IN THE HIGH COURT OF SINDH, KARACHI
CP D-7097 of 2016 &
CP D-131 of 2017

Date Order with signature of Judge

Present: **Munib Akhtar and Arshad Hussain Khan, JJ.**

For hearing of main case and
miscellaneous applications

Dates of hearing: 06,11,13,19,20,26,27.04 and
02,03,04,10,11,16,17,18,23,24,25 and 30.05.2017

Mr. Faisal Siddiqui, Advocate for petitioners

Mr. Zameer Ghumro, Advocate General,
Sindh, and Mr. Mustafa Mahesar, AAG,
for the Province

Mr. Salman Talibuddin, Additional Attorney
General and Mr. Asim Mansoor Khan, DAG,
for the Federation

Mr. Shahab Usto, Advocate for respondent
No. 7 in CP D-7097/2016

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Munib Akhtar, J.: These two petitions are in the nature of public interest litigation, the petitioners being concerned citizens who are resident in Sindh (more particularly Karachi, though nothing turns on that). Some of the petitioners are NGOs. The petitioners are all deeply concerned with, and aggrieved by, what they describe as the sorry, and indeed appalling, state of policing in the Province. The principal statute regarding the police currently in force in Sindh is the Police Act, 1861 ("Police Act"), as revived and restored by the Sindh (Repeal of the Police Order, 2002 and Revival of the Police Act, 1861) Act, 2011 ("2011 Sindh Act"). As the short title suggests, the 2011 Sindh Act (which came into effect on 15.07.2011) repealed the Police Order, 2002 ("2002 Order") insofar as it applied in this Province and revived the Police Act, with immediate effect as it stood on 13.08.2002. This last is important because the Police Act was amended fairly extensively by the Police (Amendment) Order, 2001 ("2001 Order"), which took effect on 14.08.2001. Therefore, the Police Act was revived inclusive of the changes made in 2001.

2. The petitioners have advanced two constitutional arguments. Firstly, they challenge the 2011 Sindh Act and hence the revival and currency of the Police Act in this Province on the ground of legislative competence. It is

submitted that the 2002 Order was and, notwithstanding the 18th Amendment which omitted the Concurrent Legislative List from the Fourth Schedule to the Constitution, remained a federal statute. It could not therefore be repealed by provincial legislation. The 2011 Sindh Act was constitutionally invalid and hence the purported revival of the Police Act was to no legal effect. Thus, it is argued, the principal statute regarding the police continues to be the 2002 Order, and various declaratory and injunctive reliefs are sought to ensure its enforcement and implementation. In the alternative and assuming that the 2011 Sindh Act was constitutionally valid, it is submitted that the manner in which the Police Act and a relevant provision of the Sindh Government Rules of Business, 1986 ("1986 Rules", framed under Article 139 of the Constitution) have been given effect (or not, as the case may be) has seriously affected, if not substantially eroded and compromised, the efficacy and availability of fundamental rights in the Province. Accordingly, suitable relief is sought for the enforcement of the fundamental rights by the making and issuance of appropriate directions by the Court in exercise of its jurisdiction Article 199(1)(c) of the Constitution. In particular, the petitioners are much exercised by the alleged failure of the Provincial Government to adhere to that provision in the 1986 Rules which specifies the term of office of the Inspector General of Police to be five years. In the years that the 2002 Order was in force in the Province (under which the equivalent post was that of the Provincial Police Officer), the term of office was three years. However, whatever was the applicable provision, it is claimed that it was, and has almost always been, honored in the breach since very few Inspectors General have, in the 30 odd years since 1986 (and in particular since 2002), had a term commensurate with the tenure specified. The present Inspector General of Police is the Respondent No. 7 in CP D-7079/2016 (he is also a respondent in the other petition). The Respondent No. 7 was appointed to the post on or about 12.03.2016. One additional point, also in the alternative, was raised as well, by way of appointment of a commission to make recommendations regarding police reforms. This point will be noted in greater detail in due course. The Province of course seriously contests the petitioners' case on all points and prays that the petitions be dismissed. The Federation, which is a party to these proceedings, has also had something to say especially with regard to the appointment in the Province of officers of the Police Service of Pakistan ("PSP"), an All-Pakistan Service within the meaning of Article 240 of the Constitution.

3. The first petition (CP D-7097/2016) was filed on 26.12.2016, and an application seeking certain interim injunctive relief with regard to the continuance as Inspector General of the Respondent No. 7 was also filed. The matter came up before a learned Division Bench on 28.12.2016, when such

relief was granted. The learned Division Bench also set out the case sought to be made by the Petitioners. The order was in the following terms (emphasis in original):

> "Mr. Faisal Siddiqui, counsel appearing for the petitioners, contends that the instant petition challenges The Sindh (Repeal of the Police Order 2002 and Revival of the Police Act 1861) Act 2011 in terms of which, inter alia, the Police Order 2002 has been repealed. The counsel submits that the Police Order 2002 enjoyed protection under Article 142(b) of the Constitution of the Islamic Republic of Pakistan, 1973, which confers concurrent jurisdiction of Majlis-e-Shoora (Parliament) and a Provincial Assembly to make law with respect to the "Criminal Law", "Criminal Procedure" and "Evidence". Per counsel, there was no specific entry in the concurrent list to confer the jurisdiction either on the Parliament or a Provincial Assembly to legislate the laws for the Police, and such laws were legislated on the basis of entry Nos.1 and 2 available in the concurrent list. Per counsel, after these entries were removed from the concurrent list vide Eighteenth Amendment, the Provincial Government misconstrued the same having fallen in its domain and legislated the Act 2011, which, inter alia, repealed the Police Order 2002, which was a Federal Legislation. Per counsel, through the very Eighteenth Amendment, the introduction of Sub-Clause (b) to Article 142 instantly filled the void and empowered the Majlis-e-Shoora and the Provincial Government to legislate the matters related to Criminal Law, Criminal Procedure and Evidence, rendering the same as an occupied field and accordingly the Provincial Legislature was not entrusted with singular authority of legislating in respect of these subjects, rather these subjects continued to be legislated by the Majlis-e-Shoora and the provincial Government concurrently. Accordingly the singular act of the Provincial Government which resulted in the promulgation of Act 2011 has no Constitutional merit. Per counsel, even otherwise, Article 143 provides that where there is an inconsistency between the Federal and Provincial Laws, the Federal Laws, of course would prevail, therefore, the repeal of the Federal Law by the Provincial Legislators through the Act 2011 is indirect violation of these specific Constitutional Provisions.
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> It is next contended that the Government of Sindh is about to remove the respondent No.7, Inspector General of Police Sindh, which per Police Order 2002 as well as Sindh Government Rules of Business 1986 (through Schedule – IX read with Item 14 Column – 4 of Schedule-I), enjoys a tenure of three years of posting. Counsel in this regard has referred to the judgments of the Apex Court delivered in the case of *Ms. Anita Turab vs. Federal of Pakistan (PLD 2013 SC 195* as well as *Haider Ali and another vs. DPO Chakwal and others (2015 SCMR 1724).* In the case of Haider Ali (supra), the Apex Court at Para 9(v) has reaffirmed the principle that the respective Provincial and Federal heads of police shall have continued posting of three years, therefore, the Provincial Government be restrained from removing the respondent No.7 from his present position of Inspector General of Police Sindh. Counsel has further contended that it is an open secret that the respondent No.7 has been sent on forced leave and there are strong apprehension that this would culminate in the removal of the respondent No.7 which can be ascertained from the review of the press reports, in particular those where many retired police officers made representation to the higher ups to intervene in the matter related to the respondent No.7. The learned counsel further submitted that subsequent to the above forced leave notification, in the last few days, the Provincial Government has attempted to interfere in the process of

recruitment of new police force by reducing the passing marks of NTS from 40 to 35 solely aimed to induct individuals, who were initially considered "fail", thereby mutilating merit.

Contentions raised required consideration. Let notices be issued to the respondents as well as Advocate-General Sindh and Attorney General for Pakistan for 12.01.2017, till then the respondent No.7 shall not be dealt with in violation/contradiction of the judgment of the Apex Court, referred to above, by his removal."

4. Thereafter, the matter was listed on a few dates but no substantive hearing took place. It appears that on 31.03.2017 the Provincial Government wrote to the Federal Government, expressing the former's desire to surrender the services of the Respondent No. 7 (of course, a PSP officer) to the latter, and proposing/recommending three names (also of PSP officers) for posting as Inspector General of Police. The very next day, 01.04.2017, without apparently waiting for any reply from the Federal Government, the Provincial Government purported to relieve the Respondent No. 7, and directed that another PSP officer, already serving in the Sindh Police, would hold charge of the post of Inspector General in addition to his own duties. These developments triggered the filing of two applications by the Petitioners, one a contempt application and the other an application seeking further interim injunctive relief. These applications came up before us on 03.04.2017. The order made on that date is set out below in material part:

"There are before us two applications that the petitioners seek to file. One application is a contempt application, CMA No.10049/2017, and the other is an application for interim relief, CMA No.10050/2017. Copies of these applications have been provided to the learned Advocate General Sindh, who may take instructions, file reply etc. Applications are taken on record.

Learned counsel for the petitioners draws attention to order dated 28.12.2016…

Learned counsel for the petitioners stated that the constitutional issues as raised in the petition have been set out in the order of 28.12.2016 but at present the petitioners are aggrieved by the alleged disobedience and disregard of the operative part thereof…. Learned counsel submits that in terms of the interim relief granted, it had been directed that the respondent No.7 was not to be dealt with in a manner in violation of the judgment of the Supreme Court in the well-known *Anita Turab* case by his removal. With reference to the applications filed today, learned counsel referred to an order dated 31.03.2017 issued by the Government of Sindh and addressed to the Federal Government whereby the services of respondent No.7, who on that date was serving in the office of Inspector General of Police Sindh, were surrendered to the Federal Government and it was further stated that the Government of Sindh recommended the names of three (03) officers (as listed in the order) for appointment as Inspector General of Police Sindh in place of respondent No.7. Learned counsel referred to the follow up notification dated 01.04.2017 whereby firstly, the respondent No.7 was relieved from the post of Inspector General of Sindh with immediate effect and directed to report to the

Establishment Division of the Government of Pakistan and secondly, Mr. Sardar Abdul Majeed was directed to hold charge of the said post of Inspector General of Police Sindh in addition to his own duties. We may note that both the respondent No.7 and Mr. Sardar Abdul Majeed are officers in the Police Service of Pakistan, which is an All-Pakistan service within the meaning of Article 240 of the Constitution. On queries from the Court, learned Advocate General Sindh accepted that the post of Inspector General of Police in any Province was to be held only by an officer of the Police Service of Pakistan.

Learned counsel for the petitioners submitted that the order and notification referred to above were in complete violation of the interim order made in this petition on 28.12.2016 and sought suitable relief both in terms of appropriate action against the alleged contemnors and also by way of further/ fresh interim relief as prayed in CMA 10050/2017.

Learned Advocate General Sindh strongly opposed both applications without prejudice to his right to file an appropriate reply to the same and in particular strongly opposed the grant of further/fresh interim relief as today prayed for. Learned Advocate General Sindh submitted that the respondents were not in violation of the order dated 28.12.2016 and that in any case matters relating to transfer/posting etc. as here relevant were peculiarly within the provincial domain and that, therefore, the Government of Sindh had appropriately exercised its powers in this regard by issuing the order and notification referred to above.

On an query from the Court, learned Advocate General Sindh submitted that the legal power with regard to the Police force of the Province in general and in particular in relation to the Inspector General of Police vested in the Provincial Government in terms of ss. 3 and 4 of the law currently in force in this Province, being the Police Act 1861 ("Police Act"). Learned Advocate General further submitted there [is] the constitutional challenge to the Provincial Assembly Act of 2011, whereby the Police Order 2002 ("Police Order") had been repealed and the Police Act reinstated insofar as this Province is concerned, were without merit.

We have considered the rival submissions especially in the context of whether the petitioners have been able to make out a prima facie case with regard to the grant of further/fresh interim relief. On a query from the Court, learned Advocate General, candidly and quite properly, stated before us that the order and notification referred to above had not been issued as a result of decisions taken by or in the Provincial Cabinet. The reason for this query, which was of course explained to the learned Advocate General, was in the context of the very recent and seminal judgment of the Supreme Court reported as *Mustafa Impex and others v. Government of Pakistan and others* PLD 2016 SC 808, wherein the Supreme Court has considered in considerable detail the proper constitutional meaning of "Federal Government" (and, in our respectful view, by necessary extension and implication also "Provincial Government") and has held, in the specific context of the exercise of statutory powers that if such powers are conferred on the Government concerned, they can be exercised in the Cabinet and by Cabinet decisions, and not otherwise. In this regard, we draw attention in particular to the concluding para 84 of the judgment, where the conclusions have been summarized and inter alia in sub-para (iii) it is held as follows:

> "Neither a Secretary, nor a Minister and nor the Prime Minister are the Federal Government and the exercise, or purported exercise, of

a statutory power exercisable by the Federal Government by any of them, especially, in relation to fiscal matters, is constitutionally invalid and a nullity in the eyes of the law…."

Turning briefly to the constitutional point as raised on the merits of the case by the petitioners, prima facie, it appears to us that perhaps principal reliance has been placed by the petitioners on the subject of "criminal procedure" that continues to remain in the concurrent field even after the 18th Amendment to the Constitution. As we understand it (though this is only prima facie), the case of the petitioners is that the Police Order is saved as a federal law on account of it pith and substance being relatable to "criminal procedure", which as just noted continues to remain in the concurrent list and that, therefore, the Provincial Act of [2011] purporting as it does (according to the petitioners) to repeal a federal law is ultra vires the Constitution. While of course, all the parties will be heard on the merits of the case, by way of a tentative observation only, we draw the attention of the learned counsel for the petitioners to the historical and constitutional background of the legislative lists of the 1973 Constitution (and of course there is only one such list now). It appears that in terms of legislative powers, there was a specific entry in relation to "Police" in the Government of India Act, 1935 in the legislative lists of that Act (see 7th Schedule, List II, Entry No. 3). The lists of the Government of India Act, 1935 are of course the precursors of all the legislative lists of the various Constitutions that have prevailed from time to time in this country including the present Constitution as well as the Indian Constitution. In all of the said Constitutions which contain three lists, it appears that there is/was a specific entry relating to "Police" in the exclusive Provincial List. (See the Indian Constitution, 7th Schedule, List II, Entry No. 2 (subject to a modification not presently relevant), the 1956 Constitution, 5th Schedule, Provincial List, Entry No. 3 and the Interim Constitution, 4th Schedule, List II, Entry No. 3). Thus, prima facie, "Police" had been made a purely Provincial subject in terms of these Constitutions. Therefore (and tentatively), since it appears to us that the constitution of a police force would be a matter relatable to such Entry, it would appear to fall within the Provincial domain with the result that it would not be relatable (apparently) to subject/entry of "criminal procedure". If at all this is correct (and we emphasize again that this is a tentative observation), it would appear that the Police Order, after the 18th Amendment was a law that fell in the Provincial domain (and perhaps was always in the said domain) with the result that perhaps the Provincial Assembly in this Province did have the constitutional and legislative competence, insofar as this Province is concerned, to repeal the Police Order and replace it with such legislation as it deemed appropriate being, in the present case, a reinstatement of the Police Act. Learned counsel for the petitioners as also learned Advocate General to prepare themselves on this and, of course, on all the other points that they wish to take before the Court.

Learned counsel for the petitioners, drawing attention to the interim order of 28.12.2016, states that reliance had also been placed on the Sindh Government Rules of Business, 1986, with regard to the continuation of … the respondent No.7 in the post of Inspector General of Police. However, on a query from the Court, learned counsel candidly accepted that this plea did not appear as such in the prayer clause of either this or the connected petition, although learned counsel submitted that such a ground had been taken. Learned counsel for the petitioners as also learned Advocate General may also prepare themselves on this point since, prima facie, it does sound on the constitutional plane and in any case is a legal point and decision will be taken later as to whether this point will be entertained when this and the connected petition are taken up on the merits.

> Referring to the immediate question which is whether a case has been made out for the grant of fresh/further interim relief, having considered the matter, we direct that till the next date, the order dated 31.03.2017, annexure AA to CMA 10050/2017 as also follow up notification dated 01.04.2017, annexure AA-1 thereto are suspended with immediate effect, with the result that Mr. Sardar Abdul Majeed, if at all he has taken over charge of the office of Inspector General of Police Sindh is, with immediate effect, restrained from acting in such charge, and the respondent No.7 is, with immediate effect, restored to his position as Inspector General of Police Sindh. Interim order made earlier also to continue till next date…."

5. On 05.04.2017 it appears that the Sindh Cabinet, responding to the above, considered the continuance of the Respondent No. 7 in the office of Inspector General and approved the orders/communication of 31.03.2017 and 01.04.2017. This decision of the Sindh Cabinet will be considered in detail below at the appropriate stage. Hearing, more or less on a day to day basis, started in respect of both petitions on 06.04.2017 and continued till 30.05.2017, when judgment was reserved and the interim orders made on 28.12.2016 and 03.04.2017 continued till announcement.

6. Learned counsel for the petitioners, starting his case with submissions on the *vires* of the 2011 Sindh Act, referred to the system of legislative lists whereby legislative competence has been divided between the Federation (or Centre or Union) and the Provinces (or States) since, as is well known, the Government of India Act, 1935 ("GOIA"). That Act of course was not only the constitution enacted by the Imperial Parliament for British India but also served as the first constitution for the Dominions of Pakistan and India upon Independence. Learned counsel drew attention to the fact that the GOIA had three legislative lists, one exclusive to the Federation, the second to the Provinces and the third common (or concurrent) to both. Learned counsel submitted that "police" as a legislative competence appeared as Entry No. 3 of the (exclusive) Provincial Legislative List, whereas the legislative competence with regard to "criminal law" and "criminal procedure" appeared as the first two entries of the (common) Concurrent Legislative List. After Independence, the 1956 Constitution and the Interim Constitution of 1972 also had three lists (as indeed, does the Indian Constitution), in which the foregoing competences appeared in the manner as they had in the GOIA. Thus, learned counsel submitted and accepted, "police" as a legislative competence had consistently been in the exclusive provincial domain. However, it was submitted, a major change came when the present (1973) Constitution came into force (on 14.08.1973, its commencing day). The present Constitution had only two lists, the (exclusive) Federal Legislative List and the Concurrent Legislative List. Learned counsel submitted that "police" as such did not appear on either list. Although there was an entry

(No. 16) in relation to the police on the Concurrent List, that was for specified purposes and in a different context. In particular, it was not a general competence relating to the "police". Although the 18th Amendment omitted the Concurrent List and placed some of its entries in the Federal List, entry No. 16 disappeared along with the omission of the former List. However, learned counsel submitted, legislative competence in relation to "criminal law", "criminal procedure" and "evidence" continued to remain concurrent, in terms of the amended clause (b) of Article 142. Learned counsel submitted that the petitioners' case rested on the legislative competence (or field, as it is also referred to) of "criminal procedure". It was submitted that in the present Constitution, from its commencing day, the legislative competence in relation to police had vested in the "criminal procedure" entry. Thus the Police Act, as an existing law within the meaning of Article 268, had been a federal law since the commencement of the present Constitution, notwithstanding its earlier existence as a law in the exclusive provincial domain. The 2002 Order, itself a federal law, had therefore validly repealed and replaced the Police Act. Since admittedly "criminal procedure" continued to remain a concurrent field even after the 18th Amendment, the 2002 Order, which had started out as a federal law remained in the Federation's domain and could not be displaced by provincial legislation, i.e., the 2011 Sindh Act. This submission formed the crux of learned counsel's case insofar as the *vires* of the Act were concerned.

7. Expanding on his case, learned counsel referred to a certain amendment made in 1981 to the Police Act by a federal law to show that the statute was regarded as in the federal domain. With regard to the 2002 Order, learned counsel pointed out that it had in fact been enacted before the lifting of the Gen. Musharraf's Martial Law. It was therefore protected under Article 270AA, and reliance was placed on clause (6) of the said Article. Even after the 18th Amendment, the Provinces had taken different approaches to the 2002 Order. In this Province of course, the situation was as already described, and learned counsel drew attention in particular to the words "as if it [i.e., the Police Act] had never been repealed" appearing in s. 2 of the 2011 Sindh Act. In Punjab, the 2002 Order had not been repealed although the Punjab Assembly had made amendments to the law, in 2013. The KPK Assembly had enacted its own KPK Police Act, 2017, but learned counsel referred to s. 141 of this Act. That section, in its subsection (1), states that the 2002 Order stands repealed in its application to the KPK Province in respect of its provisions "relating to the Provincial Legislative Field and in respect of which corresponding provisions are provided in this Act". However, subsection (2) states that notwithstanding the repeal in terms of subsection (1), "all the provisions of the Police Order, 2002, relating to the Federal

Legislative List shall continue to remain in force". In Balochistan, the Provincial Assembly had, by means of the Balochistan Police Act, 2011, repealed the 2002 Order. Learned counsel drew attention to s. 46 of that statute.

8. The essential point that learned counsel sought to make was that if, in respect of a concurrent legislative competence (or field) a law is made by the Federation, then that law can also be "acted upon", i.e., amended by a Provincial Assembly, and vice versa. In this regard, learned counsel referred to Article 143 of the Constitution, as it had stood prior to the 18th Amendment. It was submitted that the said Article was *in pari materia* s. 107(1) of the GOIA, and these provisions corresponded to Article 110 of the 1956 Constitution and Article 143 of the Interim Constitution. Learned counsel submitted that the Code of Criminal Procedure, which as an existing law under the 1973 Constitution fell in the federal domain, had been amended by the KPK Assembly in 2009. Reference was also made to certain case law in this regard, and also in relation to the Electricity Act, 1910, to show that laws that fell within the ambit of an entry of the Concurrent List and were, or were regarded as, federal laws had been acted upon by Provincial legislatures and vice versa. Reference was also made to the Indian Constitution and certain cases decided in terms of the relevant Articles of that Constitution. These cases, to the extent relevant, will be considered in due course. Learned counsel submitted that since on the commencing day, the Fourth Schedule to the 1973 Constitution (which contained the legislative lists) did not contain any general legislative competence in relation to "Police", the Police Act, as an existing law within the meaning of Article 268, fell in its pith and substance within the ambit of "criminal procedure". (In this regard reliance was also placed on certain provisions of the Canadian Constitution.) That meant that it was a federal law under the 1973 Constitution. Since "criminal procedure" was a concurrent legislative field that meant that the 2002 Order could be acted upon by provincial legislation but not so as to displace and repeal it altogether. That was why, according to learned counsel, in the other Provinces either the 2002 Order continued to hold the field or had been acted upon in a manner that gave due recognition to its federal nature and preserved the federal aspects of the law. It was only in Sindh that the Provincial Assembly had so acted as to displace the 2002 Order altogether, and in a manner as though it had never been enacted. This, according to learned counsel was contrary to the constitutional provisions and hence the 2011 Sindh Act was *ultra vires* the Constitution. It may be noted here that learned counsel also drew attention to an order dated 28.02.2005 made by a learned Single Judge of the Lahore High Court in WP 16244/2002 (titled *Zafarullah Khan v. Federation of Pakistan*) in which an opinion had been expressed that

the "Police Order 2002 primarily related to the enforcement of the criminal law and policing" and that therefore it was relatable to the "criminal law" legislative field. Although learned counsel himself did not subscribe to this view (since, as noted, the relevant legislative competence according to him was "criminal procedure"), this order was relied upon to show that "police" as a legislative competence fell in the concurrent domain and not the exclusive provincial domain.

9. While learned counsel was making submissions on the *vires* of the 2011 Sindh Act, his attention was drawn to *Inspector-General of Police Punjab and others v. Mushtaq Ahmed Warraich and others* PLD 1985 SC 159, and in particular to a passage appearing at pg. 178. This appeared to show that the Supreme Court had held that even under the 1973 Constitution, the Police Act fell in the provincial domain as "police" was "within the legislative competence of the Provincial Legislature". Learned counsel submitted, for reasons that will be set out and considered later at an appropriate stage that the passage referred to did not constitute binding authority within the meaning of Article 189 of the Constitution. Certain case law cited by learned counsel in support of this submission will also be considered subsequently. For all of the foregoing reasons, learned counsel contended that the 2002 Order was a federal law, which could not be repealed by provincial legislation. The 2011 Sindh Act was therefore *ultra vires* the Constitution.

10. Without prejudice to his primary submission, learned counsel then turned to his case in the alternative, on the assumption (without conceding) that the 2011 Sindh Act had properly restored the Police Act. Here, learned counsel referred to the second petition (CP D-131/2017), and relied upon the second part of prayer clause (f) therein. This prayer, as presently relevant, is in the following terms:

> "(f) Direct the constitution of a broad based independent Commission, headed by a retired High Court Judge or Supreme Court Judge and comprising of relevant and respected civil society persons as nominated by this Honourable Court (at the cost of the Provincial Government)… and… direct this broad based Commission to inquire and give recommendations regarding further Police reforms to be initiated for a modern, autonomous, accountable and service oriented police which ensures the protection of the fundamental rights of the citizens of Sindh, and for the effective implementation of the Rule of Law, and to submit a compliance report in this regard before this Honourable Court for further orders."

With regard to this prayer, i.e., the setting up of a law commission, learned counsel placed strong reliance on a decision of the Indian Supreme

Court, *Prakash Singh and others v. Union of India and others* (2006) 8 SCC 1, relying in particular on the observations made and directions given by the Court at paras 29-31 (pp. 13-17).

11. With regard to his alternate submissions, both as to the formation of a commission in terms as above and also the enforcement of fundamental rights, learned counsel formulated three questions: (i) what was the rationale for the judicial organ to intervene in a matter that was, normally and generally, to be regarded as falling in the legislative or executive domains? (ii) What the connection between an autonomous police force and fundamental rights? And (iii) what would be the proper mechanism for giving any directions, especially in exercise of the jurisdiction conferred by Article 199(1)(c)? In regard to these questions learned counsel placed reliance on various cases, both from our jurisdiction as well as from India, which will be considered to the extent relevant at the appropriate stage. However, it may be noted here that particular reliance was placed on *Human Rights Commission of Pakistan v. Government of Pakistan* PLD 2009 SC 507 with regard to the scope of the power conferred by Article 199(1)(c), learned counsel emphasizing the observations and directions at paras 31-35 (pp. 527-9). Learned counsel also referred to various cases to show that commissions had been appointed by the Courts in a variety of circumstances and for different purposes and thus, it was submitted, the relief sought in terms of prayer clause (f) was well within the established and recognized jurisdiction of the High Court.

12. In the specific context of enforcement of fundamental rights by ensuring that the police force was autonomous, learned counsel referred in particular to the term of office of the Inspector General, as given in the 1986 Rules. Referring to the relevant provisions, learned counsel submitted that the said Rules expressly provided for a term of five years for the Inspector General. Turning to the record, learned counsel submitted that it showed that hitherto very few (if any) Inspectors General had ever had a term even close to this period, or even the three year period stipulated in 2002 Order, when that enactment was in force. Learned counsel submitted that the failure to adhere to the stipulated term was, in particular, a clear violation of the principles enunciated by the Supreme Court in *Syed Mahmood Akhtar Naqvi and others v. Federation of Pakistan and others* PLD 2013 SC 195 (commonly known as the "*Anita Turab* case"). Referring to the action taken to remove the Respondent No. 7 (who, it will be recalled, at present holding the office of Inspector General) learned counsel submitted that the Provincial Government kept changing its stance as to the reasons for removal. Reference was made to the record in this context to show how, according to learned

counsel, the stance changed over time up to and including the endorsement of the action taken by the Provincial Cabinet at its aforementioned meeting of 05.04.2017. Learned counsel submitted that none of the reasons given were valid in law and were clearly motivated by the desire, which was said to be mala fide in law and fact, to remove the Respondent No. 7 and replace him with a person more to the liking of the Government of the day. It was submitted that this attempt was not simply contrary to law but was detrimental to the functioning of the police force and hence destructive also of the proper implementation of the rule of law, which was vital for the enforcement of fundamental rights, which was of course what the petitioners were seeking through these petitions. The submissions made by learned counsel will be considered in detail at the appropriate place subsequently. Learned counsel prayed that the petitions be allowed and appropriate relief granted.

