IN THE SUPREME COURT OF PAKISTAN
(Original Jurisdiction)

PRESENT:

Mr. Justice Umar Ata Bandial, CJ
Mr. Justice Ijaz ul Ahsan
Mr. Justice Munib Akhtar
Mr. Justice Syed Hasan Azhar Rizvi
Mr. Justice Shahid Waheed

CONSTITUTION PETITIONS NO. 14 TO 17 OF 2023
(Declaring Notification dated 19.05.2023 (Regarding constitution of an inquiry Commission to probe into the veracity of alleged Audio Leaks) as ultra vires to the Constitution of Pakistan, 1973)

Abid Shahid Zuberi, Advocate Supreme Court of Pakistan
(in Const. P. 14 of 2023)

Muqtedir Akhtar Shabbir
(in Const. P. 15 of 2023)

Imran Ahmad Khan
(in Const. P. 16 of 2023)

Riaz Hanif Rahi, Advocate Supreme Court of Pakistan
(in Const. P. 17 of 2023)

...Petitioner(s)

Versus

Federation of Pakistan through Secretary, Cabinet Division, Islamabad and others
(in Const. P. 14 & 15 of 2023)

Federation of Pakistan through its Secretary Cabinet, Pak Secretariat, Islamabad and others
(in Const. P. 16 of 2023)

Government of Pakistan through Secretary Cabinet Division, Islamabad and another
(in Const. P. 17 of 2023)

...Respondent(s)

For the petitioner(s) : Mr. M. Shoaib Shaheen, ASC
Mr. Haseeb Jamali, ASC
Mr. Umar Lakhani, ASC
Mr. Ayan Memon, ASC
Mr. Maqsood Buttar, ASC
(in Const. P. 14/23)

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Malik Shakeel-ur-Rehman, ASC
Mr. Muqtedir Akhtar Shabbir, ASC
(in Const. P. 15/23)

Nemo
(in Const. P. 16/23)

In-person
(in Const. P. 17/23)

For the Federation : Mr. Mansoor Usman Awan,
Attorney General for Pakistan
Assisted by:
Mr. Saad Javaid Satti, Adv.
Ms. Maryam Rasheed, Adv.
Ms. Maryam Ali Abbasi, Consultant.

Date of hearing : 26.05.2023

O R D E R

UMAR ATA BANDIAL, CJ. We have heard Mr. Shoaib Shaheen, ASC learned counsel for the petitioner at length and have also heard the brief submissions in response by Mr. Mansoor Usman Awan, the learned Attorney General for Pakistan. The petitioner's challenge is to Notification No.SRO.596(I)/2023 dated 19.05.2023 (**impugned notification**) issued by the Federal Government for appointment of an Inquiry Commission (**Commission**) in exercise of its power under Section 3 of the Pakistan Commissions of the Inquiry Act, 2017 comprising Justice Qazi Faez Isa, Hon'ble Senior Puisne Judge Supreme Court of Pakistan, Mr. Justice Naeem Akhtar Afghan, Chief Justice High Court of Balochistan and Mr. Justice Aamer Farooq, Chief Justice Islamabad High Court. The terms of reference (**TORs**) of the Commission, *inter alia,* are to determine whether certain alleged audios leaked on 16.02.2023 and thereafter subsequently broadcast on the electronic media, involving alleged conversations between persons connected to or including Judges of the superior Courts, constitute material whereby public trust and confidence in the credibility, uprightness, impartiality and independence of the superior judiciary is eroded.

