**IN THE SUPREME COURT OF PAKISTAN**
(Original Jurisdiction)

**PRESENT:**

Mr. Justice Umar Ata Bandial, CJ
Mr. Justice Qazi Faez Isa
Mr. Justice Sardar Tariq Masood
Mr. Justice Ijaz ul Ahsan
Mr. Justice Syed Mansoor Ali Shah
Mr. Justice Munib Akhtar
Mr. Justice Yahya Afridi
Mr. Justice Sayyed Mazahar Ali Akbar Naqvi
Mrs. Justice Ayesha A. Malik

**CONSTITUTION PETITION NO.24 TO 26 OF 2023**
(Trials of Civilian under the Army Act, 1952 is violative of Constitution)

**AND**

**C.M. APPEAL NO. 80 OF 2023 IN CONST. PETITION NIL OF 2023**
(Declaration of trial of civilians under the Army Act, 1952 as unconstitutional, void and of no legal effect.)

Jawwad S. Khawaja
(in Const.P.24/2023)

Aitzaz Ahsan
(in Const.P.25/2023)

Karamat Ali and others
(in Const.P.26/2023)

Imran Ahmed Khan Niazi ... **Petitioner(s)**
(in C.M. Appeal 80/2023)

Versus

Federation of Pakistan, etc.
(in Const.P.24/2023)

Federation of Pakistan through the Secretary, Ministry of Law and Justice, Islamabad and others
(in Const.P.25-26/2023)

Federation of Pakistan through Ministry of Defence through its Secretary and other
(in C.M. Appeal 80/2023)

**...Respondent(s)**

For the petitioner(s) : Kh. Ahmad Hosain, ASC
(in Const.P.24/2023)

Sardar Muhammad Latif Khan Khosa, Sr. ASC
(in Const.P.25/2023)

Mr. Faisal Siddiqi, ASC
(in Const.P.26/2023)

Kismat Khan Zimri

Watermarkly

Mr. Shoaib Shaheen, ASC
Mr. Ajmal Ghaffar, ASC
Syed Rifaqat Hussain Shah, AOR
(in C.M. Appeal 80/23)

For the Federation : Mr. Mansoor Usman Awan, Attorney General for Pakistan
Ch. Aamir Rehman, Addl. AGP

Date of hearing : 22.06.2023.

**ORDER**

At the start of the hearing today, two of us, Mr. Justice Qazi Faez Isa and Mr. Justice Sardar Tariq Masood, have made statements in the open Court declining to hear these matters. Consequently, the Bench that has to hear these matters is to be reconstituted by the Hon'ble Chief Justice.

sd/-
Chief Justice

Note attached
Judge

Note attached
Judge

sd/-
Judge

sd/-
I have attached my seperate note
Judge

sd/-
Judge

sd/-
Judge

sd/-
Judge

sd/-
Judge

Islamabad,
22.06.2023.

Kismat Khan Zimri

Watermarkly

1. **قاضی فائز عیسیٰ، جج۔** 21 جون 2023ء، کو تقریباً 8 بجے شام مجھے میری رہائش گاہ پر سپلیمنٹری کاز لسٹ 2023/316ء موصول ہوئی جس میں ظاہر کیا گیا تھا کہ 9 ججز پر مشتمل ایک "لارجر بنچ-1" تشکیل دیا گیا ہے جس میں مجھے بھی شامل کیا گیا ہے اور 4 آئینی درخواستوں کی سماعت کے لیے 22 جون 2023ء کو 11:45 بجے دن کا وقت مقرر کیا گیا ہے، یعنی درخواستوں کو پڑھنے کے لیے مناسب موقع نہیں دیا گیا۔ یہ بنچ میرے اور اگلے سینیئر فاضل جج جناب جسٹس سردار طارق مسعود کے ساتھ مشاورت کے بغیر بنایا گیا ہے۔ سماعت کے لیے مقرر کی گئی ان آئینی درخواستوں کی تفصیل یوں ہے:

| | | | |
|---|---|---|---|
| 1 | آئینی درخواست بغیر نمبر/2023<br><br>مندرجہ بالا میں سول متفرق اپیل نمبر 2023/80 | 25 مئی 2023 کو دائر کی گئی (اعتراضات لگائے جانے کے بعد دوبارہ 6 جون 2023ء کو دائر کی گئی)<br>9 جون 2023ء کو دائر کی گئی | عمران احمد خان نیازی بنام وفاق پاکستان<br><br>عمران احمد خان نیازی بنام وفاق پاکستان |
| 2 | آئینی درخواست نمبر 2023/26 | 10 جون 2023ء کو دائر کی گئی | کرامت علی و دیگر بنام وفاق پاکستان |
| 3 | آئینی درخواست نمبر 2023/25 | 17 جون 2023ء کو دائر کی گئی | اعتزاز احسن بنام وفاق پاکستان |
| 4 | آئینی درخواست نمبر 2023/24 | 20 جون 2023ء کو دائر کی گئی | جواد ایس خواجہ بنام وفاق پاکستان |

یہ بات غور طلب ہے کہ جو آئینی درخواست سب سے پہلے (25 مئی 2023ء) کو دائر کی گئی تھی، وہ آخر میں لگائی گئی اور ان کے بعد بتدریج آنے والی درخواستیں بھی بعد میں لگائی گئیں لیکن سب سے آخری درخواست جو 20 جون 2023ء کو دائر کی گئی، اس کو ترجیح بھی دی گئی اور ترتیب میں پہلا نمبر بھی دیا گیا۔ اس بات پر بھی تعجب ہوا کہ اگر یہ مقدمات اہم ہیں، تو پھر موسم گرما کی چھٹیاں شروع ہونے کا انتظار کیوں کیا گیا اور اچانک صرف ایک دن پہلے شام ہی کو ان مقدمات کی پیپر بک کیوں ارسال کی گئی؟

2. عدالتِ عظمیٰ اور تمام عدالتوں کو اختیار آئین کی دفعہ 175(2) دیتی ہے جس کا اردو ترجمہ کچھ یوں ہے:
"کسی عدالت کو کوئی اختیارِ سماعت نہیں ہوگا سوائے اس کے جو آئین یا قانون کے تحت اسے دیا گیا ہے۔"

3. اپنا آئینی منصب سنبھالنے سے پہلے تمام جج آئینِ پاکستان کے تیسرے جدول میں دیا گیا حلف اٹھاتے ہیں اور یہ حلف لازم کرتا ہے کہ وہ "آئین اسلامی جمہوریہ پاکستان اور قانون" کے مطابق اپنے فرائض سرانجام دیں گے۔ پاکستان کے قوانین میں سپریم کورٹ (پریکٹس اینڈ پروسیجر) ایکٹ 2023ء بھی شامل ہے جو بذریعہ دفعہ 2(1) اور (2) لازم کرتا ہے (اردو ترجمہ):

> "(1) ہر مقدمہ، اپیل اور معاملہ جو عدالتِ عظمیٰ کے سامنے ہے، اس کی سماعت اور فیصلہ ایسا بنچ کرے گا جس کی تشکیل چیف جسٹس پاکستان اور سینیارٹی کی ترتیب میں اگلے دو سب سے سینیئر ججوں پر مشتمل کمیٹی نے کی ہو۔
> (2) اس قانون کے اجرا کے فوراً بعد ذیلی دفعہ (1) کے تحت بنائی گئی کمیٹی اپنا پہلا اجلاس کرے گی اور اپنے لیے ضابطۂ کار تشکیل دے گی، بشمول اس کے کہ کمیٹی کے اجلاس کب ہوں اور بنچوں کی تشکیل کیسے ہو۔"

4. مذکورہ بالا قانون کے وجود میں آنے سے قبل ہی، جب وہ بل کی صورت میں تھا، اسے عدالتِ عظمیٰ میں (آئینی درخواست نمبر 6 تا 2023/8ء کے ذریعے) چیلنج کیا گیا اور معزز چیف جسٹس کے بنائے ہوئے بنچ نے یک طرفہ اور مسئول علیہان کو نوٹس دیے بغیر اور ان کا موقف سننے سے پہلے ہی حکم نامہ جاری کیا (اردو ترجمہ):

> "جس وقت بھی بل صدر منظور کرے یا (جیسا کہ معاملہ ہو) جب یہ تصور کیا جائے کہ اسے منظور کر لیا گیا ہے، تو اس لمحے سے ہی اور مزید احکامات تک، قانون [سپریم کورٹ (پریکٹس اینڈ پروسیجر) ایکٹ 2023ء] جو وجود میں آجائے، اس کو کسی طرح مؤثر نہیں سمجھا جائے اور کسی بھی طرح اس پر عمل نہ کیا جائے۔"

5. جب 13 اپریل 2023ء کو یہ حکم صادر کیا گیا، وہ ان آئینی درخواستوں کی سماعت کا پہلا دن تھا۔ اس کے بعد ان درخواستوں کی سماعت 2 مئی، 8 مئی، یکم جون اور 8 جون 2023ء کو ہوئی اور آخری سماعت کے حکم میں کہا گیا کہ ان درخواستوں کو جولائی 2023ء میں سنا جائے گا مگر اب تک نہ چیف جسٹس نے، اور نہ ہی دفتر نے، ان کی سماعت کے لیے تاریخ مقرر کی ہے۔ نتیجتاً سپریم کورٹ (پریکٹس اینڈ پروسیجر) ایکٹ 2023، عدالتِ عظمیٰ کی جانب سے 13 اپریل 2023ء کو جاری کیے گئے ایک عبوری یک طرفہ حکم نامے کی بنا پر معطل ہے۔

Kismat Khan Zimri
Watermarkly

6. عدالتِ عظمیٰ میں یہ رواج رہا ہے کہ بنچ کی تشکیل اور دیگر امور میں سینیئر جج سے مشورہ لیا جاتا تھا اور اسی طریقِ کار کے مطابق پچھلے چیف جسٹس گلزار احمد چلتے رہے اور متواتر معزز جسٹس عمر عطا بندیال سے نہ صرف مشاورت کرتے تھے، بلکہ تقریباً ہر آئینی اور اہم مقدمے میں بنچ کی سربراہی کی ذمہ داری ان کو دی یا انھیں بنچ کا حصہ ضرور بناتے۔ تاہم جب سے معزز جسٹس بندیال نے چیف جسٹس کا عہدہ سنبھالا، تو اس روایت کو ترک کر دیا اور نہ صرف مجھ سے، بلکہ اگلے سینیئر جج معزز جسٹس سردار طارق مسعود سے مشاورت کیے بغیر تمام ضروری معاملات اپنی ہی مرضی سے یا اپنے چنیدہ اہلکاروں کے ذریعے چلائے۔ باقی ججوں کی حیثیت کا اندازہ اس بات سے لگایا جا سکتا ہے کہ اپنے دورِ منصبی میں ایک بار بھی full court یعنی تمام ججوں کی میٹنگ نہیں بلائی مگر مدعیان اور ان کے وکلا کو ترجیح بھی دی۔

