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1. Safeguard against arbitrary arrest. Article 10 is meant to provide safeguards to every person against arbitrary arrest or detention. A person can be arrested either under the ordinary law or under the law relating to preventive detention. A person arrested under ordinary law has been given safeguards as follows:

1. that he shall be informed of the grounds for his arrest as soon as possible;
2. that he shall be allowed to consult and be defended by a legal practitioner of his choice; *[PLD 1975 SCMR 1]*
3. that he shall be produced before a Magistrate within 24 hours of his arrest excluding the time necessary for the journey if any, from the place of arrest to the Court of the Magistrate; and
4. that he shall not be detained longer than the said period without the sanction of the Magistrate. *[1975 P.Cr.L.J. 1413]*

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10 Added by Constitution Third Amendment Act, 1975, *w.e.f.* Feb. 13, 1975.

So far as the person arrested under any law relating to preventive detention is concerned, the safeguards are:

1. that no person detained under any such law can be detained for a period exceeding three months, unless he is given an opportunity to appear before the Review Board in person, and the State obtains the opinion of the said Board that there is sufficient cause for such detention before the expiry of that period;
2. if the detention is continued after the said period of three months, the State will have to obtain opinion of Review Board, before the expiry of each period of three months, that there is, in its opinion, sufficient cause for such detention;
3. that the authority ordering the detention shall, within fifteen days from such detention, communicate to the detenu the grounds for his detention, and shall afford him the earliest opportunity of making a representation against the orders of his detention. However, the authority making order for the detention may not disclose the grounds or any particular fact if they consider its disclosure against the public interest;
4. that no person shall be detained for more than a total period of eight months in case of a person detained for acting in a manner prejudicial to public order and twelve months in any other case within a period of twenty-four months commencing on the day of the first detention.

2. Arrest. Before a person is said to be `arrested within the meaning of the sub-paragraphs (1) and (2) two tests ore to be satisfied,

(i) the arrest must to by the Executive and not by order of a competent Court or under a legal warrant, and

(ii) there must be an accusation of certain offence or some prejudicial activity on the part of the person arrested.

3. Right to counsel. A person arrested has a constitutional right to the services of a counsel. Therefore, the provisions of the law which deny to such person the right to be defended by a legal practitioner are void. *[PLD 1965 Lah. 293; PLD 1957 Lah. 388]* The person arrested must be given reasonable opportunity to engage counsel, and the counsel engaged must be given reasonable opportunity to defend him. *[PLD 1957 Dacca 101]* The constitutional provision giving to an accused person the right to be defended by counsel must be read as part of the law, irrespective of whether the law gives or denies such right. *[PLD 1965 Dacca 241]* The right to be defended by a pleader attaches to a person on arrest and continues even though he is released on giving security. *[52 Cr.L.Jour. 1251]* Any statuary provision which conflicts with the right of an arrested person to consult and be defended by a legal practitioner of his choice will be void as repugnant to Cl. (1) of the Article. Where the impugned statute permits the proceedings to be conducted in the absence of the counsel of the accused, it would be void being inconsistent with this provision. *[PLD 1958 Kar. 92]* It is to be noted that in order to show that the Constitution has been infringed, it is not necessary to show that a person arrested under a certain Act was actually denied the right of defence by a legal practitioner. It is sufficient that the Act impugned denied the arrested person such right. *[PLD 1956 Lah. 668.]*

4. Accused not able to engage counsel. Under the Constitution, an accused person has a right to be defended by counsel of his own choice but not necessarily at State expense. He can engage any counsel he likes; but, when he is not able to engage one, then the choice is no longer available to him. He has to be satisfied with the counsel assigned by the Court. In such cases, the counsel so engaged is not required to file a *vakalatnama*. If the condemned prisoner is not satisfied with the counsel, he can, of course, object to him. *[1975 SCMR 1]*

