonwealth country, with the singular exception of Pakistan. At the time when the subcontinent was captured and ruled by the East India Company, and later when it came under the direct rule of the British Crown, British officers, soldiers and judges, whether deployed in the subcontinent or serving at home, were not conferred land. They also did not have rights to captured territory and property. Sometimes a portion of captured property was distributed amongst officers and soldiers as prizes, but it was made clear that this was not by way of entitlement. In the Deccan prize-money case of *Alexander v Duke of Wellington*<sup>97</sup> it was held that<sup>98</sup>:

All prize is clearly and distinctly the property of the Crown. This is a principle not to be disputed... It is equally incontrovertible that that the Crown possesses this property absolutely, and wholly without control; that it may deal with it entirely at its pleasure; may keep it for its own use; may abandon or restore it to the enemy; or, finally, may distribute it in whole or in part among the persons instrumental in its capture; making that distribution according to whatever scheme, and under whatever regulations and conditions it sees fit. It is equally clear that the title of a party claiming prize must in all cases be the act of the Crown, by which the royal pleasure to grant prize shall have been signified to the subject.

*'The capturing force having therefore no legal right to the spoils of war'*.<sup>99</sup> When a portion of captured property was distributed amongst officers and soldiers it was done pursuant to a legal enactment. The land distributed

<sup>97</sup> 2 Russell and Mylne's *Reports*, 54; reproduced in H. Prendergast, *Law Relating to Officers in the Army* (2nd edition, Parker, Furnivall, and Parker, Military Library, London, 1855) p. 106.

<sup>98</sup> Lord Chancellor Brougham.

<sup>99</sup> n97, p. 107.

amongst the officers of the armed forces of Pakistan is not captured land nor has Parliament authorized its distribution. Those who serve in the judiciary and in the armed forces of Pakistan receive a salary for their services and receive a pension on their retirement; they do not serve in the expectation of receiving land from the State.

29. **Elite Capture and Impoverishing the Poor:** Elite capture creates, ‘a *“predatory state” in which the division between private and public interests is totally dismantled*’<sup>100</sup>. *‘Elite patronage is not always associated with autocratic rule; it can sometimes continue even after the formal transition to democracy*’.<sup>101</sup> But, *‘Following the demise of domestic rule, however, the distribution of benefits becomes increasingly characterized by exclusionary, centralized distribution modes favouring powerful groups like top military officers*’<sup>102</sup>. Studies by preeminent researchers<sup>103</sup> have found that democracy is an institutionally established mechanism for regulating resources and hence effective in controlling elite capture. The horizontal expansion of Pakistani cities<sup>104</sup> took place when land was distributed amongst members of the armed forces<sup>105</sup>; these areas have come to dwarf the original cities. If this land was sold at market-price Pakistan may have escaped the indebtedness that it suffers and its people not made to suffer calamitous, backbreaking and perpetuating poverty. The manner in which land is distributed impoverishes and marginalizes the poor further. *‘When communities have well-established organizations where the poor are sufficiently empowered, the participatory approach is on safe grounds. The problem arises when local organizations do not exist or when they are dominated by strong elites driven by their peculiar interests.*’<sup>106</sup> It needs

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<sup>100</sup> Arild Schou (Professor at the University of South-Eastern Norway), *Demand-driven Poverty Programmes and Elite Capture in Malawi: Between Prebendalism and Benevolence*, European Journal of Development Research, Vol. 19, p. 594-613, 597.

<sup>101</sup> Ibid.

<sup>102</sup> Ibid.

<sup>103</sup> Jean-Phillipe Platteau, Professor of Economics and Director of the Centre for Research on the Economics of Development at the University of Namur, Belgium and Frederic Gaspart, Associate Professor of Economics at the Faculty of Agricultural Sciences at the University of Louvain-La-Neuve, Belgium.

<sup>104</sup> <https://earth.google.com>, Historical Imagery.

<sup>105</sup> Commenced under the unconstitutional rule of General Mohammad Ayub Khan, established under the dictatorship of General Zia ul Haq and perpetuated ever since.

<sup>106</sup> F. Gaspart and J. Platteau, *Is Cheap Aid Money Good for the Poor?*, Centre for Research on the Economics of Development, 2012  
<[www.editorialexpress.com/cgi-bin/conference/download.cgi?db\\_name=CSAE2013&paper\\_id=494](http://www.editorialexpress.com/cgi-bin/conference/download.cgi?db_name=CSAE2013&paper_id=494)>.

restating that the people have not sanctioned the distribution of land to judges and to the members of the Armed Forces.

