



LUMS Rule of Law Project - Briefing Paper Legality of Detentions of Chaudhry, Ahsan, Mehmood & Kurd

INTRODUCTION

Pakistan has placed the Chief Justice of Pakistan and three prominent lawyers under house arrest since 3 November, 2007. In the absence of an independent judiciary, there is no forum for the detainees to seek enforcement of their rights under domestic and international law. This LUMS Rule of Law Project briefing paper addresses the bases for their detention and the legality of the same under Pakistan's constitution, relevant caselaw, and international human rights law.

FACTUAL BACKGROUND

The Chief Justice of Pakistan, his wife and three children have been under house arrest in Islamabad since November 3, 2007. The government has not issued any documents justifying their detention.

A District Magistrate in Islamabad issued a detention order against Aitzaz Ahsan, President, Supreme Court Bar Association, under Section 3 of the Maintenance of Public Order Ordinance of 1960 ("MPO") on November 3, 2007. The Home Secretary of the Punjab issued a new detention order on December 2, 2007, and the Home Secretary issued another order extending the detention on December 31, 2007.

Advocate Ali Ahmed Kurd was arrested on November 3, 2007 and subsequently served with a detention order from the Government of Punjab Home Secretary. Kurd was later transferred to Quetta and served with a detention order from the Capital City Police Officer on November 26, 2007. This order was extended several times.

A District Magistrate in Islamabad similarly issued a detention order against Justice (ret'd) Tariq Mehmood on November 3, 2007. The Home Secretary of Punjab issued an additional detention order for Mehmood on November 4, 2007 and this order was extended several times. With the exception a brief release for Ahsan and Mehmood for the Eid ul-Azha holiday,¹ the three have been confined to their homes for over three

1 Aitzaz Ahsan was released on December 19, 2007 to celebrate the Eid ul-Azha holiday, but subsequently beaten up and rearrested at a rest stop en route to Islamabad and exposed to extreme cold in the back of a police van for several hours. *Statement of Chaudhry Aitzaz Ahsan* (Dec. 21, 2007) (copy on file with Rule of Law Project). Mehmood was similarly granted temporary leave to offer prayers for Eid, but was rearrested after he addressed a rally against media curbs.

months.

Mehmood, Ahsan and Kurd were released on Friday, February 1, 2008, on the 90th day of their detention. Subsequently, on Saturday, February 2, 2008, the detainees were again arrested and confined to their residences. They were each served with detention orders under the MPO. Ahsan was able to leave his house to address a rally in Lahore prior to being rearrested at the airport on his way to Karachi. However, Mehmood was served with an additional detention order in the morning on Saturday before he could leave his residence. Ahsan was also banned from entering Sindh province by the Sindh Home Secretary.

LEGAL ANALYSIS

The Detention of the Chief Justice is Unconstitutional

The detention of the Chief Justice of Pakistan, Iftikhar Mohammad Chaudhry, his wife and three children violates Articles 9 and 10 of Pakistan's constitution. The Government of Pakistan has publicly stated that Chief Justice Chaudhry is confined for his own protection.² But in an open letter to the international community, the Chief Justice noted that he and his family cannot step outside their home, phone lines have been cut off and water service has been periodically interrupted.³ Lawyers who have tried to meet with the Chief Justice have been repelled with force.⁴

The government has never issued a detention order for the Chief Justice. In the absence of a valid detention order, any detained person must be produced before a magistrate within 24 hours of his or her arrest.⁵ The detention of the Chief Justice and his family is unconstitutional because the government has deprived the family of liberty without acting "in accordance with law."⁶

The Detention Orders Against Ahsan, Kurd and Mehmood Are Unconstitutional

The Constitution of Pakistan permits preventative detention under certain specific circumstances. Specifically, a person who is "acting in a manner prejudicial to the integrity, security or defence of Pakistan . . . or public order, or the maintenance of supplies or services" may be detained for up to three months without charge.⁷ Within 15

Justice Tariq re-arrested after addressing rally, DAILY TIMES (Dec. 21, 2007).

2 Farahnaz Ispahani, *Return to democracy*, THE NEWS (Feb. 4, 2008) (Caretaker Information Minister Nisar Memon stated of the detained judges, including Chief Justice Chaudhry, that "Their movements have been restricted for their own security -- otherwise they are free men.").