13. The learned Advocate General, ably assisted by the learned AAG, strongly contested the case put forward by the petitioners and submitted that the petitions ought to be dismissed. It was submitted that the petitioners had sought three kinds of relief: (i) a restoration of the 2002 Order by declaring the 2011 Sindh Act to be *ultra vires*; (ii) the appointment of a law reform commission; and (iii) the continuance in office of the Respondent No. 7. Referring to the legislative lists and tracing the history thereof from the GOIA onwards and through the 1956 and Interim Constitutions, the learned Advocate General submitted that it was clear that "police" as a general legislative competence had always vested exclusively in the provincial legislatures. Insofar as the matter of fundamental rights was concerned, the learned Advocate General submitted that no such claim could be put forward by the petitioners as Article 8(3)(a) expressly excluded the application of the Article to the police. This was in line with what had been the position under the earlier constitutional dispensations, the relevant provisions of which were also read out. The learned Advocate General submitted that public order was the primary and most important state duty and function, which had been entrusted to the Provincial Governments by the Constitution. Earlier, a number of police forces had been within the scope of the provincial power, such as the Railways Police and Rangers. The learned Advocate General submitted that the enactments in relation to the latter two passed to the Federation as existing laws, but the general police power remained vested exclusively in the Provinces. In 1985 the PSP was re-organized in terms of s. 25 of the (federal) Civil Servants Act, 1973. There was an arrangement, subject to the practices and conventions that developed and evolved over time, between the Federation and the Provinces as to how officers of the PSP were to serve in the Provinces. Here, it may be noted that an agreement, said

to have been arrived at in 1993 between the Federal and Provincial Governments with regard to the manner in which federal officers were to serve in the Provinces, was also placed on record and relied upon by both learned counsel for the Petitioners and the learned Additional Attorney General. According to them, this agreement was controlling and the action taken for the removal of the Respondent No. 7 and his replacement by another officer was contrary to the same and hence unlawful. This agreement was however strongly challenged by the learned Advocate General, who submitted that it was never confirmed by the Government of Sindh and had never been acted upon in the manner as claimed. Thus, while there was an arrangement, it was not that as contained in the so-called agreement of 1993. The learned Advocate General submitted that the enactment of the 2002 Order as a federal law during the Gen. Musharraf Martial Law was a constitutional aberration and in any case in the post-18th Amendment scenario, the whole position had been regularized. The police were within the exclusive provincial domain. In this regard, the learned Advocate General placed strong reliance on *Inspector-General of Police Punjab and others v. Mushtaq Ahmed Warraich and others* PLD 1985 SC 159, and read out several passages from this judgment to show that it conclusively and authoritatively established that "Police" was a legislative competence exclusive to the Provinces. The learned Advocate General strongly contested the submission made by learned counsel for the Petitioners that the relevant portions of the judgment were not binding within the meaning of Article 189. Hence the Police Act and the 2002 Order, relating to the general "police" competence, were within the provincial domain and it was for the Provincial Assemblies to craft the legislation in relation thereto. This was precisely what the Sindh Assembly had done in terms of the 2011 Sindh Act. While the Federation did have a limited jurisdiction to legislate in respect of matters exclusive to the Provinces, that competence, being as contained in Article 144 and the Emergency provisions, was not attracted and applicable in the present circumstances.

14. The learned Advocate General submitted that the Constitution envisaged a harmonious relationship between the Federation and the Provinces, and referred to various Articles relating to the administrative relations between the two. However, it was contended, the power to appoint the Inspector General always vested and remained in the hands of the Provincial Government. In this regard, the learned Advocate General referred to the provisions of the various laws relating to the police as prevailing in the different Provinces (which have been alluded to in the above) to support his submission that it was always for the Province to appoint the head of the police force. Insofar as the relief sought in relation to the continuance of the

Respondent No. 7, the learned Advocate General submitted that the petitions were in effect nothing other than in relation to the terms and conditions of service of the said Respondent. As such, they were hit by the bar contained in Article 212. It was emphasized that all transfers and postings of police officers in any police force (which was necessarily provincial) were in the hands of the Provincial Governments. In this regard, the learned Advocate General also made reference to the relevant provisions contained in the ESTACODE. Reference was also made to certain decisions in support of the case sought to be made out. The term contained in the 1986 Rules with regard to the Inspector General was nothing but part of the terms and conditions of service, and no relief could be sought in relation thereto on account of the bar contained in Article 212. Reference was also made in this context to the Provincial civil service laws and rules made in terms thereof. What could not be done directly (by the Respondent No. 7) could not be done indirectly by the petitioners, claiming to be citizens seeking the enforcement of fundamental rights.

15. Referring specifically to the Respondent No. 7, the learned Advocate General submitted that he had been appointed as Inspector General on OPS ("own pay and scale") basis only as a temporary measure. This was permissible under the relevant case law of the Supreme Court (which was referred to) but only for a short period and on a temporary basis; such an appointment (i.e., of an officer on OPS basis) could not be continued indefinitely. It was for this reason that the Provincial Government sought to replace him with an officer who was otherwise properly and duly qualified to serve as Inspector General. This position had been duly endorsed by the Sindh Cabinet at its aforementioned meeting after careful consideration and full deliberation, and the minutes of the meeting were referred to in this regard. The learned Advocate General submitted that in this manner the requirements of the law enunciated in *Mustafa Impex and others v. Government of Pakistan and others* PLD 2016 SC 808 had also been duly complied with. The various cases referred to by the learned Advocate General in support of his submissions will be considered to the extent relevant at the appropriate place later.

16. Referring to the relief sought for the appointment of a commission, the learned Advocate General submitted that the facts and circumstances before the Indian Supreme Court in *Prakash Singh and others v. Union of India and others* (2006) 8 SCC 1, the judgment so strongly relied upon, were completely different. Thus, there a commission had earlier been constituted by the Government of India itself. It was submitted that the case law from our jurisdiction as relied upon was also distinguishable as the commissions

constituted did not envisage the making of directions of a legislative nature, which was however what was sought by the Petitioners. The directions given in those cases were only of an executive nature. It was also brought to our attention that the Provincial Government had in fact issued a notification on 22.05.2017 whereby a high powered committee, chaired by the concerned Provincial Minister and including the learned Advocate General, had been constituted with the mandate to engage upon a reform exercise with regard to the laws and rules governing the Sindh Police. The committee had been mandated to "come up with solid proposals in the shape of draft amendments to… existing laws/rules within six months". Such proposals were to be submitted to the Chief Minister for approval "in principle prior to legislative process". Thus, the very thing that the Petitioners wanted had already been initiated by the Provincial Government. It was also strongly contested and denied that there had been any failure of fundamental rights in the Province brought about by the alleged failure in policing. Such allegations, it was submitted, were made only to malign the Provincial Government. It was submitted that the petitions be dismissed.

17. The learned Additional Attorney General submitted that the power to appoint the Inspector General of Police in the Provinces was the prerogative of the Federation. Reference was made to Article 240 of the Constitution, as also to the establishment/continuance of the PSP as an All-Pakistan Service. The concept of a country-wide service predated the present Constitution, and the learned Additional Attorney General referred to an agreement of 1954 in which the parameters of appointment of federal officers from such Services to the Provinces were set out. At present, it was submitted, the entire matter was governed by an agreement (already referred to above) arrived at a meeting held on 19.09.1993, which regulated the appointment of the provincial Chief Secretaries and Inspectors General. The learned Additional Attorney General emphasized that this agreement was binding because it had been followed consistently by the Federation and the Provinces, gave due recognition to the role of the Federal Government in our federal system and also allowed for the discharge by the Federal Government of its overarching responsibility of ensuring that law and order prevailed throughout the country. A Province could not unilaterally resile from the agreement. The Respondent No. 7 had been duly appointed pursuant to this process and the Provincial Government, which had accepted his services now wished suddenly and unilaterally to dispense with the same. The learned Additional Attorney General emphasized that the Federal Government did not promote this or that officer for any particular post in any particular Province, and that was certainly its position vis-à-vis the Respondent No. 7. His incumbency was the result of the operation of the system and nothing else. No cogent

reason had been given by the Provincial Government for his sudden removal and "surrender". Furthermore, the Provincial Government could not itself act unilaterally, as it had purported to do in the instant case. If at all the Provincial Government wished for a replacement, the proper course would have been to follow the established procedure.

18. Exercising his right of reply, learned counsel for the Petitioners submitted that Article 8(3)(a) did not stand in the way of the Petitioners or bar the grant of relief sought. Learned counsel submitted that the Chapter on Fundamental Rights had two aspects, one negative and the other positive and it was only the former that was affected by Article 8(3)(a). Furthermore, the bar was in relation to the Article itself and not the whole of the Chapter. Relying on certain case law, it was submitted that there was no restriction in the way of the High Court from giving suitable directions for the enforcement of fundamental rights in relation to the police force. As regards the term of office of the Inspector General, as given in the 1986 Rules, learned counsel submitted that it was clear on the face of it and its application was mandated by the principles laid down in the *Anita Turab* case. A subsequent decision of the Supreme Court was also referred to. As regards the appointment of the Respondent No. 7 on OPS basis, learned counsel, referring to the record, submitted that many officers in the past had been so appointed as Inspectors General, without demur or objection. It was submitted that the case law relied upon by the learned Advocate General was distinguishable. It was further submitted that the officer with whom the Provincial Government now sought to replace the Respondent No. 7 had been serving in the Sindh Police since before the latter's appointment. Therefore the reference to OPS was nothing but a smokescreen and merely an excuse to justify the removal of the Respondent No. 7—the real objective sought to be achieved. As regards the practice and procedure for the appointment of an Inspector General in the Provinces, and the general manner in which PSP officers were to be selected for this purpose, learned counsel adopted the submissions made by the learned Additional Attorney General. As regards the committee appointed for purposes of reforming the law relating to the police, learned counsel submitted that it was only an "in-house" committee of the Provincial Government and did not meet the required level and standards of transparency. Learned counsel submitted that the necessary work could only be done by an independent commission as sought by the Petitioners. In this regard, learned counsel again laid emphasis on *Prakash Singh and others v. Union of India and others* (2006) 8 SCC 1.

19. With regard to the enforcement of fundamental rights in the context of an autonomous police force, learned counsel submitted that it was essential

that the term of the Inspector General, as set out in the 1986 Rules, should be strictly observed and adhered to. In addition, learned counsel submitted that suitable directions could, and should, be given as regards the proper interpretation and application of the Police Act (on the assumption, without conceding, that it, and not the 2002 Order, was the law applicable to the police force). In this regard, learned counsel drew attention to the distinction between the power of the Provincial Government to "supervise" the police force in terms of s. 3 and that of the Inspector General to "administer" the force in terms of s. 4. Reference was made also to s. 5, especially its subsections (2) and (4), and the power of the Inspector General to make rules in terms of s. 7. Learned counsel submitted that these provisions clearly pointed to the relative autonomy of the Inspector General. Various other provisions of the Police Act were also relied upon. Referring yet again to *Prakash Singh and others v. Union of India and others* (2006) 8 SCC 1, learned counsel submitted that the directions given by the Indian Supreme Court envisaged precisely the result sought by the Petitioners in relation to the Police Act. Learned counsel prayed that a clear case had been made out and prayed accordingly.

20. We have heard learned counsel as above, examined the record and considered the very many authorities and case law relied upon. Before we begin, one point may be made. Whatever is said herein below in relation to the enforcement of fundamental rights is only in the context of Article 199 (and especially para (c) of clause (1)) as it relates to the High Court. Nothing is intended to be said about the jurisdiction of the Supreme Court in terms of Article 184(3). What applies to the latter jurisdiction may (or may not) apply also to the High Courts under Article 199. But what can (or cannot) be said for the High Courts under Article 199 is not in and of itself necessarily applicable to the jurisdiction of the Supreme Court in terms of Article 184(3). That is that Court's jurisdiction, the scope and extent of which is to be determined by the Supreme Court itself.

21. We begin by taking up the Petitioners' primary contention, namely that the 2011 Sindh Act is *ultra vires* the Constitution and that it is the 2002 Order, and not the Police Act, that is still the law that applies in this Province. It will be convenient to start by referring to a recent decision of a Division Bench of this Court (of which one of us was a member), *Pakistan International Freight Forwarders v. Province of Sindh and another* 2017 PTD 1 (herein after "*Pakistan International Freight Forwarders*"), where the matter of the division of legislative power in a federal system, and the manner in which laws existing at the time when a new constitutional dispensation comes into effect are to be dealt with, have been considered in some detail. In

the following extracts (pp. 21-24), attention is drawn in particular to the portion emphasized in para 29:

> "28. A constitution that establishes a federal state and regulates both the federating units (whether called Provinces or States) and the federation itself (whether called the Union or the Centre or simply the Federation) invariably makes provision for the distribution of legislative powers between the two tiers of the state. In the sub-continent the archetypal distribution was that made in the Government of India Act, 1935 ("GOIA"), which sought to set up a federal system for British India and served as the first constitution for both the Dominions of Pakistan and India. In drawing up the legislative lists, the Imperial Parliament drew on experience with the constitutions set up for the Dominions of Canada and Australia, and primarily the former, being the British North America Act, 1867 (known, since the "patriation" of the constitution to Canada, as the Constitution Act, 1867). There, sections 91 and 92 enumerate in two separate lists the exclusive legislative powers of the Canadian Parliament and the Provinces respectively. The pronouncements of the Judicial Committee of the Privy Council in relation to the interpretation and application of those lists laid down principles that were adopted by the Board itself and the Federal Court (set up under the GOIA) in respect of the legislative lists contained in the latter. Subsequently, those principles were affirmed, adopted and applied by the Supreme Courts of Pakistan and India in relation to the post-Independence Constitutions.
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> 29. As is well known, the GOIA contained three lists in its Seventh Schedule, the first enumerating legislative powers exclusive to the Federation, the second those exclusive to the Provinces, and the third those matters in respect of which both could make laws (i.e., the concurrent list). Both the Indian Constitution and the Constitution of 1956 used the same device, i.e., had three lists, which took over the distribution as contained in the GOIA, the Indian version being the Seventh Schedule to that Constitution, and the Pakistani version being contained in the Fifth Schedule. The Indian version has undergone several changes in the intervening decades. The Pakistani version, like the Constitution in which it appeared, got swallowed up by the events of October, 1958. The Constitution of 1962 … had only one list, which appeared in the Third Schedule, and enumerated matters exclusive to the Centre…. The Interim Constitution of 1972 revived, in its Fourth Schedule, the model of three legislative lists. Finally, the present Constitution of 1973 had two lists, one exclusive to the Federation (the Federal Legislative List) and the other enumerating powers in respect of which both the Federation and the Provinces could legislate (the Concurrent Legislative List). The latter list has of course been omitted by the 18th Amendment, which also made many changes in the Federal Legislative List. It should also be noted that the GOIA and all the Constitutions made provision for those matters that did not appear in any of the lists. Thus, s. 104 of the GOIA (headed "residual powers of legislation") provided that a matter not enumerated in any of the three lists would be allocated to either the Federation or the Provinces by the Governor-General. Article 248 of the Indian Constitution (also headed "residual powers of legislation") on the other hand provides that any matter not enumerated in any of the three lists, including expressly any power of taxation, would fall in the (exclusive) Union domain. Article 109 of the 1956 Constitution (which bore a similar heading) on the other hand vested legislative powers not enumerated in the Provinces. Article 132 of the 1962 Constitution … provided that the Provinces had the power to make laws in respect of any matter that did not fall in the Third Schedule…. The Interim Constitution reverted to the pattern

of the GOIA; Article 141, with the heading "residual powers of legislation", provided that any powers not enumerated would be allocable by the President to either the Federation or the Provinces. *Finally, in the present Constitution, Article 142, which bears the heading "subject-matter of Federal and Provincial laws" both pre- and post-18th Amendment, provides that any matter not enumerated in the Federal Legislative List or concurrent between the Federation and the Provinces falls exclusively in the provincial domain. We may note that it is somewhat commonplace to refer to the non-enumerated powers of the Provinces under the present Constitution as "residual". In our view, this characterization is misleading and an unnecessary holdover from and echo of the GOIA and the 1956 (and Indian and Interim) Constitutions. In those Constitutions where the exclusive powers of both the Federation and the Provinces were elaborately listed, and there was also a fairly lengthy concurrent list, it was understandable that any remaining powers could be regarded as "residual". However, in a distribution such as that adopted in the present Constitution, where the exclusive legislative powers of the Provinces were never listed and now even more powers have been allocated to them with the omission of the Concurrent List, it is inappropriate to regard those powers merely or only as "residuary". While this point may seem somewhat pedantic, it is nonetheless of importance. In our view, it does tend to color somewhat negatively one's perception of the Provinces' legislative powers if the same are regarded as "residuary", as though the "real" powers vest only in the Federation on account of the Federal Legislative List. Huge swathes of legislative power, many of an essential and important nature, inhere in the Provinces by virtue of not being enumerated. With respect, to describe these powers as "residuary" can hamper a proper understanding of the functioning of the Constitution.*

30. One issue that can arise in a federal state, where powers are distributed along the lines described above, is that a law made by one legislature may be challenged as relating to a matter that is exclusively within the domain of the other, and hence beyond the former's constitutional remit. This problem arose early in the Canadian context, and the Privy Council developed the well known rule of "pith and substance" to address it. If a law, in its pith and substance, was found to be within the legislative competence of the legislature that made it, then it was constitutionally valid. This was so even if the law also incidentally encroached or trenched upon a matter that fell within the exclusive competence of the other. The doctrine of "pith and substance", of fundamental importance to this branch of constitutional law, was adopted and applied in relation to the GOIA both by the Board and the Federal Court and, post-Independence, by the Supreme Courts of Pakistan and India to the various Constitutions referred to above. At the same time, another constitutional rule was developed, using the metaphor of the "field", which too is of importance: the legislative entries in the lists were regarded as "fields" of legislative power that had to be interpreted and applied not narrowly and pedantically but liberally and in the widest sense possible. Of course, and especially where the Constitution expressly enumerated the exclusive powers of both the federal and provincial legislatures, these principles had to be applied in such manner as reconciled and resolved any conflict or differences, since a legislative entry on one list could not be interpreted and applied in such manner as rendered redundant or nugatory an entry on another list. However, in the main these two principles constituted, and continue to constitute, the principal bedrock on which rests the interpretation and application of the legislative entries.

> 31. It is important to keep in mind that a legislative entry (or "field" of legislative power) exclusive to one legislature is precisely that: a legislative area made over to that legislature where it alone, subject to any incidental encroachment permissible under the "pith and substance" rule, can legislate. (Nice questions can arise where there has been a permissible incidental encroachment and the legislature exclusively empowered then also makes a law in relation to the area encroached upon (or even vice versa), and the provisions of the two statutes are in conflict. However, a consideration of such issues will take us too far afield and they must therefore be regarded as left open.) It is for that legislature alone to decide whether and if so to what extent it wishes to legislate in relation to the "field" exclusively allocated to it. Thus, the legislature may let the field lie "fallow" for years, even decades (i.e., not make a law in relation thereto at all); it may "till" (and go on "tilling") only this or that part of the field (i.e., exercise its legislative power only in part); or it may "occupy" the field in its entirety (i.e., enact one or more laws that appear to cover the entire subject matter of the legislative entry). Subject only to any permissible incidental encroachment, the other legislature cannot at all legislate in relation to a legislative field allowed to lie "fallow" or "tilled" only in part. *Where there are concurrent powers on the other hand, and the legislative field may be acted upon by either legislature, the nature of the problem changes. If the one or the other legislature has not exercised its legislative competence or has done so only in part, the other legislature may enact in relation to the portion not acted upon. However, the constitution sets up rules of precedence in this context, with the federal legislature invariably trumping the exercise of provincial legislative power to the extent of any inconsistency between the two statutes. Thus, in effect, the federal legislature has the competence to "clear" the field for its own use to any extent necessary and even, if it so desires, "occupy" the whole of it*."

22. As the portion emphasized in para 29 reproduced above makes clear, the fact that the 1973 Constitution had, on its commencing day, only two legislative lists did not mean that those competences that were previously in the exclusive Provincial List in the GOIA, and the 1956 and the Interim Constitutions (and, for comparative purposes, are still to be found in the Indian Constitution), and had not been reallocated to either the Federal List or the Concurrent List in the Fourth Schedule, ceased to exist and disappeared. Obviously that could not be so. Those legislative competences simply passed to the exclusive Provincial domain in terms of Article 142. Now, as was noted in the order made on 03.04.2017, two legislative competences are relevant for present purposes. One is in relation to "police" and the other in relation to "criminal procedure". To recapitulate, in all the constitutions starting from the GOIA onwards (but excluding, for reasons that need not detain us, the 1962 Constitution) "criminal procedure" has always been concurrent, i.e., a legislative field common to both the Federation and the Provinces. "Police", on the other hand, has always been in the exclusive provincial domain. Where was the Police Act to be placed and allocated in all of these constitutions, especially in the 1973 Constitution? Learned counsel for the Petitioners has contended that in the 1973 Constitution, it fell within

the legislative competence (or field) of "criminal procedure". If so, then the subsequent 2002 Order also came within this legislative field and hence both were to be regarded as federal laws. On the other hand, the learned Advocate General has contended that "police" as a legislative competence continued (and continues) to be in the exclusive provincial domain in the 1973 Constitution, being simply a non-enumerated field within the meaning, and by virtue, of Article 142. The Police Act, and likewise the 2002 Ordinance fell in this domain.

23. While resolving the controversy one must remember that the Police Act was enacted in 1861. Thus, when the GOIA was brought into force (which happened only in 1937) the Police Act had long since been in existence. This requires us to consider the concept of an "existing law", which was to be found not just in the GOIA (where it was referred to as "existing Indian law") but also in all subsequent constitutions (including the one across the border). It will be noted that for all of those constitutions, including of course the 1973 Constitution, the Police Act was an "existing law". In the 1973 Constitution, existing laws are dealt with in Article 268. The need to make provision for "existing laws" whenever a new constitutional dispensation comes into effect was explained by a Full Bench (of which one of us was a member) of this Court in *Dr. Nadeem Rizvi and others v. Federation of Pakistan and others* PLD 2017 Sindh 347. It was observed as follows (pg. pp. 369-70; emphasis supplied):

> "32. Every Constitution establishes its own constitutional dispensation, creating its own legislative and executive bodies, imbuing them with requisite powers and competences and, if the nature of the polity is federal, sharing the same between the two tiers of the State. *One question that needs to be addressed is the fate of laws existing on the commencing day of the new Constitution. In terms of the Constitution itself, such laws would of course not be laws at all, since they were made under a different constitutional dispensation. Yet, to discard the existing laws (a possibility that does exist in theory) would be to invite chaos. So, each Constitution provides for continuity and gives due recognition and force to existing laws*. This was done in the present Constitution by means of Article 268, but this provision is by no means unique. It had its equivalents in the 1962 Constitution (Article 225), the 1956 Constitution (Article 224), the Indian Constitution (Article 372) and even the Government of India Act, 1935 (s. 292)…."

Since existing laws were to be continued, the problem arose as to how they were to be allocated between the Federation and the Provinces. This point was considered in *Pakistan International Freight Forwarders*, where it was observed as follows (at pp. 43-44; emphasis supplied):

> "49. … Article 268(1) provided that all laws existing on that date were to continue in force "until altered, repealed or amended by the appropriate Legislature"…. For present purposes, it suffices to note that what it meant was that each "existing law" stood allocated to one or the other of the legislatures created by the Constitution (i.e., Majlis-e-Shoora (Parliament) on the one hand and the Provincial Assemblies on the other) and till such time as the relevant legislature chose to alter, repeal or amend it, the law continued in force in the form it had on the commencing day. But how was this allocation to be made? How was it to be decided that a particular "existing law" fell to the lot of the Federation or the Provinces? In our view, given the federal structure and scheme of the Constitution, the allocation could be only on the basis of the well known test of "pith and substance". The pith and substance of each "existing law" had to be determined, and here it is important to remember that the legislative source or origin of the statute in any previous constitutional dispensation was irrelevant. In other words, it was irrelevant whether the "existing law" in question would have been regarded as a federal or provincial statute when enacted in terms of whichever constitution was then prevailing. The "existing law" had to be considered simply as a law in its own right, and its pith and substance determined. If the pith and substance was relatable to any entry on the Federal Legislative List or the Concurrent Legislative List (both Lists of course existed on the commencing day) then the "existing law" stood allocated to the Federation. *If the pith and substance was not relatable to any enumerated power then it stood allocated to the Provinces*."

24. Now, in respect of the three-list constitutions, i.e., the GOIA, the 1956 Constitution and the Interim Constitution (and also of course the Indian Constitution), there could be no doubt that the Police Act, as an existing law, fell in its pith and substance within the legislative competence of "Police", which was exclusive to the Provinces. Learned counsel for the Petitioners ultimately, and quite properly, accepted that this was so. The question is what happened on 14.08.1973, the commencing day of the 1973 Constitution? As an existing law, where was the Police Act to be allocated? Having considered the point, in our view, the answer must be that the Police Act stood allocated to the Provinces, as its pith and substance fell (as before) in the legislative competence of "Police", the only difference being that that competence was now a non-enumerated power within the meaning of Article 142. The view propounded by learned counsel for the Petitioners cannot, with respect, be accepted. We repeatedly invited learned counsel to explain what it was in the legislative competence of "criminal procedure" as would require the conclusion that the Police Act, in its pith and substance, came within the same. With respect, no satisfactory answer was forthcoming. It is important to appreciate that, as is clear from para 49 of *Pakistan International Freight Forwarders* (reproduced in the last preceding para) and especially the emphasized last sentence that it is not mandatory that each existing law must necessarily be allocated to an entry (i.e., legislative competence) appearing in one of the Lists. In other words, there is no requirement that the pith and substance of every existing law must perforce be related to an enumerated

competence. It is quite possible that an existing law, in its pith and substance, does not relate to an entry in any of the lists. The consequence is not that the existing law disappears. It is only that it falls to a legislative competence that is not enumerated. Of course, each existing law as on the commencing day of the 1973 Constitution had to be considered on its own footing, i.e., simply as a law existing on that date. Its pith and substance had to be determined, and then it had to be considered whether that came within the scope of any of the legislative fields (i.e., entries) either on the Federal List or the Concurrent List. There is no dispute that on this basis, the Police Act in its pith and substance was not relatable to any entry on the Federal List. Insofar as the Concurrent List was concerned, entry No. 2 stated as follows:

> "Criminal procedure, including all matters included in the Code of Criminal Procedure, on the commencing day."

Nothing, with respect, was shown as would satisfy us that the Police Act, in its pith and substance, came within the scope of this legislative field. In this context, the law relating to criminal procedure actually in force, the Code of Criminal Procedure (or the CrPC, as it is more familiarly known) may be looked at, as a good stand-in for the sort of matters that are covered by this competence. Of course, since the CrPC was enacted in 1898, it was itself an existing law. Even a cursory look at the two laws shows that while there may be some incidental overlap, in its pith and substance, the Police Act is different from the CrPC. (It must be remembered that here we are looking at the two laws as they stood on the commencing day.) The Police Act is concerned with the police force as such, its composition, appointment, discipline, terms and conditions of service and such like matters. For example, s. 12 of the Police Act gives a good flavor of the sort of things that the statute, in its pith and substance, was (and is) concerned with:

> "**12. Power of Inspector General to make rules**. The Inspector-General of Police may, from time to time, subject to the approval of the Provincial Government, frame such orders and rules as he shall deem expedient relative to the organization, classification and distribution of the police force, the places at which the members of the force shall reside, and the particular services to be performed by them; their inspection, the description of arms, accoutrements and other necessaries to be furnished to them ; the collecting and communicating by them of intelligence and information ; and all such other orders and rules relative to the police-force as the Inspector-General, shall, from time to time, deem expedient for preventing abuse or neglect of duty, and for rendering such force efficient in the discharge of its duties."