30. **Enriching the Elite and Tax Free:** Most Pakistanis struggle their entire lives to put a roof over their heads. Judges and officers of the armed forces who receive land in prized urban locations invariably do not build on it a house for themselves to live in, and those officers who get agricultural lands do not cultivate it. They sell their plots and agricultural land or become absentee landlords. *‘This negative perception and reference to the most visible and talked about aspects of military rule and operations: foremost of which is the creation of residential Defence Housing Societies throughout the country for military officers, which yield huge windfall profits when individual officers sell their plots – reflects one of the many challenges to the army today. The sale of each urban plot fetches hundreds of millions of rupees. The army is perceived to be in charge...everywhere.’*<sup>107</sup> These profits are also not taxed and the original recipients do not pay fees and duties<sup>108</sup> which even the poor pay. *‘This benefits ladder has been defined by the army itself, over time, with officers now allowed access to subsidized housing plots at almost all their senior posting stations, where such valuable land is available for allocation at the discretion of the local army commanders and not the civilian government.’* Many senior officers liquidate these assets, convert the sale proceeds into foreign currency, send the money abroad and live luxurious lives in prime locations overseas, creating disillusionment in the ranks. The ranks may also question why, say a general’s need for housing and agriculture is more pressing than theirs, as it is their lives which are more susceptible to danger as they stand more exposed.
31. **Land Unavailable for Public Utilities and Services:** A just social order, and an Islamic one, enjoins the well-being of the people; the provision of basic necessities and public welfare. Islam is a religion of community (*ummah*); the spirit of community is ordained from Above; Almighty Allah is

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<sup>107</sup> Shuja Nawaz, *Crossed Swords - Pakistan, its Army, and the Wars Within*, Oxford University Press, Pakistan (2008), p. 567.

<sup>108</sup> This is done by surrendering the original allotment order in exchange for money (sale consideration) and a valuable piece of property is surrendered (transferred) and a fresh allotment order is issued in favour of the purchaser. Since the ‘powerful’ in the country are the beneficiaries of this most suspect mechanism, questions are not raised either by the Federal Board of Revenue (‘FBR’) or by the provincial authorities which are required to collect stamp duty under the Stamp Act, 1899 and registration fee on transfers under the Registration Act, 1908.

present in every human community<sup>109</sup> and is ‘*closer to you than your jugular vein*’<sup>110</sup>. State or community (*ummah*’s) land can only be used for everyone’s benefit; for public hospitals, clinics, graveyards, police stations, schools, universities, parks, playgrounds, sport facilities, retirement homes, bus and train stations, water reservoirs, drains, abattoirs and other public purposes which serve society. It is also meritorious to establish hospitals for birds and animals because the earth is for all ‘*the creatures*’<sup>111</sup> (*lil’anami*) and to provide a place for the community<sup>112</sup> of injured or lame animals to live protected and in peace. But land is not available for utilities and public services and the destitute and the poor are cast aside. However, free or heavily subsidized State/public land is distributed amongst the elite. People lose faith in the system of governance, despondency sets in and society then comes to be held together by sheer force.

32. **Injunctions of Islam:** The Constitution mandates that ‘*all existing laws shall be brought in conformity with the Injunctions of Islam as laid down in the Holy Quran and Sunnah ... and no law shall be enacted which is repugnant to such Injunctions*’<sup>113</sup>. The practice of giving away the *ummah*’s land to judges and to members of the armed forces is contrary to the Injunctions of Islam. Islam jealously guards the properties and assets of the *ummah* (community/State). The majority of citizens are poor, they barely manage to eke out a subsistence. Most live out their lives without the ability to buy a couple of *marla*<sup>114</sup> of land to build a shack on. Many encroach on State land and often in precarious places like alongside riverbeds and storm drains to put a roof over their and their children’s heads; forever exposed to the elements and the threat of eviction and demolition of their shanty homes, a threat which is oftentimes carried out. An Islamic polity is founded on the principle of unity and brotherhood<sup>115</sup> which is fractured when those in dire poverty and abject need are ignored. Islam is a religion of balance, ‘*He imposed the balance (al-mizan)*’<sup>116</sup> and we are directed not to ‘*transgress the balance*’<sup>117</sup>; the *balance* is ruptured when lands are bestowed on the

<sup>109</sup> *Al-Qur’an, surah Al-Mujadilah* (58) verse 7.

<sup>110</sup> *Al-Qur’an, surah Qaf* (50) verse 16.

<sup>111</sup> *Al-Qur’an, surah Ar-Rahman* (55) verse 10.