3 Open Letter from Chief Justice of Pakistan (Jan. 30, 2008) (copy on file with Rule of Law Project).

4 Shakeel Anjum, *Police baton-charge lawyers in Islamabad*, THE NEWS (Jan. 24, 2008).

5 Const., Art. 10, § 2.

6 Const., Art. 9 (stating that "[n]o person shall be deprived of . . . liberty save in accordance with law.").

7 Const., Art. 10, § 4.

days of the commencement of the detention, the government "must communicate to such person the grounds on which the order has been made, and shall afford him the earliest opportunity of making a representation against the order"8 If the detention is to extend for a period longer than 90 days, the government must place the matter before a review board consisting of three current or former judges for a decision prior to the expiration of the 90 day period.9

Pakistan's provincial high courts have jurisdiction to review orders of detention.10 In *Federation of Pakistan v. Amatul Jalil Khawaja*,11 the government contended that the scope of judicial review of detention orders was limited to determining whether the order appeared "reasonable" on its face. The Supreme Court wholly rejected this contention, concluding that the High Court may consider material submitted by the detainees in independently determining whether the government has met its burden to justify the detention.12

To meet its burden under *Khawaja*, the detaining official must place all the material relating to the case before the court and establish, for each period of detention, that the material "was such that a reasonable person would be satisfied as to the necessity for making the order of preventive detention." The *Khawaja* court thus reaffirmed the principle that detention orders may be challenged in the High Courts under Article 199 of the Constitution if they are based on *mala fide* because a "*mala fide* action is not action in accordance with law."13 If a single ground alleged in the detention order is vague or otherwise objectionable, the entire detention order is *void ab initio*.14

At the outset, the *mala fide* of the detention orders may be inferred from the method employed by the government to circumvent the constitutional 90-day limit on preventive detention. The government "released" each detainees on the 90th day of their detention and then re-arrested each detainee the following day to avoid placing the orders before a judicial review board as required by the constitution for detention longer than 90 days. This practice is significant evidence of *mala fide* because "each of the requirements of the law of preventive detention should be strictly complied with."15

The February 2, 2008 detention order against Ahsan is based on Section 5 of the Maintenance of Public Order Ordinance16, alleging that Ahsan is:

8 Const., Art. 10, § 5.

9 Const., Art. 10, § 4.

10 Const., Art. 199.

11 *Khawaja*, P.L.D. 2003 S.C. 442, ¶ 6.

12 *Khawaja*, P.L.D. 2003 S.C. 442, ¶ 13.

13 *Khawaja*, P.L.D. 2003 S.C. 442, ¶ 14, quoting *Begum Agha Abdul Karim Shorish Kashmiri*, P.L.D. 1969 S.C. 14.

14 *Mamoona Saeed v. Government of Punjab*, P.L.D. 2007 Lahore 128, ¶ 9.

15 *Khawaja*, P.L.D. 2003 S.C. 442, ¶ 6.

16 "Government of the District Magistrate, if satisfied with respect to any particular person that, with a

acting in a manner prejudicial to public safety and the maintenance of public order and is inciting the public, particularly the lawyers' community, to obstruct the normal functioning of the courts and that his public remarks and speeches have created unrest in the general public regarding the peaceful conduct of the forthcoming general elections.

The detention orders issued against Kurd and Mehmood contain similar allegations. Kurd's order states that he is being detained under Section 3(1) of the MPO because he is involved in activities likely to cause fear to the general public, he is involved in illegal activities and challenging the writ of government and he is a potential threat to public safety and law and order situation in the area of Quetta. Mehmood's detention order similarly alleges that he has "designs" to create a law and order situation in Islamabad that may threaten the lives of the general public because there is a danger of sabotage, that he will make "inflammatory speeches" that will promote feelings of hatred, and that he has plans to organize public assemblies in sensitive areas of Islamabad.

These detention orders fail for a number of reasons. For the detention to be valid, the detaining authority must allege facts supporting the conclusion that the detenu will act "in a manner prejudicial to public safety or public interest or the maintenance of public order."¹⁷ Instead of reciting facts that would support this conclusion, the orders merely recount the *conclusion* that the detainees are "acting in a manner prejudicial to public safety and the maintenance of public order." This bootstrapping is insufficient to meet the government's burden to justify the detention without charge.

The other allegations in the orders fail for vagueness. The "grounds for detention should not be vague and indefinite and should be comprehensive enough to enable to detenu to make representation against his detention"¹⁸ The detention orders fail the meet constitutional requirements because they do not list any specific acts undertaken by the detainees nor do the orders recite any specific evidence to this effect. "It is the primary duty of the police officials of a local police station to maintain public order."¹⁹ Thus, "unless a case of grave threat to the peace and tranquility in the local society is made out, it cannot be said that the public order cannot be properly maintained."²⁰ An assertion of criminal conduct unsupported by evidence of the same is insufficient to justify preventive detention.²¹ "The liberty of a citizen cannot be curtailed merely on

view to preventing him from acting in any manner prejudicial to public safety or public interest or the maintenance of public order, it if necessary to do so, may" detain the person. MPO § 5(1).

17 Maintenance of Public Order Ordinance, §§ 3(1), 5(1) (1960).

18 *Khawaja*, P.L.D. 2003 S.C. 442, ¶ 6.

19 *Chaman Shereen v. Government of N.W.F.P.*, 2006 P.Cr.L.J. 127, ¶ 4 (Peshawar).

20 *Shereen*, 2006 P.Cr.L.J. 127, ¶ 4.