5. Convict fugitive from law—Appeal. Appeal filed by a counsel or a relative on behalf of a person who was fugitive from law was not competent, nor the same could be treated as having been competently filed. Nowhere in the Constitution or in the Criminal Procedure Code it had been provided that a fugitive from law could have recourse to law by challenging his conviction through a counsel of his choice, merely because S. 11-A was added in Anti-Terrorism Act, 1997, in order to bring the Act in comformity with Article 10 of the Constitution, which provided that nothing contained in subsections (10) & (11) of S. 19 would be construed to deny the accused the right of consulting or to be defended by a Legal Practitioner of his own choice, but it did not mean that an accused person who had decamped had an indispensable right to be defended by a counsel of his choice, without surrendering to the process of law. In such a situation the fundamental rule of administration of justice, viz., a person seeking aid of justice in a criminal case should submit to the due process of justice, would be applicable. Appeals filed on behalf of the convicts/absconders, who had not surrendered to the process of law after their conviction, therefore, were not competent, nor the same could be field by the counsel in whose favour statedly power of attorneys were executed or by their relatives, as such, the same being not maintainable under the law were dismissed accordingly. *[PLD 2004 Quetta 16]*

6. Counsel appearing at State expense. The counsel appearing for an accused person at the appellate or revisional stage at State expense is under no legal duty to interview the accused in jail or to obtain his personal instructions, because, at this stage, he is only concerned with the case, as it transpires on the record, for, normally no additional evidence can be brought in at this stage. However, if the counsel so desire, he can, if he considers it necessary interview the accused in jail, with the permission of the Court. No legitimate complaint can be made if the counsel engaged in the case did not consider it necessary to interview the accused in jail. *[1975 SCMR 1]*

7. Production before a Magistrate. It is an established practice that the person arrested should be produced before the nearest Magistrate within the prescribed time. Failure to comply with this requirement would make further detention illegal. *[PLD 1957 Lah. 813]* The rule is applicable whether the arrest is with or without a magisterial warrant. *[PLD 1957 Lah. 813]* The Magistrate cannot go to the place where the detenu is being kept and remand him to custody. If he does so, he contravenes the provisions of this clause. *[PLD 1965 Lah. 324 DB]* It is to be noted that both under Cl (2) and under S. 167 Cr.P.C. the actual production of the accused before the Magistrate is necessary for obtaining an order of first remand. But the production of the accused before the Magistrate is not necessary on the occasion of a subsequent remand. *[52 Cr. L. Jour. 165]*

8. Communication of grounds. The object of communication of the grounds on which a person is arrested or detained is bringing home to detenu effective knowledge of facts of his detention or the grounds of his arrest so that he may be in a position to make an application to the competent Court for bail or to move the High Court for a writ of

habeas corpus. The intimation also enables the person concerned to prepare his defence in time for the purpose of his trial. Mere reference to the section of the law under which he has been arrested will not be treated as a sufficient compliance with the requirement. *[AIR 1956 All. 56]* In *Jumma Khan Baluch v. Government of Pakistan*, Qadeeruddin, J. observed that the illiteracy of the detenu would undoubtedly make it impracticable to communicate to him the grounds of his arrest in writing. It was held that where such grounds were communicated orally to the persons arrested who were illiterate, information was duly given to them in terms of the Article. *[PLD 1957 Kar. 939]* Grounds of detention should be communicated within 15 days from such detention, which means that 15 days time has been allowed by the Constitution. Such time is the maximum limit for supply of grounds of detention and it can be done even earlier than that period. Such requirement of the Constitution has to be kept in view at the time of detaining a person or dealing with the cases of detention. *[2007 P.Cr.L.J. 268]* For providing grounds of arrest, provisions of Article 10 of the Constitution are attracted, which contemplate that communication of the grounds should be made within 15 days and it is the maximum limit of delay. Words "as soon as" appearing in S. 3(6) of West Pakistan Maintenance of Public Order Ordinance, 1961, are to be interpreted or read in such a way that they are consistent with the requirements of the Constitution. *[2007 P.Cr.L.J. 268]* Grounds of detention were the material ingredient upon which the authority relied to pass order of detention so it could be presumed that grounds of detention must precede order of detention, which would indicate that first there should be grounds in the form of material which was to be considered by the authority to pass the order of detention. Existence of grounds of detention was to be pre-supposed and it was essential that reason or ground for preventive detention should have been disclosed to the detenu himself so that he should decide whether he would like to stay in detention or should manage himself for his own safety. High Court declared such detention order as illegal and not sustainable under law, hence was quashed. Petition was allowed in circumstances. *[2007 P.Cr.L.J. 268]* Home Secretary, himself passing impugned order. No one should be a judge of his own cause—order overruled. *[2007 P.Cr.L.J. 1776]*