<sup>112</sup> *Al-Qur’an, surah Al-Anam* (6) verse 38, *surah An-Nur* (24) verse 41 and *surah Ar-Rahman* (55) verse 10.

<sup>113</sup> Article 227 of the Constitution of the Islamic Republic of Pakistan.

<sup>114</sup> 25 square yards.

<sup>115</sup> ‘Indeed believers are (one another’s) brothers’ - *Al-Quran, surah Al-Mujadilah* (58), verse 10.

<sup>116</sup> *Al-Qur’an, surah Ar-Rahman* (55) verse 7.

<sup>117</sup> *Ibid*, verse 8.

elite. The Holy Qur'an mandates that the destitute, the poor and the needy are entitled to charity and may be supported by the State (*ummah*). Almighty Allah says that, '*charity (sadaqatu) is only for the poor (fuqara'), the needy (masakin)*'<sup>118</sup>, etcetera. If a person is not poor (*fuqara*) or needy (*masakin*) it is not permissible to give him/her the *ummah's* land. When the *ummah's* land is bestowed upon the privileged elite, those blessed with good salaries, secure jobs and pensions may attract the Qur'anic rebuke, '*Competing to piling up (worldly things) distracts you, until you visit your graves*'<sup>119</sup>. The Prophet Muhammad (peace and blessings be upon him) graphically expanded on this insatiable desire for wealth, '*If a man had a valley full of gold, he would want another valley full of gold, but in the end only dust will fill his mouth*'<sup>120</sup>.

33. **Unconstitutional Nondisclosure and Secrecy:** The affront to the people is confounded when information with regard to distribution of State / *ummah's* land is kept under wraps. The people have every right to know what is given to those in the service of Pakistan and holding constitutional positions. There is no quicker way to lose public trust than to shroud information in secrecy. To withhold such information from the people is unconstitutional. The '*right to Information*' is a Fundamental Right<sup>121</sup>. Almighty Allah says that '*there is no good*'<sup>122</sup> in secrecy except when giving charity, extending kindness and effecting reconciliation. Keeping public matters secret is castigated<sup>123</sup>. The Holy Qur'an calls on believers to, '*firmly establish truth*'<sup>124</sup> (*liyuhiqqa l-haqqa*) and not to '*hide the truth*'<sup>125</sup>. '*The truth will set you free*'<sup>126</sup>. '*The Report of the Hamoodur Rehman Commission of Inquiry into the 1971 War*', a Commission headed by the Chief Justice of Pakistan, reported that, '*responsible service officers*' had asserted before the Commission that '*corruption resulting from ... lands and houses*' had resulted in loss of will to fight and loss of professional competence. These

<sup>118</sup> Al-Qur'an, *surah At-Tawbah* (9) verse 60.

<sup>119</sup> Al-Qur'an, *surah At-Takathur* verses 1 and 2.

<sup>120</sup> Narrated on the authority of Anas bin Malik, *Sahih Al-Bukhari*, 6439, also in *Al-Muslim*.

<sup>121</sup> Article 19A of the Constitution of the Islamic Republic of Pakistan.

<sup>122</sup> Holy Qur'an, *surah An-Nisa* (4) verse 114.

<sup>123</sup> Holy Qur'an, *surah At-Tawbah* (9) verse 78, *surah Al-Isra* (17) verse 47, *surah Ta Ha* (20) verse 62, *surah Al-Anbiya* (21) verse 3, *surah Az-Zukhruf* (43) verse 80 and *surah Al-Mujadilah* (58) verse 10.

<sup>124</sup> Holy Qur'an, *surah Al-Anfal* (8) verse 8.

<sup>125</sup> Holy Qur'an, *surah Al-Baqarah* (2) verse 42.

<sup>126</sup> Attributed to the Prophet Isa (peace be upon him), John 8:32.



disastrous consequences<sup>127</sup> and the aphorism, *those who do not learn from history are condemned to repeat it* must be avoided.

34. **Declaration by Quaid-i-Azam Mohammad Ali Jinnah:** The Constitution dictates that, we must remain, '*Faithful to the **declaration** made by the Founder of Pakistan, Quaid-i-Azam Mohammed Ali Jinnah, that Pakistan would be a democratic State based on Islamic principles of social justice*'<sup>128</sup>. The Quaid addressed '*Civil, Naval, Military & Air Officers of the Pakistan Government*'<sup>129</sup>, and said:

The establishment of Pakistan for which we have been striving for the last ten years is, by the grace of God, an established fact today, but the criterion of a State of our own was means to an end and not end in itself. The idea was that we should have a State in which we could live and breathe as free men and which could develop according to our own lights and culture and where principles of Islamic social justice could find freer play<sup>130</sup>.