21 *Abdul hameed Khalid v. Government of the Punjab*, 2003 P.Cr.L.J. 130, ¶ 4 (Lahore); *Nasir Mahmood v. District Magistrate*, 1995 M.L.D. Lahore 1766; *Shereen*, 2006 P.Cr.L.J. 127, ¶ 5.

presumptions."²²

The Lahore High Court ordered a detainee released in *Abdul Hameed Khalid v. Government of the Punjab*, holding that the government failed to produce any evidence to support the allegation that the detainee was endangering public peace and tranquility.²³ Similarly, in *Mamoona Saeed v. Government of Punjab*, the court rejected a detention order where the stated grounds for detention were not supported by any evidence.²⁴ "[L]imiting the liberties of a human being on vague allegations is not only unconstitutional, but also offends the basic principles of the teachings of Islam and such order could not be sustainable in law."²⁵ As in *Khalid* and *Saeed*, the detention orders here are invalid because they are based on vague, conclusory allegations lacking any evidentiary support.

Even if the detention orders had provided more specific allegations to justify the detention, the detention orders may still be challenged on the grounds of malice if they are based on "extraneous considerations."²⁶ There is substantial evidence that the three detainees have been targeted for detention because of their prominent stature and ability to draw audiences for peaceful, nonviolent expression of opposition to Musharraf's extraconstitutional actions in November,²⁷ rather than any danger that the detainees may take actions prejudicial to public order. There is no evidence that their speeches would be any different than the hundreds of similar speeches which have occurred without incident over the past 3 months. The orders issued against Tariq Mehmood, Aitzaz Ahsan and Ali Ahmed Kurd are unlawful under Pakistani law.

The Detention Orders Are Unlawful Under International Law

The Universal Declaration of Human Rights states that "[n]o one shall be subjected to arbitrary arrest [or] detention"²⁸ Similarly "[n]o one shall be subjected to arbitrary interference with his privacy, family, home, or correspondence" and "[e]veryone has the right to the protection of the law against such interference or attacks."²⁹ Although the U.D.H.R. is not a treaty, it represents evidence of customary international law.

22 *Abdul Rauf v. Chief Commissioner, Islamabad*, P.L.D. 2006 Lahore 111, ¶ 8.

23 2003 P.Cr.L.J. 130 (Lahore), ¶ 4.

24 *Saeed*, P.L.D. 2007 Lahore 128, ¶ 13.

25 *Saeed*, P.L.D. 2007 Lahore 128, ¶ 10.

26 *Khawaja*, P.L.D. 2003 S.C. 442, ¶ 6.

27 For example, the order against Ahsan specifically refers to the boycott of the judges in the superior judiciary who opted to take the oath under the Provisional Constitutional Order. There is no evidence that the lawyers' boycott against the PCO judges has caused any public disorder that would justify Ahsan's detention. The reference to the boycott in the text of his detention order is strong evidence that the order was issued in bad faith and, thus, subject to challenge.

28 Universal Declaration of Human Rights ("U.D.H.R."), Art. 9.

29 U.D.H.R., Art. 12.

Instead of protecting the detainees from arbitrary arrest as required under customary international law, the government of Pakistan is perpetuating a human rights violation by detaining these individuals without charge. Additionally, Pakistan's detention of the Chief Justice's children violates its obligations as a signatory to the Convention on the Rights of the Child.³⁰

The U.D.H.R. also provides that "[e]veryone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law."³¹ In Pakistan today, there are no "competent national tribunals" where one can seek a resolution of grievances because General Musharraf removed the majority of the appellate judges on November 3, 2007. The detainees are thus in a double-bind: they are suffering under an unconstitutional detention and there are no tribunals within the country that will enforce their rights.

The detentions of the Chief Justice, Ahsan, Mehmood and Kurd are without justification under domestic or international law. As such, the four must be recognized as political prisoners, or prisoners of conscience, because they have been deprived of their liberty solely for the peaceful expression of their beliefs.

RECOMMENDATIONS

- The Government of Pakistan should immediately release the Chief Justice, Aitzaz Ahsan, Ali Ahmed Kurd and Justice (ret'd) Tariq Mehmood from detention as well as all other individuals who are detained for the peaceful expression of their beliefs.
- The Government of Pakistan should end its policy of arbitrarily arresting and detaining individuals for their political viewpoints.
- The Government of Pakistan should respect the rights of its citizens to freedom of expression, freedom of peaceful assembly and freedom of movement.
- The Government of Pakistan should restore the deposed judiciary and restore the constitution to its status on November 2, 2007 to ensure that Pakistani citizens have competent national tribunals to address their grievances.
- International human rights groups and concerned individuals should contact the Pakistani government directly and urge them to release the detainees.
- International human rights groups should recognize these detainees as political prisoners and publicize their plight.

30 Convention on the Rights of the Child, Art. 37(b) (stating that the detention of a child "shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time").

31 U.D.H.R., Art. 8.