9. **Grounds supplied must be sufficient.** Insistence on making provision for serving grounds is not for mere ceremony but really in the interest of justice so that the person deprived of his liberty may have adequate information about the allegations against him and give explanations for securing his release. Particulars supplied must be of a such nature as would enable him to make a representation—as a result of which he may secure his release. Where the grounds of detention were found to be vague and they gave no clear indication as to the charges made against the detenu to enable him to make a representation which the Constitution guarantees him, the detention was held to be illegal. *[PLD 1965 Dacca 241]*

10. **Satisfaction of the Court.** Although High Court cannot claim in the exercise of writ jurisdiction to usurp the functions of the authority in which power has been vested nor to substitute its own decision for the decision of that of Authority nor can the Court insist on being satisfied that there was material upon which it itself would have taken the same action. It is in this sense that it has been said that the Court is not concerned with either the adequacy or the sufficiency of the grounds upon which action is taken. The Court in order to be satisfied as required by the Constitution, must know that there were in fact grounds relatable to the purposes of the statute upon which the action of the authority concerned could at all have been founded after an honest application of the mind of the

authority concerned to all the relevant considerations. The question, however, that still remains to be considered is as to whether the reasonableness of the action can be examined when the statute itself does not require the authority to act upon reasonable grounds but leaves him to act upon his own subjective satisfaction. In view of the provisions of Article 199 of the Constitution that degree of reasonableness has atleast to be established. Otherwise, if an authority could protect himself by merely saying that he believed himself to be acting in pursuance of a statute then what would be the material upon which the Court could say that it was satisfied that the detention or impugned action had not been taken in an unlawful manner. The presumption is that every imprisonment without trial and conviction is *prima facie* unlawful. *[PLD 2003 S.C. 442]*

11. Ground for detention must satisfy the Court of justification for detention. Reasonableness of the grounds of detention can be examined while exercising Constitutional jurisdiction which could not have been done in vacuum and the material/evidence which could not be produced in Court should have been made available in Chamber. The order of detention must show on the face of it that the detaining authority is satisfied to the effect specified under the relevant detention law and if there is no record of satisfaction of the detaining authority the order of detention can be declared to have been passed without lawful authority and *ab initio* void. *[PLD 2003 S.C. 442]* It is not the subjective satisfaction of the detaining authority alone which is sufficient but it is also his duty to satisfy the Court that there existed material on which any reasonable person could have formulated the opinion as to the necessity of the detention. No amount of legislation can deprive a person of the protection afforded to him by this Article. *[PLD 1969 Lah. 438]* The High Court has not only a right but to see the fundamental Right is not fringed by the legislature. *[PLD 1966 Dacca 576]* Court can see whether the satisfaction of the detaining Authority about the existence of the requisite condition is a "satisfaction really and truly" existing in the mind of detaining Authority or "one merely professed by the detaining Authority". Order of detention which is really passed for an ulterior purpose and not because the detaining Authority is really satisfied that it is necessary to detain the intended detenu with a view to preventing him from acting prejudicially to certain objects will be void. *[PLD 2003 S.C. 442]*

An order of preventive detention has to satisfy the following requirements:

(i) The Court must be satisfied that the material before t he detaining authority was such that a reasonable person would be satisfied as to the necessity for making the order of preventive detention;

(ii) that satisfaction should be established with regard to each of the grounds of detention, and, if one of the grounds is shown to be bad, non-existent or irrelevant, the whole order of detention would be rendered invalid;

(iii) that initial burden lies on the detaining authority to show the legality of the preventive detention, and

(iv) that the detaining authority must place the whole material, upon which the order of detention is based, before the Court notwithstanding its claim of privilege with respect to any document, the validity of which claim shall be within the competence of the Court to decide.