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2. The essence of the submissions made by Mr. Shoaib Shaheen, ASC, learned counsel for the petitioners are as follows:

i) The impugned notification violates fundamental rights by breaching the principle of separation of powers on the basis of which the constitutional framework of our country is established. The Executive cannot transgress into the area of the judicial function. While Article 209 of the Constitution of Islamic Republic of Pakistan, 1973 (**Constitution**) enables the President of Pakistan (acting on advice i.e. the Executive branch) to present a Reference in respect of any alleged misconduct by a Judge of the superior Courts, the determination and all matters and aspects relating thereto whether directly or indirectly are exclusively vested in the judicial branch, as embodied in the constitutional body known as the Supreme Judicial Council (**SJC**). Thus, the constitutional principle of trichotomy of powers has placed these functions in mutually exclusive zones i.e. the two branches of the Executive and the Judiciary. However, in appointing senior sitting Judges as the Commission of Inquiry to investigate and enquire upon the matters which are the subject matter of the TORs of the Commission, *prima facie*, the principle of separation of powers has been breached. The Federal Government, in what tentatively appears to be a complete misdirection of law, has thus trenched upon a constitutional domain exclusive to the Judiciary and demarcated exclusively for the latter under Article 209 *ibid*.

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ii) The TORs for the Commission are specified in the impugned notification in sub-paras (iii) to (ix) of paragraph-6, being the questions upon which the Commission is to render its determination. These questions include in paragraph-6(v) the determination whether any disciplinary proceedings are attracted by virtue of the matters under inquiry. Keeping in view paragraph-6 (viii) which concerns the genuineness and the correctness of the alleged audios leaked, it appears, *prima facie,* that paragraph-6(v) is addressing judicial misconduct in veiled terms. This function is reserved by Article 209 of the Constitution to be performed solely by the Judiciary through the SJC. In this way, the TORs of the Commission appear to extend its jurisdiction into an area falling within the domain of the SJC at the instance of the Executive which is an arrangement that is, *prima facie*, unconstitutional and void.

iii) A perusal of paragraph-6(i) and (ii) of the TORs of the Commission setting out the subject matter of enquiry by the Commission, *prima facie,* overlaps or at the very least appears to fall within the penumbra of the constitutional jurisdiction vesting in the SJC under Article 209 of the Constitution. This jurisdiction is an integral component of the independence of the Judiciary enunciated, *inter alia*, in Article 175(3) of the Constitution which is not only a fundamental right but also a Salient Feature of the Constitution.

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3. Learned counsel for the petitioner also emphasised on the apparent violation of Article 14 of the Constitution relating to dignity of man and the rights of privacy that are inherent therein. Learned counsel submitted that such rights extended not just to the person but also to the communications made by him. Illegal and unlawful surveillance of such communication or the targeting of any person in this regard was clear cut violation of the said fundamental rights. In this regard reference was made to certain laws, including principally, the Investigation for Fair Trial Act, 2013 (**Act**) to show that it is the only law which permits surveillance under strictly limited circumstances in terms of the elaborate regime set out in the Act and only in relation to the offences appearing in the Schedule thereof which relate to terrorism and such like offences. Learned counsel read out various sections of the said Act and in particular drew attention to Section 10(2)(b) where even if surveillance for such limited purposes could be lawfully carried out, rights of privacy and property were always to be respected. It was submitted that the subject matter of the present proposed inquiry could not conceivably fall within the ambit of the said Act. Learned counsel also placed reliance on the judgment of Justice Syed Mansoor Ali Shah (concurring in part) and reported as **Justice Qazi Faez Isa and others vs. The President of Pakistan** (PLD 2021 SC 1). Various paragraphs in relation to the concept of privacy were read out from this judgment and in particular reliance was strongly placed on the following passage from para-48:

> "48. ... While the fundamental right to personal liberty and privacy guaranteed by Articles 9 and 14 of the Constitution are subject to law, there is no law in our country that authorizes any law enforcement or intelligence agency to pry into the privacy of any person through surveillance and interception, except the IFTA. The scope of the IFTA, as discussed above, is also restricted to the surveillance and interception of a person who is suspected to be involved in any terrorist or anti-state activity. Besides this limited scope under the IFTA, no other law regulates the fundamental right of privacy of citizens and allows probe into their lives through surveillance and interception. Thus, in the remaining

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> sphere the right to privacy is absolute, until law is enacted to regulate it. The violation of this sphere of the absolute privacy right makes the inadmissibility of evidence collected in violation thereof also absolute. Absolute right entails absolute prohibition on its violation. ..."
>
> ***(emphasis supplied)***