The preamble to the Police Act may also be referred to: "WHEREAS it is expedient to re-organize the police and to make it a more efficient

instrument for the prevention and detection of crime". Thus, the Police Act created (and, hopefully, honed) the instrument, while the CrPC was concerned with how this instrument was actually put to use in detecting and preventing crime, and also in prosecuting those accused of crimes or proscribed activities. These are, in substance, different matters and it is not correct to regard them, in pith and substance, as one and the same. We may also note here the decision of the Supreme Court referred to above, *Inspector-General of Police Punjab and others v. Mushtaq Ahmed Warraich and others* PLD 1985 SC 159. This decision is considered in detail below. Here, it suffices to note that the decision was concerned with the terms and conditions (relating to seniority) of members of the provincial police service. The relevant provisions were contained in the Police Rules, 1934, framed under the Police Act, both of which were held by the Supreme Court to be existing law within the meaning of Article 268. It was held that these were the provisions applicable to the issue before the Supreme Court. This serves to confirm the point being made here, namely, that that with which the Police Act was concerned with in its pith and substance was materially different from, and lay outside, what can be regarded as the proper domain of "criminal procedure". We are therefore satisfied that the Police Act did not come within the scope of the "criminal procedure" legislative field on the commencing day of the 1973 Constitution.

25. It is now necessary to consider certain submissions made by learned counsel in relation to concurrent legislative competences. These submissions were in support of his contention that the Police Act, in its pith and substance, fell in the concurrent legislative field of "criminal procedure". What learned counsel contended was that a law made by a legislature exercising its power in respect of a concurrent field could be "acted upon", i.e., amended, by any other legislature that could also, concurrently, legislate in respect of that field. Thus, e.g., if the Federation made a law relatable to, say, the "criminal procedure" legislative field, that law could then be amended by the Provincial legislatures. With respect, we are unable to agree. It fails to recognize the important and basic principle, that it is only the legislative field that is concurrent, and not the laws made by the respective legislatures. Each law is distinct and peculiar to the legislature that makes it and it cannot be "acted upon", i.e., amended by the other legislature. (This would apply equally to "existing laws" as allocated to the relevant legislature on the commencing day of the constitutional dispensation under consideration.) The point has been made in para 31 of *Pakistan International Freight Forwarders* (reproduced above) and reference is made to the portion emphasized. The "rules of precedence" referred to in para 31 were to be found in each of the constitutions starting from the GOIA. In the 1973 Constitution the rule is

contained in Article 143. In its essence it provided (there were certain amendments made to this Article consequent upon the omission of the Concurrent List by the 18th Amendment) that if a provision of a federal law (or an existing law, since such laws were allocated to the Federation on the commencing day) and a provision of a provincial law, both laws being made in exercise of, or relatable to, a concurrent legislative competence, were found to be repugnant, then the provincial law would be void to the extent of the repugnancy. Now, there would be no need for such a rule of precedence if the principle were as stated by learned counsel. Any such principle would cause the rule to fail. The reason is obvious. The rule provides that if, e.g., a Provincial Assembly wants to make a law that would be repugnant to an existing federal law then it cannot do so; the provincial law would be void to the extent of the repugnancy. However, in terms of the principle contended for by learned counsel, there would be no problem; all that the Provincial Assembly would have to do is "act upon", i.e., amend the federal law by omitting those provisions of the latter as would conflict with its own law. The "offending" federal provisions having been removed, the provincial law could then exist in its entirety without any fear of any part being found void. Indeed, carried to its logical conclusion, the Provincial Assembly would have the power to even repeal the federal law (perhaps the ultimate manner in which a law can be "acted upon"), and replace it with its own statute. As is obvious, this would completely neuter the rule laid down in Article 143. However, learned counsel for the Petitioners referred to certain constitutional provisions from the GOIA and the Indian Constitution, certain statutory provisions from our own jurisdiction and also to certain case law in support of his submissions. It is necessary now to consider this material. (Before proceeding further and for purposes of completeness, we may note that it may be that there are one or two isolated examples in some of the three-list Constitutions that are an exception to what has been said here (although we come to no firm conclusion on this aspect). However, those examples, even if they exist, would be precisely that: exceptions that would serve only to highlight the basic principle. More importantly, no such exceptions existed in the two-list 1973 Constitution (as it was on the commencing day), nor would they apply to the one-list position that we have today.)

26. Turning first to statutory provisions, learned counsel referred to a federal law, the Federal Laws (Revision and Declaration) Ordinance, 1981 ("1981 Ordinance") which made certain amendments to the Police Act. This, learned counsel contended, demonstrated that the law was in the concurrent domain, where it had to fall within the "criminal procedure" competence. Now, the actual amendments made by the 1981 Ordinance were in ss. 16, 26, 37 of the Police Act. The amendment made in each case was exactly the

same: for "Code of Criminal Procedure, 1882" (the earlier version of the criminal procedure law), the words "Code of Criminal Procedure, 1898" were substituted. The amendments, with respect, were hardly the most resounding example of law making; it was merely legislative spring cleaning of the most trivial sort. (This is so, *inter alia*, because even if the changes had never been made, the sections would be read as referring to the CrPC, by applying well established principles of statutory interpretation.) However, it is of course the principle that matters and needs to be considered. In our view, the example taken by learned counsel is misconceived. The 1981 Ordinance was promulgated while the country was under Gen. Zia-ul-Haque's Martial Law. Now, with respect, Martial Law has (for fairly obvious reasons which need not detain us) a seriously disruptive and distorting effect on constitutional law and principles, and it certainly disturbs the distribution of legislative power between the Federal and Provincial legislatures. An example from a time when the Constitution was in abeyance and the country under Martial Law is no example for how the federal nature and structure of the Constitution is to work in normal circumstances. What is needed is an example from a period when the Constitution was fully operational.

27. Learned counsel then produced what was submitted was one such example, in relation to an amendment made in the CrPC. The amendment was made by the NWFP Assembly (as it was at that time), the law being the Code of Criminal Procedure (North-West Frontier Province) (Amendment) Act, 2008. This Act proceeded to amend s. 144 of the CrPC, the changes being firstly that in the said section for "Zila Nazim", wherever appearing, the words "District Co-ordination Officer" were substituted, and secondly, in subsection (6) for certain words the word "months" was substituted. Again, the amendments were minor but, again, it is the principle that needs to be considered. Now, consideration of a law of the KPK Assembly is, properly speaking, within the writ of the Peshawar High Court. It would therefore not be proper to us to comment directly on this KPK law. However, of one thing there is no doubt in our minds. If the Sindh Assembly were ever to make any law amending the CrPC, it would be struck down as *ultra vires* the Constitution by this Court. Expanding on what has been said earlier in para 25 above, and using the KPK law relied upon as an example, one further point may be made. If learned counsel for the Petitioners were correct in his submission, there could be a real possibility of a legislative tussle between Parliament and the Provincial Assembly concerned. For example, if the KPK law were constitutionally valid, there would be nothing preventing Parliament, were it so minded, from further amending the CrPC to restore s. 144 to its position before the KPK law. And, if Parliament were to do so, then there would be nothing preventing the KPK Assembly from again making a

law “restoring” its amendments to the section. In other words, there could be a wholly unseemly legislative to and fro as each legislature successively tried to assert its position. And, there would be no end to it. It is for precisely this reason that there is the principle set out above: what is concurrent is the legislative field, and not the laws made in relation thereto by the respective legislatures. And, since each legislature can make its own laws, the rule of precedence contained in Article 143 is also a part of the constitutional structure in order to ensure resolution of a situation where the two laws conflict.

28. In the context of the CrPC, learned counsel also referred to a Full Bench decision of the Balochistan High Court reported as *Muhammd Kamran Mullahkhail v. Government of Balochistan and others* PLD 2012 Bal. 57. At issue were certain amendments made to the CrPC by a 2010 Act of the Balochistan Assembly. The amendments made were many, and certainly substantive in nature. Learned counsel referred to para 33 of the judgment (at pg. 93). However, as we read this passage, it goes decisively against the submission made by learned counsel. The amendments made to the CrPC by the provincial legislation were found in their entirety to be repugnant to Article 143 of the Constitution. Indeed, in our view this judgment also serves to show that a provincial law seeking to amend a federal law made in relation to a concurrent legislative field (or an existing law relatable to such a competence) is *ipso facto* void. This is so because an amendment of such nature is by definition “repugnant” to the statute that it seeks to amend. The reason is not difficult to appreciate. Put generally, the effect of an amending Act on the law sought to be amended can be stated as follows. The law to be amended, in its unamended form, says *this*; the amending Act requires it to say *that*. Obviously, the law sought to be amended cannot say both *this* and *that* simultaneously; it has to be one or the other. The amending Act therefore in a sense sets up an incompatibility. Of course, normally this makes no difference. Both the law sought to be amended and the amending Act emanate from or relate to the same legislature and the amending Act, being the last expression of the legislative will, prevails. However, in the context under consideration, the situation would be created in a concurrent field, by an amending provincial Act “acting upon” a federal law. The federal law says *this*; the amending provincial law requires it to say *that*. Can the provincial law do this? The answer must surely be in the negative. It is here, and in this sense, that the incompatibility brought about by the provincial “amendment” *ipso facto* amounts to “repugnancy” within the meaning of Article 143.

29. With regard to the rule of precedence contained in Article 143, which as noted is also to be found in the other constitutions, learned counsel referred

to certain provisions of the GOIA and the Indian Constitution. Reference may also be made to the 1956 Constitution. It will be convenient to set out these provisions in tabular form:

GOIA (as originally enacted)	Indian Constitution	1956 Constitution
107.-(1) If any provision of a Provincial law is repugnant to any provision of a Federal law which the Federal Legislature is competent to enact or to any provision of an existing Indian law with respect to one of the matters enumerated in the Concurrent Legislative List, then, subject to the provisions of this section, the Federal law, whether passed before or after the Provincial law, or, as the case may be, the existing Indian law, shall prevail and the Provincial law shall, to the extent Provincial, of the repugnancy, be void. (2) Where a Provincial law with respect to one of the matters enumerated in the Concurrent Legislative List contains any provision repugnant to the provisions of an earlier Federal law or an existing Indian law with respect to that matter, then, if the Provincial law, having been reserved for the consideration of the Governor-General or for the signification of His Majesty's pleasure, has received the assent of the Governor-General or of His Majesty, the Provincial law shall in that Province prevail, but nevertheless the Federal Legislature may at any time enact further legislation with respect to the same matter:…	**254.** (1) If any provision of a law made by the Legislature of a State is repugnant to any provision of a law made by Parliament which Parliament is competent to enact, or to any provision of an existing law with respect to one of the matters enumerated in the Concurrent List, then, subject to the provisions of clause (2), the law made by Parliament, whether passed before or after the law made by the Legislature of such State, or, as the case may be, the existing law, shall prevail and the law made by the Legislature of the State shall, to the extent of the repugnancy, be void. (2) Where a law made by the Legislature of a State with respect to one of the matters enumerated in the Concurrent List contains any provision repugnant to the provisions of an earlier law made by Parliament or an existing law with respect to that matter, then, the law so made by the Legislature of such State shall, if it has been reserved for the consideration of the President and has received his assent, prevail in that State: Provided that nothing in this clause shall prevent Parliament from enacting at any time any law with respect to the same matter including a law adding to, amending, varying or repealing the law so made by the Legislature of the	**110.** (1) If any provision of an Act of a Provincial legislature is repugnant to any provision of an Act of Parliament, which Parliament is competent to enact, or to any provision of any existing law with respect to any of the matters enumerated in the Concurrent List, then, subject to the provisions of clause (2), the Act of Parliament, whether passed before or after the Act of the Provincial Legislature, or, as the case may be, the existing law, shall prevail and the Act of the Provincial Legislature shall, to the extent of the repugnancy, be void. (2) Where an Act of a Provincial Legislature with respect to any of the matters in the Concurrent List contains any provision repugnant to the provisions of an earlier Act of Parliament or an existing law with respect to that matter, then, if the Act of the Provincial Legislature, having been reserved for the consideration of the President, has received his assent,

	State.	the Act of the Provincial Legislature shall prevail in the Province concerned, but nevertheless Parliament may at any time enact any law with respect to the same matter, amending or repealing the law so made by the Provincial Legislature.

The rule of precedence, as contained in Article 243, was embodied in subsection (1) of s. 107 of the GOIA and clause (1) of Article 110 of the 1956 Constitution, and is contained in clause (1) of Article 254 of the Indian Constitution. What learned counsel focused on was subsection (2) of s. 107, which was *in pari materia* clause (2) of both Article 110 and Article 254. These provisions, according to learned counsel, showed that a provincial law could "act upon" a federal law as made in relation to a legislative competence that was concurrent, i.e., that there could be a concurrence of the laws as well. With respect, the conclusion arrived at by learned counsel does not apply in respect of our Constitution. Firstly, Article 143 does not contain any provision similar to those being relied upon; there was (and is) nothing in the 1973 Constitution of a similar nature. Secondly, the concept behind the provisions relied upon is clear. It allows for provincial legislation to trump federal legislation (i.e., reverses the rule of precedence) but only if such provincial law has been reserved for consideration by the President (or Governor-General, as the case may be) and has been assented to. Furthermore, the power of the federal legislature to enact further legislation with respect to the same matter is preserved, and in the 1956 and Indian Constitutions, the federal legislature was expressly empowered to "act upon" the provincial legislation, by way of amending, varying or even repealing the same. Now, the important (and obvious) point is this: these are express constitutional provisions, which allow for the rule of precedence to be reversed under carefully structured conditions while at all times preserving the basic rule that ultimately it is federal legislation that is to prevail. The corollary is also obvious: absent such express constitutional provisions, the only rule of precedence is the general one, namely as contained in Article 143 of our Constitution, and with which the other Constitutions also open. In other words, any reversal of the rule of precedence must be expressly enacted in the Constitution itself; it cannot be read into the text, as that would nullify an express constitutional provision.

Therefore, rather than supporting the submission made by learned counsel, the provisions relied upon tend to show the exact opposite. Learned counsel also, in this context referred to certain decisions of the Indian Supreme Court. In those cases the provincial (or State) laws amended existing federal laws. However, it appears that in each case the State law was made in terms of Article 254(2) and not otherwise. With respect, no useful purpose will therefore be served in specifically considering the Indian cases relied upon. Learned counsel also referred to *Chief Secretary to the Government of East Pakistan v. Moslem-ud-Din Sikdar and another* PLD 1957 SC 1. With respect, this decision is not relevant for present purposes and, if anything, the particular passage relied upon (at pg. 8) tends to go against the submission made by learned counsel, when the judgment is read as a whole. The case arose under the 1956 Constitution. At issue was the *vires* of certain provincial legislation, which was ultimately found by the Supreme Court to relate to certain entries in the (exclusive) Provincial List. Therefore, no issue of concurrence, as such, arose. A question was mooted, somewhat collaterally, as to whether the provincial law could relate to a certain entry on the Concurrent List. As to that, the Supreme Court observed that no federal law in relation to the entry on the Concurrent List had been shown as would engage the issue of repugnancy. It was in this context only that reference was made to clause (2) of Article 110, when it was observed that if such a federal law had existed, then the provincial law, if made without the required Presidential assent, would be void to the extent of any repugnancy on account of the lack of assent, though not of legislative competence.

30. Learned counsel relied on *Rashid & Company v. Punjab Government and another*1995 CLC 1914, a decision of a learned Single Judge of the Lahore High Court, to support his submission. The facts were that an award was made on stamp paper of Rs. 50/-. An objection was taken that the document was not properly stamped since the stamp duty on awards in the Punjab had been enhanced by a Punjab law amending the Stamp Act, 1899. The defence was that the amendment was invalid, since a provincial law had purported to amend a federal law. The learned Single Judge was pleased to reject this defence. He referred to the Concurrent List, noting that entry No. 8 related to “arbitration”, and entry No. 44 allowed for fees to be levied in respect of matters on the Concurrent List. The amendment was held valid on the basis of the Punjab Assembly’s power to make laws with respect to matters on the Concurrent List. With respect, we are unable to agree that the matter related to the Concurrent List. This was not so at all. The Stamp Act is a fiscal statute. It does not levy a fee; it imposes a tax. In its pith and substance, it levies a tax on documents. In the 1973 Constitution there was no reference at all to stamp duties either in the Federal List or the Concurrent

List. Since the Stamp Act was an existing law, and in its pith and substance related to a tax on documents, that meant that it was relatable to a non-enumerated legislative competence, and hence fell exclusively to the Provinces. Thus (to revert to the cited case) when the Punjab law amended the Stamp Act in relation to the duty payable on awards, it was not the case of a provincial law amending a federal law. It was simply a case of a provincial (existing) law being amended by another provincial law, as to which there could obviously be no cavil. We are, with respect, unable to accept that the cited decision correctly states the law in relation to the Stamp Act (although we agree with the conclusion for completely different reasons), or to agree with learned counsel for the Petitioners that it supports his submission under consideration.

31. Learned counsel also relied on another 1995 decision of the Lahore High Court, this time of a learned Full Bench, reported as *Water and Power Development Authority and others v. Mian Muhammad Riaz and another* PLD 1995 Lah 56. The cited case involved consideration of the Electricity Act, 1910, which was yet another statute that was an "existing law" for all the constitutions starting from the GOIA. However, as we will see, it followed a trajectory rather different from the Police Act. In a nutshell, the question, as presently relevant, was as to how a certain provision of the Electricity Act was to apply to the facts and circumstances before the learned Full Bench: as amended in 1971 by a Punjab law or as subsequently amended by a federal law of 1979? The point in issue was stated thus (pg. 67):

> "At this juncture, the question as to whether section 24(2) as amended by Punjab Ordinance XXIX of 1971 still holds the field and is operative is under discussion. Section 24(2) of the Act as amended by Punjab Ordinance and as amended by Federal Ordinance [of 1979] is in respect of the same matter. Which one of the two is to prevail?"

The learned Full Bench referred to (and reproduced) Article 143. After referring to certain case law, it was held as follows (pg. 68):

> "Applying the criteria and test [of] repugnancy noted above it is apparent that the provisions of subsection (2) of section 24 as contained in the Central Law [of 1979] manifestly supersede the provisions on the same subject contained in subsection (2) as enforced by the Provincial Law [of 1971]. Both these provisions cannot stand together as the one conferred right of appeal whereas the other took away the said right. Both the provisions as occupy the same field the provision of the Central Law have to prevail by virtue of Article 143 of the Constitution."

Learned counsel for the Petitioners submitted that this decision supported his contention that a law made with respect to a legislative

competence in the Concurrent List could be "acted upon" by both the federal and provincial legislatures. Again, with respect, we must disagree.

32. When the Electricity Act is considered as an "existing law" in terms of the GOIA, it fell in the Federal domain, the reason being that "Electricity" as a legislative competence was to be found in the Concurrent List (entry No. 31). Under the 1956 Constitution however, the law became an (exclusive) provincial statute, since the legislative field for "Electricity" was to be found as entry No. 56 of the Provincial List. This position continued under the 1962 Constitution. It will be recalled that that Constitution had only one list, exclusive to the Federation (or Centre, as it was then called). While the Centre could, if certain conditions applied, also make laws in respect of legislative competences not on the Central List, that aspect need not detain us here. Since "Electricity" was not to be found on the Central List, it was a provincial subject and the Electricity Act stood allocated accordingly. Now, it will be recalled that in both the 1956 and the 1962 Constitutions there were only two Provinces, West Pakistan and East Pakistan. However, this position came to an end in 1970, when "One Unit" was dissolved and the areas that had been brought together to constitute West Pakistan were re-constituted as four Provinces. This change did not however affect the distribution of legislative competences. Thus, those matters that were exclusively provincial remained so, the only change being that they were now distributed over more than two Provinces. The Electricity Act therefore became a provincial law in each of the four Provinces that succeeded West Pakistan. Of course, that included the Punjab. It was in such circumstances that the Punjab Ordinance of 1971, with which the cited case was concerned, came to be promulgated. It is crucial to appreciate that it was a purely amending Ordinance. It amended the Electricity Act as applicable in the Punjab in terms as set out therein. As applicable in the other Provinces, the Act remained unaffected. One amendment made was to s. 24(2), which now provided for a right of appeal to the Electric Inspector. In the other Provinces there was no such right since s. 24(2) continued to apply in its unamended form.

33. It is necessary to pause here and consider the nature of a purely amending law, i.e., a statute that does nothing other than make changes in some other law(s). According to well settled principles, the changes made by an amending law are immediately incorporated into the law(s) being amended and become an integral part of the latter. A purely amending law therefore ceases to have any independent existence immediately on enactment. All that remains is, as it were, an empty shell or husk; the substance is incorporated at once into the text of the law(s) being amended. It is for this reason that the General Clauses Acts (both federal and provincial) provide that if an

amending Act is repealed, such repeal does not (unless a contrary intention is expressed) affect the continuance of the amendments made to the law(s) amended by the amending Act. Those amendments, having become part of the very fabric of the other laws, continue to remain in force. With respect, this crucial aspect, relating to the nature of a purely amending law, was not brought to the attention of the learned Full Bench. It proceeded on the basis that the amending Punjab Ordinance of 1971 somehow had, and continued to have, an existence independent of the Electricity Act. With respect, this was not so. As soon as the Punjab Ordinance was promulgated, it had, as it were, shot its bolt. The changes were immediately incorporated into the Electricity Act (as it applied in the Punjab) leaving behind only an empty shell.

34. What then was the position on the commencing day of the 1973 Constitution? Now, entry No. 34 of the Concurrent List related to "Electricity". Therefore, the Electricity Act, as an existing law, stood allocated to the Federation. However, the statute as so allocated had to be, as it were, "re-assembled" from the four parts into which it had been fractured while a provincial law under the previous constitutional dispensations. Had the Electricity Act not undergone any (provincial) amendments during that period, then there would be no problem. The law would simply resume and continue as a federal law. But of course that was not the position. Certain provisions of the Act as applicable in the Punjab had been amended by the Ordinance of 1971. How then was the Electricity Act to apply in the new constitutional dispensation created by the 1973 Constitution? The answer is clear. It applied in three of the Provinces in exactly the same manner, in its unamended form. But, in the Punjab, it applied in terms as amended by the Ordinance of 1971. This position, though unusual, is well within the law making power. It is perfectly open to a legislature to enact a law stipulating that it will apply in a certain way in one portion of the territory but in a different way in another portion. In principle, this aspect of law making is no different from another aspect more commonly applied and therefore better known: that a law will apply only in one portion of the territory and not the other. This was a fairly common situation in pre-Independence days and is not unheard of after 1947. So, to recapitulate: the Punjab Ordinance of 1971 had embedded the amendments made by it into the Electricity Act as applicable in that Province and as an integral part thereof. When the Act was "re-assembled" as an existing law in the federal domain under the 1973 Constitution, it took effect with those amendments intact although of course they applied only in the Punjab. In other words, while the Electricity Act became one Act applicable over the entire country on and from the commencing day, it applied in the Punjab in a somewhat different manner in respect of some of its provisions.

35. This now brings us to the federal law, the Ordinance of 1979. This was also a purely amending Ordinance. It therefore had the same effect as any other amending law, as described above. But, this Ordinance applied to the whole of Pakistan (see s. 1(2)). One of the amendments made by it was a substitution of s. 24 in its entirety. What was the effect of this? The substitution changed s. 24 as applicable all over Pakistan, i.e., in each of the four Provinces. As presently relevant, this meant that the "version" applicable in the Punjab (i.e., as amended by the Ordinance of 1971) also stood substituted. Thus, the amendments of 1979 restored uniformity to the Electricity Act over the entire country. The somewhat unusual position that had up till then prevailed in the Punjab came to an end. What is crucial to appreciate for present purposes is that the changes made by the 1979 Ordinance were simply a case of one federal law amending another federal (existing) law. The 1971 Punjab Ordinance was not a law that had somehow continued to exist independently in 1979, and that had therefore to be considered in apposition to the 1979 Ordinance and be regarded as having been overridden by it. Its changes had long before, and prior to the commencing day of the 1973 Constitution, become incorporated and embedded in the Electricity Act itself (as it applied in the Punjab). Thus, while we agree with the conclusion arrived at by the learned Full Bench, that after the amendments made by the 1979 Ordinance (as presently relevant) the Electricity Act applied in exactly the same manner in the whole of the country including the Punjab, we reach this result by a rather different route. With respect, we are unable to agree with the reasoning that found favor with the learned Full Bench. Learned counsel drew attention to the fact that the decision of the learned Full Bench was cited, it appears with approval, by the Supreme Court in *Shamas Textile Mills Ltd. and others v. Province of Punjab and others* 1999 SCMR 1477. We have carefully considered the passage where the decision is referred to (para 19 at pg. 1493) in the overall context of the judgment. In our respectful view, the citation does not preclude the reasoning that we have set out in some detail in the paras herein above.

36. Learned counsel also referred to the Canadian Constitution. Now, that Constitution (to the interpretation of which, as noted above, so much of our constitutional law is indebted) has two legislative lists. One is exclusive to the Federation (s. 91) and the other exclusive to the Provinces (s. 92). Learned counsel submitted that entry (or "head", as it is called in Canadian constitutional law) No. 27 of s. 91 specifically allocates "procedure in criminal matters" to the federal domain. Head No. 14 of s. 92 on the other hand allocates the "administration of justice" to the Provinces. Learned counsel also referred to some decisions of the Supreme Court of Canada. It is

not necessary to consider these in detail since the entire matter is explained with clarity in what is without any doubt the leading Canadian treatise, Mr. Peter Hogg's *Constitutional Law of Canada* (5th ed. (loose leaf), 2014). The learned author has set out the position as follows (para 19.5(a); internal citations omitted; emphasis supplied):

> "Provincial power over the administration of justice in the province (s.92(14)) is not confined to civil justice. It includes criminal justice as well, despite the allocation to the federal Parliament of power over criminal law and procedure (s.91(27)). In *Di Iorio v. Warden of Montreal Jail* (1976) [[1978] 1 SCR 152] … [s]even of the nine judges explicitly made the point that the administration of justice in the province included criminal justice. Laskin C.J. (with de Grandpre J.) dissented….
>
> … Apart from Laskin C.J.'s surprising dissent in *Di Iorio*, it never seems to have been doubted that provincial authority over the administration of justice in the province includes the provision of police services. *It has always been accepted that each province has the power to establish a police force, and this includes the power to "appoint, control and discipline" the members of the force.* A provincial police force would have the power to police not only provincial penal laws enacted under s. 92(5), but also federal criminal laws."

Thus, it would seem that even under the Canadian scheme, a law such as the Police Act would be regarded as provincial legislation.

37. We now come to the decision so strongly relied upon by the learned Advocate General, *Inspector-General of Police Punjab and others v. Mushtaq Ahmed Warraich and others* PLD 1985 SC 159 ("*Mushtaq Ahmed Warraich*"). The matter came before the Supreme Court by way of conjoined appeals from a decision of the Punjab Service Tribunal. At issue was a question of seniority. The respondents, who had succeeded in the Tribunal, were members of the provincial police service. They contended that their seniority had to be determined according to the relevant provision of the Police Rules, 1934, which had been framed under the Police Act. The appellants on the other hand contended that the matter of seniority was governed by the Punjab Civil Servants Act, 1974 ("1974 Punjab Act") and the relevant rules framed under this Act. Leave to appeal had been granted to consider the following question (pg. 166):

> "Leave to appeal was granted to consider whether in the matter of confirmation/seniority/promotion and other related issues, the Punjab Police Rules, 1934, read with the Police Act, 1861, would be applicable to the respondents or the Punjab Civil Servants Act, 1974, and they Punjab Civil Servants (Appointment and Conditions of Service) Rules, 1974, by reason of their general application to the civil servants as a whole."