7. اس بات کی نشان دہی ضروری ہے کہ موجودہ آئینی درخواستوں سے ملتے جلتے امور 26 مقدمات (سول اپیل نمبر 1675/2019ء وغیرہ) میں بھی عدالتِ عظمیٰ کے سامنے پہلے سے دائر شدہ ہیں۔ یہ مقدمات عدالتِ عالیہ پشاور کے 17 اکتوبر 2019ء کے فیصلے کے خلاف دائر کیے گئے تھے جس فیصلے میں کہا گیا تھا کہ قید خانے (internment centers) اور ان کے متعلق قوانین آئین سے متصادم ہیں۔ اس فیصلے کے خلاف حکومت نے اپیل دائر کی جب موجودہ مقدمے میں درخواست گزار نمبر 4 وزیرِ اعظم کی حیثیت سے وفاقی حکومت کے سربراہ تھے۔ عدالتِ عظمیٰ نے 24 اکتوبر 2019ء کو عدالتِ عالیہ پشاور کے فیصلے کے خلاف حکمِ امتناعی جاری کیا، جو آج تک برقرار ہے۔ ان مقدمات کی سماعت آخری بار 4 دسمبر 2019ء کو ہوئی اور اس تاریخ کا تحریری حکم یہ ہے (اردو ترجمہ):

"کچھ مزید دلائل سنے گئے۔ ملتوی۔"

جب ایک دفعہ کسی مقدمے کی سماعت شروع ہو جائے، تو پھر اس کا بلا تاخیر فیصلہ بھی ہوتا ہے، لیکن ساڑھے تین سال گزرنے کے باوجود ان 26 مقدمات کو سماعت کے لیے مقرر نہیں کیا گیا۔

8. ایک اور اہم مقدمہ 20 اگست 2021ء کو عدالتِ عظمیٰ میں صحافی لائے تھے جن میں پریس ایسوسی ایشن آف دی سپریم کورٹ کے صدر بھی شامل تھے اور انھوں نے کہا کہ صحافیوں کے بنیادی حقوق[1] سلب کیے جا رہے ہیں۔ عدالتِ عظمیٰ کے بنچ نے، جس کی سربراہی میں کر رہا تھا، اس بات کا نوٹس لیا اور اس کی سماعت کے لیے 26 اگست 2021ء کی تاریخ مقرر کی۔ تاہم معزز جسٹس عمر عطا بندیال نے، جو اس وقت قائم مقام چیف جسٹس تھے، اپنی سربراہی میں ایک بنچ تشکیل دیا اور اس میں اس بنچ سے کسی جج کو شامل نہیں کیا گیا جس نے وہ نوٹس لیا تھا، اور پھر اپنے سے اور مجھ سے جونیئر جج محترم جسٹس منیب اختر سے فیصلہ لکھوایا کہ آئین کی دفعہ 184(3) کا نوٹس صرف اور صرف چیف جسٹس ہی لے سکتے ہیں۔ انھوں نے 55 پیراگراف پر مشتمل فیصلہ لکھا[2] جس میں یہ بھی کہا کہ ججوں کے ذہن میں تصور واضح نہ ہونے (lack of conceptual clarity) کی بنا پر نوٹس لیا گیا تھا۔ انھوں نے میرے لکھے ہوئے 15 صفحات کو بھی مسترد اور کالعدم کر دیا۔[3] تعجب کی بات یہ ہے کہ فیصلے میں از خود نوٹس لینے کا تو تذکرہ ہے اور معزز مصنف نے سات ممالک کے نظائر اور پریکٹس پر تو نظر ڈالی[4] مگر جو اصل مسئلہ تھا، یعنی صحافیوں کے بنیادی حقوق کی پامالی کا، اس کے متعلق ایک جملہ بھی نہیں لکھا۔ اتفاقاً موجودہ درخواست گزاروں میں سے ایک اس وقت بھی وزیرِ اعظم تھے۔

9. یہ بھی واضح کرنا ضروری ہے کہ ایک اور مقدمہ، جس کا نوٹس عدالتِ عظمیٰ نے آئین کی دفعہ 184(3) کے تحت لیا تھا (از خود مقدمہ نمبر 4/2022ء)، اس میں بذریعہ تحریری حکم نامہ، مؤرخہ 29 مارچ 2023ء، کو یہ فیصلہ کیا گیا (اردو ترجمہ):

> "28۔ شہریوں کے مفاد کے لیے بہتر ہو گا کہ اس مقدمے اور ایسے تمام مقدمات کی سماعت ملتوی کی جائے جن کا نوٹس آئین کی دفعہ 184(3) کے تحت لیا گیا ہے، جب تک مذکورہ بالا امور کو منضبط کرنے کے لیے آئین کی دفعہ 191 کے مطابق ضروری قواعد بنائے نہ جائیں۔"

10. آئین کی دفعہ 191 قرار دیتی ہے (اردو ترجمہ):

> "عدالت کے عمل اور طریقِ کار کے لیے، آئین اور قانون کے تابع، سپریم کورٹ قواعد وضع کر سکتی ہے۔"

تاہم آئین کی دفعہ 184(3) کے تحت مقدمات کے لیے نہ تو عدالتِ عظمیٰ نے خود قواعد (rules) بنائے ہیں، جیسا کہ 29 مارچ 2023ء (از خود مقدمہ نمبر 4/2022ء) کے حکم نامے میں نشان دہی کی گئی تھی، اور نہ ہی پارلیمان کے بنائے گئے قانون کو چلنے دیا گیا، اور اس قانون کے متعلق درخواستوں کا اب تک فیصلہ بھی نہیں کیا۔

---

[1] آئین کی دفعات 9، 11، 13، 14(1)، 14(2)، 15، 18، 19، 19اے، 23، 24(1) اور 25اے۔

[2] PLD 2022 SC 306۔

[3] ایضاً، پیراگراف 53۔

[4] امریکا، آسٹریلیا، برطانیہ، سری لنکا، آئرلینڈ، بھارت اور کینیڈا۔

Kismat Khan Zamri

Watermarkly

11. افسوسناک امر یہ ہے کہ بعض ججوں کے فیصلوں کو رجسٹرار مسترد کر دیتے ہیں۔ چنانچہ جناب عشرت علی، رجسٹرار، نے 31 مارچ 2023ء کو ایک سرکولر جاری کیا جس میں قرار دیا کہ مندرجہ بالا فیصلے کو (جس کا مصنف میں تھا) نظر انداز (disregard) کیا جائے۔ تذلیل کے لیے انھوں نے یہ بھی ضروری سمجھا کہ سپریم کورٹ بار ایسوسی ایشن، پاکستان بار کونسل اور تمام ایڈووکیٹ آن ریکارڈ سمیت 21 افراد اور اداروں کو اپنے جاری کردہ سرکولر کی نقول بھیج دیں، اور یہ کہ عدالتِ عظمیٰ کی ہر رجسٹری میں نوٹس بورڈ پر لگایا جائے۔

12. اس کے بعد 4 اپریل 2023ء کو اسی مقدمے (از خود مقدمہ نمبر 4/2022ء) کے لیے معزز چیف جسٹس نے اپنی مرضی کا ایک 6 رکنی بنچ تشکیل دیا جس نے اسی تاریخ کو حکم بھی جاری کیا اور اس میں 31 مارچ 2023ء کے سرکولر کی تصدیق کرتے ہوئے 29 مارچ کے فیصلے کو واپس لیا (recalled)۔ اس مزعومہ حکم نامے کے پہلے صفحے پر لکھا گیا کہ اسے عدالتِ عظمیٰ کے ابتدائی اختیارِ سماعت (Original Jurisdiction) میں جاری کیا گیا ہے۔ آئین عدالتِ عظمیٰ کو مقدمات کے لیے مندرجہ ذیل مختلف نوعیت کا اختیارِ سماعت دیتا ہے: (1) ابتدائی اختیارِ سماعت[5]، (2) اپیل کے لیے اختیارِ سماعت[6]، (3) مشاورتی اختیارِ سماعت،[7] (4) مقدمات منتقل کرنے کے لیے اختیارِ سماعت،[8] (5) نظر ثانی کے لیے اختیارِ سماعت،[9] (6) توہینِ عدالت کے لیے اختیارِ سماعت[10] اور (7) انتظامی عدالتوں اور ٹریبونلز کے فیصلوں کے متعلق اپیل کے لیے اختیارِ سماعت۔[11]

13. از خود مقدمہ نمبر 4/2022ء کا 29 مارچ 2023ء کا حکم نامہ ابتدائی اختیارِ سماعت میں دیا گیا تھا، اس لیے دوبارہ ابتدائی اختیارِ سماعت استعمال نہیں کیا جا سکتا تھا۔ صرف نظر ثانی کا اختیارِ سماعت استعمال ہو سکتا تھا، مگر معزز چیف جسٹس کے بنائے ہوئے خصوصی بنچ نے دوبارہ ابتدائی اختیارِ سماعت ہی استعمال کرتے ہوئے 29 مارچ کا حکم نامہ واپس لیا (recalled)، جبکہ ان کے اس بنچ میں اس 3 رکنی بنچ کا ایک بھی رکن شامل نہیں تھا۔ میں نے یہ مناسب سمجھا کہ میں اپنے معزز ساتھیوں کو آئینی موقف سے آگاہ کروں۔ اس لیے میں نے 9 صفحات پر مشتمل ایک تحریر میں اس بات کی نشان دہی کی کہ 4 اپریل 2023ء کو جاری کی گئی دستاویز کو آرڈر کہا گیا ہے لیکن اسے آرڈر کہنا آئینی و قانونی تقاضوں کے تحت درست نہیں ہو گا اور اس لیے میں نے اسے "4 اپریل کا نوٹ" کہا۔ 9 صفحات پر مشتمل میری اس تحریر کا اختتام ان الفاظ پر ہوا (اردو ترجمہ):

> "20۔ چونکہ نہ تو آئین نے اور نہ ہی کسی قانون نے کسی عدالت میں چھ جلیل القدر ججوں کو یہ اختیار دیا ہے کہ وہ اپنے آپ کو اختیار دیں، اس لیے مقدمہ نمبر 4 میں عدالتِ عظمیٰ کے حکم نامے مؤرخہ 29 مارچ 2023ء کو 4 اپریل کا نوٹ منسوخ نہیں کر سکتا۔ متکبرانہ آمریت کی دھند میں لپٹے کسی کمرۂ عدالت سے نکلنے والے فیصلے آئین کو برطرف نہیں کر سکتے۔"

یہ تحریر میں نے 8 اپریل 2023ء کو لکھی اور اسے "اشاعت کے لیے منظور شدہ" قرار دیا (منسلک ضمیمہ الف)۔ تاہم یہ تحریر صرف ایک ہی دن عدالتِ عظمیٰ کی ویب سائٹ کی زینت بنی اور اس کے بعد اسے وہاں سے ہٹا دیا گیا۔