The Quaid<sup>131</sup> wanted Pakistan to be a prosperous and happy place to live in; a place which ensured the well-being of the people and above all of the poor:

Now, if we want to make this great State of Pakistan happy and prosperous we should wholly and solely concentrate on the well-being of the people, and especially of the masses and the poor.<sup>132</sup>

The primary reason for the creation of an independent nation state by Mohammad Ali Jinnah and his companions was to enable believers to freely pursue their faith, to end discrimination and the economic exploitation of the people. We must never forget that Pakistan was, '*achieved by the*

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<sup>127</sup> '*His [General Mohammad Ayub Khan] economic policies mostly resulted in the unequal distribution of wealth between certain privileged classes and the common person. With the growth of the economy, a vacuum of income between the inter-regional, inter-personal, rich and poor classes grew. A gap between the majority people of East Pakistan and West Pakistan was clearly visible.*' This inequality is stated to have contributed towards the country fragmenting into two separate States. *Pakistan's First Military Coup: Why Did the First Pakistani Coup Occur and Why Does it Matter?* Naghman Chaudhry, Captain Pakistan Navy, 2004-5, thesis submitted for the degree of Master of Arts in Security Studies; referenced S. J. Burki, *Ayub's Fall, A Socio-Economic Explanation*, Asian Survey, Vol. 12, No. 3, March 1972.

<sup>128</sup> The Preamble to the Constitution of the Islamic Republic of Pakistan, quite unlike the preambles to the constitutions of other countries, is not a mere introduction or adornment but a '*substantive part of the Constitution and shall have effect accordingly*' (Article 2A of the Constitution).

<sup>129</sup> At Khaliqdina Hall, Karachi on 11 October 1947.

<sup>130</sup> Z. H. Zaidi, Editor-in-Chief, *Jinnah Papers - Pakistan at Last*, Volume IV, published by Quaid-i-Azam Papers Project, Cabinet Division, Government of Pakistan (1999) p. 75.

<sup>131</sup> Presidential Address to the Constituent Assembly of Pakistan, 11 August 1947 at Karachi.

<sup>132</sup> Z. H. Zaidi, Editor-in-Chief, *Jinnah Papers - Pakistan at Last*, Volume IV, published by Quaid-i-Azam Papers Project, Cabinet Division, Government of Pakistan (1999).

*unremitting struggle of the people against oppression and tyranny*<sup>133</sup>. Bestowing wealth, which is unearned, obliterates the cherished goals of Pakistan.

35. **Serving Humanity Without Reward:** The leaders of the Freedom Movement, of the All-India Muslim League, who got us Pakistan, amongst whom were many who had lost their own homes, did not take a single square inch of land. These proud Freedom Fighters of Pakistan were also not remunerated nor pensioned. They spent from their own pockets to create Pakistan. Their only motivation was a burning desire to serve the people. The constitutional goal of '*creating an egalitarian society*'<sup>134</sup> is undermined when public land furtively finds its way into private hands.
36. For the reasons mentioned above, I concur with the conclusions arrived at by the learned Mushir Alam, J: that the applicable law for the compulsory acquisition of the Land was the Land Acquisition Act, that the Land was legally acquired by the Foundation and that its distribution amongst the allottees did not violate the Land Acquisition Act nor the Constitution.
37. It would be appropriate to translate this judgment into Urdu<sup>135</sup> for its wider dissemination as it contains matters of public importance. Since the Pakistan Electronic Media Regulatory Authority Ordinance, 2002<sup>136</sup> was enacted to also, '*ensure accountability, transparency and good governance by optimizing the free flow of information*'<sup>137</sup>, therefore, a copy of this judgment be sent to the Pakistan Electronic Media Regulatory Authority<sup>138</sup> ('**PEMRA**') which is directed to send copies onwards to its licencees, who may want to broadcast it. And, PEMRA should ensure that such broadcasts are unimpeded.

Islamabad,

JUDGE

Dated: 8 October 2020.

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<sup>133</sup> Preamble - Objectives Resolution – of the Constitution of the Islamic Republic of Pakistan.

<sup>134</sup> Ibid.

<sup>135</sup> Article 251 of the Constitution of the Islamic Republic of Pakistan.

<sup>136</sup> Gazette of Pakistan, Extraordinary, Part I, published on 1 March 2002 (PLD 2002 Federal Statutes 63).

<sup>137</sup> Preamble (iv) of the Pakistan Electronic Media Regulatory Ordinance, 2002.

<sup>138</sup> Constituted under section 3 of the Pakistan Electronic Media Regulatory Ordinance, 2002.