During the course of its judgment, the Supreme Court traced in some detail the history of the Police Act since its enactment and how the terms and conditions of members of a provincial police service were regulated in terms thereof. The provisions of the 1973 Constitution relating to service of the Federation and the Provinces were also considered. It was held that the Police Act and the Police Rules, 1934 were existing law within the meaning of Article 268. One question that was raised before the Court was whether the Police Act had been impliedly repealed by the 1974 Punjab Act. After considering certain treatises on the interpretation of statutes, it was held as follows (pg. 174):

> "In this view of the matter, the principle laid down in these treatises as to the application of the special law is in no doubt, that is, as all of them are unanimous to state that there is no implied repeal of the earlier special Act by the later general Act without particular intention of implied repeal merely by the use of general words. As held earlier there is not an express repeal of the Police Act and the rules by the Provincial Assembly while enacting Civil Servants Act, 1974, nor there is any constitutional exclusion of the Police Act and the rules from their application to the officers of the subordinate ranks of the police force. The substance of the provisions of the Civil Servants Act which are of general application also do not give any indication to the contrary by the force of the general words used."

The Court then considered certain case law, and held as under (pg. 177):

> "From the above discussion it is clear that the special law will prevail over the later law of general application. Therefore, rule 12.2 of the Punjab Police Rules, 1934, will provide the criterion for determining the seniority of the subordinate ranks of the Police force as from the dates of their confirmation and not from the dates of continuous appointment in the grade as laid down in rule 8(1)(b) of the Punjab Civil Servants (Appointment and Conditions of Service) Rules, 1974 read with section 7(2) of the Punjab Civil Servants Act, 1974."

38. While the learned Advocate General read out several passages from the judgment during the course of his submissions, the key passage for present purposes appears towards the end (which of course was also relied upon), when it was observed as follows (pg. 178):

> "I have not been able to assess the efficacy of Article 143 and Article 148 of the Constitution which were taken into consideration by the Tribunal for determining that the Police Act and the rules framed thereunder prevailed over the Punjab Civil Servants Act on the criterion that they were Central Acts, which is not correct as the Police Act is now a Provincial Act by reason of the subject—Police, being within the legislative competence of the Provincial Legislature. The alternate argument dealt with in paragraph 11 of the Tribunal's order is also of no efficacy once it is held that the special law prevails over the later law of general application."

We had sought the assistance of learned counsel for the Petitioners in particular with reference to this passage, since it appeared to confirm that the "Police" legislative competence was in the exclusive provincial domain under the 1973 Constitution. In response, learned counsel submitted that the passage was only in the nature of what he described as a "tentative observation", which had no binding effect and in particular was not binding in terms of Article 189 of the Constitution. In support of this submission learned counsel relied on certain cases, which must now be considered.

39. Starting with the Pakistani case law, and proceeding chronologically, learned counsel referred to *Afaquz Zubair v. Muhammad Idrees* PLD 1978 Kar 984 (DB), where a learned Division Bench of this Court had to consider a 1964 decision of the Supreme Court that was cited before it. It was observed (at pg. 988) that "the Supreme Court did not express final opinion on the precise question which is at issue in this appeal". It was further observed (*ibid*) that on "a careful reading of the observation" relied upon it was clear that the opinion expressed by the Supreme Court was "explicitly tentative and the true interpretation" of the relevant statutory provision "left open". With respect, this decision does not support learned counsel's submission. When the passage here under consideration is examined, it can hardly be said that the Supreme Court has not expressed a final opinion on the precise question, namely as to whether the "Police" legislative competence is in the exclusive provincial domain. Nor, with respect, can it be said that the Supreme Court has left this question open. Reference was made to *Neimat Ali Goraya and others v. Jaffar Abbas, Inspector/Sergeant Traffic and others* 1996 SCMR 826, which also involved a seniority dispute in the provincial police service. The earlier judgment in *Mushtaq Ahmed Warraich* was relied upon. However, with respect, this judgment does not shed any light on the precise question now under consideration and, equally importantly, contains no observation as would negate the passage at pg. 178 of the earlier decision. Learned counsel also relied on a Division Bench judgment of this Court reported as *Khairpur Textile Mills Ltd. andn others v. National Bank of Pakistan and another* 2003 CLD 326, where the earlier decision of 1978 was cited. Although this decision contains a valuable discussion on precedents and Article 189, with respect it does not contain anything that would assist in resolving the point presently under consideration. Reference was also made to *Muhammad Tariq Badr v. National Bank of Pakistan and others* 2013 SCMR 314, at para 11 (pg. 325). With respect, the passage relied upon does not appear to be germane to the question presently under consideration.

40. Learned counsel also relied on the (UK) Court of Appeal decision in *Lancaster Motor Co. (London), Ltd. v. Bremith Ltd.* [1941] 2 All ER 11 ("*Lancaster Motor Co.*"), to submit that the observation made by the Supreme Court in the passage under consideration had been made *sub silentio* and therefore did not have any binding effect. The Court of Appeal was there considering an earlier (1936) decision of the same Court. It was held that that decision was not binding (at pg. 13, *per* the Master of the Rolls):

> "It was a judgment delivered without argument and delivered without reference to the crucial words of the rule, and without citation of any authority. As I say, I cannot help thinking that the court was induced to say what it did about it because counsel had not really desired to argue the point on either side. With all respect again I can look upon those observations only as observations which cannot be treated as a binding authority upon this court."

Learned counsel relied in particular on the first sentence in the above extract. He also referred to a decision of the Indian Supreme Court, *State of UP and another v. Synthetics and Chemicals Ltd. and another* (1991) 4 SCC 139. Reference was made to the concurring judgment of Mr. Justice R.M. Sahai, at paras 39-41 (pp. 162-3), where, *inter alia*, the learned Judge referred to the Court of Appeal decision.

41. Now, as is well known, the leading judgment in English law that established that an earlier decision of the Court of Appeal was binding on a later Court (subject to certain exceptions) is *Young v. Bristol Aeroplane Company Ltd.* [1944] EWCA Civ 1, [1944] 2 All ER 293. The principles established are well known and need not be rehearsed here. What is pertinent for present purposes is that the decision in *Lancaster Motor Co.* was also considered. It was dealt with as follows (pg. 300; emphasis supplied):

> "It remains to consider the quite recent case of *Lancaster Motor Co. (London) v. Bremith, Ltd.* [1941] 1 KB 675, in which a court consisting of the present Master of the Rolls, Clauson L.J. and Goddard L.J., declined to follow an earlier decision of a court consisting of Slesser L.J. and Romer L.J [*Gerard v Worth of Paris Ltd* [1936] 2 All ER 905.] *This was clearly a case where the earlier decision was given per incuriam*. It depended on the true meaning *(which in the later decision was regarded as clear beyond argument)* of a rule of the Supreme Court to which the court was apparently not referred and which it obviously had not in mind. The Rules of the Supreme Court have statutory force and the court is bound to give effect to them as to a statute. Where the court has construed a statute or a rule having the force of a statute its decision stands on the same footing as any other decision on a question of law, but *where the court is satisfied that an earlier decision was given in ignorance of the terms of a statute or a rule having the force of a statute the position is very different. It cannot, in our opinion, be right to say that in such a case the court is entitled to disregard the statutory provision and is bound to follow a decision of its own given when that provision was not*

> *present to its mind. Cases of this description are examples of decisions given per incuriam*….

As is clear from this passage, the Court of Appeal did not regard *Lancaster Motor Co.* as having held that in the 1936 decision the point had passed *sub silentio*. Rather, it was that that decision was *per incuriam*, and that was what *Lancaster Motor Co.* had "clearly" decided. With respect, we are unable to see how the observation of the Supreme Court in the passage from *Mushtaq Ahmed Warraich* under consideration can be regarded as *per incuriam*. Insofar as the decision of the Indian Supreme Court is concerned, the question there was as to whether an earlier decision (given in 1990) was binding. It was observed in the concurring judgment that the earlier order was made without any preceding discussion and no reason or rationale could be found in the same. It was in this context that *Lancaster Motor Co.* was cited. Obviously, on this conclusion regarding the earlier decision, it could hardly be held that it had binding effect. But we are unable to agree that this can be said about the passage from *Mushtaq Ahmed Warraich*. The Supreme Court was considering a point that had been taken in the decision appealed against. The Service Tribunal had considered whether Articles 143 and 148 were attracted on the basis that the Police Act was a federal law. This was negated for the reason that "Police" was a provincial subject. When this observation is read in the light of the judgment as a whole, it cannot, with respect, be said that it was made without any preceding discussion or was without reason or rationale. To cite but one example, in the passage from pg. 174 extracted above, the Court considered whether the 1974 Punjab Act had impliedly repealed the Police Act and, as noted, gave an answer in the negative. Now, if the Police Act were a federal law, then it could not of course be repealed at all by a provincial law (either expressly or impliedly). In other words, the Supreme Court obviously had to regard both the laws to be provincial laws for the question of implied repeal even to arise for consideration. As will be appreciated the Court's analysis on this point relates directly to what was observed in the passage at pg. 178. Therefore, we are unable to subscribe to the view that has been expressed by learned counsel for the Petitioners regarding this passage. The passage at pg. 178 adds to what was said earlier in the judgment. In our respectful view it confirms our conclusion that "Police" was a legislative competence that fell in the exclusive provincial domain in the 1973 Constitution from the commencing day, and that is where it is to be found since then. The Police Act, as an existing law, in its pith and substance was relatable to this non-enumerated legislative competence.

42. This brings us to the 2002 Order, which was promulgated during Gen. Musharraf's Martial Law. It applied to the whole of Pakistan, and repealed

the Police Act. At the restoration of the Constitution, it was placed in the Sixth Schedule to the Constitution. This Schedule, which was omitted by the 18th Amendment, contained laws that could not be altered, repealed or amended without the previous sanction of the President. The restoration of the Constitution also led to the insertion of Article 270-AA, which sought to protect the laws that had been made during the Martial Law period. This Article was itself substituted by the 18th Amendment. Learned counsel relied on this Article to submit that the 2002 Order was protected in terms thereof, and being a federal law (as it had been promulgated by the Chief Executive (i.e., Gen. Musharraf)) could not be repealed by provincial legislation, i.e., the 2011 Sindh Act. With respect, we are unable to agree. Firstly, as to the promulgation of the 2002 Order during the Martial Law period. We have already expressed our views as to laws enacted or promulgated during periods of Martial Law, when the Constitution is in abeyance (see para 26 above). Therefore nothing turns, for present purposes, on the fact that Gen. Musharraf promulgated the 2002 Order. What is to be seen is how this law was to be treated once the Constitution was fully restored. This brings us to Article 270-AA. Now, clause (2) of this Article, broadly speaking (and at the risk of some overgeneralization), provides that the laws made during the Martial Law period were to continue in force "until altered, repealed or amended by the competent authority". An explanation to this clause provides that "competent authority" means, in relation *inter alia* to Chief Executive's Orders, "the appropriate Legislature". The 2002 Order was the Chief Executive's Order No. 22 of 2002. Therefore, it was saved by Article 270-AA, remained a law upon the full restoration of the Constitution and continued in force until altered, repealed or amended by the appropriate Legislature. So, the question becomes as to what was the appropriate legislature for the 2002 Order, which leads to the general question, what would be the appropriate legislatures for the various laws saved and protected by Article 270-AA? The Article itself gives no indication in this regard. It does not, e.g., provide that the federal legislature is the appropriate legislature for Chief Executive's Orders or anything of this sort. In our view, the nature of the problem can be analogized to that posed in relation to existing laws under Article 268, which has been described and explained above. It is not merely coincidental that that Article also uses exactly the same term, "appropriate Legislature". Therefore, if a question arises as to what is the appropriate legislature in relation to a law protected by Article 270-AA, the question that needs to be asked is simply this: what is the pith and substance of the law? If it relates to an entry in the Federal Legislative List, then it is exclusive to the Federation. If it relates to any of the three competences still concurrent after the 18th Amendment, i.e., "criminal law", "criminal procedure" and "evidence" then it is still a federal law. However, if none of

these apply then the law is in the exclusive provincial domain, as its pith and substance would relate to a non-enumerated legislative competence. When the 2002 Order is considered in this perspective, it is at once obvious that it passed to the exclusive provincial domain. In its pith and substance (reinforced by the very obvious fact that it was the successor to the Police Act) it was relatable to the "Police" legislative competence. We have already concluded that that lay (and has always lain) in the exclusive provincial domain. Therefore, regardless of its antecedents and in particular the fact that Gen. Musharraf promulgated it as Chief Executive, the 2002 Order without any doubt lay in the exclusive provincial domain upon the full restoration of the Constitution.

43. On the conclusion just reached, it is obvious that it therefore lay with the Provincial Assemblies to alter, repeal or amend the 2002 Order if they chose to do so. The fetter imposed on this power by the Sixth Schedule had also disappeared with its omission by the 18th Amendment. Therefore, in our view, it was fully within the legislative competence of the Sindh Assembly to repeal the 2002 Order and replace with it with such legislation relating to the police as it considered appropriate (subject of course, to any other applicable constitutional limitations). It follows that the 2011 Sindh Act, whereby the 2002 Order was repealed and the Police Act revived in the manner as set out therein, was within the legislative power of the Sindh Assembly. The 2011 Sindh Act was *intra vires* the Constitution and the law currently in force in this Province is the Police Act as so revived and restored, and not the 2002 Order. The principal submission made for the Petitioners cannot therefore, with respect, be accepted.

44. Since the Petitioners' primary case has failed, it is necessary to consider the alternative submissions that have been put forward, of which there were essentially two. The first submission in this regard was the relief sought in terms of clause (f) of the prayer clause in CP D-131/2017, reproduced in para 10 above. Learned counsel sought the formation of a law reform commission, which would undertake a comprehensive exercise (including wide ranging consultations) in order to reform the Police Act. This, learned counsel submitted, was necessary for improving and revamping policing in the Province and thus lead to the proper enforcement of fundamental rights. The Police Act was simply not up to the job. Enacted in the immediate aftermath of the events of 1857 and the takeover of the governance of India by the British Crown from the East India Company, the statute was ill suited to the conditions in, and requirements of, 21st century Pakistan. This was so notwithstanding the fact that as revived and restored by the 2011 Sindh Act it included the amendments made in 2001. Learned

counsel submitted that the constitution of such a commission was well within the powers of the High Court in terms of Article 199(1)(c) of the Constitution. It was submitted that a number of commissions had been formed from time to time to undertake a wide variety of tasks, and learned counsel referred to the relevant cases, which included the following (listed chronologically):

(a) *Syed Mansoor Ali Shah and others v. Government of Punjab and others* PLD 2007 Lah 403, where environmental issues relating to pollution were raised. The Lahore High Court formed a commission that was assigned the task of submitting a report "on feasible and practical solutions and measures for monitoring, controlling and improving the vehicular air pollution in the city of Lahore". The commission made many detailed recommendations, which were considered by the Court with the assistance of the parties. Ultimately certain detailed directions were issued, which were however, so it would seem, to be implemented within the existing framework of the applicable law.

(b) *Pakistan Bar Council v. Federal Government and others* PLD 2007 SC 394, which was a petition under Article 184(3) and raised issues relating to legal education. The Pakistan Bar Council was directed to frame rules relating thereto (within the existing framework) and, *inter alia*, a committee was formed "to examine the existing courses of law prescribed by the universities". The committee was to submit its report within six months to the Pakistan Law Commission.

(c) *In re: Cutting of Trees for Canal Widening Project, Lahore* 2011 SCMR 1743, which was a case under Article 184(3). It involved consideration of the environmental effects and impact of the widening of the road that runs (in Lahore) along both sides of the Lahore/BRB Canal. The decision is recognized as an important milestone in the development of environmental laws. Here, the aspect with which we are concerned is that a mediator was nominated with the consent of the parties, and he was empowered to associate any other person, expert or official with him. The mediator convened a committee, which made many recommendations. These were considered in detail by the Court and ultimately a series of directions were given, again it would appear within the framework of existing law.

(d) *Fazal Hussain v. Chief Commissioner, Islamabad* PLD 2013 Isb. 18, where the Islamabad High Court was concerned with the

functioning of the Capital Development Authority (CDA). A commission was constituted (within the framework of existing law) to consider in detail the functioning of the CDA.

(e) *Dr. Akmal Saleemi and others v. Federal Government and others* 2013 SCMR 103, where a commission was set up to report on the "Lal Masjid/Jamia Hafsa" incident.

(f) *Syed Nazeer Agha and another v. Government of Balochistan and others* PLD 2014 Bal. 86, where the Balochistan High Court gave detailed directions in relation to education in the Province.

(g) *In re: Application by Abdul Hakeem Khoso, Advocate* PLD 2014 SC 350 where, in exercise of the jurisdiction under Article 184(3) detailed directions were given in relation to the disposal and utilization of certain funds that had to be made available by oil and gas development companies to the provincial authorities for the welfare of the people of the regions where they were in production or active. The provincial and local governments were directed to review existing guidelines and/or frame new guidelines in line with the directions of the Supreme Court.

(i) *Suo Moto Case in re: Minorities* PLD 2014 SC 699, where the Supreme Court gave a seminal judgment in relation to the security of the minorities and their rights, especially their right to practice and profess their faiths. Learned counsel referred, for present purposes, to the detailed directions given by the Court which included the setting up of a taskforce by the Federal Government.

(j) *Akhtar Hussain Langove v. Inspector General of Police, Balochistan and others* 2015 YLR 58, where the Balochistan High Court took up the matter of sports facilities with specific reference to a particular sports complex. Detailed directions were given with regard to the running, protection (from encroachment) and utilization of the sports complex and in relation to the board that had been constituted to run and manage it.

(k) *Azhar Iqbal (Azhar Hussain) v. Abid Hussain* 2015 SCMR 1795, where the Supreme Court gave detailed directions to counter the menace of human (and especially women) trafficking. Commissions were constituted in relation to the KPK and Balochistan Provinces, and detailed terms of reference established.

(l) *Shahab Usto v. Government of Sindh and others* 2017 SCMR 732, which related to the deplorable water conditions in the Province of Sindh. The Supreme Court, *inter alia*, appointed a Judge of this Court to act as a one-man commission, with a wide ranging task and fully empowered in relation thereto, to report on and take action in respect of the water conditions in this Province.

(m) In addition to the foregoing, learned counsel also referred to the seminal (indeed, foundational) judgment of the Supreme Court in *Shehla Zia and others v. WAPDA* PLD 1994 SC 693, where NESPAK was appointed as commissioner to report on whether there were health and other hazards associated with the high tension power transmission lines laid by WAPDA and used as part of the national grid. Reference was also made to *Marvi Memon v. Federation of Pakistan* PLD 2011 SC 854, where the Supreme Court considered the effects of the devastating floods of 2010. The Court had constituted a commission with wide ranging terms of reference, and in the cited order considered in detail the report presented to it. The findings, concluding remarks and recommendations of the commission were endorsed. Reference was also made to *Watan Party and others v. Federation of Pakistan* PLD 2012 SC 292, more commonly known as the "Memogate" case.

45. As the foregoing resume shows, and as learned counsel quite properly conceded, in none of the cited cases was a law reform commission established as would make recommendations to the Court, which would then be incorporated in one or more directions by the Court for appropriate legislation to be enacted. In other words, the directions issued in the various cases were essentially of an executive nature and, occasionally, at most required the executive authority to enact subordinate legislation (i.e., frame rules or regulations or issue guidelines etc. under existing laws). No directions for enacting specific primary legislation were given. Here, we may note that for the relief sought by the Petitioners to be meaningful, and for the efforts and recommendations of the law reform commission (if formed) to bear fruit, it would not suffice for this Court to give general guidelines to the respondents (and in particular the Provincial Government) to make amendments to the Police Act. The directions finally given by the Court would have to incorporate the recommendations, if accepted, virtually as though it were a proposed Bill. Since admittedly case law from our jurisdiction was lacking in this regard, learned counsel placed strong reliance on the decision of the Indian Supreme Court referred to above, *Prakash Singh and others v. Union of India and others* (2006) 8 SCC 1. The Court was there

concerned with the Police Act as in force in India and this, according to learned counsel, obviously added to the relevance and persuasiveness of the judgment. It will be remembered that the Indian Constitution has adopted the three-list approach to the division of legislative powers, and "Police" as a legislative competence is to be found in the exclusive State (i.e., provincial) List. We will consider this judgment (and precisely what it was that the Indian Supreme Court did) in detail later.

46. Having considered the matter, we are, with respect, not persuaded that the High Court, in exercise of its jurisdiction under Article 199(1)(c) can (or at any rate ought to in the present circumstances) issue directions that are essentially legislative in nature and require the Provincial Government to enact appropriate legislation in respect of any matter. This would be so regardless of whether the directions are couched in general terms or reflect (at any level of detail) the recommendations of a law reform commission set up by the Court, along the lines as prayed for by the Petitioners (or anything similar thereto). This conclusion requires consideration of a Full Bench decision of this Court that was also relied upon by learned counsel, but before we do so, one other point may be made. This is in relation to the Law and Justice Commission of Pakistan ("Commission"). This is a body set up under an eponymously titled Ordinance of 1979. It comprises, *inter alia*, of the Chief Justice of Pakistan, the Chief Justice of the Federal Shariat Court and the Chief Justices of the High Courts. Now, the functions of the Commission are set out in s. 6, which as presently relevant is as follows: "The Commission shall study and keep under review on a continuing systematic basis the statutes and other laws with a view to making recommendations to the Federal Government and the Provincial Governments for the improvement, modernization and reform thereof and, in particular, for- (i) making or bringing the laws into accord with the changing needs of the society, consistent with the ideology of Pakistan and the concept of Islamic social justice;…." Thus, the law reform exercise that the Petitioners seek this Court to have undertaken is within the remit of the Commission. In our view, it would in the circumstances be inappropriate for such an exercise to be conducted here. There already exists a body, comprising of the highest levels of the Judiciary, which has been entrusted with the task of law reform. Of course, the Province on its own can continue with the committee that, as noted above, the learned Advocate General informed us has been constituted for the purposes of reforming the law relating to the police and suchlike matters.

47. The Full Bench decision relied upon was *Sharaf Faridi and others v. Federation of Islamic Republic of Pakistan and another* PLD 1989 Kar 404.

The case involved consideration of clause (3) of Article 175, which provides as follows: "The Judiciary shall be separated progressively from the Executive within fourteen years from the commencing day". (The clause had originally provided for separation within five years; it was altered to fourteen in 1985.) The focus of the Article was essentially the criminal justice system. The CrPC (which we have already met above) provided also for the establishment of criminal courts and their jurisdiction and powers. The CrPC however was always much more than simply the law governing criminal procedure. It was also one of the principal statutes for the governance of British India (and thereafter the independent states of Pakistan and India). The maintenance of law and order was regulated by the magistratical system set up under the CrPC. The linchpin of the system was the District Magistrate (who was the Deputy Commissioner) and below him the Sub-Divisional Magistrate (or SDM, who was the Assistant Commissioner). Therefore, there was a near-complete fusion of the Judiciary and the Executive in the criminal justice system. This was required to be abolished in terms of Article 175(3) but by 1989 nothing had come about. This led to the filing of a petition in this Court, which was disposed off by the learned Full Bench by means of the cited decision. Now, the separation clearly required changes to be made to the CrPC, which entailed legislation. This raised the question as to whether any such directions could be given to the Federal Government by the Court. (It will be recalled that the CrPC was an existing law that, relating to a concurrent entry, fell in the federal domain on the commencing day.) To this question the learned Chief Justice (Ajmal Mian, CJ), who wrote the principal judgment, gave the following answer, which was relied upon by learned counsel (pg. 442):

> "I am inclined to hold that there is a marked distinction between a direction to the Legislature to legislate and a direction to the Executive to initiate the legislative measures to bring the existing laws in conformity with the provisions of the Constitution. The latter in my view is permissible."

48. We have considered the point. With respect, in our view if we were to form a law reform commission as sought and then, if its recommendations were accepted, direct the Provincial Government to introduce the necessary legislation in the Provincial Assembly regarding the Police Act, that would fall in the former and not the latter of the two categories identified by the learned Chief Justice. This is so because Article 175(3) identified a specific issue, which was directed to be resolved in a certain manner by the Constitution itself. Both the end and the means were thus known, and in a sense particularized. However, that would not be the case if we were to give directions to amend the Police Act in the manner sought. The exercise to be

conducted by any law reform commission would necessarily have to be open-ended and its terms of reference comprehensive, and the recommendations, to be effectively implemented, may have be regarded as a "package deal" and legislated as such. This could entail massive changes being made to the Police Act. It could even virtually amount to a replacement of the statute. This, in our view, lies beyond the jurisdiction of the High Court under Article 199 and outside the scope of para (c) of clause (1) in particular. It follows that the first alternate submission made by learned counsel for the Petitioners cannot, with respect, be accepted.

49. We turn therefore to consider the second alternate submission. This submission can be regarded as comprising of two interconnected strands. One related to the interpretation and application of the Police Act. Learned counsel submitted that the relevant sections thereof, of which quite a few were referred to, had to be so interpreted and applied as led to the effective enforcement of fundamental rights in the Province. The second strand related to a specific problem (according to learned counsel) with the functioning of the police force, namely frequent transfers and changes in postings. Referring to material on record, learned counsel submitted that at virtually all levels police officers were posted and transferred with bewildering rapidity, and the frequent turnovers resulted in a force rendered incapable of properly discharging its functions. In this context, reference was made in particular to the post of Inspector General. Learned counsel submitted that while this post had a fixed tenure, very few officers appointed as Inspector General had had a term commensurate with that tenure. The attempt to remove and replace the present incumbent (Respondent No. 7) was thus not out of the ordinary, but that was the whole problem. Learned counsel emphasized that the Petitioners were not concerned with this or that officer serving as the Inspector General or indeed at any level in the police force. Rather, their concern was with the system-wide problem of frequent transfers and postings at the behest of the Government of the day, which had reduced the police force essentially to an instrument answering only to political masters, to the manifest detriment of the public at large and amounting to a denial to them of the fundamental rights enshrined in the Constitution. (As already noted, all of this was strenuously contested by the learned Advocate General.)

50. Insofar as the term of the Inspector General was concerned, learned counsel referred to the Sindh Government Rules of Business, 1986 ("1986 Rules"). Rule 2 contains various definitions, and learned counsel referred to that of "attached department", which means a department listed in Schedule I and also that of "head of attached department", which refers to the officer shown in the corresponding column of the said Schedule as heading the

department. Referring to entry No. 14, learned counsel submitted that it showed the Police Department as an attached department and the Inspector General as the head of the said department. Learned counsel then referred to Rule 35, of which the second and third sub-rules are relevant (the first having in any case been omitted), and are as follows:

> "(ii) The posts specified in column 2 of Schedule IX shall be tenure posts and the normal tenure for the incumbents of such posts shall, subject to the provisions of sub-rule (iii) be as shown against each in column 3 thereof.
>
> (iii) The Chief Minister may extend the tenure of any post specified in Schedule IX."