14. مجھے یہ بات لکھنے پر مجبور کیا گیا ہے کہ مجھ سے معزز چیف جسٹس نے 16 مئی 2023ء کو اچانک پہلی بار تحریری طور پر دریافت کیا کہ میں کب تک چیمبر ورک (Chamber Work) کرنا چاہتا ہوں۔ جواب میں میں نے معزز چیف جسٹس کو اگلے دن (17 مئی 2023ء) کو 5 صفحات پر مشتمل جواب ارسال کیا جس میں میں نے سپریم کورٹ (پریکٹس اینڈ پروسیجر) ایکٹ 2023ء کا ایک بار پھر حوالہ دیا اور اس بات کی نشان دہی کی کہ اس قانون کی دفعہ 2 لازم کرتی ہے کہ مقدمات کی سماعت کے لیے بنچ کی تشکیل چیف جسٹس اور 2 سینیئر ججوں پر مشتمل کمیٹی کرے گی لیکن اس قانون پر عمل نہیں کیا گیا کیونکہ عدالتِ عظمیٰ نے اس قانون کو جنم لینے سے پہلے ہی، جب یہ بل ہی کی شکل میں تھا، معطل کر دیا۔ میں نے اپنے تحریری جواب میں نشان دہی کی کہ اس قانون کے خلاف دائر کی گئی آئینی درخواستیں یا تو منظور ہوں گی یا انھیں مسترد کیا جائے گا اور پھر یہ سوال اٹھایا (اردو ترجمہ):

> "اگر درخواستیں مسترد کی جاتی ہیں، تو پھر درمیانی مدت میں، یعنی جب سے قانون نافذ ہوا ہے اور جب اسے مسترد کیا گیا، عدالت کو چلانا کیا اس قانون کی دفعہ 2 کی خلاف ورزی نہیں ہے؟"

---

5 آئین اسلامی جمہوریہ پاکستان، دفعہ 184۔
6 ایضاً، دفعہ 185۔
7 ایضاً، دفعہ 186۔
8 ایضاً، دفعہ 186-اے۔
9 ایضاً، دفعہ 188۔
10 ایضاً، دفعہ 204۔
11 ایضاً، دفعہ 212(3)۔

Kismat Khan Zumri
Watermarkly

15. معزز چیف جسٹس عمر عطا بندیال نے مجھے ایک مخمصے میں ڈال دیا ہے جس سے اس وقت ہی نکلا جا سکتا ہے جب وہ اس قانون کے خلاف دائر کی گئی آئینی درخواستوں کا فیصلہ کریں یا حکم امتناعی واپس لے لیں۔ میں نے یہ بھی واضح کیا کہ جو سوال معزز چیف جسٹس نے مجھ سے کیا ہے، کہ میں کب تک چیمبر ورک (Chamber Work) کرنا چاہتا ہوں، اس کا بہتر جواب وہ خود ہی دے سکیں گے کیونکہ جو بنچ سپریم کورٹ (پریکٹس اینڈ پروسیجر) ایکٹ 2023ء کے متعلق درخواستوں کی سماعت کر رہا ہے، اس کی سربراہی وہ خود کر رہے ہیں اور وہی بہتر جانتے ہیں کہ فیصلہ کب ہو گا؟ میں نے اسی تحریر میں یہ تصریح بھی کی کہ میرے معزز ساتھی ان درخواستوں کا کیسے فیصلہ کریں، یہ ان کی صوابدید پر منحصر ہے جس سے مجھے کوئی غرض نہیں مگر میں اس بات کی توقع رکھتا ہوں، جو یقیناً پوری قوم بھی رکھتی ہے، کہ جو بھی فیصلہ ہو وہ جلد ہو کیونکہ عدالت کی کارروائی اس غیر یقینی صورت حال سے متاثر ہو رہی ہے۔ 5 صفحات پر مشتمل 17 مئی 2023ء کی میری تحریر منسلک ہے، ضمیمہ ب۔

16. وفاقی حکومت نے 19 مئی 2023ء کو "آڈیو لیکس" کے متعلق ایک نوٹی فیکیشن جاری کر کے ایک 3 رکنی کمیشن قائم کیا جس کا میں چیئرپرسن ہوں اور جس کے دیگر 2 ارکان چیف جسٹس عدالتِ عالیہ بلوچستان اور چیف جسٹس عدالتِ عالیہ اسلام آباد ہیں۔ اس انکوائری کمیشن کے خلاف آئین کی دفعہ (3)184 کے تحت آئینی درخواستیں (نمبر 14 تا 17/2023ء) دائر کی گئیں اور 26 مئی 2023ء کو معزز چیف جسٹس عمر عطا بندیال کی سربراہی میں بنچ نے سماعت کی اور وفاقی حکومت کے نوٹی فیکیشن کو معطل کرتے ہوئے انکوائری کمیشن کو کام کرنے سے بھی روک دیا، باوجود اس کے کہ مبینہ طور پر ان کی خوش دامن کی آڈیو بھی زیرِ غور تھی۔ ان مقدمات میں اگلی تاریخ 31 مئی 2023ء تھی اور اس کے بعد تاریخ ابھی تک مقرر نہیں کی گئی اور انکوائری کمیشن کو غیر فعال بنا دیا گیا ہے۔ انکوائری کمیشن نے نوٹس موصول ہونے پر اپنے سیکرٹری کے ذریعے 31 مئی 2023ء کو عدالتِ عظمیٰ میں جواب جمع کرایا (متفرق درخواست نمبر 3924/2023ء)۔ اس تحریری جواب میں ایک بار پھر دفعہ 2، سپریم کورٹ (پریکٹس اینڈ پروسیجر) ایکٹ 2023ء، کی یاددہانی کرائی کہ اس کے تحت کمیٹی نے ہی بنچ بنانا ہے، نہ کہ چیف جسٹس نے اپنی صوابدید سے (منسلک ضمیمہ ج)۔

17. جب سے میری تعیناتی عدالتِ عظمیٰ میں ہوئی ہے (5 ستمبر 2014ء)، تب سے آج تک میں نے کبھی کسی مقدمے کی سماعت سے گریز نہیں کیا، الا یہ کہ کوئی ایسا مقدمہ ہو جس میں بلوچستان ہائی کورٹ کے چیف جسٹس کے طور پر میرا فیصلہ یا حکم ہو، یا اس کا تعلق میرے خاندان یا دوستوں سے ہو۔ نہ ہی میں نے کبھی کسی چیف جسٹس سے گزارش کی کہ مجھے کام کرنے کے لیے کسی رجسٹری بھیجا جائے، نہ ہی کبھی میں نے دفتر کو کسی نوعیت کا مقدمہ لگانے یا نہ لگانے کے لیے کہا۔ میری ہمیشہ کوشش رہی ہے کہ مقدمے کے ہر فریق کو ایک ہی نظر سے دیکھوں اور ہر فیصلہ ایک ہی پیمانے سے آئین اور قانون کے مطابق کروں۔ میں پوری صراحت کے ساتھ یہ بھی کہنا چاہتا ہوں کہ میں ان مقدمات کی سماعت سے اپنے آپ کو دستبردار (recuse) نہیں کر رہا ہوں، مگر چونکہ میں یہ سمجھتا ہوں کہ جب تک سپریم کورٹ (پریکٹس اینڈ پروسیجر) ایکٹ 2023ء کے خلاف آئینی درخواستوں کا فیصلہ نہیں ہو جاتا، اور جب تک حکم امتناعی موجود ہے جس کی میں خلاف ورزی بھی نہیں کرنا چاہتا ہوں، اس لیے 14 اپریل 2023ء سے، جب اس قانون کو معطل کیا گیا، میں عدالت میں نہیں بیٹھا۔ اگر میں اب یہ مقدمات سنوں تو میں خود ہی اپنے موقف، جو میری نظر میں آئینی اور قانونی ہے، کی خلاف ورزی کروں گا۔ آج دن تک معزز چیف جسٹس عمر عطا بندیال نے میرے موقف کی تردید نہیں کی ہے بلکہ حضور نے تو جواب دینا بھی گوارا نہیں کیا۔

18. مجھے اس بات کا بھی بخوبی ادراک ہے کہ معزز چیف جسٹس عمر عطا بندیال نے اپنے معزز ساتھیوں کو بلاوجہ ایک غیر ضروری کشمکش میں الجھا دیا ہے۔ اس ناچیز کی رائے میں عدالتِ عظمیٰ کے سربراہ کو ایسا نہیں کرنا چاہیے۔ نہایت احترام سے مجھے یہ کہنے پر مجبور کیا گیا ہے کہ عدالتِ عظمیٰ جیسا آئینی ادارہ کسی فردِ واحد کی مرضی سے نہیں چل سکتا۔ یہ وضاحت بھی ضروری ہے کہ سپریم کورٹ (پریکٹس اینڈ پروسیجر) ایکٹ 2023ء کی دفعہ 2 کا اطلاق صرف چیف جسٹس اور اگلے دو سینیئر ججوں پر ہوتا ہے۔ معزز جسٹس سردار طارق مسعود نے بھی اس وجہ سے شروع میں کسی بھی بنچ میں بیٹھنے سے کنارہ کشی اختیار کی لیکن پھر یہ فرمایا کہ عدالت عظمیٰ میں مقدمات کثرت سے جمع ہو گئے ہیں،[12] تو اس لیے وہ صرف آئین کی دفعہ (3)184 کے تحت دائر کیے گئے اور اہم مقدمات نہیں سنیں گے لیکن معمول کے مقدمات سنیں گے۔ میں ان کے موقف کا احترام کرتا ہوں اور اسی طرح وہ بھی میرے موقف کا احترام کرتے ہیں۔ سینیئر ترین جج کی حیثیت میں سمت کو درست رکھنا بھی میرا فریضہ ہے۔ عدالتِ عظمیٰ کے ججوں کا گلدستہ اس تنوع میں اپنی مہک سے فضا کو معطر رکھتے ہوئے بخوبی انصاف مہیا کر سکے گا جب کسی بھی فریق کو یہ شک نہ ہو کہ اس کے مقدمے میں ایک مخصوص فیصلہ دینے کے لیے ایک خصوصی بنچ تشکیل دیا گیا یا بغیر کسی معقول وجہ کے اسے جلد سماعت کے لیے مقرر کیا گیا یا اس کی سماعت مؤخر کی گئی۔

قاضی فائز عیسیٰ
سینیئر ترین جج

اسلام آباد
23 جون 2023ء

اشاعت کے لیے منظور شدہ

---

[12] 23 جون 2023ء کو عدالتِ عظمیٰ میں 830، 54 زیرِ التوا ہیں اور اتنی بڑی تعداد پہلے کبھی نہیں دی گئی۔

Watermarkly

**Regarding Suo Motu Case No. 4 of 2022**

**Mr. Ishrat Ali**

1. Mr. Ishrat Ali, a Federal Government employee, who was sent on deputation to the Supreme Court to work as Registrar, was '*withdrawn*' by the Federal Government *vide* notification dated 3 April 2023[1] and '*directed to report to the Establishment Division, with immediate effect.*' But, Mr. Ishrat Ali refuses to abide by the order of the Federal Government.