4. It was submitted that since there was, and could not possibly be, any law that allows for surveillance or hacking of any communication of Judges or their family members, the bar, as noted in the extract above, was absolute and that therefore, at a very fundamental level there could hardly be any point in light of the forgoing observations to the inquiry envisaged by the impugned notification being held. In addition, it was also submitted that in respect of the petitioner in Const. P. 14 of 2023, who is an Advocate, the alleged audio (the veracity of which was directly challenged) would amount to illegal disclosure of privileged communication which could not form the subject matter of any inquiry. Reliance was also placed in this regard on **Ishtiaq Ahmed Mirza vs. Federation of Pakistan** (PLD 2019 SC 675), which lays down detailed parameters as to admissibility of any audio or video material. Given that the alleged audios in the present case were all leaks made by a so called "black hat hacker" operating under the twitter handle "indibell", the first and primary question was the very veracity, credibility and legality of, and authorization for the alleged audios and so also the identity of the person or "hacker" engaged in or abetting such acts.

5. On any view of the matter, therefore, learned counsel submitted, further proceedings by the Commission in terms of the impugned notification would amount to a continued serious breach of fundamental constitutional principles and rights.

6. At the outset, learned Attorney General for Pakistan had sought permission to make a preliminary submission which was to the effect that one of us *(Umar Ata Bandial, CJ)* ought to consider recusing himself from the Bench. Reason given in this regard was that the constitution of the Commission and in

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particular the appointment of its Chairman could not have been done by the Hon'ble Chief Justice, in view of the stated subject matter of the reference. The contention was repelled, *inter alia,* for the reason that it was an accepted and settled constitutional principle, acted upon several times in the constitution of Commissions whenever a sitting Judge was intended to be made a member thereof, that the permission of the Hon'ble Chief Justice of Pakistan had first to be sought. Since this power was peculiar to the said office, the incumbent for the time being of the same could neither divest himself nor be divested by the Federal Government from discharging the constitutional duty. Inasmuch as the Federal Government appeared to have acted unilaterally in this matter, a constitutional principle of the highest importance had been, *prima facie,* breached. We may note in this regard that even though the other two members of the Commission are Chief Justices of respective High Courts as noted above, the subject matter of the reference transcends any particular High Court and involves at the very least a sitting Judge of the Supreme Court and a Chief Justice of a third High Court. Therefore, keeping in mind the settled principles of federalism, *prima facie,* the aforementioned constitutional principle would apply even in regard to the other two members of the Commission and therefore, the permission of the Hon'ble Chief Justice of Pakistan was required for their appointment. *Prima facie*, therefore, the very constitution of the Commission is cast in doubt. In this regard reliance is placed on:

a) **Federation of Pakistan vs. Muhammad Akram Sheikh** [PLD 1989 SC 689 @ para-28(ii) to (iv)]

b) **Gen.(R) Parvez Musharraf vs. Nadeem Ahmed (Advocate) & another** (PLD 2014 SC 585 @ para-26)

c) **The President vs. Justice Shaukat Ali** (PLD 1971 SC 585 @ page 605)

d) **Malik Asad Ali vs. Federation of Pakistan** (PLD 1998 SC 161 @ para 66)

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7. In view of the above, let notice be issued to the respondents in all petitions. Notice be also issued to the learned Attorney General for Pakistan in terms of Order XXVIIA of the Civil Procedure Code.

8. **CMA NO.3663 OF 2023 IN CONST.P.14 OF 2023.** Learned counsel for the petitioner also prayed for interim relief since the Commission has already started functioning and has made an order on 22.05.2023 and the next meeting of the Commission is scheduled for 27.05.2023. In the circumstances, till the next date of hearing, the operation of the impugned notification No.SRO.596(I)/2023 dated 19.05.2023 issued by the Federal Government is suspended as is the order dated 22.05.2023 made by the Commission and in consequence thereof proceedings of the Commission are stayed.

To come up on **31.05.2023**.

Sd/-
Chief Justice

Sd/-
Judge

Sd/-
Judge

Sd/-
Judge

Sd/-
Judge

Islamabad
26.05.2023

APPROVED FOR REPORTING.

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