Referring to Schedule IX learned counsel relied on entry No. 2 thereof, which provides that the normal period of tenure of heads of attached departments is to be five years. Reading all of these provisions together learned counsel submitted that the tenure of the Inspector General was five years as provided by the 1986 Rules and that the holder for the time being of this office could not be removed before that term expired. Thus, the present incumbent, the Respondent No. 7, could not be removed from the post in the manner as being attempted by the Respondents. (We may note that in the 2002 Order, the term for the corresponding post, the Provincial Police Officer, was three years, but of course we have already concluded that that statute does not apply in this Province.)

51. Learned counsel referred to a well known decision of the Supreme Court, *Syed Mahmood Akhtar Naqvi and others v. Federation of Pakistan and others* PLD 2013 SC 195 (commonly known as the "*Anita Turab* case", and herein after so referred), with regard the matter of the tenure and transfer/ posting of civil servants, relying in particular on the following passages (emphasis in original):

> "12. This Court … has repeatedly observed that "*functionaries of the State are fiduciaries of the people and ultimately responsible to the people who are their pay masters*." [Syed Yousaf Raza Gillani v. Assistant Registrar, (PLD 2012 SC 466) affirming Muhammad Yasin v. Federation of Pakistan]. Most recently, in the case relating to dual nationality of Parliamentarian, we have reiterated that "*all State authority is in the nature of a 'sacred trust' and its bearers should therefore be seen as fiduciaries*" (Mehmood Akhtar Naqvi v. Federation of Pakistan, Const. P. 5/2012). One of the implications of this concept, highlighted in the case-law considered below, is that the matter of tenure, appointment, posting, transfer and promotion of civil servants cannot be dealt with in an arbitrary manner; it can only be sustained when it is in accordance with the law. Moreover, the use of the words 'in the public interest' in such matters are not fatuous or pointless, but emphasise the fiduciary nature of orders relating to tenure, posting etc. Thus a proposed decision which deviates from the

accepted or rule-based norm without proper justification, can be tested on the touchstone of a manifest public interest." [pg. 205]

"13. Tenure, appointment, promotion and posting/transfer are of utmost importance in the civil service. If these are made on merit in accordance with definite rules, instructions etc., the same will rightly be considered and treated as part of the terms and conditions of service of a civil servant. If, however, rules and instructions are deviated from and as a result merit is discouraged on account of favoritism, sifarish or considerations other than merit, it should be evident the civil service will not remain independent or efficient. It is necessary once again, to hark back to the considerations set out in the speech of Quaid-i-Azam and the eternal wisdom reflected in the Epistle of Hazrat Ali, may Allah be pleased with him, cited at the start of this opinion. It is also relevant to note that the principles of good governance are already envisioned in the Constitution and are also encoded in statutes such as the Civil Servants Act, 1973, the Civil Servants (Appointment, Promotion and Transfer) Rules, 1973 and other rules made under the aforesaid Act and in regulations and instructions given in the Civil Establishment Code (Estacode). It is, however, apparent from precedent and civil service matters coming up before Service Tribunals and this Court that problems/difficulties arise for civil servants when the rules of good governance so encoded are breached and the reason for such breach appears to be abuse of discretion. We are aware that matters relating to tenure etc. cannot be put in a strait-jacket and that there is to be an element of flexibility. A balance between the competing pulls of discretion and rule based decision making is a fine one where perception of fairness and even handed treatment is of utmost importance. It is for this reason that transparency in decisions relating to tenure etc. are required to be entrenched and cemented to assure the quality, effectiveness and morale of the civil service. Since executive decisions generally are subject to judicial review, the assurance of transparency is itself likely to eliminate decision making based on considerations other than merit. We have referred to accepted principles and rules above and may now advert to certain relevant rulings earlier rendered by this Court." [pp. 205-6]

"22. The principles of law enunciated hereinabove can be summarized as under:--

(i) Appointments, Removals and Promotions: Appointments, removals and promotions must be made in accordance with the law and the rules made thereunder; where no such law or rule exists and the matter has been left to discretion, such discretion must be exercised in a structured, transparent and reasonable manner and in the public interest.

(ii) Tenure, posting and transfer: When the ordinary tenure for a posting has been specified in the law or rules made thereunder, such tenure must be respected and cannot be varied, except for compelling reasons, which should be recorded in writing and are judicially reviewable.

(iii) Illegal orders: Civil servants owe their first and foremost allegiance to the law and the Constitution. They are not bound to obey orders from superiors which are illegal or are not in accordance with accepted practices and rule based norms; instead, in such situations, they must record their opinion and, if necessary, dissent.

(iv) OSD: Officers should not be posted as OSD except for compelling reasons, which must be recorded in writing and are judicially

> reviewable. If at all an officer is to be posted as OSD, such posting should be for the minimum period possible and if there is a disciplinary inquiry going on against him, such inquiry must be completed at the earliest." [pg. 210]

Learned counsel also placed reliance on the following observation in *Haider Ali and another v. DPO Chakwal and others* 2015 SCMR 1724, which specifically applied to the police (pg. 1737): "No police officer is to be transferred in breach of the principles laid out by this Court in the *Anita Turab case* (PLD 2013 SC 195)". It was submitted that the attempt to remove the Respondent No. 7 from the post of Inspector General, and the repeated and frequent transfers of officers at all levels throughout the police force, was a gross and blatant violation of the clear cut principles enunciated by the Supreme Court.

52. As regards the jurisdiction of the High Court to give suitable directions for the enforcement of fundamental rights, learned counsel drew attention to Article 199(1)(c), which provides as follows:

> "(1) Subject to the Constitution, a High Court may, if it is satisfied that no other adequate remedy is provided by law— …
>
> (c) on the application of any aggrieved person, make an order giving such directions to any person or authority, including any Government exercising any power or performing any function in, or in relation to, any territory within the jurisdiction of that Court as may be appropriate for the enforcement of any of the Fundamental Rights conferred by Chapter 1 of Part II."

With regard to the scope of the foregoing provision, learned counsel relied in particular on *Human Rights Commission of Pakistan and others v. Government of Pakistan and others* PLD 2009 SC 507 (herein after the "*HRCP* case"). The matter came to the Supreme Court by way of appeals against a decision of this Court. Leave had been granted to consider the "exact scope of the Bonded Labour System (Abolition) Act, 1992 and its effect on the provisions of the Sindh Tenancy Act, 1950 and other laws" (pg. 515). The relevant facts were set out as follows (pp. 515-6):

> "3. There does not appear to be any serious dispute as to the factual matrix of the controversy. The factum of indebtedness to land owners was not seriously questioned by the detenues who only alleged that they or their family members were forced to work on the lands against their will till debts were liquidated. At the same time, as is evident from para. 32 of the impugned judgment the landlord also did not seriously dispute the existence of any restraint upon the movement of the detenues They only alleged that the Habeas Corpus jurisdiction of the Court was being invoked for exploiting the landlords who, on account of the refusal of the tenant to work of moving away from the land, were required to hire other labour at heavy cost at the time of

harvesting the crop unless their tenants unreasonable demands were yielded to. It was further contended that the Sindh Tenancy Act, 1950 contained inbuilt provisions for resolving all disputes and the invocation of the jurisdiction of the High Court under Article 199 of the Constitution or section 491, Cr. P.C. amounted to abuse of the process of law."

This Court had dismissed the petition under Article 199. The Supreme Court, while allowing the appeals, explained the true scope of this Article in the context before it, emphasizing para (c) of clause (1) in the following terms (pp. 527-8):

"30. There also seems to be force in the contention that the Honourable High Court was not justified in dismissing petitioners under Article 199 of the Constitution where enforcement of fundamental rights guaranteed inter alia under Articles 11, 14 and 15 was sought. In the above context it needs to be kept in view that apart from the jurisdiction vested in the High Courts by virtue of clauses (a) and (b) of Article 199(1) a special jurisdiction is conferred by clause (c) (which a High Court shares with the original jurisdiction of this Court under Article 184(3)) in the following words:-- [the provision already set out above was then reproduced]

31. It needs to be explained that in matters pertaining to fundamental rights the jurisdiction of the High Court is wider than that available under clauses (a) and (b). In this context the true meaning of the expression "enforcement of fundamental rights" needs to be ascertained. For doing so a comparison of the provisions pertaining to fundamental rights in the Constitutions of US and Pakistan may be appropriate. For instance, the 13th Amendment to the US Constitution forbids slavery and forced labour but provides that the Congress has the power to enforce this Article through appropriate legislation. Similarly in the 14th Amendment section-1 requires that any State shall not deprive any person of life, liberty or property or equal protection of laws. Section-5 however requires that the Congress shall have the power to enforce by appropriate legislation. These provisions show that while State-action violating or ignoring provisions of the Constitution may be struck down by Courts exercising normal judicial power, the power to positively enforce the rights through appropriate sanctions could be exercised by the Congress alone. It is for this reason that the US Supreme Court was able to give effect to the 14th Amendment in respect of racial segregation in the absence of legislation, only through extending the concept of State-action to State-aided school etc.

32. On the other hand, in the scheme of our Constitution, the power to enforce fundamental rights has been conferred upon the superior Courts through Articles 199(1) (c) and 184(3). It may be seen that under Article 4 everybody has to be treated in accordance with the law and under Article-8, a law inconsistent with fundamental rights is to be treated as void. Therefore, even in the absence of clause (c) any action by a person performing functions in connection with the affairs of the Federation, a province or local authority, inconsistent with fundamental rights is to be declared without lawful authority under the clause (a) of Article 199.

33. The reach of clause (c) however is wider. It not merely enables a Court to declare an action of a State functionary inconsistent with fundamental rights to be unlawful but also enables the Courts to

> practically enforce such rights by issuing appropriate directives as is evident from its language. Accordingly, this Court after having earlier held that the fundamental rights guaranteed by Article-17 included the right of a political party to contest elections as a collective entity was able to issue mandatory directives in the case of Benazir Bhutto v. Federation of Pakistan reported in (PLD 1989 SC 66) to the election authorities to amend the election rules to provide for the same under its powers to enforce fundamental rights under Article-184(3) of the Constitution. Moreover, such directives could be issued to any person including the Government. In the case of Peoples Union for Democratic Rights v. Union of India reported in (AIR 1982 SC 1473) it was held that though some of the fundamental rights imposed negative obligation on the part of the State not to encroach upon individual's liberty etc., there were others, which were positively enforceable against the whole world. We are therefore clearly of the view that the High Court has plenary powers to positively enforce fundamental rights not merely against public authorities but even private parties. Accordingly direction for positive enforcement of fundamental rights against private parties could only be given by the High Court in respect of rights guaranteed, inter alia, by Articles 11, 22 etc. which might in most cases require enforcement against such parties."

Learned counsel relied in addition on the conclusions summarized in para 35 (pp. 529-30) of the judgment. Reference was also made to a decision of a Division Bench (of which one of us was a member) of this Court, *Captain Salim Bilal v. Pakistan International Airlines Corporation and others* 2013 PLC (CS) 1212, where it was observed as follows (pg. 1218):

> "…the jurisdiction of the High Court to enforce fundamental rights has been expressly conferred by Article 199(1)(c). The jurisprudence with regard to the substantive application of this provision is, in our respectful view, essentially the same as that developed by the Supreme Court in relation to its original jurisdiction under Article 184(3). This is because of the express linkage between the two constitutional provisions. We note that in recent years in particular, the Supreme Court has taken an expansive and broad view of the jurisdiction to enforce fundamental rights."

53. The foregoing was, in its essentials, the basis on which the second alternate submission was made. Before turning to consider the submission, it will be appropriate to take up certain objections that were raised by the learned Advocate General in relation to both of its strands, since if those objections are sustained then of course the submission may fail (either in whole or in part).

54. The learned Advocate General submitted that the Petitioners could not seek enforcement of fundamental rights as their case was hit by Article 8(3)(a) of the Constitution. It was emphasized that this provision had its antecedents in the earlier constitutional dispensations. Clauses (1) and (2) of Article 8 declare respectively that any law inconsistent with fundamental rights shall be void to the extent of the inconsistency, and bar the State from making any

such law. The provision here relied upon provides that Article 8 shall not apply to any law "relating to members of the Armed Forces, or of the police or of such other forces as are charged with the maintenance of public order, for the purpose of ensuring the proper discharge of their duties or the maintenance of discipline among them". The learned Advocate General submitted that the Police Act was precisely such a law and hence it could not be considered or applied on the touchstone of fundamental rights. With respect, this submission is misconceived. The scope and purpose of Article 8(3)(a), as presently relevant, is clear. Firstly, it applies only to a person who is a member of (i) the Armed Forces, (ii) the police or (iii) a force charged with the maintenance of public order. Secondly, it applies to such person only in his capacity as member of any of the three types of forces. Thirdly, it operates in respect of a law, as that law applies to such person and has the purpose of ensuring the proper discharge of duty or the maintenance of discipline. In other words, the purpose of Article 8(3)(a) is limited. It is only to preclude a member of any of the three types of forces from claiming that a law that applies to him as such member, and operates in relation to the proper discharge of his duties or the maintenance of discipline, violates his fundamental rights. However, the Petitioners do not seek to enforce the fundamental rights of any member of the police force in respect of the Police Act insofar as it relates to the proper discharge of duties or the maintenance of discipline. Rather, they seek to enforce their own fundamental rights as ordinary citizens of Pakistan who reside in this Province. As will be appreciated, that is an altogether different proposition. The Petitioners are certainly aggrieved by what they claim to be and perceive as a failure of policing in the Province. But their grievance is not against (or on account or for the benefit of) this or that particular member of the police or even a class or category or part of the force. Rather, they claim that the police force as a whole acts, or fails to act, in such manner that they, the Petitioners, are denied their fundamental rights. The Petitioners are not concerned with whether the members of the police force, in their capacity as such, are or are not entitled to fundamental rights, and if at all entitled to what extent and in what manner. With respect, the submission by the learned Advocate General therefore goes against both the scope and purpose of Article 8(3)(a) as here relevant and cannot be accepted.

55. The learned Advocate General also took the objection that the petitions were nothing but a camouflaged attempt to secure the present incumbent, the Respondent No. 7, in the post of Inspector General. It was submitted that the posting and transfer of police officers was part of their terms and conditions of service and hence the petitions were hit by the bar contained in Article 212 of the Constitution. The learned Advocate General also submitted, relying on various cases, that the 1986 Rules, being provincial in nature, did not apply to

the Respondent No. 7 as he was a federal (PSP) officer on deputation to the Province. Reliance was placed on the Police Service of Pakistan (Composition, Cadre and Seniority) Rules, 1985 ("1985 PSP Rules") framed under the (federal) Civil Servants Act, 1973. A certain extract from the ESTACODE, which is a compendium of the laws, rules, regulations, etc. that relate to the terms and conditions of federal civil servants was also cited. It was submitted that since the Respondent No. 7 was only on deputation he had no vested right in remaining in service in the Province or holding any particular post. It was further submitted that the said Respondent could not himself come before the High Court as any petition filed by him would be hit by Article 212. The Petitioners could not place themselves in any better position and, in effect, do indirectly that what could not be done directly by the said Respondent. The learned Advocate General also submitted that the Police Act itself did not provide for the tenure of the Inspector General and it was only to be found in the 1986 Rules. Without, for obvious reasons, questioning the *vires* of the provisions in the 1986 Rules relating to the tenure of the head of an attached department, the learned Advocate General submitted that matters relating to the terms and conditions of service could not be provided for in the Rules of Business. He therefore appeared to suggest that there could be no fixed term for the post of Inspector General, regardless of what was contained in the 1986 Rules. The learned Advocate General also submitted that a federal civil servant on deputation like the Respondent No. 7 was not subject to the provincial civil service laws, including provisions relating to disciplinary matters. The only thing that lay in the Province's power was to surrender to the Federation any person whose service the Province did not wish to retain. It was this power that could be, and had been, exercised in respect of the Respondent No. 7.

56. We have carefully considered the objection taken by the learned Advocate General in its various aspects but, with respect, conclude that the same cannot be sustained. Insofar as the position of a person on deputation from the Federation to a Province (or even *vice versa*) is concerned, reliance was placed on *National Assembly Secretariat v. Manzoor Ahmed and others* 2015 SCMR 253, *S. Masood Abbas Rizvi v. Federation of Pakistan and others* 2014 SCMR 799 and *Dr. Shafi-ur-Rehman Afridi v. CDA and others* 2010 SCMR 378. We may note that the last two decisions were leave refusing orders. The jurisprudence of the Supreme Court categorically holds that leave refusing orders do not enunciate the law. A very recent example is the judgment in C.A. 622/2008 and connected appeals dated 26.04.2017 (*Squibb Pakistan (Pvt) Ltd. v. Commissioner of Income Tax* etc.), where it was clearly observed that a leave refusing order is not the law enunciated by the Supreme Court (para 5). Therefore while the leave refusing orders relied upon by the

learned Advocate General are worthy of the highest respect, they will, in our respectful submission, have to be considered as a matter of law in the manner as established by Supreme Court jurisprudence. In the first cited case, the first respondent was a civil servant in the federal Ministry of Education, who was deputed to the National Assembly Secretariat. He had two terms of deputation there and at the expiry of the second term was being repatriated to the Federal Government. He challenged his repatriation and claimed regularization of service in the National Assembly Secretariat. This challenge was mounted both by way of a complaint before the Wafaqi Mohtasib (still pending at the time of the Supreme Court decision) and a petition under Article 199 in the Islamabad High Court. The High Court was pleased to allow the petition, which led to the appeal before the Supreme Court. It was held that the jurisdiction of the High Court was barred by reason of Article 212. As regards the matter of deputation and repatriation, it was observed that a person on deputation had no right to "get himself absorbed nor the borrowing department, in law, could be compelled to retain the services of such an employee on permanent basis by absorption" (pg. 257). As will be appreciated, the facts of the case, and the issue before the Supreme Court, were materially different from the one before us in these petitions. This decision does not therefore, with respect, advance the learned Advocate General's objection.

57. In the second cited case (leave refusing order), the civil servant was deputed from the Federal Government (where he was in the Audit and Accounts Service) to the Export Processing Zone Authority (EPZA). The EPZA is of course also in the federal domain. Shortly after the deputation, he was repatriated by the Federal Government to his parent department. The civil servant challenged his repatriation by means of a petition under Article 199 in this Court, which was dismissed. He sought leave to appeal to the Supreme Court. In refusing leave, the Supreme Court relied on the third decision cited above and observed that a person on deputation had no vested right to continue for the stipulated period. In the third cited decision (leave refusing order), the federal civil servant (of the Office Management Group) was deputed to the Capital Development Authority (CDA) for a period of three years. However, well before the end of the stipulated period the deputation was terminated by the CDA and he was returned to his parent department. The civil servant filed a petition under Article 199 in the Islamabad High Court, which was dismissed. In refusing leave to appeal, the Supreme Court observed that a person on deputation "by no stretch of imagination and in absence of any specific provision of law can ask to serve the total period of deputation and he can be repatriated being a deputationist by the Competent Authority in the interest of exigency of service as and when so desired and such order of

the competent authority cannot be challenged" (pg. 382). It was also observed that the period of deputation "can at best be equated to that of an expression of maximum period which can be curtailed or extended by the Competent Authority and no legal or vested rights whatsoever are available to a deputationist to serve his entire period of deputation in the borrowing department" (*ibid*).

58. Before considering the two leave refusing orders relied upon, it will be appropriate to focus on the actual point in issue and under consideration here. What the Petitioners submit is that there is a fixed term, of five years, given in the 1986 Rules for the post of Inspector General, as head of an attached department and that this term must and ought to be adhered to. Now, obviously the 1986 Rules, framed as they are under Article 139 of the Constitution, have the force of law. Rule 35(ii) provides for the term. Sub-rule (iii) expressly allows the Chief Minister to extend the tenure of any post covered by sub-rule (ii). It does not allow the Chief Minister to curtail, reduce or otherwise dispense with the stipulated term. As the legal maxim has it, *expressio unius exclusio alterius*: to express one thing is to exclude another. The question in our view is this: can the Provincial (or for that matter the Federal) Government essentially disregard, and effectively discard, its own Rules of Business and simply do as it pleases? Whom do such Rules bind, if not, first and foremost, the Government itself? As has been noted above, learned counsel for the Petitioners took pains to establish from the record that the term of office has been largely (barring perhaps a few exceptions) honored only in the breach. This position has not been denied or seriously contested by the learned Advocate General, nor could it. The record speaks for itself. This is the Petitioners' grievance: here is a binding rule that has the force of law, it is not and has not been adhered to, and the failure to do so has seriously affected policing in the Province, with detrimental effects on the enforcement of fundamental rights. Now, when this position, which requires decision in these petitions, is compared with the two leave refusing orders relied upon, the differences are at once obvious. Thus, in the third cited decision, the period of deputation was stipulated by the parent department, but curtailed by the borrowing department. Here there is no question of any period of deputation being set by the "parent department" (i.e., the Federal Government). Rather, what is required is simply adherence to a rule of law that applies to the "borrowing department" (i.e., the Provincial Government) in terms of the Province's law itself. Is that law not binding on the Provincial Government? In our view, the questions raised in this para answer themselves. Of course, the Provincial Government is bound by its own Rules of Business. Of course, they have the status of law and take effect accordingly. Of course, the Provincial Government cannot disregard a provision in the said Rules. In our

view, the situation in the third cited decision was completely different from that at hand. Insofar as the second cited decision is concerned, the situation was again materially different. In the present case, there is no demand or requirement by the "parent department" (i.e., the Federal Government) that their officer be returned. Indeed, it seems to be quite the opposite. As we understood him, the learned Additional Attorney General's stance was that the Federal Government had no objection if the Respondent No. 7 continued to serve as the Inspector General. (This aspect, as to how PSP officers are to serve in the Provinces, is a matter to which we will have to return.) Thus, the second cited decision was also materially different and, with respect, the reliance placed on it was misconceived.

59. The learned Advocate General relied on *Muhammad Bachal Memon and others v. Syed Tanveer Hussain Shah and others* 2015 PLC (CS) 767, a decision of the Supreme Court, to support his contention that Rules of Business could not affect or relate to a matter that was properly to be regarded as part of the terms and conditions of service of a civil servant. At issue was a question of seniority, which arose in relation to certain provincial civil servants of Sindh. The opposing parties were two sets of engineers. One set was originally in the Communications and Works (C&W) Department. The other set was originally in the Directorate of Education Engineering Works, which was part of the Education Department. Each set of engineers, being in different departments had their own seniority lists. Sometime in 2002, there was reorganization in the Provincial Government. A new department, the Works and Services Department, was created in terms of the 1986 Rules (by amendments being made therein, which are set out in the judgment at pp. 773-775), and the C&W Department and the Directorate were brought together in this department. Thus, the two sets of engineers became part of one Department. The question arose as to how seniority was to be determined in terms and for purposes of the new Department. A combined seniority list was created for engineers. This led to two sets of proceedings, one in the Provincial Service Tribunal and the other in this Court, in terms of a petition under Article 199. This Court took the view that on account of the merger there had to be one and not two lists. The Tribunal held that the combined seniority list was invalid. These separate decisions led to appeals to the Supreme Court, which were disposed off by the cited decision. The Supreme Court identified the issue before it as follows (pg. 772):

> "10. The core issue before us is as to whether the merger, creation or reorganization of the administrative departments of the Sindh Government has a bearing on the service structure, seniority, promotions and other terms of service of civil servants employed in the service of the Province…."

After an exhaustive consideration of the Constitutional and statutory provisions, including Articles 139 and 240, it was observed as under:

> "22. As has been noted above, the terms and conditions of service including seniority inter se between civil servants can only be altered/effected by means of an Act of the Provincial Assembly as has been expressly stipulated in Article 240 of the Constitution or by rules made within the rule making power given in section 26 of the Sindh Civil Servants Act, 1973…." [pg. 780]

> "25. … As has been considered above by us, the rules of business cannot be made in respect of service matters. Even if an attempt is made by the Provincial Government to provide for a change or merger of cadres this would have to be done in accordance with the provisions of section 8 of the Sindh Civil Servants Act, 1973, which relates to seniority or through legislation. The issue before us is clearly an issue of seniority…. The issue of seniority is quintessentially a matter of service laws. It is for this reason that the provincial legislature has enacted the Sindh Civil Servants Act and has laid down the law as to seniority in terms of section 8 of the said statute. Section 8 ibid has been supplemented by the prescribed rules…." [pg. 781]

60. In our view, with respect, this decision does not assist the objection advanced by the learned Advocate General. Firstly, the facts of the case, as is clear, were quite distinct and separate from the circumstances at hand. Secondly, to apply the cited decision to the issue before us requires a conclusion that the tenure laid down in the 1986 Rules for heads of attached departments is part of the terms and conditions of service of provincial civil servants. With respect, we are unable to agree. The terms and conditions of service relate to and determine, e.g., the eligibility of a civil servant to be appointed to a post. But whether that post has associated with it any statutory period of tenure or a fixed term is not part of the terms and conditions of service of any particular civil servant. It certainly relates to the exigencies of service but that is not the same thing. The terms and conditions of service operate individually, in relation to a given civil servant (although of course he may "share" them with any number of other civil servants similarly placed). Any statutory term or tenure that relates to a post is associated with the post and not the individual civil servant who may for the time being, or from time to time, hold the post. The terms and conditions of service of a civil servant (as a general rule) travel with him wherever he may be posted. That is not the case for a statutory term or tenure that relates specifically to a post. That remains fixed with the post, regardless of who occupies it. In the cited decision, the question was whether the changes made to the 1986 Rules affected a matter (seniority) that related individually to each of the engineers who were brought together from the C&W Department and the Directorate into the new Department. The fact that in terms of the 1986 Rules, there is associated a statutory term with the posts of heads of attached departments does not relate individually to any given civil servant; it only relates to the

post and only for that reason to the incumbent for the time being, and from time to time, of that post. The cited decision does not therefore, with respect, advance the objection taken by the learned Advocate General. The reference to the 1985 PSP Rules and the ESTACODE are also not, with respect, germane to the issue immediately at hand (though we will shortly revert to the former) and therefore need not be considered in any detail.

61. In our view, it is simply not acceptable that the Provincial Government has repeatedly disregarded, disobeyed and indeed flouted the specific statutory requirement in relation to the term or tenure of the Inspector General. The 1986 Rules are binding and must be adhered to. The Rules do not exist or apply at the Government's pleasure. They are not optional, to be applied or dispensed with at will. If the Rules specify a term of office, then that applies as stated and must be adhered to. That is certainly the case with the post of Inspector General. Of course, there may be exceptional circumstances that may allow for the tenure to be curtailed, and primarily that would mean only the "compelling reasons" as made permissible by para 22(ii) of the *Anita Turab* case. Even there the reasons have to be recorded in writing and are judicially reviewable. However, at all times it must be kept in mind that exceptional circumstances and compelling reasons, if any, are precisely that: exceptional and compelling. The norm must be strict adherence to the term as provided. The history of repeated, abrupt and swift turnover in officers who hold the post of Inspector General, without any apparent cause or reason (and certainly none that is stated) is therefore something that must come to an end. It is contrary to law. It is a flagrant breach of the law. It cannot be countenanced or allowed to continue.

62. This brings us to the next point, which is the explanation given by the learned Advocate General as to why the Provincial Government sought to remove the Respondent No. 7 and replace him with another officer. It was submitted that the said Respondent had been appointed as Inspector General on OPS (i.e., "own pay and scale") basis. The notification, dated 12.03.2016, issued by the Federal Government appointing the Respondent No. 7 stated as follows:

> "Mr. Allah Dino Khawaja, a BS-21 Officer of Police Service of Pakistan, presently posted under Government of Sindh, is transferred and posted as Provincial Police Officer (PPO), Government of Sindh, in his own pay and scale, with immediate effect and until further orders."