2. On 4 April 2023, Mr. Ishrat Ali misdescribed himself as '*Registrar*', and purported to sign and issue '*Court Roster for Tuesday 4th April, 2023*' in Suo Motu Case No. 4/2022 ('**Case No. 4**') and further purported to constitute a '*Larger Bench*' *at 2:00 p.m.*' This was stated to have been done '*By Order of HCJ*', that is, Hon'ble Chief Justice.

**The illegal Circular**

3. Case No. 4 was fixed before a three-member Bench[2] on 15 March 2023 and an order was announced on 29 March 2023.[3] Rather than complying with the order of the Supreme Court, Mr. Ishrat Ali (when he was still the Registrar) did something out of the ordinary; he issued a *Circular*,[4] stating that any observation made in this order of the Supreme Court '*is to be disregarded*'. I wrote to Mr. Ishrat Ali that his *Circular* '*purports to negate, undo, disobey and violate order dated 29 March 2023 of a three-member Bench of the Supreme Court, passed in Suo Motu Case No. 4 of 2022*'. He was also informed that, '*The Registrar does not have the power or authority to undo a judicial order, and the Chief Justice cannot issue administrative directions with regard thereto*'. The letter was also

---

[1] No. PF.(674)/E-5(PAS) issued by the Establishment Division, Cabinet Secretariat, Government of Pakistan, from Islamabad on 3 April 2023. This order was copied to Mr. Ishrat Ali amongst others and also ordered to be published in the Gazette of Pakistan.
[2] Qazi Faez Isa, Amin-ud-Din Khan and Shahid Waheed, JJ.
[3] With a 2-1 majority, Shahid Waheed, J dissented.
[4] No. Registrar/2023/SCJ dated 31st March 2023.

Kisnat Khan Zimri

Watermarkly

copied to the Hon'ble Chief Justice. Till date no reply has been received to my letter.

**What constitutes the Supreme Court**

4. The Constitution of the Islamic Republic of Pakistan ('**the Constitution**') establishes the Supreme Court, and defines it as consisting of the Chief Justice of Pakistan and Judges of the Supreme Court.[5] Order dated 29 March 2023 which was passed in Case No. 4 had pointed out the constitutional and legal position, and that the Chief Justice could not unilaterally assume all the powers of the Supreme Court. It would be appropriate to reproduce paragraphs 27 and 28 of the order dated 29 March 2023:

> '27. The Supreme Court is empowered to make makes rules attending to the aforesaid matters. The Supreme Court comprises of the Chief Justice and all Judges. The Constitution does not grant to the Chief Justice unilateral and arbitrary power to decide the above matters. With respect, the Chief Justice cannot substitute his personal wisdom with that of the Constitution. Collective determination by the Chief Justice and the Judges of the Supreme Court can also not be assumed by an individual, albeit the Chief Justice.
>
> 28. The interest of citizens therefore will be best served to postpone the hearing of this case, and of all other cases under article 184(3) of the Constitution, till the matters noted hereinabove are first attended to by making requisite rules in terms of article 191 of the Constitution.'

The purported *Larger Bench* was presumably constituted when it was realized that the Circular was patently unconstitutional and illegal, and that the Chief Justice could not have given legal instructions to issue it.

**Jurisdiction of the Supreme Court**

5. The Constitution stipulates that, '*No court shall have any jurisdiction save as is or may be conferred on it by the Constitution or by or under any law.*'[6] The Constitution does not bestow

---

[5] Constitution of the Islamic Republic of Pakistan, Article 176.
[6] Ibid., Article 175(2).

Kismat Khan Zimri

Watermarkly

unlimited jurisdiction on the Supreme Court, let alone on its Chief Justice. The Constitution confers only the following jurisdictions on the Supreme Court: (1) *original jurisdiction,*[7] (2) *appellate jurisdiction,*[8] (3) *advisory jurisdiction,*[9] (4) *power to transfer cases jurisdiction,*[10] (5) *review jurisdiction,*[11] (6) *contempt jurisdiction*[12] and (7) *appellate jurisdiction with regard to decisions of administrative courts and tribunals.*[13]

**Clarifying further the constitutional position**

6. To further clarify the above vital point about jurisdiction, let it be assumed that the Supreme Court conducts a murder trial, and then convicts or acquits the accused. This would be of no legal effect, because neither the Constitution nor any law bestows jurisdiction on the Supreme Court to conduct a criminal trial. However, such a trial could be conducted by a Sessions Judge, who is two-steps below Judges of the Supreme Court. And, to cite a civil law example, a Family Judge presiding over a Family Court, can decide family law matters, a jurisdiction which does not vest in the Supreme Court.

***Larger Bench* and *order* dated 4 April 2023**

7. The Constitution does not confer jurisdiction on a *bench* or on Judges of the Supreme Court (no matter how many in number) to sit in appeal over an order of the Supreme Court. Therefore, the so called *Larger Bench* was wrongly constituted purportedly to hear Case No. 4. The *Larger Bench* did not constitute a (constitutional) court; it did not possess any of the abovementioned jurisdictions, and could not pass an *order*. The purported '*order*' dated 4 April 2023 cannot be categorized as an order of the Supreme Court; it is of no constitutional or legal effect. It would be legally incorrect to

---

[7] Ibid., Article 184.
[8] Ibid., Article 185.
[9] Ibid., Article 186.
[10] Ibid. Article 186A.
[11] Ibid., Article 188.
[12] Ibid., Article 204.
[13] Ibid., Article 212(3).

Kishnat Khan Zamri

Watermarkly

refer to it as an order; therefore, it shall be referred to as '**the 4 April Note**.'

**Could the order dated 29 March 2023 be reviewed?**

8. Can then the 4 April Note be construed as an order reviewing order dated 29 March 2023? The answer is that the said *Larger Bench* could not do so. If the review jurisdiction was to be invoked then Case No. 4 would have to be listed for hearing before the same Judges who had earlier heard it on 15 March 2023[14] but this was not done.

**Procedural Irregularities**

9. In addition to disregarding the abovementioned constitutional provisions the following procedural irregularities were also committed:

(1) The roster was issued for the same day, which is only done when there is an extraordinary emergency, but in the instant matter there was none;

(2) The very day the case roster was issued the matter was also listed, and after court-time;

(3) No prior notice of the listing of the matter was issued;

(4) Notice was not issued to the Attorney-General for Pakistan as per Order XXVIIA of the Code of Civil Procedure, 1908;

(5) Notice to the Attorney-General had not been issued, yet the April 4 Note records that the Additional Attorney-General was '*On Court's Notice*'; and

(6) The counsel of PMDC[15] was in attendance (without prior notice), which meant he was verbally or telephonically sent for, contrary to usual practice.

---

[14] Supreme Court Rules, 1980, Order XXVI, rule 8. The bench which had passed order dated 29 March 2023 comprised of Qazi Faez Isa, Amin-ud-Din Khan and Shahid Waheed, JJ, therefore, it had to be heard by this bench or before a bench of which at least the author Judge was a member.

[15] Pakistan Medical and Dental Council (PMDC) represented by Mr. Afnan Karim Kundi, ASC.

Kismat Khan Zimri

Watermarkly

**Responsibility of senior Judges**

10. Six Judges were hurriedly assembled. The learned Judge heading the *bench* and the next senior Judge[16] concluded the matter within a few minutes. Immediately, on the very same day, the 4 April Note, comprising of 8 pages, was issued. If the matter had been listed for hearing in the ordinary course as per normal procedure, sufficient notice had been given, and it was properly deliberated upon, then the four Hon'ble junior Judges may have realized that what their seniors were doing did not accord with the Constitution and the law.

**The Note relies on yet another earlier note**

11. Paragraph 7 of the 4 April Note refers to what three of the same Judges had earlier done in a similar situation.[17] Then, I had written a 15 page note[18] trying to explain to my distinguished colleagues the different jurisdictions of the Supreme Court and that the Constitution did not grant them unlimited jurisdiction. However, and unfortunately, the 4 April Note overlooks what was pointed out earlier and the very same mistake was again committed. We learn from each other, but the authors of the 4 April Note disregarded a 15 page explanatory note that would have been helpful. Despite practicing law (as an advocate and Judge) for 40 years I still consider myself a student of law. Hubris destroys institutions.

**The reasoning applied in the 4 April Note**

12. The Note designates the Chief Justice of Pakistan as the '*Master of Rolls*',[19] a term not found in the Constitution, in any law or even in the Supreme Court Rules, 1980. And, on the pretext that the Chief Justice is the *Master of Rolls* and empowered to do

---

[16] Ijaz Ul Ahsan and Munib Akhtar, JJ, respectively.
[17] *Suo Motu Case No. 4 of 2021*, PLD 2022 Supreme Court 306, written by Munib Akhtar, J.
[18] Dated 24 August 2021, which stated that it should be '*immediately uploaded on the Supreme court website*' but the Chief Justice had stopped it from being up-loaded. Therefore, it was circulated to my distinguished colleagues.
[19] Paragraph 7 of the Note.

Kismat Khan Zimri

Watermarkly

as he pleases the 4 April Note proceeds to rely on an earlier note (authored by Munib Akhtar, J), stating that it '*clearly and categorically lays down the rule that the suo motu jurisdiction of this Court can only and solely be invoked by the HCJP. The majority order also appears to be in violation of the well settled rule of law, which is axiomatic, that Chief Justice is the master of the roster.*' With respect, the Hon'ble Justice Munib Akhtar's earlier note was not a legal precedent. In any event the said reasoning is without a constitutional or legal foundation. The stated *rule of law* was not enacted pursuant to a law nor can it by its own self-serve itself to be categorized as *rule of law*, particularly when it contravenes the Constitution, which does not grant to the Chief Justice such powers.

13. The reasoning, with respect, is otherwise flawed too. The order dated 29 March 2023 had noted the lack of procedural rules with regard to cases filed or taken notice of under article 184(3) of the Constitution. However, in Case No. 4 notice under Article 184(3) of the Constitution had already been taken (with regard to the matter of grant of additional marks). Ironically, in a matter in which the so called *Larger Bench* had wrongly assumed jurisdiction the 4 April Note stated that order dated 29 March 2023 '*was therefore both without and beyond jurisdiction*'. The 4 April Note has no constitutional or legal validity as it seeks to supplant the Constitution.

**The Constitution**

14. The Constitution was unanimously passed with the votes of 196 members out of 200 of the National Assembly fifty years ago, on 10 April 1973.[20] Not a single vote was cast against it.[21] The Constitution's credibility and longevity rests on its democratic foundations, and it is the document which holds the Federation together.

---

[20] Presidential assent was given on 12 April 1973.
[21] Four Members abstained.