In addition to these requirements, the Court has further to be satisfied, in cases of preventive detention, that the order of detention was made by the authority prescribed in the law relating to preventive detention; that each of the requirements of the law relating

to preventive detention should be strictly complied with; that "satisfaction" in fact existed with regard to the necessity of preventive detention of the detenu; that the grounds of detention had been furnished within the period prescribed by law, and if no such period is prescribed, then "as soon as may be"; that the grounds of detention should not be vague and indefinite and should be comprehensive enough to enable the detenu to make representation against his detention to the authority prescribed by law; that the grounds of detention, that is, they are not irrelevant to the aim and object of this law and that the detention should not be for extraneous considerations or for purposes which may be attacked on the ground of malice. *[PLD 2003 S.C. 442]*

11.1 **Involvement of State security.** Where State security in involved, the Court may be reluctant to exercise Constitutional jurisdiction even in case of detention if the order is bona fide and is supported by the material on record though there may be some infirmity in the detention order as to procedure and not as to substance. Information supplied to Home Secretary by Security Service is, and must be, highly confidential. Public interest in the security of the realm is so great that sources of the information must not be disclosed, nor should the nature of the information itself be disclosed, if there is any risk that it would lead to the sources being discovered. Such non-disclosure is for the reason that in this very secretive field, enemies may try to eliminate the source of information. Such information must not be disclosed even to Parliament, to any tribunal or Court of inquiry or body of advisers, statutory or non-statutory. Public interest in the freedom of the individual and the doing of justice to him, must take second place to the security of country itself, so much so that arrests have not been made, nor proceedings instituted, for fear that it may give away information which must be kept secret. When public interest requires that information be kept confidential, it may outweigh even the public interest in administration of justice. Power to detain is not a power to punish for offences which an executive authority in its subjective satisfaction believes a citizen to have committed. Such power is primarily intended to be exercised in those rare cases when the larger interest of the State demand that restrictions should be placed upon the liberty of a citizen curbing his future activities. Restrictions so placed must consistently with the effectiveness of detention, be minimal. *[2004 YLR 1680]*

12. **Remedy of representation—Adequate remedy.** Remedy of availing of representation as provided by S. 3(6) of W.P. Maintenance of Public Order Ordinance, 1960 read with Article 10 of the Constitution was available to the detenu but he had not availed of for no cogent reasons. Without availing of the remedy of representation, Constitutional petition was not sustainable unless and until the petitioner was in a position to make out a case of exceptional nature. Where no such case had been established, whereof it could be said that the case was of such a nature that a remedy of representation could not be decided on merits and in accordance with law Constitutional petition was not maintainable. *[2001 P.Cr.L.J. 1727]*

13. **Retrospective effect to enactment not barred by the Article.** This Article is no bar to the grant of retrospective effect to any enactment. *[PLD 1968 S.C. 101]* It is difficult to construe Article 10 as conveying a fundamental right in every citizen of Pakistan and every person for the time being within Pakistan against the making of laws by the established Legislatures, which expressly operate retrospectively or retroactively against

his interest. The power to amend and repeal legislation as well as the power to enact it, is vested in the Legislature. A legislative act does not bind a subsequent Legislature. It has the right to pass the laws even to have a retrospective effect, with reference to any matter covered by law of an earlier Legislature unless it is forbidden by the Constitution. There is no principle of construction by which the legislative act may be made irreplaceable, because if any legislation is given a permanent character it would give rise to most injurious consequences, affecting both the citizens and the State. *[PLD 1969 Lah. 1087 (DB); PLD 1970 S.C. 146]*

14. Judicial review. Article 8 of the Constitution grants the power of judicial review of legislation according to which this Court is empowered to declare a law void if it is inconsistent with or in derogation to the fundamental rights. However, at the same time this Court is empowered to declare any legislation contrary to the provisions of Constitution under some of the identical provisions of the Constitution as under Article 143 of the Constitution on having noticed inconsistencies between the Federal and Provincial laws the court is empowered to declare that which out of the two laws is in accordance with the Constitution. Besides it is an accepted principle of the Constitutional jurisprudence that a Constitution being a basic document is always treated to be higher than other statutes and whenever a document in the shape of law given by the Parliament of other competent authority is in conflict with the Constitution or is inconsistent then to that extent the same is liable to be declared un-inconsistent then to that extent the same is liable to be declared un-Constitutional. As held by the Supreme Court in *Syed Zafar Ali Shah's* case (PLD 2000 S.C. 869) that judicial power mean that the superior Courts can strike down a law on the touchstone of the Constitution. The nature of judicial power and its relation to jurisdiction are all allied concepts and the same cannot be taken away. It is inherent in the nature of judicial power that the Constitution is regarded as a supreme law and any law contrary to it or its provisions is to be struck down by the Court, as the duty and the function of the Court is to enforce the Constitution. *[PLD 2006 S.C. 657]*