(The reference to PPO must of course be read as meaning the Inspector General.) The learned Advocate General, relying on a judgment of the Supreme Court reported as *Province of Sindh and others v. Ghulam Fareed*

and others 2015 PLC (CS) 151 submitted that the Supreme Court had deprecated appointing any officer to a post on OPS basis and had allowed for such an appointment only as a stopgap arrangement and for a short period. Learned counsel for the Petitioners was quick to point out that the Respondent No. 7 had been so appointed with the full consent and indeed (according to him) at the behest of the Provincial Government. It was further submitted that on many occasions in the past, officers had been appointed to the post on such basis, and even on "additional" or "acting" charge basis. All of this was not denied by the learned Advocate General, nor could it as the record speaks for itself. However, it was submitted that subsequent to his appointment it was seen fit to replace the Respondent No. 7 with some other, more eligible, officer, i.e., one who did not have to be appointed on OPS or some such basis. Thus, what the Provincial Government took issue with was not with the appointment of the Respondent No. 7 on OPS basis but rather with his continuation in office on such basis. It was for this reason that (as noted in our order dated 03.04.2017, reproduced above) the Provincial Government communicated with the Federal Government on 31.03.2017 whereby the services of Respondent No.7 were surrendered to the latter and the names of three other officers were recommended for appointment as Inspector General in his place. Furthermore, it was contended, the notification dated 01.04.2017 whereby the Respondent No.7 was relieved with immediate effect (and directed to report to the Establishment Division of the Federal Government) and Mr. Sardar Abdul Majeed was directed to hold charge of the post in addition to his own duties was but in continuation of this objective. It will be recalled that in our aforementioned order of 03.04.2017, we had referred to the decision of the Supreme Court in *Mustafa Impex and others v. Government of Pakistan and others* PLD 2016 SC 808 (herein after, "the *Mustafa Impex* case") and pointed out that the power of the Provincial Government to appoint the Inspector General, being statutory in nature, could only be exercised by the Provincial Cabinet. The learned Advocate General also referred to the meeting of the Provincial Cabinet held on 05.04.2017, where the removal of the Respondent No. 7 and his replacement was considered. Referring to the minutes of the meeting (agenda item No. 6) the learned Advocate General submitted that the Cabinet was given a detailed presentation by himself and the Chief Secretary. The learned Advocate General submitted that the *Anita Turab* case, and in particular para 22(ii) thereof, were expressly referred to. The minutes record that the Cabinet was informed as follows: "Since, the posting of Mr. A.D. Khawaja was on OPS basis, the Anita Turab case is not attracted". In light of the presentation given to it the Cabinet approved the actions earlier taken, on 31.03.2017 and 01.04.2017.

63. Before considering the foregoing submissions, and in particular the judgment of the Supreme Court relied upon (i.e., *Province of Sindh and others v. Ghulam Fareed and others* 2015 PLC (CS) 151), it will be convenient to refer to the manner in which PSP officers are to be appointed to various posts in the provincial police forces. As already noted, the PSP is an All-Pakistan Service. For present purposes, it suffices to note that in terms of Article 240 of the Constitution the service of Pakistan can be of three types: a service of the Federation, a service of a Province and an All-Pakistan Service. An All-Pakistan service is a federal service, but as set out in the explanation to the Article, it is "a service common to the Federation and the Provinces". One such service is the PSP and another is the DMG (the District Management Group, the lineal descendant of the famous (or notorious, according to taste) Indian Civil Service (ICS) through the Civil Service of Pakistan (CSP)). The hallmark of an All-Pakistan Service is that civil servants belonging to such a service alternate between the Federation and the Provinces throughout their careers. It may be that one officer of an All-Pakistan Service remains mainly in federal service, and another may spend almost his entire career in the provinces, and even in one province. But the essence is that it is a common service, with officers moving from one level of the State to the other (or "laterally" among the Provinces) and back again. Furthermore, the topmost echelons of the provincial service are inevitably reserved for officers belonging to such a service. This is clearly provided, in the case of the PSP, in the Schedule to the 1985 PSP Rules. The post of Inspector General (or equivalent) is reserved for an officer of the PSP throughout Pakistan. Other posts reserved for the PSP are as given in the Schedule for each Province, and deal with great specificity with posts at all levels of the provincial police hierarchy.

64. It is important to keep in mind that in the case of an All-Pakistan Service, the officer is federal but the post is provincial. How is the appointment to be secured? While the Petitioners have focused in particular on the post of Inspector General, the question of course relates also more generally to provincial appointments of PSP officers. It will be recalled that the learned Additional Attorney General had submitted (and learned counsel for the Petitioners had adopted the stance so taken) that the matter was regulated by an agreement dated 19.09.1993 ("Agreement") arrived at a meeting held at Islamabad, which was attended by the Prime Minister, the Governors and Chief Ministers and the Chief Secretaries of the Provinces. At the presentation given on 05.04.2017 to the Sindh Cabinet, alluded to above, it was stated by the Chief Secretary that up to the 2002 Order, the matter was so regulated. While the Additional Attorney General submitted that that continued to be the situation even up to the present, the learned Advocate

General strongly contested that this was the case. It was not denied by the learned Advocate General that the matter was regulated in terms of certain practices and conventions as developed between the Federation and the Provinces, which however, were not spelt out with any particularity. But it was strongly denied that the Agreement continued to provide the operative framework. Nonetheless, it will be convenient to look at the Agreement to understand how the system operated at least in the past (since this much is common ground). If nothing else, this may provide clues as to how the arrangement works in the present even if the stance taken by the learned Advocate General is accepted. As regards the Inspector General, the Agreement provided that the PSP officer was to be appointed to the post by the Federal Government in "consultation" with the Provincial Government concerned and "due consideration" would be given to the "recommendations" of the latter. For such purpose, the Federal Government was to communicate a name, or a "panel of names", to the Provincial Government, "preferably in writing". If the Provincial Government did not respond within 15 days, then the Federal Government could proceed to appoint the named officer (or, as the case may be, an officer from the panel) and this would be "deemed" to have the approval of the Provincial Government. In cases of urgency, the Federal Government could convey its proposal by "telephone/fax or any other means" and hold "necessary consultation" with the Provincial Government. If no response was received within a week, then the Federal Government could "pass appropriate orders". The procedure outlined above was to also apply generally to all PSP officers being posted in the Provinces at different levels, but with the modification that in those cases the period allowed to the Provincial Government to respond was extended to one month. The Agreement also provided that provision would be made for a "timely response/decision" by the Federal Government to "any requests for repatriation of [PSP] officers posted in the provinces and for any panel of officers proposed by the Provincial Government for posting to a province".

65. It is clear from the above that the learned Additional Attorney General has contended that, essentially, the power to appoint an officer in the post of Inspector General lies with the Federal Government, and certainly the Provincial Government cannot unilaterally take any action in this regard. It is perhaps for this reason that, as we understood him, the learned Additional Attorney General opposed the actions taken by the Provincial Government in terms of the correspondence of 31.03.2017 and the follow-up notification of 01.04.2017. The Respondent No. 7 could not, in effect, be removed and replaced by the Provincial Government acting on its own behest. The learned Advocate General contested this position, his emphasis (as we understood it) being that the Provincial Government could at any time surrender a PSP

officer to the Federal Government (and that included an officer holding the post of Inspector General) and, while it was being worked out as to who would be the replacement, appoint any other (eligible) officer to the said post. We have considered the matter. One thing is clear. Both sides appear to agree, and we emphasize that this is the position at law, that the exercise of appointing a PSP officer to the Provinces to any post (and certainly, and perhaps most crucially, to the post of Inspector General) is and must be a collaborative effort. There may be differences and divergences from time to time, but it must not descend into a tussle or power struggle, bureaucratic or otherwise. However, the essential dilemma, and this is the real question that, as a matter of law, requires consideration remains: how best does one accommodate a federal officer to a provincial post? Having considered the record and the stances adopted before us, we must begin by noting an oddity: neither side has paid any heed to what provincial law says (if anything) about the post to be filled (here that of the Inspector General). The learned Additional Attorney General has emphasized the power of the Federal Government to make the appointment and keep the PSP officer there for such period as it deems fit. And indeed, this is reflected in the notification whereby the present incumbent was appointed on 12.03.2016: he was to hold the post "till further orders". The learned Advocate General on the other hand emphasized the power of the Provincial Government to surrender the officer to the Federation at any time as it deemed fit. With respect, both sides have missed the point. First, and foremost, it must be seen what the provincial law says about the post, for that is the law of the land for the Province concerned. That must be adhered to and followed, simply and directly as a matter of law by the Provincial Government, and must be shown due respect and regard by the Federal Government as required by Article 148(2) of the Constitution. This provides that in the exercise of federal executive authority in a Province, "regard shall be had to the interests of that Province". Is it possible to have regard to such interests by disregarding and disrespecting any applicable provincial law for no apparent reason, other than, perhaps, to display and assert federal executive authority? The question answers itself. Furthermore, the law enunciated by the Supreme Court in, in particular, the *Anita Turab* case must obviously be adhered to and followed by both Governments, as being the law of the land. Thus, the first thing that must be done is to see whether provincial law provides that the post of Inspector General (or equivalent) is to be filled in according to any particular procedure or subject to any conditions, and also whether it provides for a tenure or term for the said post. If so, that must be adhered to and followed. Neither the Provincial Government nor the Federal Government have the power or authority to simply ignore the provincial law and proceed as they deem fit and this is so

regardless of whether (and perhaps especially when) they appear to acting in tandem and harmony.

66. When the position in this Province is considered, the first point to note is that the statutory power to appoint the Inspector General vests in the Provincial Government in terms of s. 4 of the Police Act. That, for reasons already stated, means and can only mean the Provincial Cabinet. Thus, at the Provincial end, the decision to appoint (or to remove and replace an incumbent) cannot be taken elsewhere in the executive branch and then endorsed or approved by the Cabinet. The decision itself must be that of the Provincial Cabinet. Secondly, in this Province the post has associated with it a specific term as given in the 1986 Rules. We emphasize that this is the law of the land insofar as this Province is concerned. It is simply not permissible for the Provincial Government to disobey and flout this requirement in an almost cavalier fashion and "surrender" the services of the incumbent for the time being to the Federation as and when it pleases. And equally, it is not permissible for the Federation to disregard this requirement and disrespect provincial law, by recalling its officer at any time it deems fit, on the ground that his appointment and service was "till further orders" or at the pleasure of the Federal Government. Therefore, in the appointment of the Inspector General the real question is not whether it is the Federal or the Provincial Government that is to prevail. The exercise has always to be a collaborative effort. That is a given. Really speaking, it is immaterial whether the exercise is initiated (i.e., recommendation made) by the Federal Government for consideration by the Provincial Government or *vice versa*. The two must act together to ensure that the best possible officer is selected from the available pool. The officer must meet the federal requirements of the PSP, including the 1985 PSP Rules and any other rules and regulations. What must also be ensured is that the requirements of provincial law as regards appointment are adhered to, and in particular if the post has a term or tenure that must be also followed and applied. At the same time the law laid down from time to time in Supreme Court and other, bindingly applicable, decisions must also be adhered to. This means, *inter alia*, that an officer who can serve for the full tenure must be selected. Two specific points may be made here. Firstly, the officers in the available pool may be such that the more senior officers may not be able to complete the tenure before retirement, and therefore a rigid adherence to what has just been said may work to the professional disadvantage of such officers. Such a situation may therefore amount to an exceptional circumstance, in which a more senior officer may be appointed even though he would not be able to complete the term before retirement. But this can only be done if the officer is able to serve not less than three-quarters of the term. Secondly, as we have seen, the record shows that there has been a

rapid turnover in the officers who have held the post of Inspector General and, barring perhaps a few exceptions, most officers have had a term not even remotely commensurate with the tenure. This state of affairs, already condemned as a flagrant breach of provincial law, could not have come about without the approval, actual or tacit, of the Federal Government, since it is, after all, a PSP officer who must be appointed as Inspector General. Therefore, we must conclude that the Federal Government is also implicated in bringing about and continuing this sorry state. This is unacceptable. The Federal Government must discharge fully, faithfully and in accordance with law its obligations in this regard. Federal law must be obeyed by it, and provincial law fully regarded and respected. What that means and requires has already been explained above, and is further elaborated below.

67. What of the situation where either the Provincial or the Federal Government wish to remove an officer during the term of office? Here, the law enunciated by the Supreme Court in the *Anita Turab* case would apply. The relevant portion, para 22(ii), is again reproduced for convenience: “When the ordinary tenure for a posting has been specified in the law or rules made thereunder, such tenure must be respected and cannot be varied, except for compelling reasons, which should be recorded in writing and are judicially reviewable”. Thus, if the Provincial Government (here meaning the Provincial Cabinet) seeks to surrender the incumbent to the Federation or otherwise remove him from the post, then the decision must be taken at a duly convened meeting of the Cabinet, and the agenda circulated for the same, which must set out the compelling reasons for which it is proposed to remove him. Proper notice must be given to the incumbent Inspector General and the relevant papers provided to him so that he can make a representation and, if he so desires, attend the Cabinet meeting to explain his position. If the decision is taken to remove or surrender the incumbent then the reasons for the same must be fully and duly recorded in the minutes of the meeting. The decision, along with the relevant record, must be transmitted to the Federal Government to which also the incumbent may make representations. The Federal Government must properly apply its mind to the situation. If it disagrees with the Provincial Government, namely that the stated circumstances or reasons are not compelling, then the incumbent cannot be removed or surrendered to the Federation. It is only if the Federal Government concludes that the circumstances or reasons are compelling that the incumbent can then be removed and/or surrendered to the Federation. And of course, as held by the Supreme Court, the entire exercise would be subject to judicial review. Furthermore, while the exercise is being carried out, neither the Provincial nor the Federal Government (either unilaterally or even acting together) can remove, surrender, recall or replace the incumbent, whether by way of an

"interim" measure or otherwise. It must also be kept in mind that any replacement would not follow automatically at the behest or desire of the Provincial Government. This is so because once the post is vacated it must then be filled in as a collaborative effort in the manner as indicated above.

68. If the Federal Government seeks to recall its officer or replace him with another while the term has not expired, then that decision must be taken by the Federal Cabinet, in order to show proper regard and respect for provincial law. Again, the decision must be taken at a duly convened meeting of the Federal Cabinet, and the agenda circulated for the same, which must set out the compelling reasons for which it is proposed to recall the incumbent and/or replace him with another officer. Proper notice must be given to the incumbent Inspector General and the relevant papers provided to him so that he can make a representation and, if he so indicates, he must be invited to attend the meeting of the Federal Cabinet to explain his position. If the decision is taken to recall the incumbent and/or replace him with another (the reasons for which must be fully and duly recorded in the minutes of the meeting), then it must be transmitted along with the relevant record to the Provincial Government to which also the incumbent may make representations. The Provincial Government (here meaning the Provincial Cabinet) must properly apply its mind to the situation at a duly convened meeting to which the incumbent must be invited. If the Provincial Cabinet disagrees with the Federal Government, namely that the stated circumstances or reasons are not compelling, then the incumbent cannot be recalled by the Federal Government and/or replaced by another officer. It is only if the Provincial Government concludes that the circumstances or reasons are compelling that the incumbent can then be recalled and/or replaced by the Federal Government. And of course, as held by the Supreme Court, the entire exercise would be subject to judicial review. Furthermore, while the exercise is being carried out, neither the Provincial nor the Federal Government (either unilaterally or even acting together) can remove, surrender, recall or replace the incumbent, whether by way of an "interim" measure or otherwise. It must also be kept in mind that any replacement would not follow automatically at the behest or desire of the Federal Government. This is so because once the post is vacated it must then be filled in as a collaborative effort in the manner as indicated above.

69. We recognize that occasionally an emergent situation may arise, and the post of Inspector General may fall vacant on account of circumstances not reasonably foreseeable, which require immediate remedial action to be taken. (The retirement of an incumbent in office would not be such a situation because the retirement date of a civil servant is known well in advance and

proper action can, and must, be taken in a timely manner to fill the post.) If such a situation does arise, then the Federal and Provincial Governments (here of course meaning the Provincial Cabinet) must act together to appoint an officer to hold the post by way of an interim or stopgap measure. However, appropriate action must immediately and simultaneously be initiated to make a permanent appointment in the manner as indicated above. In case no permanent appointment is made within 21 days, then the post of Inspector General shall be deemed to have become vacant, and the officer in temporary charge will not be able to act as such.

70. We now return to the judgment of the Supreme Court relied upon by the learned Advocate General, *Province of Sindh and others v. Ghulam Fareed and others* 2015 PLC (CS) 151 ("the *Ghulam Fareed* case"). The matter arose out of appeals against a decision of the Sindh Service Tribunal, and, *inter alia*, involved a provincial civil servant who had been placed in a certain post on OPS basis. It should be kept in mind that since the matter related to this Province, reference was made to the Sindh Civil Servants Act, 1973 and the Sindh Civil Servants (Appointment, Promotion and Transfer) Rules, 1974 framed thereunder. The Supreme Court observed as follows (pp. 157-8; emphasis supplied):

> "11. We have inquired from the learned Additional Advocate-General to show us any provision of law and or rule under which a Civil Servant can be appointed on higher grade/post on OPS basis. He concedes that there is no specific provision in the law or rule which permits appointment on OPS basis. He, however, submitted that in exigencies the Government makes such appointments as a stop gap arrangement. We have examined the provisions of Sindh Civil Servants Act and the Rules framed thereunder. We do not find any provision which could authorize the Government or Competent Authority to appointment any officer on higher grade on "Own Pay And Scale Basis". Appointment of the nature that, too of a junior officer causes heart burning of the senior officers within the cadre and or department. This practice of appointment on OPS basis to a higher grade has always been discouraged by this Court, as it does not have any sanction of law, besides it impinges the self respect and dignity of the Civil Servants who are forced to work under their rapidly and unduly appointed fellow officers junior to them. Discretion of the nature if allowed to be vested in the Competent Authority will offend valuable rights of the meritorious Civil Servants besides block promotions of the deserving officers.
>
> 12. At times officers possessing requisite experience to qualify for regular appointment may not be available in a department. However, all such exigencies are taken care of and regulated by statutory rules. In this respect, Rule 8-A of the Sindh Civil Servants (Appointment, Promotion and Transfer) Rules, 1974, empowers the Competent Authority to appoint a Civil Servant on acting charge and current charge basis... Sub-Rule (4) of the afore-referred Rule 8 further provides that appointment on acting charge basis shall be made for vacancies lasting for more than 6 months and for vacancies likely to last for less than six months. Appointment of an officer of a lower

> scale on higher post on current charge basis is made as a stop-gap arrangement and should not under any circumstances, last for more than 6 months. This acting charge appointment can neither be construed to be an appointment by promotion on regular basis for any purposes including seniority, nor it confers any vested right for regular appointment. In other words, appointment on current charge basis is purely temporary in nature or stop-gap arrangement, which remains operative for short duration until regular appointment is made against the post. *Looking at the scheme of the Sindh Civil Servants Act and Rules framed thereunder, it is crystal clear that there is no scope of appointment of a Civil Servant to a higher grade on OPS basis except resorting to the provisions of Rule 8-A*, which provides that in exigencies appointment on acting charge basis can be made, subject to conditions contained in the Rules."

Of course, the provincial civil service law does not apply as such to the PSP officer who holds the post of Inspector General since he is a federal civil servant. However, what the learned Advocate General emphasized was the generality of the law enunciated by the Supreme Court in respect of OPS appointments and the (at most) temporary and stopgap nature of the same. It was for this reason that, according to the learned Advocate General, a decision was taken to discontinue with the Respondent No. 7 and, while surrendering his services to the Federation, appoint an eligible officer in his stead.

71. We have considered the submission made by the learned Advocate General in light of the foregoing and the law enunciated by the Supreme Court in the cited decision. In our view, since the post of Inspector General has a fixed tenure, the situation is governed by the rule established by the Supreme Court in para 22(ii) of the *Anita Turab* case. It will be recalled that in the presentation given to the Provincial Cabinet on 05.04.2017 it was stated that the *Anita Turab* case did not apply as the Respondent No. 7 was appointed on OPS basis. With respect, we cannot agree. The correct legal position is in fact the exact opposite. If at all the Respondent No. 7 can be removed from the post on account of his appointment being on OPS basis that is precisely because, and only if, such appointment can be regarded as a "compelling reason" within the meaning of the rule laid down in the *Anita Turab* case. Furthermore, even if the continuation of service on such basis is a "compelling reason", the Respondent No. 7 can only be removed in terms of the procedure identified herein above since he is a PSP officer and the post of Inspector General is to be filled in by a collaborative effort between the Federal and Provincial Governments.

72. Having considered the point, in our view, since the Respondent No. 7 was appointed on OPS basis it may be that that can be regarded as a "compelling reason" within the meaning of the rule down in the *Anita Turab* case. If so, this would be by reason of the law enunciated by the Supreme

Court in the *Ghulam Fareed* case. However, we do not make any firm determination on this point, since if at all there is a "compelling reason" on such basis the matter has to be considered by both the Provincial Government (meaning the Provincial Cabinet) and the Federal Government in the manner as explained herein above. Each has to independently, and separately, apply its mind to the matter and it would not be appropriate for this Court to pre-judge any decision that either may take. We are not unmindful of the point raised by learned counsel for the Petitioners that the Respondent No. 7 was appointed on OPS basis by and/or with the concurrence of the Provincial Government, and it does not therefore now lie with it to argue to the contrary. Ordinarily, this would be a powerful (and perhaps even decisive) point since the law generally frowns on parties who (as does appear to be the position here) adopt conflicting stances at different times, as suits their convenience. Nonetheless, the point taken by the learned Advocate General is based on the law enunciated by the Supreme Court, and due regard must necessarily be given to this aspect. What we can however do is determine whether the exercise hitherto carried was contrary to law or not. In our view, it was contrary to law and cannot be sustained. This is so for more than one reason. Firstly, the decision at the Provincial end had to be taken by the Provincial Cabinet since the statutory power can be exercised by it alone, and must be so exercised by it, in light of the *Mustafa Impex* case. It does not suffice, and indeed is contrary to law, for the decision to be taken elsewhere in the executive branch and then to be simply endorsed or approved by the Cabinet. The power vests only in the Cabinet and must be exercised there and nowhere else. Furthermore, until and unless the Federal Government concurs in the decision taken by the Provincial Cabinet, the incumbent cannot be removed from the post or surrendered to the Federation and another officer cannot unilaterally be appointed in his stead as an "interim" measure, whether on acting or additional charge basis or otherwise. Indeed, until the entire exercise has been completed the incumbent cannot be removed from the post. In the present case, all of these mandatory and necessary ingredients are missing. The communication of 31.03.2017 and the notification of 01.04.2017 were not decisions of the Provincial Cabinet but taken elsewhere in the executive branch. Their retroactive sanctioning by the Cabinet is to no effect. Furthermore, the unilateral removal of the Respondent No. 7 was also contrary to law. We therefore hold and declare that the communication of 31.03.2017 and the notification of 01.04.2017 were contrary to law. They are hereby quashed and declared to be of no legal effect. Likewise, the decision of the Provincial Cabinet taken in relation to the post of Inspector General at its meeting of 05.04.2017 (agenda item No. 6) is declared to be contrary to law and is hereby set aside. This will not however prevent the Provincial Cabinet, should it be so minded, from initiating afresh an exercise to replace the

Respondent No. 7 on the ground that his appointment on OPS basis constitutes a "compelling reason" within the meaning of the rule laid down in the *Anita Turab* case. Any such exercise must be in accordance with law, and undertaken in the manner as explained in detail herein above. It is only if the exercise is carried to completion in its entirety and results in fruition (and not before) that the Respondent No. 7 can be removed from the post of Inspector General. Of course, is he is so removed, his replacement must also be made in a manner that accords with law and not otherwise.

73. The various objections taken by the learned Advocate General having been dealt with, we now turn to consider the second alternate submission made by learned counsel for the Petitioners, namely that suitable orders be made and directions given in terms of Article 199(1)(c) in relation to the Police Act, as ensure the proper enforcement of fundamental rights in this Province. In particular, learned counsel seeks that the orders and directions given should interpret and apply the relevant sections of the Police Act, of which quite a few were cited, in such manner as achieves the desired result. Learned counsel placed strong reliance on the *HRCP* case. As noted in para 52 *supra* in that case the Supreme Court gave detailed directions as to how the two laws before it were to interact and apply in the given context. Now, whenever a question arises as to whether a statutory provision is in violation of fundamental rights, and the Court concludes that this is so, the archetypal response is to strike it down, i.e., declare it void to the extent of the repugnancy. This approach can, on occasion, prove too broad in its effect since it sometimes results in the whole statute being rendered ineffective and inoperable. Over time therefore, another approach, now well established, emerged, that of "reading down" the offending provision. The provision is, in effect, judicially sculpted by a process of interpretation to remove from it that aspect that violates fundamental rights. That which is left behind is constitutionally valid, and the operation of the Act as a whole is not affected. What learned counsel for the Petitioners now seeks goes beyond this and, if one may put it so, in a sense in the opposite direction. The submission, in effect, is that even if the relevant sections of the Police Act, when construed in accordance with the well established principles of interpretation ordinarily applied (what might be called, and are herein after referred to as, the "standard model interpretation"), are clear in their meaning and do not offend or go against any fundamental rights, they can and must nonetheless be given, by making suitable directions under Article 199(1)(c), a meaning that enforces such rights. Such an approach, if valid and permissible, was not as such considered in the *HRCP* case but would not, in our respectful view, be inconsistent therewith. The questions that arise in terms of the second alternate submission may therefore be stated as follows:

a. Whether there is any jurisprudential approach that allows for the possibility of a statute, whose meaning is otherwise clear in terms of standard model interpretation, being nonetheless interpreted in some other manner so as to enforce fundamental rights?

b. If the answer to (a) be in the affirmative, whether the enforcement of fundamental rights requires the Police Act to be so interpreted (and if so, what would be the appropriate basis for such interpretation)?

c. If the answer to (b) also be in the affirmative, then how are the specific sections of the Police Act to be interpreted and applied?

We take up these questions sequentially.

74. In order to address the first question, we can usefully look to the manner in which the House of Lords has interpreted and applied the UK Human Rights Act, 1998 ("UK Act"). In the immediate aftermath of the Second World War, when Europe still lay in ruins and a new international order was being built, an urgent need was felt to establish a European convention for the protection of human rights, and to provide for a means to enforce such rights. As was to be expected, the United Kingdom was one of the leading lights in this endeavor. The result was the 1950 European Convention on Human Rights. An international tribunal, the European Court of Human Rights, which sits at Strasbourg, was established under the Convention. However, Convention rights could not be directly enforced in the UK courts and there was, for a long time, a movement to enact the necessary legislation in this regard. The result was the UK Act, which was enforced on 02.10.2000. Most, though not all of the Convention rights were set out in the Schedule to the statute. For our purposes, sections 3 and 4 are relevant, which provide in material part as follows:

> "**3. Interpretation of legislation**. (1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.
>
> **4. Declaration of incompatibility**. (1) Subsection (2) applies in any proceedings in which a court determines whether a provision of primary legislation is compatible with a Convention right.
>
> (2) If the court is satisfied that the provision is incompatible with a Convention right, it may make a declaration of that incompatibility."