Kismat Khan Zumri

Watermarkly

**The Judicature**

15. The Constitution establishes the Judicature.[22] The Constitution also established the trichotomy of powers; the Legislature, Executive and Judiciary. The Judiciary is given the responsibility to decide cases in accordance with the Constitution and the law[23] and by applying due process[24] requirements. Every Judge before entering office takes oath: '*I will discharge my duties, and perform my functions, honestly, to the best of my ability, faithfully in accordance with the Constitution of the Islamic Republic of Pakistan and the law.*' Judges also swear to '*preserve, protect and defend the Constitution*'. The Constitution alone grants jurisdiction and empowers courts to decide cases, therefore, if non-existing jurisdiction is assumed then the oath to act *in accordance with the Constitution* is violated.

**Islamic Injunctions**

16. The Chief Justice is deserving of respect but he is not a *master;* such servitude is also alien to Islam, and the Constitution stipulates that all laws must be brought in conformity with the Injunctions of Islam,[25] the State religion of Pakistan.[26] The Constitution opens with two of the most beautiful names of the Almighty Allah (*Ar-Rahman*, the most Beneficent, and *Ar-Rahim*, the most Merciful) and stipulates that, '*sovereignty over the entire Universe belongs to Almighty Allah alone*' and the exercise of authority is a *sacred trust*.[27] Order dated 29 March 2023 required that rules in respect of the stated matters be made by Supreme Court through consultation. The Holy Qur'an also mandates consultation, '*Do that which is in agreement amongst the people*'.[28] Qur'anic exegetes[29] down the ages are unanimous in the

---

[22] Constitution of the Islamic Republic of Pakistan, Part VII, Articles 175 to 212.
[23] Ibid., Article 4(1).
[24] Ibid., Article 10A.
[25] Ibid., Article 227.
[26] Ibid., Article 2.
[27] Ibid., Preamble/Objectives Resolution, which Article 2A has made into a, '*substantive part of the Constitution and shall have effect accordingly*'.
[28] Al Qur'an, surah Ash-Shura (42) verse 38.
[29] To cite just two examples, the Pakistani Islamic scholar Abul A'la Maududi (1903-1979) in his *Tafhim Al-Qur'an* (vol. 4, pp. 508-510) and the great Qur'anic

Kishwar Khan Zimri

Watermarkly

interpretation of this verse, and say that consultation is obligatory in respect of all matters pertaining to more than one person. Because: (a) no one should impose their will on others, (b) imposing one's will on others either means that one does not give importance to others or that one deems oneself to be more intelligent, both of which are morally evil and (c) deciding an issue that pertains to the people is a serious thing and one should fear Allah. They derive the following principles from this verse: (1) all requisite information be provided, (2) appointments should not be made on the basis of fear or favour, (3) leaders should seek advice from advisors, (4) advisors must give their honest and well considered opinion and (5) matters should preferably be resolved consensually, failing which through majority opinion.

17. That even Almighty Allah's prophet, Muhammad (peace and blessings be upon him), was ordained to *consult the people in their affairs.*[30] And, it is reported by his companion, *'None was more apt to seek council of his companions than the Messenger of Allah'*.[31]

**Absolute Power**

18. The world has also been moving away from the days when monarchs and dictators wielded absolute power. The Kingdom of Bhutan, until recently, was one of the few remaining countries ruled by a monarchy having absolute power. However, the enlightened King Wangchuk voluntarily gave up his powers, saying, *'I do not believe that a system of absolute monarchy, wholly dependent on one individual is a good system for the people in the long run...the destiny of the nation lies in the hands of the people, we cannot leave the future of the country in the hands of one person.'*[32] Bhutan now is governed by a constitution.[33] History

---

exegete and hadith scholar (*muhaddith*) of Cordoba, Spain Abu Abdullah Muhammad bin Ahmad al-Qurtabi (1214-1273) in his *Al-Jami li-Ahkam Al-Qur'an* (vol. 18, pp. 586-588).

[30] Ibid., surah Al-Imran (3) verse 159.

[31] *Sunan al-Tirmidhi*, Kitab al-Jihad, Hadith No. 48, on the authority of Abu Hurairah.

[32] Inscribed on a pillar in the courtyard of the Supreme Court of Bhutan.

[33] Enacted in 2008.

Kishwat Khan Zimri

Watermarkly

witnesses, that when in an individual power is concentrated, disastrous consequences invariably follow.

**Dangers and pitfalls**

19. Irreparable damage will be caused to the Judiciary and to the people of Pakistan if the legitimacy, integrity and credibility of the Judiciary is undermined, because without it the people (who it serves) will lose their trust. The surest way for this to happen is when cases are not decided in accordance with the Constitution. Pakistan was first ravaged when a bureaucrat Governor-General unconstitutionally dismissed the Constituent Assembly and the unanimous judgment of the Chief Court of Sindh[34] was set aside by the Federal Court.[35] The Federal Court's decision enabled future dictators to overthrow civilian governments. Regretfully more than once Chief Justice and Judges of the Supreme Court facilitated dictators. The country with the largest Muslim population broke apart because constitutional deviations were justified.

**Conclusion**

20. Since the gathering in a court of six distinguished judges was not permissible under the Constitution or under any law, the Supreme Court's order dated 29 March 2023 passed in Case No. 4 could not have been set aside by the 4 April Note. Decisions emanating from a courtroom overcast with the shadow of autocracy cannot displace the Constitution.

Islamabad,
Dated: 8 April 2023.

Senior Puisne Judge.

Approved for reporting

[34] Now High Court of Sindh.
[35] Now the Supreme Court of Pakistan.

Kismat Khan Zmri

Watermarkly

1. A note has been put up to me by the 'Registrar' dated 16 May 2023 which states that the Hon'ble Chief Justice has enquired how long I would *'like to remain on Chamber work'*. This is a question which is better answered by the Hon'ble Chief Justice. Let me proceed to state why.

2. Constitutional Petitions No. 6 to 8 of 2023, filed on 12 April 2023, sought to set aside the Supreme Court (Practice and Procedure) Bill, 2023 ('**the Bill**'). The petitions were filed under Article 184(3) of the Constitution, which stipulates that *'the Supreme Court shall, if it considers that a question of public importance with reference to the enforcement of any of the Fundamental Rights conferred by Chapter 1 of Part II is involved, have the power to make an order of the nature mentioned in the said Article'* (199 of the Constitution).

3. The first petition (CP No. 6 of 2023) was filed by two Lahore-based lawyers represented by Messrs Khawaja Ahmad Tariq Rahim and Imtiaz Rashid Siddiqui. The Office of the Supreme Court had noted five legal objections. The first two are reproduced hereunder:

> *'a. That the petitioners have not pointed out as to what questions of public importance in the instant case are involved with reference to enforcement of any of the Fundamental Rights guaranteed under the Constitution, so as to directly invoke jurisdiction of the Supreme Court under Article 184(3) of the Constitution.*
> *b. That ingredients for invoking extra ordinary jurisdiction of this Court under Article 184(3) of the Constitution have not been satisfied.'*

An eight-member bench proceeded to hear these petitions. However, none of the three orders passed till date (Orders dated 13 April 2023, 2 May 2023 and 8 May 2023) attend to the office objections, nor state that the petitions are maintainable under Article 184(3) of the Constitution.

4. The order dated 13 April 2023, which is an ad-interim *ex-parte* order, reads as a final decision. With respect, it is most unusual, if not unprecedented, to give categorical findings on legislation which does not exist, and to do so without hearing the other side. The seven-page order holds:

Kismat Khan Zimri

Watermarkly

- *'Prima facie, this approach is a serious encroachment upon, interference with and intrusion into the independence of the judiciary'.*
- *'Any intrusion in the practice and procedure of the Court, even on the most tentative of assessments, would appear to be inimical to the independence of the judiciary, no matter how innocuous, benign or even desirable the regulation may facially appear to be.'*
- *'Prima facie therefore, when the Bill and the Act that is soon to come into being, is examined on the anvil of the most fundamental principles that underpin the Constitution, it can be regarded as seriously wanting in constitutional competence.'*
- *'...there is a substantial, immediate and direct interference with the independence of the judiciary in the form of multiple intrusions, in the guise of regulating the practice and procedure of this Court and conferring upon it a jurisdiction that appears not to be permissible under any constitutional provision.'*

Notice under Order XXVIIA of the Code of Civil Procedure, 1908, was issued to the Attorney-General but notices were not issued to the Advocates-General of the Provinces, even though the law under challenge applies throughout Pakistan. However, notices were issued to eight political parties despite the Bill not affecting any of their rights/privileges.

5. On 21 April 2023 the Bill became the Supreme Court (Practice and Procedure) Act, 2023 (**'the Act'**). Section 2 of the Act stipulates that:

> *'(l) Every cause, appeal or matter before the Supreme Court shall be heard and disposed of by a bench constituted by the Committee comprising the Chief Justice of Pakistan and two most senior judges, in order of seniority.*
>
> *(2) The decisions of the Committee shall be by majority.'*

Section 3 of the Act attends to the original Jurisdiction of the Supreme Court under Article 184(3) of the Constitution. Section 4 stipulates that wherever the interpretation of a constitutional provision is involved, the case should be heard by not less than five judges of the Supreme Court.

Kismat Khan Zimri

Watermarkly

Section 5 provides for an appeal against a decision of the Supreme Court under Article 184(3). Section 6 enables any Advocate of the Supreme Court to file a review petition (under Article 188 of the Constitution). Section 7 requires that urgent cases should be fixed no later than 14 days from the date of filing. And, section 8 is in the nature of a *non obstante* clause.

6. Another three petitions (Constitutional Petitions No. 10 to 12 of 2023) were filed, seeking the same relief, and when all six petitions came up for hearing on 2 May 2023, it was ordered '*That injunction continues and shall continue to be enforced against the Act till further orders*'. On 8 May 2023, the petitions were adjourned to 1 June 2023, that is, after 24 days.

7. Leaving aside:
   (1) Whether the said petitions seek the enforcement of any Fundamental Right (none has been mentioned in any order);
   (2) Whether a law not yet enacted, can be suspended under Article 184(3), and it be further ordered that when the Bill becomes the Act it too shall stand suspended;
   (3) Whether at the very outset (through an ad-interim *ex-parte* order) the operation of a law can be suspended;
   (4) Whether *independence of the judiciary* was threatened merely because the burden of responsibility on the Honourable Chief Justice was henceforth to be shared with two other senior judges;
   (5) Why the petitions, which were taken to be of such utmost importance and urgency, and which necessitated the passing of an ad interim *ex-parte* order were then not listed for day-to-day hearing, but with a delay of 24 days;
   (6) Whether it was appropriate for the Hon'ble Chief Justice to hear cases pertaining to his own powers;
   (7) Whether Article IV of the Judges Code of Conduct - '*A Judge must decline resolutely to act in a case involving his own interest*', was attracted; and
   (8) If the petitions were to be dismissed, what will happen in the interregnum when section 2 of the Act was not complied with.