The Court can see whether the satisfaction about the existence of the requisite condition is a satisfaction really and truly existing in the mind of the detaining authority or one merely professed by the detaining authority. (AIR 1953 SC 451) A duty has been cast upon the High Court, whenever a person detained in custody in the Province is brought before that Court, to "satisfy itself that he is not being held in custody without lawful authority or in an unlawful manner." This Constitutional duty cannot be discharged merely by saying that there is an order which says that he is being so detained. If the mere production of an order of detaining authority, declaring that he was satisfied, was to be held to be sufficient also to "satisfy" the Court then what would be the function that the Court was expected to perform in the discharge of this duty. Therefore, it cannot be said that it would be unreasonable for the Court, in the proper exercise of its Constitutional duty, to insist upon a disclosure of the materials upon which the authority had acted so that it should satisfy itself that the authority had not acted in an "unlawful manner." *[PLD 2003 S.C. 442]* In this Article the emphasis is no curtailing the arbitrary power of the Executive authorities to deprive a person of his life and liberty and from this promise it may fairly be concluded that this Fundamental Right should be interpreted liberally in favour of maintaining the liberty of every person in Pakistan, but Courts can resort to such a course only if the words used in the Statute are susceptible to more than one meaning. *[PLD 1965 Lah. 112 (DB)]*

14.1 **Banking Companies (Recovery of Loans etc) Act, 1997.** Expression "in such other manner as it deems fit" in S. 18(1), Banking Companies (Recovery of Loans, Advances, Credits and Finances) Act, 1997 only means that apart from the modes prescribed in the C.P.C. and other laws the Banking Court may adopt any other method for execution of the decree provided the same is not repugnant to or in conflict with any existing law. Judgment-debtor, therefore, would not be detained in prison without fulfilling the requirement of S. 51 and O. XXI, R. 40, C.P.C. *[PLD 2003 Kar 322]*

14.2 **Guardians & Wards Act, 1890.** Matter brought to the notice of High Court in Constitutional petition had reflected that Fundamental Rights of minor were likely to be violated. High Court, in view of serious threats of violation of Fundamental Rights to life and property of petitioner, could entertain Constitutional petition. *[2000 YLR 2097]*

15. **Constitution of Review Board.** In the case of a person detained under a Federal Law the Board is to be appointed by the Chief Justice of Pakistan and it will consist of a Chairman and two other persons, each of whom is or has been a Judge of the Supreme Court or a High Court. In the case of a person detained under a Provincial law, the Board is to be appointed by the Chief Justice of the High Court concerned and will consist of a Chairman and two other persons, each of whom is or has been a Judge of a High Court. In the Constitution of the Review Board the practice of representation of Executive as was allowed in the 1962 Constitution, has been done away with. Proceedings before Review Board quasi-judicial in nature and amenable to judicial review by superior Courts. *[PLD 1986 Quetta 270]*

16. **Functions of the Board.** In *Gopalan case*, Sastri, J. was of the view that the function of the Review Board is to consider whether there is sufficient cause for detention at all of the detenu, while according to Kania C.J. and Fazl Ali, J. the function of the Board is to consider whether there is sufficient cause for detention for a longer period than (three) months. But the Board has no power to express any opinion as to how much longer than (three) months, if at all the detenu should be kept in custody. *[AIR 1952 S.C. 324]* In the very nature of things the decision as to the period of detention must be of the detaining authority. The reference to the Board is only a safeguard against Executive vagaries and high handed action. *[AIR 1958 S.C. 163]* It is necessary that not only the report of the Advisory Board should be received within (three) months but also that the order for the continuation of the detention beyond three months must have been passed within a period of three months. *[AIR 1953 Sau. 61]*

17. **Baby born in Jail.** Newly-born baby not being a convicted person, her remaining in jail would be negation of fundamental right of liberty conferred upon baby from the very day of her birth by Constitution of Pakistan (1973). Newly-born baby being a suckling child, her separation from her convicted mother might prove detrimental to physical as well as psychic health. Execution of sentence of convicted mother was suspended pending her appeal against her conviction and sentence and she was released on bail. *[1999 P.Cr.L.J. 1004]*