75. The Convention rights in many ways correspond to fundamental rights under our Constitution. The doctrine of parliamentary sovereignty, which is still the cornerstone of the British constitution (though now perhaps somewhat attenuated in its operation) necessitated s. 4 of the UK Act. Under our Constitution, there is of course no such limitation: as already noted, a statutory provision if found to be contrary to fundamental rights may be struck down to the extent of the repugnancy. However, for present purposes s. 3(1) is more relevant. How was this to be interpreted, and applied? As will be appreciated, one aspect of this provision could be the doctrine of "reading down" a provision. This has already been alluded to. The more important question is whether the scope and extent of s. 3(1) went beyond this, and if so, in what manner and to what extent? Section 3(1) was considered by the House of Lords in the seminal case of *Ghaidan v. Mendoza* [2004] UKHL 30, [2004] 3 All ER 411 (herein after "*Ghaidan*"). The House had to consider certain words in the Rent Act, 1977 (contained in para 2(2) of the first Schedule thereto). It is important to note that just a few years before, when the UK Act had not been in force, those very same words had been interpreted and applied by the House in *Fitzpatrick v Sterling Housing Association Ltd* [1999] 4 All ER 705. Thus, there was no ambiguity with the words. Their meaning was clear. And, the meaning ascribed to them in the earlier case was contrary to that which was now urged before the House in *Ghaidan*. Ordinarily therefore, the appeal would have met but one fate. Indeed, it would most probably not even have reached the House. However, now the words had to be looked at in terms of the Convention rights. Did s. 3(1) allow or warrant a different approach, one that enabled the words to be read and applied in a way that was compatible with, i.e., enforced Convention rights? By majority (Lord Millett dissenting), the House of Lords answered this question in the affirmative. In order to fully appreciate the effect of the decision, several passages will have to be referred to.

76. Lord Nolan, delivering a speech with which all the Law Lords constituting the majority agreed, observed as follows (pp. 422-4; emphasis supplied):

> "**[26]** Section 3 is a key section in the 1998 Act. It is one of the primary means by which convention rights are brought into the law of this country. Parliament has decreed that all legislation, existing and future, shall be interpreted in a particular way. All legislation must be read and given effect to in a way which is compatible with the convention rights 'so far as it is possible to do so'. This is the intention of Parliament, expressed in s 3, and the courts must give effect to this intention.

[27] Unfortunately, in making this provision for the interpretation of legislation, s 3 itself is not free from ambiguity. Section 3 is open to more than one interpretation. The difficulty lies in the word 'possible'. Section 3(1), read in conjunction with s 3(2) and s 4, makes one matter clear: Parliament expressly envisaged that not all legislation would be capable of being made convention-compliant by application of s 3. Sometimes it would be possible, sometimes not. What is not clear is the test to be applied in separating the sheep from the goats. What is the standard, or the criterion, by which 'possibility' is to be judged? …

[28] One tenable interpretation of the word 'possible' would be that s 3 is confined to requiring courts to resolve ambiguities. Where the words under consideration fairly admit of more than one meaning the convention-compliant meaning is to prevail. Words should be given the meaning which best accords with the convention rights.

[29] This interpretation of s 3 would give the section a comparatively narrow scope. This is not the view which has prevailed. *It is now generally accepted that the application of s 3 does not depend upon the presence of ambiguity in the legislation being interpreted. Even if, construed according to the ordinary principles of interpretation, the meaning of the legislation admits of no doubt, s 3 may none the less require the legislation to be given a different meaning*.

[30] *From this it follows that the interpretative obligation decreed by s 3 is of an unusual and far-reaching character. Section 3 may require a court to depart from the unambiguous meaning the legislation would otherwise bear. In the ordinary course the interpretation of legislation involves seeking the intention reasonably to be attributed to Parliament in using the language in question. Section 3 may require the court to depart from this legislative intention, that is, depart from the intention of the Parliament which enacted the legislation*. The question of difficulty is how far, and in what circumstances, s 3 requires a court to depart from the intention of the enacting Parliament. The answer to this question depends upon the intention reasonably to be attributed to Parliament in enacting s 3.

[31] On this the first point to be considered is how far, when enacting s 3, Parliament intended that the actual language of a statute, as distinct from the concept expressed in that language, should be determinative. Since s 3 relates to the 'interpretation' of legislation, it is natural to focus attention initially on the language used in the legislative provision being considered. *But once it is accepted that s 3 may require legislation to bear a meaning which departs from the unambiguous meaning the legislation would otherwise bear, it becomes impossible to suppose Parliament intended that the operation of s 3 should depend critically upon the particular form of words adopted by the parliamentary draftsman in the statutory provision under consideration*. That would make the application of s 3 something of a semantic lottery. If the draftsman chose to express the concept being enacted in one form of words, s 3 would be available to achieve convention-compliance. If he chose a different form of words, s 3 would be impotent.

[32] From this the conclusion which seems inescapable is that the mere fact the language under consideration is inconsistent with a convention-compliant meaning does not of itself make a convention-compliant interpretation under s 3 impossible. *Section 3 enables language to be interpreted restrictively or expansively. But s 3 goes further than this. It is also apt to require a court to read in words which change the meaning of the enacted legislation, so as to make it convention-compliant. In other words, the intention of Parliament in*

enacting s 3 was that, to an extent bounded only by what is 'possible', a court can modify the meaning, and hence the effect, of primary and secondary legislation.

[33] *Parliament, however, cannot have intended that in the discharge of this extended interpretative function the courts should adopt a meaning inconsistent with a fundamental feature of legislation*. That would be to cross the constitutional boundary s 3 seeks to demarcate and preserve. Parliament has retained the right to enact legislation in terms which are not convention-compliant. *The meaning imported by application of s 3 must be compatible with the underlying thrust of the legislation being construed. Words implied must, in the phrase of my noble and learned friend Lord Rodger of Earlsferry, 'go with the grain of the legislation'*. Nor can Parliament have intended that s 3 should require courts to make decisions for which they are not equipped. There may be several ways of making a provision convention-compliant, and the choice may involve issues calling for legislative deliberation."

77. Lord Steyn observed as follows (pp. 426-7; emphasis in original):

"**[44]** It is necessary to state what s 3(1), and in particular the word 'possible', does not mean. First, s 3(1) applies even if there is no ambiguity in the language in the sense of it being capable of bearing two *possible* meanings. The word 'possible' in s 3(1) is used in a different and much stronger sense. Secondly, s 3(1) imposes a stronger and more radical obligation than to adopt a purposive interpretation in the light of the convention….

…

[46] Parliament had before it the mischief and objective sought to be addressed, viz the need 'to bring rights home'. The linch-pin of the legislative scheme to achieve this purpose was s 3(1). Rights could only be effectively brought home if s 3(1) was the prime remedial measure, and s 4 a measure of last resort…."

78. Lord Rodger observed as follows (pg. 454; emphasis supplied):

"**[121]** For present purposes, it is sufficient to notice that … in terms of s 3(1) of the 1998 Act, *it is possible for the courts to supply by implication words that are appropriate to ensure that legislation is read in a way which is compatible with convention rights. When the court spells out the words that are to be implied, it may look as if it is 'amending' the legislation, but that is not the case*. If the court implies words that are consistent with the scheme of the legislation but necessary to make it compatible with convention rights, it is simply performing the duty which Parliament has imposed on it and on others. It is reading the legislation in a way that draws out the full implications of its terms and of the convention rights. And, by its very nature, an implication will go with the grain of the legislation. By contrast, using a convention right to read in words that are inconsistent with the scheme of the legislation or with its essential principles as disclosed by its provisions does not involve any form of interpretation, by implication or otherwise. It falls on the wrong side of the boundary between interpretation and amendment of the statute.

[122] … [T]he key to what it is possible for the courts to imply into legislation without crossing the border from interpretation to amendment does not lie in the number of words that have to be read in.

> The key lies in a careful consideration of the essential principles and scope of the legislation being interpreted. If the insertion of one word contradicts those principles or goes beyond the scope of the legislation, it amounts to impermissible amendment. On the other hand, if the implication of a dozen words leaves the essential principles and scope of the legislation intact but allows it to be read in a way which is compatible with convention rights, the implication is a legitimate exercise of the powers conferred by s 3(1). Of course, the greater the extent of the proposed implication, the greater the need to make sure that the court is not going beyond the scheme of the legislation and embarking upon amendment. Nevertheless, what matters is not the number of words but their effect…."

79. Soon after the decision in *Ghaidan*, its effect was summarized by Lord Bingham in *Sheldrake v. DPP* [2004] UKHL 43, [2005] 1 All ER 237 in a passage which has been cited in many decisions subsequently (see, e.g., *R v. Waya* [2012] UKSC 51, [2013] 1 All ER 889). The learned Law Lord summarized *Ghaidan* in the following terms (emphasis supplied):

> "[28] The interpretative obligation of the courts under section 3 of the 1998 Act was the subject of illuminating discussion in *Ghaidan v Godin-Mendoza* [2004] 2 AC 557. The majority opinions of Lord Nicholls, Lord Steyn and Lord Rodger in that case (with which Lady Hale agreed) do not lend themselves easily to a brief summary. But they leave no room for doubt on four important points. *First, the interpretative obligation under section 3 is a very strong and far reaching one, and may require the court to depart from the legislative intention of Parliament.* Secondly, a Convention-compliant interpretation under section 3 is the primary remedial measure and a declaration of incompatibility under section 4 an exceptional course…. Fourthly, there is a limit beyond which a Convention-compliant interpretation is not possible…. In explaining why a Convention-compliant interpretation may not be possible, members of the committee used differing expressions: such an interpretation would be incompatible with the underlying thrust of the legislation, or would not go with the grain of it, or would call for legislative deliberation, or would change the substance of a provision completely, or would remove its pith and substance, or would violate a cardinal principle of the legislation (paras 33, 49, 110-113, 116). All of these expressions, as I respectfully think, yield valuable insights, but none of them should be allowed to supplant the simple test enacted in the Act: 'So far as it is possible to do so …'. While the House declined to try to formulate precise rules (para 50), it was thought that cases in which section 3 could not be used would in practice be fairly easy to identify."

80. In *Assange v. The Swedish Prosecution Authority* [2012] UKSC 22, [2012] 4 All ER 1249, Lord Mance (minority judgment) referred with approval to the manner in which the Court of Appeal, in *Vodafone2 v. Commissioners* [2009] EWCA Civ 446, [2010] Ch 77, summarized the principles by which the UK Act (and also EU law) were to be interpreted, based on *Ghaidan* and other cases. The principles are set out in paras 37-8 of the Court of Appeal judgment, and are here reproduced without including the specific cases referred to there (the principles being referred to herein after as the "*Ghaidan* approach"):

(a) It [i.e., the *Ghaidan* approach] is not constrained by conventional rules of construction;

(b) It does not require ambiguity in the legislative language;

(c) It is not an exercise in semantics or linguistics;

(d) It permits departure from the strict and literal application of the words which the legislature has elected to use;

(e) It permits the implication of words necessary to comply with Community law [and Convention] obligations; and

(f) The precise form of the words to be implied does not matter.

The *Ghaidan* approach is however subject to the following limitations, which are the "only constraints on the broad and far-reaching nature of the interpretative obligation":

(a) The meaning should "go with the grain of the legislation" and be "compatible with the underlying thrust of the legislation being construed." An interpretation should not be adopted which is inconsistent with a fundamental or cardinal feature of the legislation since this would cross the boundary between interpretation and amendment; and

(b) The exercise of the interpretative obligation cannot require the courts to make decisions for which they are not equipped or give rise to important practical repercussions which the court is not equipped to evaluate.

Reference may also be made to another decision of the Court of Appeal, *R (IDT Card Services Ireland Ltd) v Customs and Excise Comrs* [2006] EWCA Civ 29, [2006] STC 1252 (at paras 86-90), also referred to with approval by Lord Mance.

81. In our view, the *Ghaidan* approach can usefully be adopted for purposes of Article 199, and especially clause (1)(c), and regarded as providing the necessary jurisprudential framework that allows for a statute, whose meaning is otherwise clear in terms of standard model interpretation, being nonetheless interpreted and applied in some other manner so as to enforce fundamental rights. Insofar as the High Court is concerned, the *Ghaidan* approach is to be applied in relation to Article 199 subject to the limitations noted above. Therefore, in our view, question (a) posed in para 73 herein above must be answered in the affirmative.

82. We turn to the second question. It will be noted that in fact it comprises of two sub-parts, which, in light of our answer to the first question, can now be restated as follows: (i) whether the enforcement of fundamental

rights requires the Police Act to be interpreted by applying the *Ghaidan* approach; and if so, (ii) what would be the appropriate basis for such interpretation?

83. Learned counsel for the Petitioners relied on *Watan Party and another v. Federation of Pakistan* PLD 2011 SC 997 to support his contention that the law and order situation in the Province was so bad as to amount to a denial of fundamental rights. Reference was made in particular to the strong observations and conclusions of the Supreme Court in para 131 (pp. 1129-1134) and also to para 130, in which it was observed as follows with specific reference to the police (pg. 1128):

> "130. The morale of the police is low. Even honest Policemen are demoralized. They are caught between the devil and the deep blue sea. On the one hand, they may be punished for doing their duty if it runs counter to the political objectives of the party in power and on the other, they are afraid of being shot by the persons they have apprehended or their associates. They are conscious of the fact that so many policemen who took part in the operations of 1992 and 1996 have disappeared or have been eliminated. It is necessary, therefore, for the Police to fully and impartially investigate and find out the circumstances of each such disappearance/elimination and provide a detailed report to this Court in respect thereof."

Learned counsel submitted that these observations were true in their essential aspects even today in respect of the police force. This had had, and continued to have, a seriously detrimental effect on the enforcement of fundamental rights. Learned counsel also relied on the opening paragraph of a judgment of the Bombay High Court, *Panchabhai Popotbhai Butani and others v. The State of Mahrastra and others* (2010) 211 BomLR 427. Attention was drawn in particular to the last sentence, emphasized below:

> "Preamble of our Constitution guarantees to a citizen justice, liberty, equality and fraternity. All these are possible only when there is rule of law. The rule of law could discernibly be dissected into two well accepted concepts: (i) governance and (ii) administration of justice. They are not only the pillars of the Constitutional mandate, but are linchpin to the growth, development and independence of any nation or society. Governance obviously means good governance and it refers to the task of running the Government in an effective manner. Right to a legitimate and accountable government under which fundamental rights and human rights are respected and the Government controlled by the rule of law are the basic elements of good governance. Rule of law indicates good governance which requires fair legal framework that enforce law impartially. *Impartial enforcement of laws requires an independent judiciary and an impartial and incorruptible police force*."

84. It will be recalled that in the *HRCP* case, the Supreme Court inter alia observed that "the High Court has plenary powers to positively enforce fundamental rights" (para 33, pg. 528). It is of course undeniable that proper

policing and an efficient and effective police force have a connection with many, and perhaps most, fundamental rights. This is true not merely because, in a general sense, fundamental rights are best enjoyed in an environment where the rule of law is respected and properly enforced, and the rule of law is in essential part dependent on the law and order situation, which in turn depends on effective policing. The nexus is deeper and more intimate. Some individual rights have a direct connection with policing. Obvious examples include Articles 9 and 10, which preserve the right to life and liberty and protect against arrest and detention. These rights are, in a most basic and direct sense, dependent on a police force that is properly responsive to the rule of law. Another example is Article 14(2), which prohibits the use of torture for the purpose of extracting evidence; the link here requires no explanation. Other fundamental rights also, on a moment's reflection, lead to the same conclusion. Here, one can refer to Article 15 (the right to free movement) and Article 16 (freedom of assembly). It must also be remembered that most fundamental rights are not cast in (apparently) absolute terms, but expressly allow the State to impose reasonable restrictions in certain specified circumstances (which vary from right to right). Where such restrictions are legitimately imposed, they may take the form of prohibitions that are backed by penal sanctions, i.e., are criminal offences. Here again, the connection between the fundamental right and proper policing is obvious. We may note that while an efficient police force is necessary for enforcing the rule of law and hence fundamental rights, efficiency in and of itself is not enough. A police force may be efficient but no respecter of fundamental rights. To some, that may be a legitimate tradeoff; the Constitution however, takes a different view. But, it cannot be denied that a functional police force and one that is effective at doing its job is a *sine qua non* for the proper enforcement of fundamental rights. There is in addition another aspect in which effective policing is necessary for such purposes. The traditional approach to fundamental rights is to emphasize the "negative" role of the State, i.e., to focus on what the State cannot do. From this perspective, it is State inaction that is called for. However, it is not merely enough for the State not to do anything that violates fundamental rights. It may sometimes also be necessary for the State to play a "positive" role, i.e., take action and do things that lead to the enforcement of fundamental rights. (The exact scope of this obligation must be regarded as subject to further analysis and consideration in future.) The most basic of fundamental rights, that of life and liberty enshrined in Article 9, is dependent on proper and effective policing for its proper enjoyment. The State is not merely under an obligation not to take away life or liberty, save in accordance with law. Surely, it is also under a duty to ensure that all persons can even otherwise enjoy these rights without fear or interference from others. At its most basic level, this requires a police force

vigilant in the preservation of law and order. Other examples can be cited. Take, for example, Article 15, the right of free movement. It is necessary for the State not to do anything that curtails this freedom (although it may impose reasonable restrictions in the circumstances listed in the Article). However, even if the State does nothing (i.e., imposes no restrictions at all) what good is this right if a citizen cannot move from place A to B because the law and order situation along the way is so bad that travel is sharply restricted or even, for some, impossible altogether. Is not the right effectively curtailed in such circumstances? Here, the State may well be under a duty to take the necessary action to ensure that the fundamental right can be exercised in a meaningful manner. As is obvious, the police have a vital role to play in this regard. Another example is Article 16, the right of assembly. If citizens wish to assemble peacefully and without arms for any legitimate purpose but are unable or afraid to do so because of (e.g.) hostility from this or that group, it is surely the duty of the State to ensure that the situation on the ground is such as enables the citizens to effectively exercise their right. Here again, proper policing is necessary. These examples can be multiplied across virtually the entire spectrum of fundamental rights, but perhaps enough has been said to make the point. However, if the police force is so inept, demoralized or reduced to such a level of incompetence, or its operations are organized and run in such a manner, that it cannot perform its essential functions and duties, then clearly many fundamental rights are effectively denied to the citizens. It is clear therefore that in appropriate circumstances it may be necessary to make orders and give directions in respect of policing and the police force in terms of Article 199, and in particular under clause (1)(c), to ensure the proper enforcement of fundamental rights.

85. This brings us to the next point: are such orders and/or directions appropriate or necessary in respect of the police in Sindh in order to ensure the proper enforcement of fundamental rights in this Province? Hardly any independent, neutral or objective person will dispute that the answer must be in the affirmative. While things may have improved in the recent past, the situation is still far from acceptable. The observations of the Supreme Court in *Watan Party and another v. Federation of Pakistan* PLD 2011 SC 997 unfortunately still ring true. There is no need to burden this judgment with elaborate recitation of statistics and illustrative examples to establish the point. All that material (and more) is readily available including on the Internet. Citizens (and, as appropriate, other persons) in this Province are to a large extent unable to effectively and meaningfully enjoy fundamental rights. The close connection between fundamental rights and proper policing has just been highlighted. The poor state of policing in the Province cannot be denied. The problem is of course not limited to this Province. It is, unfortunately, a

countrywide issue, though the relative intensity and nature of the problem may vary from place to place. However, we are concerned only with this Province. Now, policing as a whole is a broad and complex matter. It is intimately connected with, and is an inseparable part of, the overall criminal justice system. It has many aspects and issues, many of which have at least the appearance of being so intertwined that some may argue that it is not possible to resolve even a few without trying to resolve them all. It is not possible to address all of the myriad issues involved in the scope of this judgment. However, simply because the task may appear to be gargantuan should not deter us. A start must be made somewhere even though, of necessity, our focus must be relatively narrow and specific. Furthermore, particularity has the advantage, important for a court of law, that any orders made or directions given in relation to the enforcement of fundamental rights can be cast in terms that are, if and as necessary, enforceable judicially, readily and in a meaningful manner. Which aspect of policing is therefore most suitable for present purposes in terms as just stated? That is the question that must now be considered.

86. In our view, the proper approach for the Court in this judgment, while disposing off these petitions, is to consider the Police Act itself. The aspect of policing most suitable for present purposes is the police force, with which the statute is directly concerned. At the risk of repetition (and of yet again restating the obvious) an effective, functional and efficient police force is essential for policing, which provides the basis for a stable law and order situation, which is essential for the rule of law, which provides the environment and framework in which fundamental rights can best thrive and be guaranteed. Furthermore, focusing on the Police Act has the advantage of casting the exercise in statutory form, i.e., essentially requires interpretation and application of an enactment. That of course is a matter that is peculiarly the province of the Court. Additionally, the *Ghaidan* approach is itself concerned foremost with the proper interpretation of statutes in the context of applying them in a manner compatible with fundamental rights, i.e., of enforcing those rights. We will therefore limit ourselves to a consideration of the statute. But even here the exercise needs to be further particularized. A review of every section of the Police Act, testing each in general terms on the anvil of fundamental rights while adopting the *Ghaidan* approach, would be too broad and diffuse. The exercise needs to be refined further and focused even more sharply. In our view, what is needed is an objective against which select provisions of the Police Act can be measured and analyzed by applying the *Ghaidan* approach. This will enable, as necessary, for appropriate orders to be made or directions given to ensure the proper enforcement of fundamental rights. Now, the one problem that has been highlighted by the

Petitioners is the failure to adhere to the term or tenure associated with the post of Inspector General, which has resulted in a rapid turnover in the officers holding that post, and the all too frequent transfers and postings in the police force in general. As has already been seen above, there can be no doubt that this is a real problem; the abysmal record in this regard is undeniable. It cannot also be doubted that this problem has a seriously negative and indeed deleterious effect on the performance, efficacy and efficiency of the police force. No organization in which the personnel from the highest to the lowest levels are frequently reshuffled can ever hope to even minimally achieve any performance targets or tasks. Stability in the structure of an organization is essential for its professional health and performance. The frequent changes made in the organizational structure have destabilized the police force. The stability, and the balance that comes with it, must be restored. It would therefore be appropriate if the objective that is to be selected especially addresses this particular problem.

87. In our view, the objective that best addresses the problem just noted can be stated as follows: the police force must have autonomy of command and independence of operation. It is this autonomy and independence that must be regained and restored. Autonomy and independence will bring stability and balance to the organizational structure of the police force by curbing and reducing, and ideally eliminating, the farcical frequency of turnover, transfers and postings that now plague the system. This is therefore the objective against which certain specific sections of the Police Act will be measured and interpreted, using the *Ghaidan* approach for purposes of ensuring enforcement of fundamental rights. We now turn to this exercise.

88. The first section that requires consideration is s. 3. This provides as follows:

> "**3. Superintendence in the Provincial Government**. The superintendence of the police throughout a general police-district shall vest in and shall be exercised by the Provincial Government to which such district is subordinate; and, except as authorized under the provisions of this Act, no person, officer or Court shall be empowered by the Provincial Government to supersede or control any police functionary."

The first point to note is that by reason of the law enunciated by the Supreme Court in the *Mustafa Impex* case, "Provincial Government" can only mean the Provincial Cabinet. The statutory power cannot be exercised elsewhere in the executive branch, by any other authority or body (including any minister of whatever rank). It is only the Cabinet itself that can act, and that too at a duly convened meeting for which the agenda is properly circulated in advance. The key word in s. 3 which requires consideration is

"superintendence". Keeping the objective in mind, and applying the *Ghaidan* approach, in our view "superintendence" must be given a meaning that moves within a specified locus only. If the word is understood and applied in terms of standard model interpretation, that would be too broad and diffuse. It would easily allow the autonomy of command and independence of operation to be breached, eroded and effectively reduced to a nullity. The stability of the police force would continue to be compromised and undermined. The problem identified above would not be redressed and all efforts to do so would be thwarted. Therefore, the statutory power of the Provincial Cabinet under s. 3 to "superintend" the police force in Sindh must be regarded as limited to taking decisions of high policy only without (directly or indirectly) impacting on, compromising, affecting, negating, eroding or otherwise curtailing or reducing the force's autonomy of command and independence of operation. Furthermore, the views of the police hierarchy, acting through the Inspector General, must be taken, and the Inspector General must be invited to attend the Cabinet meeting at which the high policy is to be formulated. Indeed, the Inspector General must be likewise invited to attend all Cabinet meetings in which one or more agenda items relate directly or indirectly to law and order, or state security, or policing or the police force so that the views of the police hierarchy can be obtained. He cannot be sidelined. The Inspector General may comment in writing on any proposed policy, and if the Cabinet decides on a policy inconsistent with the views expressed by the Inspector General, then the reasons for the disagreement must be properly recorded and minuted. Furthermore, any high policy that is formulated can only be implemented through the police hierarchy acting through the Inspector General in an autonomous manner, on its own independent assessment of what needs to be done to best achieve the goals of the policy. The objective of autonomy of command and independence of performance cannot be nullified in the guise of enforcing or giving effect to a policy decision. Additionally, if there is any reasonable difference or disagreement as to whether any proposed action or matter is one of high policy or not, then it must be resolved in favor of the police force, i.e., regarded as not being high policy and hence outside the scope of s. 3. In other words, the difference between policy *simpliciter* and high policy must be recognized, maintained and given due effect. Matters of policy *simpliciter* are to be dealt with by the police hierarchy itself acting through the Inspector General in terms, *inter alia*, of ss. 4 and 12 in the manner as elaborated below.

89. The next section requiring attention is s. 4. This provides as follows:

> "**4. Inspector General of Police etc**. The administration of the police throughout a general police-district shall be vested in an officer to be

> styled the Inspector General of Police, and in such Deputy Inspectors-General and Assistant Inspectors-General, as to the Provincial Government shall seem fit.
>
> The administration of the police in a district shall vest in a District Superintendent and such Assistant District Superintendents as the Provincial Government shall consider necessary."

This is, in many respects, the crucial provision for present purposes. Again, we begin by noting that the reference to "Provincial Government" can only mean the Provincial Cabinet. Whatever it is that the "Provincial Government" can do in terms of this section, it cannot be done elsewhere in the executive branch by any other authority or body (including any minister of whatever rank). It is only the Cabinet itself that can act, and that too at a duly convened meeting for which the agenda is properly circulated in advance. Secondly, the reference to the various posts in the section must be regarded as including all posts created from time to time (e.g., that of Additional Inspector General, Senior Superintendent, etc.) after the enactment of the Police Act. This follows even from an application of standard model interpretation to the section. The key word in s. 4 which requires consideration is "administration". Keeping the objective in mind, and applying the *Ghaidan* approach, in our view "administration" must be given a broad and expansive meaning. Section 4 establishes a hierarchy which is headed by the Inspector General. The administration of the police force is vested in the Inspector General, and through him the hierarchy of officers. For this vesting to be meaningful and effective, it must be exclusive to, and remain within, the police force itself. In other words, the "administration" of the police force must be based on its autonomy of command and independence of operation. There cannot be any interference in this autonomy and independence by any other body or authority, including the Provincial Government. To put it simply, the police hierarchy, acting always through the Inspector General must have control over its own affairs as regards its operations and command. There can be no interference, direct or indirect, in the operational affairs of the force nor can anything be done to affect the autonomy of command. No authority or body, whether the Provincial Government itself, or in or of it (including any minister of whatever rank), can issue any order, direction, instruction, guideline, circular or notification that impacts on, compromises, affects, negates, erodes or otherwise curtails or reduces the force's autonomy of command and independence of operation. The control of the police force must lie where it is placed in terms of s. 4 as here interpreted and applied: the police hierarchy acting through the Inspector General. Of course, the meaning of "administration" in terms of the *Ghaidan* approach is broader than that. But at its core must lie the objective set herein above: autonomy of command and

independence of operation. Here, we may make another point, which is also of importance. Since the administration of the police force vests in the police hierarchy acting through the Inspector General, his role is a key and central one. His position is at the apex of the force. The very structure of s. 4 clearly establishes this. Any attempt therefore to sideline or marginalize the Inspector General or to circumvent him or to otherwise curtail his powers directly or indirectly (by, e.g., holding meetings with police officers to which the Inspector General is not invited) would be contrary to law and of no legal effect. It could, among other things, expose any police officer concerned to appropriate disciplinary proceedings, whether by way of misconduct or otherwise. The command structure of the police hierarchy is clear. It flows from, to and through the Inspector General. There can be no autonomy of command, nor independence of operation without this. It is also pertinent to note that prior to the 2001 Order, the second paragraph of s. 4 had read as follows (emphasis supplied):

> "The administration of the police <u>throughout the local jurisdiction of the Magistrate of the district shall, under the general control and direction of such Magistrate, be vested</u> in a District Superintendent and such Assistant District Superintendents, as the Provincial Government shall consider necessary."