8. In paragraph 11 of the order dated 13 April 2023, Article 191 of the Constitution was '*explained by adopting for present purposes a dictum from one of the most famous cases of American constitutional law*

Kismat Khan Zimri

Watermarkly

*(McCulloch v Maryland* 17 US 316 (1119)*): the power to regulate involves the power to destroy'*. However, the actual quote is - *'That the power to tax involves the power to destroy'*. The *power to tax* is altogether different from the *power to regulate*. In any event the US Supreme Court in that case was concerned with *clashing sovereignty* of the legislative powers of Congress with that of a state legislature, and it held that the state legislature by taxing could not *'pull down what there is an acknowledged right in another* [Federal Congress] *to build up'*. The US Supreme Court confirmed the supremacy of Congress:

> *'The result is a conviction that the states have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the central government. This is, we think, the unavoidable consequence of that supremacy which the constitution has declared.'*

9. The oath of office of a Chief Justice and of every Judge requires them to discharge their duties and perform their functions *'in accordance with the Constitution of the Islamic Republic of Pakistan and the* ***law***' [emphasis added]. And, Article 189 of the Constitution stipulates that the decisions of the Supreme Court are *'binding on all* ***other*** *courts of Pakistan'* [emphasis added]. The Constitution does not give pre-eminence to an *ad-interim* order of the Supreme Court over the oath of office, and as noted Article 189 stipulates that decisions of the Supreme Court are only binding on *other courts*.

10. On the one hand section 2 of the Act requires compliance, but on the other hand this Court has suspended the operation of the Act. The petitions will either be allowed or dismissed. If the petitions were to be dismissed wouldn't conducting court in the interregnum be a violation of section 2 of the Act?

11. The Hon'ble Chief Justice and my distinguished colleagues have placed me in a quandary, which can now only be resolved when the said six petitions are decided. It is prudent to await the Court's decision. It is not for me to decide, let alone *'like'* whether to continue with Chamber work. The Hon'ble Chief Justice is much better placed to answer the question he has posed to me, since he knows better when the petitions will be decided.

Kismat Khan Zimri

Watermarkly

12. Lest it be misconstrued, throughout the period of *Chamber work* I have been working; writing judgments in Civil Appeal No. 2015/2022, in Civil Appeal No. 1139-L/2019 and in 41 Customs cases being Civil Appeals No. 565/2011, etc. I have also decided Suo Moto Review Petition No. 3203/2017. I now only have one case to write a judgment in (CPLA No. 3203/2017) and in another to consider whether I agree with Hon'ble Syed Mansoor Ali Shah, J. I have also attended to the meetings concerning appointments with regard to the Federal Shariat Court, have worked from morning till night to attend to the hundreds of long pending applications of advocates seeking enrolment as ASCs, and attended to all other matters assigned to me.

13. In conclusion, let me categorically state that how my distinguished colleagues decide the pending petitions is their discretion. All that I look for, and which the country undoubtedly expects, is the earliest possible determination of the matter. I have been compelled to write this note in response to the aforesaid query of the Hon'ble Chief Justice. Since a number of my colleagues have enquired why I am not sitting in Court, I shall also be sharing this note with them.

17 May 2023 Qazi Faez Isa

Kismat Khan Zmri

Watermarkly

# IN THE SUPREME COURT OF PAKISTAN
(Original Jurisdiction)

C.M.A No. 3924 /2023
In
Constitution Petition No. 14/2023

Abid Shahid Zuberi,
Advocate Supreme Court
of Pakistan. ...Petitioner

**VERSUS**

Federation of Pakistan through Secretary
Cabinet, Islamabad, etc.

...Respondents

## CONCISE STATEMENT

It is respectfully submitted by the Inquiry Commission, respondent No. 2, as under:

**Non-compliance with the rules.**

1. The Supreme Court Rules, 1980 ('**the Rules**') require that notices, prior to filing of any petition, must be sent by the petitioner/petitioner's counsel to the respondents informing about the filing of the petitions, but this was not done. The Rules also require submission of an *affidavit of service* confirming service of notice on the respondents, and though such an affidavit was filed, service was not affected. Till date the Commission has not received copies of the petitions, therefore, the Commission reserves its right to attend to the same when and if the same are provided.

**Petitions filed under Article 184(3) of the Constitution.**

2. The petitions are statedly filed under Article 184(3) of the Constitution of the Islamic Republic of Pakistan ('**The Constitution**'), but the order of the Supreme Court dated 26 May 2023 does not mention this provision, let alone that the petitions were maintainable thereunder. A petition under Article 184(3) can only be filed provided '*a question of public importance with reference to the enforcement of any of the Fundamental Rights*' is involved. It

Kismat Khan Zimri

Watermarkly

is respectfully submitted that Mr. Abid Shahid Zuberi is himself one of the persons allegedly talking in the audio recordings. Moreover, it needs consideration whether Mr. Abid Zuberi can represent the public interest in such circumstances. All other persons allegedly found talking in the audio recordings have not filed petitions, nor have objected to appear before the Commission. On the contrary, Messrs Khawaja Tariq Rahim and Abdul Qayyum Siddiqui, have shown their readiness to do so.

**Petitions could not be fixed for hearing or heard.**

3. The Supreme Court (Practice and Procedure) Act, 2023[1] states that:

> '2. Constitution of Benches. –
>
> (l) Every cause, appeal or matter before the Supreme Court shall be heard and disposed of by a bench constituted by the Committee comprising the Chief Justice of Pakistan and two most senior judges, in order of seniority.
>
> (2) The decisions of the Committee shall be by majority.'

These petitions were not fixed *before a bench constituted by the Committee comprising the Chief Justice of Pakistan and the most senior judges*. Therefore, it is most respectfully submitted that these petitions cannot be heard till the said Committee determines which bench should hear them.

4. Khawaja Tariq Rahim, Advocate, who is one of the persons allegedly talking in the audio recordings and five others had filed petitions ('**the six Petitions**') challenging the Supreme Court (Practice and Procedure) Bill, under Article 184(3) of the Constitution, even before it became law. The Office of the Supreme Court had noted five legal objections to the maintainability of the six Petitions, the first two of which are reproduced hereunder:

> 'a. That the petitioners have not pointed out as to what questions of public importance in the instant case are involved with reference to enforcement of any of the Fundamental Rights guaranteed under the Constitution, so as to directly invoke jurisdiction of the Supreme Court under Article 184(3) of the Constitution.

[1] Supreme Court (Practice and Procedure) Act, 2023, published in the Gazette of Pakistan Extraordinary, Part 1, dated 21 April 2023.

Kismat Khan Zimri

Watermarkly

> b. That ingredients for invoking extra ordinary jurisdiction of this Court under Article 184(3) of the Constitution have not been satisfied.'

However, Chamber appeals against the said *Office Objections* were not filed, nor were the *Office Objections* set aside by this Court. Yet in the six Petitions *ex parte ad-interim* orders were passed suspending the said Bill and later on 2 May 2023, it was ordered *'That injunction continues and shall continue to be enforced against the Act till further orders'*. On 8 May 2023, the petitions were adjourned to 1 June 2023, that is, after 24 days.

5. With utmost respect the six Petitions filed under Article 184(3) of the Constitution appear not to be maintainable because the two pre-requisites mentioned in Article 184(3) were not attracted, as was correctly noted by the Office of this Court, because the subject matter of the six Petitions did not constitute a matter of *public importance* nor did they seek the enforcement of any Fundamental Right. The fate of these petitions is connected with that of the six Petitions and till they are decided these petitions should not have been fixed for hearing. And, all the more so because if the six Petitions are dismissed it will create a legal quagmire - whether conducting court in the interregnum violated section 2 of the Supreme Court (Practice and Procedure) Act, 2023?

**It would not be appropriate for this bench to hear these petitions.**

6. The oath taken by the Chief Justices and Judges of the Supreme Court and the High Courts require them to act, *'in accordance with the Constitution of the Islamic Republic of Pakistan and the law'*. They are also required to, *'abide by the code of conduct issued by the Supreme Judicial Council'* and not to allow their *'personal interest to influence'* their *'official conduct'* or *'official decisions'*. The code of conduct[2] also requires that:

> 'A Judge must decline resolutely to act in a case involving his own interest, including those of persons whom he regards and treats as near relatives or close friend.'
>
> 'A judge must refuse to deal with any case in which he has a connection with one party or its lawyer

[2] *Code of Conduct to be observed by the Judges of the Supreme Court of Pakistan and of the High Courts of Pakistan,* Article IV.

Kismat Khan Zimri

Watermarkly

> more than the other, or even with both parties and their lawyers.'
>
> 'To ensure that justice is not only done, but is also seen to be done, a Judge must avoid all possibility of his opinion or action in any case being swayed by any consideration of personal advantage, either direct or indirect.'

One of the audio recordings allegedly pertains to the mother-in-law of the Hon'ble Chief Justice. Hon'ble Mr. Justice Munib Akhtar may also be mentioned in the said recording. And, in another audio recording reference is made to case fixation before a particular bench headed by Hon'ble Mr. Justice Ijaz ul Ahsan.

**Members of the Commission are bound to act in accordance with the law.**

7. The Constitution, law and the code of conduct must also be observed by the Members of the Commission, who respectively are the senior puisne Judge of the Supreme Court, the Chief Justice of the High Court of Balochistan and the Chief Justice of the Islamabad High Court. The **law** includes the Act, which grants to the Federal Government the power, under section 3(2), to constitute inquiry commissions:

> '3(2) The Federal Government shall, by Notification in the official gazette, appoint the members of the Commission and where more than one member are so appointed, the Federal Government shall designate one of the members to be the Chairman of the Commission.'

The Act does not stipulate that the Government must consult with the Chief Justice of Pakistan before it constitutes a commission. The Act also does not grant to the Chief Justice the power to nominate members of a commission. Merely because the Government may elect to consult the Chief Justice does not mean that it has to. The Act has existed for over six years and, to the best of the knowledge of the undersigned, no challenge to it or specifically to its section 3(2) has been made, let alone the same having been struck down.

**Constituting the Commission.**

8. Pursuant to Notification No. S.R.O. 596(I)/2023, dated 19 May 2023 ('**the Notification**'), issued under the Pakistan

Kismat Khan Zimri

Watermarkly

Commissions of Inquiry Act, 2017[3] (**'the Act'**), an inquiry commission (**'the Commission'**) was constituted. The Notification's preamble states:

> 'WHEREAS, recently wide circulations of controversial audios have been witnessed on the national electronic, print and social media, allegedly regarding the Judiciary and former Chief Justices/Judges, conversation raising serious apprehensions about the independence, impartiality and uprightness of the Chief Justices/Judges of the Superior Courts in the administration of justice.
>
> 2. AND WHEREAS, such audio leaks have eroded pubic trust and serious concerns have been raised by the general public regarding independence, impartiality and uprightness of the Chief Justices/Judges of the Superior Courts. Under the Constitution of the Islamic Republic of Pakistan, the independence, integrity and character of Chief Justices/Judges is of utmost importance for keeping the public trust and confidence in the administration of justice. Judiciary is one of the main pillars under the Constitution and the society's confidence is shattered when independence of the Judiciary is tarnished.
>
> 3. AND WHEREAS, it is imperative to inquire into the authenticity, correctness and veracity of these audio leaks in order to restore not just the credibility of the Judiciary but also the public interest and confidence in the Judiciary in the larger public interest, as a matter of definite public importance.'

**Commission's working**.

9. The Commission was given an initial thirty days to complete its task. Therefore, it immediately held its first meeting on 22 May 2023. The Commission's order dated 22 May 2023 is attached hereto and marked as **'A'**, which was uploaded the same day on the webpage of the office of the learned Attorney-General for Pakistan (**'AG'**). In compliance with the Commission's order, public notices were published in three Urdu newspapers (*Jang*, *Daily Express* and *Nawa-i-Waqt*), and three English newspapers (*Dawn*, *The News* and *Express Tribune*), which are attached hereto and respectively marked as **'B1'** to **'B6'**. The notices called upon the general public to provide information they may have regarding the matter, which was to be inquired into by the Commission, to the following:

> 'Mr. Hafeezullah Khajjak, Secretary to the Commission
> Cell phone number: 0301-5579326
> Email address: inquirycommission2023@gmail.com

[3] Pakistan Commissions of Inquiry Act, 2017, enacted on 31 March 2017.

Kismat Khan Zimri

Watermarkly

Postal address: Supreme Court Building,
care of Private Secretary to Mr. Justice Qazi Faez Isa,
3rd Floor, Judges Block, Supreme Court Building,
Constitution Avenue, Sector G-5, Islamabad.'

10. The following were issued summons to attend before the Commission on 27 May 2023:

Mr. Abid Shahid Zuberi, Advocate,
Kh. Tariq Rahim, Advocate,
Mr. Najam Saqib, Advocate and
Mr. Qayyum Siddiqui, journalist.

The aforesaid were also sent summons through TCS Courier Service.

11. The Commission was to meet next on 27 May 2023, when it was learnt that a number of petitions were filed before the Supreme Court in its *original jurisdiction* under Article 184(3) of the Constitution. The Commission was informed that in two of these petitions,[4] the Commission, through its Secretary, was arrayed as a respondent.

**The Commission was stopped from working.**

12. It transpired that a Bench headed by the Hon'ble Chief Justice and four Hon'ble Judges of the Supreme Court heard these petitions on 26 May 2023, and the very same day suspended the Notification and the order of the Commission dated 22 May 2023 and the proceedings of the Commission were also stayed. Therefore, on 27 May 2023, the Commission, after noting the filing of the petitions and the order passed therein, adjourned its proceedings. The Commission required the learned AG to apprise the Commission of further developments in these petitions.

**Non-attendance and non-disclosure.**

13. Of the four gentlemen summoned on 27 May 2023, only Mr. Abdul Qayyum Siddiqui attended the Commission. Khawaja Tariq Rahim, Advocate, submitted an application (through email) stating that he had to undergo pre-scheduled '*bi-annual medical tests relating to my medical condition*' on 27 May 2023 and also stated that:

> 'I understand that the Commission has already indicated that keeping in view the age of two females whose audio is also in issue is willing to hold

[4] Constitution Petitions No. 14 and 15/2023.

Kismat Khan Zimri

Watermarkly

> proceedings relating to them in Lahore. Since one of the ladies concerned is my wife it would be appropriate and in fitness of things that matter pertaining to my alleged audio leaks be also heard on the same day and date at Lahore.'

Messrs Abid Zuberi and Najam Saqib, Advocates, who had been summoned, did not attend nor did they inform the Commission why they were not doing so. They also did not bring to the Commission's notice that petitions had been filed and that the Supreme Court had stayed the Commission from proceeding further.

**Submissions made by Mr. Abid Zuberi's counsel.**

14. The order of the Supreme Court dated 26 May 2023 refers to, *'the submissions made by Mr. Shoaib Shaheen, ASC'*, who represents Mr. Abid Zuberi. The learned counsel submitted that the Commission had assumed the powers of the Supreme Judicial Council ('**SJC**'). However, the learned counsel failed to point out the Commission's order dated 22 May 2023, which had also stated that:

> 'At the very outset it is clarified that the Commission is not the Supreme Judicial Council ('**SJC**') constituted under Article 209 of the Constitution of the Islamic Republic of Pakistan ('**the Constitution**'). This Commission will not be assuming the powers of the SJC and it will endeavor to perform its functions to the best of its ability as per the Notification and in accordance with the Act.'

Given that the Commission had specifically clarified that it was neither the SJC nor was it assuming the powers of the SJC, it was incumbent upon the petitioners and their learned counsel to point this out and not make submissions to the contrary.

**The Supreme Judicial Council – SJC.**

15. Article 209 of the Constitution stipulates that the SJC comprises of the Chief Justice of Pakistan, the two next senior Judges of the Supreme Court and the two most senior Chief Justices of the High Courts. And, that if the SJC is, *'inquiring into the capacity or conduct of a Judge who is a member of the Council'* then he cannot be part of the SJC and is to be substituted by the person next in seniority. If Article 209 of the Constitution is

Kismat Khan Zimri

Watermarkly

extrapolated as a principle, then making the next senior most Judge head the Commission accords therewith.

**Independence of the Judiciary**.

16. The petitioner's learned counsel also referred to the *independence of the judiciary*, and assumed that the same was under threat if the senior puisne Judge of the Supreme Court and two Chief Justices of the High Courts comprised of the Commission. It is not understandable why the *independence of the judiciary* would be threatened or even undermined if the senior most Judge of the Supreme Court and two Chief Justices are its members.

**'Privileged Communication'**.

17. The petitioner's learned counsel also contended that communications between Mr. Abid Zuberi, an Advocate, and his client is '*privileged communication*'. However, Mr. Abid Zuberi did not claim privilege before the Commission. Moreover, under Article 9 of the Qanun-e-Shahadat, 1984, the said privilege is not absolute as it excludes *illegal purpose, crime or fraud*.

> '9. Professional communications. No advocate shall at any time be permitted, unless with his client's express consent, to disclose any communication made to him in the course and for the purpose of his employment as such advocate, by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment, or to disclose any advice given by him to his client in the course and for the purpose of such employment:
>
> Provided that nothing in this Article shall protect from disclosure—
>
> (1) any such communication made in furtherance of any illegal purpose; or
>
> (2) any fact observed by any advocate, in the course of his employment as such, showing that any crime or fraud has been committed since the commencement of his employment, whether the attention of such advocate was or was not directed to such fact by or on behalf of his client.'

If Mr. Abid Zuberi as an Advocate claims that any communication of his was privileged, the Commission would consider the same.

Kismat Khan Zimri

Watermarkly

**Mr. Abid Zuberi's public discussion on his alleged recordings.**

18. Mr. Abid Zuberi has repeatedly spoken about the alleged audio recordings, including on national television both prior to, and after, passing of the order of this Court dated 26 May 2023. He did so on several television talk-shows, including the following:

| Date | Programme |
|---|---|
| 20 May 2023 | *'Face to Face'* on GNN News[5] |
| 23 May 2023 | *'Off the Record with Kashif Abbasi'* on ARY News[6] |
| 26 May 2023 | *Sawal yeh hai with Maria Memon'* on ARY News[7] |
| 26 May 2023 | *'Ab Pata Chala'* on Bol News.[8] |

In each of these programmes, he was attired as an Advocate, and spoke about the audio recordings / the subject of his petition.

Mr. Abid Zuberi's counsel, Mr. Shoaib Shaheen, also participated in several television programmes to discuss the workings of the Commission. These include the following:

| Date | Programme |
|---|---|
| 22 May | *'Faisla aap ka with Asma Shirazi'* on Aaj News[9] |
| 23 May | *'11th Hour with Waseem Badaami'* on ARY News[10] |
| 24 May | GNN News[11] |
| 26 May | ARY News[12] |

Mr. Abid Zuberi, together with his counsel, also did a press talk outside the Supreme Court Building on 26 May 2023.[13]

**Right of Privacy.**

19. The petitioner's learned counsel also contended that there was an absolute right of privacy stipulated in the Constitution. However, Article 14(1) of the Constitution stipulates that, *'The*

---

[5] https://www.youtube.com/watch?v=PE5mtZ0Bm5c&ab_channel=GNN (last accessed on 29 May 2023).
[6] https://www.youtube.com/watch?v=MTH7aAyZLZk&ab_channel=ARYNews (last accessed on 29 May 2023).
[7] https://www.youtube.com/watch?v=4_iEpzLS6eQ&ab_channel=ARYNews (last accessed on 29 May 2023).
[8] https://www.youtube.com/watch?v=7uBdfRGq5c8&ab_channel=BOLNews (last accessed on 29 May 2023).
[9] https://www.youtube.com/watch?v=IgtfGk4aLwo (last accessed on 29 May 2023).
[10] https://www.youtube.com/watch?v=oFGzah-0yrI&ab_channel=ARYNews (last accessed on 29 May 2023).
[11] https://www.youtube.com/watch?v=rd_jQjg2B0c&ab_channel=GNN%2B (last accessed on 29 May 2023).
[12] https://www.youtube.com/watch?v=MNU1BM5D13E&ab_channel=ARYNews (last accessed on 29 May 2023).
[13] https://www.youtube.com/watch?v=hV0FJyUZ5EE&ab_channel=CapitalTV (last accessed on 29 May 2023).

Kishwar Khan Zimri

Watermarkly

*dignity of man and, subject to law, the privacy of home, shall be inviolable*'. Whether the alleged audio recordings constitute *privacy of home* would have to be considered by the Commission, if this is contended before it. The Supreme Court in the case of *Benazir Bhutto v President of Pakistan*[14] had also restricted the phrase *privacy of home*, by excluding therefrom certain matters:

> '25. ...Article 14 guarantees to protect dignity of man and the privacy of home which shall be inviolable subject to law. ...If a person intrudes into the privacy of any man, pries on the private life, it injures the dignity of man, it violates the privacy of home, it disturbs the peace and tranquility of the family and above all it puts such person to serious danger of being blackmailed. Such acts are not permissible under law and if any occasion arises for such operation, then it can be only in cases of defence and national security.'

It is submitted that if it be urged before the Commission, that the audio recordings constitute *privacy of home* in terms of Article 14(1) of the Constitution, this submission would be considered by it. The Commission would also consider whether evidence, if it is gathered illegally, is inadmissible and/or whether those gathering it would have to face prosecution under the relevant law, and may also have to consider Article 164 of the Qanun-e-Shahadat, 1984, if these points are taken up.