By the 2001 Order, the words underlined were substituted with the words now appearing, "in a district shall vest". Thus, while earlier the administration of the police was under the general control and direction of the District Magistrate, this external control was removed in 2001. The present application of the *Ghaidan* approach to s. 4 in one sense therefore merely amplifies and strengthens the trend kept in place when the Police Act was revived and restored by the 2011 Sindh Act inclusive of the changes made in 2001. Insofar as the statutory power of the Provincial Government (i.e., the Provincial Cabinet) is concerned, it must, again applying the *Ghaidan* approach (which allows also, as appropriate, for words to be implied) be exercised with the concurrence of the Inspector General and not otherwise. That power is in any case (again applying the *Ghaidan* approach) limited to establishing only the number of posts in the police force and does not go beyond that. Furthermore, in terms of the second paragraph of s. 4, the vesting of the administration of the police in a district in a District Superintendent and Assistant District Superintendents (as also now Senior Superintendents) is not to the exclusion of the Inspector General, but subject to his overall, direct and exclusive command and control. In other words, the second paragraph of s. 4 cannot be so read as to negative and nullify the meaning and effect of the first paragraph in terms of the *Ghaidan* approach.

90. When ss. 3 and 4 are compared, it is clear that even in terms of standard model interpretation, as a matter of law the nature of the relationship between "superintendence" (s. 3) and "administration" (s. 4) had to be ascertained. However, the manner in which the police force has increasingly been run in the past years and decades, a trend that continues unabated today, is such that the Provincial Government totally dominates police affairs and effectively controls the force in all aspects and respects, down to the minutest details. Translating that ground reality into statutory terms, it is as though "superintendence" has completely taken over, if not wholly swallowed up, "administration", reducing the latter to a cipher. This state of affairs would be contrary to law even in terms of standard model interpretation. However, in our view, something much more is required than merely restoring the position on such basis. For the effective enforcement of fundamental rights in terms of the objective set above, the relationship between "superintendence" (s. 3) and "administration" (s. 4) must be recalibrated by applying the *Ghaidan* approach in terms as explained in the preceding paras. The former must be understood and applied narrowly and restrictively and the latter broadly and expansively. The roles of the Provincial Government on the one hand and the police hierarchy acting through the Inspector General must be recast in order to restore stability and efficacy to the police force. It is only then that proper policing will be achieved.

91. The next section that requires attention is s. 12. This has already been set out above in para 24. We now reproduce it in such part as material for present purposes:

> "**12. Power of Inspector General to make rules**. The Inspector-General of Police may, from time to time, subject to the approval of the Provincial Government, frame such orders and rules as he shall deem expedient relative to the organization, classification and distribution of the police force, … and the particular services to be performed by them … and all such other orders and rules relative to the police-force as the Inspector-General, shall, from time to time, deem expedient for preventing abuse or neglect of duty, and for rendering such force efficient in the discharge of its duties."

The rapid changes in personnel and the bewildering rapidity of transfers and postings, which afflict the whole of the police force, have been highlighted above. These changes are orchestrated by the Provincial Government. This farcical state of affairs must end. It is wholly inimical to the autonomy of command and the independence of operations. It is in this context that s. 12 must be viewed and construed, by applying the *Ghaidan* approach. In our view, in terms of this approach the power vested in the Inspector General to make rules and frame orders for the "organization",

"classification" and "distribution" of the police force and to ensure that the said force is rendered "efficient in the discharge of its duties", is broad enough to vest in him the powers of transfers and postings throughout the police force and the entire hierarchy at all levels, including PSP officers. We therefore apply the *Ghaidan* approach and so construe s. 12. The power of postings and transfers cannot be exercised elsewhere in the executive branch, whether the Provincial Government or any authority or body (including any minister of whatever rank). It must, subject to what is said below, vest only in the Inspector General.

92. In the context of s. 12, reference may also be made to the decision of the Supreme Court in the *Mushtaq Ahmed Warraich* case. This decision has already been considered in detail above. It will be recalled that the issue before the Supreme Court was one of seniority, and the question was whether it was to be determined in terms of rules framed under the Police Act or as per the rules generally applicable to all provincial civil servants, framed under the Punjab Civil Servants Act, 1973. It was held that the special law would prevail over the general law, and hence the rules framed under the Police Act would take precedence. In our respectful view, the law enunciated by the *Mushtaq Ahmed Warraich* case leads to the conclusion that if there is any aspect of the terms and conditions of service of police officers that is, or can be, regulated by any provision of the Police Act, and appropriate rules are framed or orders made, then they would take precedence over any similar rules applicable generally to all civil servants and framed under the general civil service law. This would clearly include postings and transfers.

93. It appears that the Sindh Government exercises power in relation to transfers and postings of police officers in terms of the Sindh Civil Servants (Appointment, Promotion and Transfer) Rules, 1974 ("1974 Rules"), which have been framed under the Sindh Civil Servants Act, 1973 ("1973 Act"). We may note that after judgment had been reserved, on 01.08.2017 a contempt application was filed on behalf of the Petitioners in CP D-7079/2017 alleging that contrary to the interim orders in the field, in terms of certain notifications, the power of postings and transfers of high level police officers had been taken away from the Inspector General and, in the last such notification, vested in the Home Minister. The alleged contemnor was the Chief Secretary, who was directed to file his reply. In his reply dated 09.8.2017, the Chief Secretary (while denying any disobedience of Court orders) set out in some detail the manner in which the power of postings and transfers has been vested since 2012. According to the Chief Secretary, the power was exercisable in terms of, and under, the 1974 Rules, and he made reference to the various provisions thereof in his reply. In terms of the 1974 Rules, the competent

authority in respect of high level police officers is the Chief Minister. In 2012 the power of postings and transfers of police officers in BS-18 was delegated to the Inspector General. On 03.07.2014, this delegation was withdrawn, with the power reverting to the Chief Minister. However, on 15.07.2014, the notification of 03.07.2014 was withdrawn. On 23.05.2016, a notification was issued to the effect that the power of transfer and posting of officers in BS-18 and BS-19 was to be exercised by the Inspector General with the approval of the Home Minister. On 09.08.2016 the last mentioned notification was cancelled, and it was ordered that transfers and postings in BS-18 and BS-19 were to be as directed by the Inspector General with the approval of the Chief Minister. About 10 months later, on 30.06.2017 the notification of 09.08.2016 was withdrawn, i.e., the delegation of powers to the Inspector General was cancelled. Henceforth, the postings and transfers were to be done by the Chief Minister. A week later, this notification was itself cancelled, and on 07.07.2017 it was ordered that the postings and transfers would be as ordered by the Home Minister. It is apparently this notification that currently holds the field. From the reply of the Chief Secretary, it appears that to support the last mentioned notification reliance has been placed firstly on Rule 9(2) of the 1974 Rules (which empowers the Chief Minister in this regard) and secondly on Rule 7(ii) of the 1986 Rules (i.e., the Rules of Business), which empowers the Chief Minister to delegate any and all of his powers in relation to a Department to the Minister, Advisor or Secretary of that Department. The Chief Secretary has pointed out in his reply that as per the 1986 Rules the police is an attached department of the Home Department.

94. We have set out the position as narrated and claimed by the Chief Secretary (who obviously represents the official view of the Provincial Government) in some detail for two specific reasons. Firstly, the narration given by the Chief Secretary demonstrates the almost cavalier manner in which the power of postings and transfers is moved around within the executive branch. At a mere whim (or so it would seem) the power is handed over first here, and then there. Sometimes it is to be exercised with approval, and sometimes not. There is neither consistency nor principle nor settled practice. This simply serves to confirm the lack of stability which afflicts the police force, and the almost anarchical circumstances in which it is forced to operate. This brings home, forcefully, the need for autonomy of command and independence of operation. Secondly, the last (and, it would seem, current) notification of 07.07.2017 is unlawful even on its own terms. Even on the face of it, the coupling of Rule 9(2) of the 1974 Rules and Rule 7(ii) of the 1986 Rules, so as to justify the Home Minister exercising the power of postings and transfers, is untenable. These provisions operate separately. Rule 9(2) applies to individual civil servants, placed in various categories in the Table attached

to said rule. Rule 7(ii), as expressly stated therein, relates to the operation of a Department at large and any delegation in respect thereof is only "under these rules", i.e., the 1986 Rules. We have been unable to fathom how the Chief Minister can delegate powers conferred upon him under one set of rules to a Minister under another set of rules. The purported delegation is, on the face of it, unlawful.

95. From the foregoing analysis and discussion, a number of conclusions emerge. Firstly, as noted, by applying the *Ghaidan* approach to s. 12 of the Police Act for purposes of the proper enforcement of fundamental rights and achieving the objective set out above, the power of transfers and postings in the police force at all levels vests in the Inspector General, to be exercised by him by framing appropriate rules or orders. Secondly, the Police Act being the special law, its provisions, and any rules framed under it, trump those of the law generally applicable to civil servants and any rules framed under the latter. This conclusion is based on the law enunciated by the Supreme Court in the *Mushtaq Ahmed Warraich* case. Thirdly, the notification dated 07.07.2017 is unlawful, even in terms of the position as claimed by the Chief Secretary and certainly in terms of the first and second conclusions.

96. We therefore hereby quash the notification dated 07.07.2017, which is declared to be without lawful authority and of no legal effect. Any and all similar notifications, orders, circulars or instructions if any (including any subsequent to 07.07.2017) are likewise quashed and declared to be without lawful authority. The power of transfers and postings of police officers, at all levels, and inclusive of PSP officers serving in the Province vests in the Inspector General and is to be exercised by him in terms of rules or orders to be framed under s. 12. Of course, the said rules or orders have to be approved by the Provincial Government, which for reasons already explained means the Provincial Cabinet. We therefore direct as follows:

a. The Inspector General shall, within 30 days, frame draft rules under s. 12 setting out the manner in which he (and/or the police hierarchy acting through him) is to exercise the power of transfers and postings in the police force at all levels (including PSP officers serving in the Province). The rules must be framed in such manner as ensures autonomy of command and independence of operation. The rules must be transparent in form and reality, and fair in operation and effect. They must also, *inter alia*, set out the period or term that is ordinarily to be served at any level/post, so as to ensure

that the rule laid down by the Supreme Court in the *Anita Turab* case shall apply in relation thereto.

b. The draft rules shall be transmitted to the Provincial Government (here meaning the Provincial Cabinet) and also, to ensure transparency, posted simultaneously and prominently on the website of the Sindh Police (i.e., on the home page). The Provincial Cabinet must consider the draft rules at its next meeting or a meeting specifically called for such purpose within 15 days (whichever is earlier). The agenda for the meeting must be circulated in advance and the Inspector General must be invited to attend the meeting. If the rules are approved as proposed, then the same shall take effect in terms of s. 12 from the date of the Cabinet meeting. If any changes, modifications or amendments are made, which are concurred to in writing by the Inspector General, the same result will follow. If the rules are not considered or approved by the Provincial Cabinet or changes, modifications or amendments are made therein which are not accepted by the Inspector General, then the entire exercise will have to be repeated. The exercise shall be subject to judicial review, which may be sought by means of an appropriate application filed in these petitions.

c. Till such time as the rules are framed and approved in terms as stated above, and with immediate effect, the power of transfers and postings in the police force, at all levels and including that of PSP officers, shall be exercised only by the Inspector General, and any orders issued by him in this regard shall be self-executing. Without prejudice to the foregoing, they will also be forthwith given full effect by the Provincial Government, including all Departments and authorities thereof.

d. Without prejudice to what has been said in sub-para (c), the Inspector General shall also immediately review the transfers and postings made in the police force since judgment was reserved.

97. The next section of the Police Act that requires attention is s. 46(2). This confers rule-making powers on the Provincial Government (which must mean the Provincial Cabinet for reasons already stated), *inter alia*, (i) to

"regulate the procedure to be followed by … police-officers in the discharge of any duty imposed on them by or under [the Police Act]", and (ii) generally, "for giving effect to the provisions of [the Police Act]". For obvious reasons, and by applying the *Ghaidan* approach, the rule-making power cannot be exercised in such manner as is inconsistent with or which negates, contradicts or impacts on anything that has been said herein above in relation to the other provisions of the Police Act. Any proposed rules must first be circulated in draft, and must be considered at a duly called meeting of the Cabinet for which the agenda is circulated in advance. Any rules finally framed must have the concurrence of the Inspector General. In any case, the rule-making power cannot be exercised at all in relation to any matter that comes within the scope of s. 12. Furthermore, and more generally, the rule-making power cannot be exercised in relation to any other provision of the Police Act in such manner as impacts on, compromises, affects, negates, erodes or otherwise curtails or reduces the autonomy of command and independence of operation of the police force. Whatever has just been said shall also apply *mutatis mutandis* in relation to any other provision of the Police Act that confers any statutory powers on the Provincial Government, whether to be exercised by the making of rules or otherwise. Specific mention may however be made of ss. 2 and 5. (The reference to "Provincial Government" therein of course means the Provincial Cabinet.) In s. 2, in the second paragraph, the reference to "all other conditions of service of members of the subordinate ranks" must be construed and applied subject to what has been said herein above, i.e., without prejudice to the objective set above and subject to the concurrence of the Inspector General. Furthermore, a matter that may come within the rubric of "conditions of service" will not be within the scope of s. 2 if it also falls within the scope of s. 12. In s. 5(3), the decision to be taken by the Provincial Cabinet must be taken after the views of the Inspector General have been obtained and, again, without prejudice to the autonomy of command and independence of operation of the police force.

98. We now turn to consider the judgment of the Supreme Court of India so strongly relied upon by learned counsel for the Petitioners, *Prakash Singh and others v. Union of India and others* (2006) 8 SCC 1 ("*Prakash Singh*"). The matter came before the Court by way of a petition under Article 32 of the Indian Constitution, which can be regarded as analogous to, if not the equivalent of, Article 184(3) of our Constitution. At issue was the policing system in India, more particularly in the context of the Indian Police Act, 1861 ("Indian Act"). As has been noted in the first part of this judgment, the legislative competence of "Police" under the Indian Constitution is an exclusively state (i.e., provincial) subject (see Entry No. 2 of List II of the Seventh Schedule). The Indian Act was an 'existing law' for the purposes of

the Indian Constitution in the same sense as our Article 268. Almost all States continued with the Indian Act as the statute regulating the police force. In 1977, the Government of India set up a National Police Commission to undertake a "fresh examination of the role and performance of the police both as a law enforcing agency and as an institution to protect the rights of the citizens enshrined in the Constitution" (*Prakash Singh*, pp. 6-7). The terms of reference of the Commission were "wide ranging". It sat for a number of years and issued a series of reports. In the "8th and final report, certain basic reforms for the effective functioning of the police to enable it to promote the dynamic role of law and to render impartial service to the people were recommended and a draft new Police Act incorporating the recommendations was annexed as an appendix" (pg. 8). However, the recommendations were not implemented. It was in this context that the petition under Article 32 came to be filed, in 1996. The petitioners prayed for the issuance of "directions to Government of India to frame a new Police Act on the lines of the model Act drafted by the Commission in order to ensure that the police is made accountable essentially and primarily to the law of the land and the people" (*ibid*). It was noted that in addition to the Commission, other "High-Powered Committees and Commissions" also examined the matter of police reforms and made recommendations (pg. 10). The Government of India, in 2005, constituted a committee headed by the renowned lawyer, and former Attorney General, Mr. Soli Sorajbee, which was tasked with drafting a new Police Act. The Sorabjee Committee reported in 2006, annexing a "draft outline for a new Police Act" (*ibid*). However, all of these efforts came to naught. The States remained supremely indifferent to all the proposals and recommendations. The Indian Act continued, as it were, to rule the roost, complete with the archaic baggage of its colonial legacy. The Supreme Court observed as follows (pp. 12-13; emphasis supplied):

> "**25.** … We expect that the State Governments would give it due consideration and would pass suitable legislations on recommended lines, the police being a State subject under the Constitution of India. *The question, however, is whether this Court should further wait for Governments to take suitable steps for police reforms. The answer has to be in the negative*.
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> **26.** Having regard to (i) the gravity of the problem; (ii) the urgent need for preservation and strengthening of Rule of Law; (iii) pendency of even this petition for last over ten years; (iv) the fact that various Commissions and Committees have made recommendations on similar lines for introducing reforms in the police set-up in the country; and (v) total uncertainty as to when police reforms would be introduced, we think that there cannot be any further wait, and *the stage has come for issue of appropriate directions for immediate compliance so as to be operative till such time a new model Police Act is prepared by the Central Government and/or the State Governments pass the requisite legislations. It may further be noted that the quality of Criminal Justice System in the country, to a large extent, depends upon the*

working of the police force. Thus, having regard to the larger public interest, it is absolutely necessary to issue the requisite directions. Nearly ten years back, in *Vineet Narain and Ors. v. Union of India and Anr*. **(**1998) 1 SCC 226, this Court noticed the urgent need for the State Governments to set up the requisite mechanism and directed the Central Government to pursue the matter of police reforms with the State Governments and ensure the setting up of a mechanism for selection/appointment, tenure, transfer and posting of not merely the Chief of the State Police but also all police officers of the rank of Superintendents of Police and above. *The Court expressed its shock that in some States the tenure of a Superintendent of Police is for a few months and transfers are made for whimsical reasons which has not only demoralizing effect on the police force but is also alien to the envisaged constitutional machinery. It was observed that apart from demoralizing the police force, it has also the adverse effect of politicizing the personnel* and, therefore, it is essential that prompt measures are taken by the Central Government.

…

29. The preparation of a model Police Act by the Central Government and enactment of new Police Acts by State Governments providing therein for the composition of State Security Commission are things, we can only hope for the present. Similarly, we can only express our hope that all State Governments would rise to the occasion and enact a new Police Act wholly insulating the police from any pressure whatsoever thereby placing in position an important measure for securing the rights of the citizens under the Constitution for the Rule of Law, treating everyone equal and being partisan to none, which will also help in securing an efficient and better criminal justice delivery system. *It is not possible or proper to leave this matter only with an expression of this hope and to await developments further. It is essential to lay down guidelines to be operative till the new legislation is enacted by the State Governments*."

99. Referring to its powers under the Indian Constitution the Court then, having considered the recommendations made in the various reports, issued in para 31 (to which particular reference was made by learned counsel) detailed directions to the Union and State Governments "for compliance till framing of the appropriate legislations". The directions were to be complied with by 31.12.2006 (the petition having been disposed off on 22.09.2006). In brief, the directions were to the following effect. The Supreme Court directed the State Governments to constitute a State Security Commission (a body created by the Court), as a "watchdog body", "to ensure that the State Government does not exercise unwarranted influence or pressure on the State police and for laying down the broad policy guidelines so that the State police always acts according to the laws of the land and the Constitution of the country". The composition of this commission was to be as specified by the Court, and the recommendations of this body were to be binding on the State Governments (pg. 14). As regards the police officers, the Supreme Court directed that they were to have the minimum terms in their respective posts as specified by the Court. The Director General of Police (DGP) in each State (the head of the police force) was to have the minimum term "irrespective of his date of

superannuation". He could however be relieved from duty by the State Government in consultation with the State Security Commission (pg. 15). As regards the matter of transfers, postings and promotion, the Supreme Court directed that in each State it was to be controlled by a Police Establishment Board, a body created by the Court and to be headed by the DGP and four senior officers. The recommendations of the Board were binding in relation to police officers of the rank of Deputy Superintendent or below, and State Governments could interfere with such decisions only in exceptional cases, for reasons to be recorded. For officers of higher rank, its recommendations were to be given "due weight" by the Government, which was "normally" expected to accept them. The Board was also to function as an appellate body "for disposing of representations from officers of the rank of Superintendent of Police and above regarding their promotion/transfer/disciplinary proceedings or their being subjected to illegal or irregular orders and generally reviewing the functioning of the police in the State" (pp. 15-16). The Supreme Court also directed the establishment of a district-level complaints authority in all districts in each State and a National Security Commission. Learned counsel for the Petitioners has sought directions of a similar nature from this Court.

100. We have considered the judgment in *Prakash Singh*. No doubt there are (perhaps unsurprisingly) many similarities between the problems that plague policing in this country and those faced in India. However, in the end we must, with respect, decline the invitation to adopt the course that found favor with the Supreme Court of India. In our view, the directions given in *Prakash Singh* go well beyond what would be appropriate for a High Court exercising jurisdiction under Article 199. In terms of the *Ghaidan* approach, (which in our view ought to be received into our jurisprudence and which we have adopted and applied), the directions given by the Indian Supreme Court clearly "cross the boundary between interpretation and amendment". Indeed, the judicial intent is clear: the directions given and bodies created by the Court are to last for each State until appropriate legislation is made. We are, with respect, not persuaded to follow *Prakash Singh*.

101. It will be convenient, before concluding, to set out in one place some of the orders made and directions given above (and also make certain additional orders and directions). We emphasize that this paragraph is not intended to be self-contained, and must be read in the light of, and conformably with, what has been stated in this judgment as a whole. Thus, e.g., any view, observation, order, direction or conclusion not included herein is not for that reason to be ignored or disregarded. All orders made and

directions given herein above must be given full, due and proper effect. Subject to the foregoing, the following orders and directions may be noted:

a. There is associated with the post of Inspector General a term or tenure as set out in the Sindh Government Rules of Business, 1986.

b. The term is part of the law of the land insofar as this Province is concerned. It cannot be disregarded, disobeyed or flouted by the Provincial Government. It has mandatory and binding effect. It must also, as explained herein above, be given due recognition by the Federal Government.

c. The present incumbent of the post of Inspector General, the Respondent No. 7, is therefore entitled, subject to what is said below, to have the benefit of the term associated with the post.

d. The manner in which PSP officers are to be appointed to the post of Inspector General has been considered in detail herein above.

e. Since the post of Inspector General has a fixed term associated with it, the rule laid down by the Supreme Court in the *Anita Turab* case is applicable. Therefore, if at all an incumbent can be removed during the term that can only be for compelling reasons within the meaning of the rule.

f. If at all the Provincial Government (meaning the Provincial Cabinet) is of the view that the continuation in office of the Respondent No. 7, on account of his having been appointed on OPS basis, is contrary to the law enunciated by the Supreme Court in the *Ghulam Fareed* case, and that this constitutes a compelling reason it must follow the proper procedure in accordance with law, as explained in detail herein above. The role to be played in such circumstances by the Federal Government has also been elaborated.

g. Since the proper procedure in accordance with law has not been followed, the correspondence addressed by the Provincial Government to the Federal Government on 31.03.2017 and the follow up notification of 01.04.2017 are quashed as being contrary to law and of no legal effect. The endorsement by the

Sindh Cabinet of the foregoing at its meeting held on 05.04.2017 (vide agenda item No. 6) is also set aside as being contrary to law.

h. There is a need for reforms of policing and the police force for law and order to be properly established, which is a *sine qua non* for the rule of law and which, in turn, enables fundamental rights to be fully and properly enjoyed. In order for fundamental rights to be effectively enforced in this Province, suitable directions can, and should, be given and appropriate orders made under Article 199 of the Constitution. One problem in particular that has been identified by the Petitioners is the rapid turnover in, and bewildering rapidity with which, postings and transfers are made in the police force at all levels. This farcical situation is wholly inimical to the stability of, and any meaningful performance by, the police.

i. In order to redress the situation, there must be autonomy of command and independence of operation in the police force. The police hierarchy, acting through the Inspector General, must have control over its own affairs especially insofar as postings and transfers are concerned (but certainly not limited to that) and outside interference, whether by the Provincial Government or any body or authority thereof or otherwise, (including any minister of any rank) must come to an end.

j. For purposes of giving directions and making orders for enforcement of fundamental rights, the Police Act ought to be interpreted and applied by adopting the approach articulated by the House of Lords in the *Ghaidan* case, in applying the (UK) Human Rights Act, 1998. Sections 3, 4 and 12 of the Police Act in particular have been so interpreted and applied, keeping in mind at all times the objective identified above, namely that there must be autonomy of command and independence of operation in the police force.

k. With specific reference to s. 12, detailed directions have been given for the formulation of rules to properly regulate postings and transfers in the police force in accordance with law.

l. Pending formulation and adoption of such rules, and with immediate effect, the power of transfers and postings in the

police force, at all levels and including that of PSP officers, shall be exercised only by the Inspector General, and any orders issued by him in this regard shall be self-executing. Without prejudice to the foregoing, such orders will also be forthwith given full effect by the Provincial Government, including all Departments and authorities thereof.

m. The order/notification that appears to be currently in the field in relation to postings and transfers, dated 07.07.2017, is quashed as being contrary to law and of no legal effect. Any and all other such orders, notifications, circulars etc. (including any issued subsequent to 07.07.2017) are likewise quashed and declared to be of no legal effect.

n. In terms of s. 4 of the Police Act, as interpreted and applied herein above using the *Ghaidan* approach, the administration of the police force vests in the police hierarchy acting through the Inspector General. His role is a key and central one. His position is at the apex of the force. Any attempt therefore to sideline or marginalize the Inspector General or to circumvent him or to otherwise curtail his powers directly or indirectly (by, e.g., holding meetings with police officers to which the Inspector General is not invited) would be contrary to law and of no legal effect. It could, among other things, expose any police officer concerned to appropriate disciplinary or other proceedings, whether by way of misconduct or otherwise. The command structure of the police hierarchy is clear. It flows from, to and through the Inspector General. There can be no autonomy of command, nor independence of operation without this.

o. If at any time the Provincial Government (here meaning the Provincial Cabinet) amends or alters the 1986 Rules in relation to the term or tenure of the Inspector General, such term cannot under any circumstances be reduced to less than three years. Furthermore, no authority or body can be given any power to curtail, reduce, suspend or otherwise dispense with the stipulated term. However, any such change, if ever made, shall apply also to the incumbent for the time being of the post of Inspector General.

102. We would also like to emphasize that in this judgment we have touched upon only some aspects of the very many problems relating to policing, the police force and the law and order situation. The reform of the police force, the revival of proper and effective policing, the regaining and restoration of law and order, and the enforcement of fundamental rights in the fullest sense is an on-going exercise and a work-in-progress. The problems and issues are many, and may need to be treated again in fresh petitions and other proceedings. However, even if this judgment proves to be but one link in that chain, it is hopefully a step in the right direction (if we may mix metaphors a bit).

103. In view of the foregoing discussion and analysis, these petitions are disposed off in the following terms:

a. It is declared that the legislative competence of "Police" is in the exclusive Provincial domain.
b. It is declared that the Sindh (Repeal of the Police Order, 2002 and Revival of the Police Act, 1861) Act, 2011 is *intra vires* the Constitution, and that therefore the Police Act, 1861, as revived and restored by the said Act is the law in force in this Province and not the Police Order, 2002.

c. The Respondents, and all authorities and bodies of the Provincial Government, and also as appropriate the Federal Government and all authorities and bodies thereof, are directed to give full and immediate effect to the orders made and directions given in this judgment and to act only in accordance and conformably with the same.

d. Without prejudice to the generality of the foregoing, the Respondents as aforesaid are directed to give full and immediate effect to the orders made and directions given in para 101 of this judgment and to act only in accordance and conformably with the same.

e. The Respondents as aforesaid are restrained from acting in any manner that is inconsistent with, or which contradicts, any orders made or directions given in this judgment and, without prejudice to the generality of the foregoing, from issuing, acting upon or giving effect to any circular, notification, guideline, instruction, order or direction that is inconsistent with, or contradicts, this judgment.

f. There will be no order as to costs.

JUDGE

JUDGE