**International Practice**.

20. Though reference was made by this Court to paragraph 48 of a judgment of this Court,[15] the learned counsel failed to point out paragraph 46 thereof, which stated that:

> '46. The Irish Supreme Court has in DPP v. JC56 laid down the following principles with regard to the admission or exclusion of the evidence obtained in violation of the constitutional rights, in order to balance the legitimate competing public interests: (i) The onus is on the prosecution to establish the admissibility of all evidence; (ii) If a claim is raised that evidence was obtained in breach of constitutional rights, the onus is on the prosecution to establish either (a) that there was no unconstitutionality, or (b) that despite any interference with constitutional rights the evidence should still be admitted; (iii) Where evidence is obtained in deliberate and conscious violation of constitutional rights, it should be excluded except in exceptional circumstances; (iv) Where evidence was taken in breach of constitutional rights, there

---

[14] PLD 1988 Supreme Court 388.
[15] PLD 2021 SC 1.

Kismat Khan Zimri

Watermarkly

> is a presumption in favour of exclusion, which can be rebutted by evidence that the breach of rights was either (a) inadvertent or (b) derived from subsequent legal developments; and (v) Whether or not a breach of constitutional rights was deliberate and conscious requires analysis of the conduct or state of mind of the individual who actually gathered the evidence, as well as, any senior official or officials within the investigating or enforcement authority concerned who was involved either in that decision or in decisions of that type generally or in putting in place policies concerning evidence-gathering of the type concerned.'

**Federalism**.

21. The order of this Court dated 26 May 2023 has referred to the *settled principles of Federalism*, and on the basis of the same it was noted that permission of the Hon'ble Chief Justice of Pakistan was required before appointing the two Chief Justices as members of the Commission. With the greatest of respect, the *Federation* includes territories mentioned in the Constitution, including the Province of Balochistan and the Islamabad Capital Territory.[16] The Constitution stipulates that, *'Each High Court shall supervise and control all courts subordinate to it'*.[17] The Constitution does not grant a similar supervisory and/or controlling role to the Supreme Court of Pakistan with regard to the High Courts, let alone exclusively to the Chief Justice of Pakistan. On the contrary, *Federalism* requires, as endorsed by the Constitution, that the High Courts function independently. The Supreme Court is only the appellate Court before which the decisions of the High Courts are assailed. And, the decisions of the Supreme Court are binding on *'all other courts in Pakistan'*, which include the High Courts. The constitutional autonomy of the High Courts is also reflected in Article 209, whereunder the SJC is established. Of the five SJC members, two are Chief Justices of the High Courts. In addition, Article 198(6) of the Constitution grants to the *Governor in consultation with the Chief Justice of the High Court*, the power to make rules with regard to the matters mentioned in clause (a) thereof and *all incidental, supplemental or consequential matters*, as per clause (6) of Article 198(6). Rules of procedure are made by the High Court alone, without the consultation with the Chief Justice of Pakistan or with the concurrence of the Supreme Court.[18] The

---

[16] Constitution of the Islamic Republic of Pakistan, Article 1(2)(a) and (b).
[17] Ibid, Article 203.
[18] Ibid, Article 202.

Kismat Khan Zimri

Watermarkly

language of Article 184(3) of the Constitution is also significant in that it commences by referring to Article 199 (jurisdiction whereunder is to be exercised by the High Courts), and states that the Supreme Court can *make an order of the nature mentioned in the said Article* 199. Significantly, the powers of the High Courts, exercised under Article 199, are not circumscribed by the constitutional prerequisites of *public importance* and *enforcement of any of the Fundamental Rights*. It is further submitted that where the Chief Justice of Pakistan has been empowered, the Constitution specifically states this, for instance, with regard to the transfer of High Court Judges under Article 200 of the Constitution.

**Copies of concise statement**

22. Copies of this Concise Statement have been supplied to all concerned, receipt whereof is attached hereto and marked as '**C**'.

23. This Concise Statement is submitted by the Secretary of the Commission without engaging the services of an Advocate-on-Record to save public resources. The Commission also does not consider the need to engage the services of an Advocate Supreme Court as it would unnecessarily waste public resources. The Commission however expects that this Concise Statement will be read out in Court by the petitioner's counsel or by the learned AG.

**Conclusion**.

24. It is most respectfully submitted that the Commission has no interest in the matter other than to undertake the assignment given to it and to do so strictly in accordance with the Constitution and the law. The Commission also assures that legal objections and concerns raised before it will be considered.

Islamabad
Dated: 31 May 2023

Secretary
Inquiry Commission

Kismat Khan Zimri

Watermarkly

In,

**CONSTITUTITON PETITIONS NO. 24, 25, 26 AND NIL OF 2023**

**SARDAR TARIQ MASOOD, J**. I totally agree with what Mr. Justice Qazi Faez Isa has written in his note/order. I was also not consulted by the Hon'ble Chief Justice before putting me on this Bench in the Constitution Petitions No. 24, 25, 26 and Nil of 2023. Surprisingly, these petitions in this Bench have been fixed when just a day earlier the petitioner of the Constitution Petition No. 25 of 2023 himself alongwith his counsel met the Hon'ble Chief Justice in his Chamber and thereafter on the next day these petitions have been fixed without any consultation or ascertaining the availability of mine. If this practice is allowed than whether every petitioners/appellants whose petitions/appeals are lying in this court since years can be allowed to meet the Hon'ble Chief Justice in the Chamber for getting fixed their cases on the very next day.

2. I was awaiting the decision in the petitions through which the Supreme Court (Practice and Procedure) Act 2023 ('**the Act**') have been challenged and expected that they would be decided soon as interim ex-parte stay order was issued which had suspended the operation of the then bill and the proposed Act. Section 3 of the Act stipulates that "any matter invoking exercise of original jurisdiction under clause 3 of Article 184 of the Constitution shall be first placed before the committee constituted under section 2 for examination if the Committee is of the view that a question of public importance with reference to enforcement of any of the fundamental rights conferred by Chapter 1 of Part II of the Constitution is involved it shall constitute a Bench comprising not less than three Judges of the Supreme Court of Pakistan which may also include the member of the committee for adjudication of the matter." However, the present matter was not referred to the Committee, of which I am member. Only by presuming that the Act will be struck down, the mechanism provided in section 3 of the Act has been disregarded.

When stay order was passed I was also reluctant to sit on a Bench till the final decision of the said petitions in which the Act was challenged but as I was heading a Bench in which about thirty to thirty five criminal cases used to be fixed daily of the citizens of the Pakistan, who were in jail and waiting for the decision of their petitions/appeals against their conviction hence I kept on dealing the said criminal work and also requested the Hon'ble Chief Justice for early disposal of the petitions filed against the Act. Although during this period I when heading two members bench, have heard Constitution Petitions No.26 and 28 of 2016 titled as Muhammad Tariq Asad Vs. Federations of Pakistan and Siraj-ul-Haq, Ameer Jamaat-e-Islami Vs. Federation of Pakistan, for the reason that regarding the maintainability of those petitions under Article 184 (3), a five Members Bench, had already decided in affirmative and declared that those petitions were maintainable. Even after

Kismat Khan Zmri

Watermarkly

formulating the certain queries, I adjourned the said case for more than a month with expectation that by that time, petitions against the said Act would be decided.

3. These four petitions have been filed by those who apparently are not detained, nor facing trial with regard to the offences, allegedly committed on 9th May 2023 in Cantonment Areas and the said persons had attacked, destroyed and/or burnt public property and the property of the armed forces, PAF base and other prohibited areas etc. including the GHQ. If a law is challenged, usually it is before the High Court under Article 199 of the Constitution however these petitions have been filed in this court under Article 184 (3) of the Constitution which jurisdiction can only be invoked in the public interest for the enforcement of fundamental rights mentioned in Chapter 1 of Part-II of the Constitution. It should not be presumed that those who may be tried raised objections to their trial under the Army Act, 1952 nor that they prefer to be tried in any Anti-Terrorism Court under the Anti-Terrorism Act, 1997 or before a criminal court mentioned in the Criminal Procedure Code. In any event, every individual case has to be considered on the basis of the fact of the case and the applicable law and this is to be done after hearing the nominated accused, nothing should be done which may jeopardize the interest of an accused without hearing his side.

4. I am also surprised that this nine Members Bench was constituted on the assumption that the Act will be struck down because if it is not, than any party who is not satisfied with its decision, their right to appeal under section 5 of the Act would be made redundant because such an appeal is to be heard by a larger bench of the Supreme Court. Presently, the Supreme Court comprises of fifteen Judges and the Chief Justice, which makes a total of sixteen Judges. However, if the full court comprising of sixteen judges and the Chief Justice is available i.e. seventeen judges then an appeal would be heard by minimum of ten Judges which is not possible in the present situation so the appeal if filed by the either party would not be heard.

5. It is made clear that I have not recused from the Bench, hence there was no question to sign the purported order in which it has been mentioned that new Bench will be constituted whereas my point of view was that these petitions be heard after the decision of the said petitions which have been filed against the Act, hence I am writing my independent note/order.

**( Justice Sardar Tariq Masood )**

Kismat Khan Zimri

Watermarkly

**Syed Mansoor Ali Shah, J.** I sit on this Bench with a reservation which I wish to record at the very outset on this first day of hearing. With respect, in the recent past there has been a consistent pattern and reluctance of not constituting the Full Court Bench (but instead Special Benches of some Hon'ble Judges) in cases[1] of immense public importance that have far-reaching impact on the political, social and economic life of the people of Pakistan and their fundamental rights. The non-formation of the Full Court Bench, in my opinion, has severely undermined the authority of the Court and the legitimacy of its judgments. The constitutional significance of the matter involved in the present case and its potential ramifications, call for the highest level of judicial scrutiny.[2] Collective deliberations and diverse insights by all the judges in cases of public importance helps the Court arrive at a sound judgment and reinforces public confidence and trust in this Court.

2. Additionally, I am of the opinion that until this Court decides the constitutionality of the Supreme Court (Practice and Procedure) Act 2023, Section 3 of which prescribes the procedure for invoking the original jurisdiction of this Court under Article 184(3) of the Constitution, all such matters under this jurisdiction must be heard by the Full Court Bench of this Court.

3. In order to safeguard the integrity and authority of this Court, I requested the Hon'ble Chief Justice of Pakistan to consider constituting the Full Court Bench of all judges of this Court, except those who are out of the country,[3] and leave it to each one of them to decide whether or not to recuse from hearing the case. However, his lordship has not, in his wisdom, thought it fit to accede to my request. I have no choice but to sit on the Bench as part of my constitutional obligation including above all the terms of my oath, which require me to preserve, protect and defend the Constitution including the fundamental rights of the

---

[1] (1) S.M.C.1/2022 (Regarding rejection of the motion of no-confidence against the Prime Minister); (2) Reference 1/2022 (Reference by the President of Pakistan under Article 186 of the Constitution, seeking interpretation of Article 63-A of the Constitution); (3) Const.P.22/2022 Chaudhary Parvez Elahi v. Deputy Speaker, Provincial Assembly of Punjab (Regarding Election of Chief Minister of Punjab); (4) S.M.C.1/2023 (Regarding Holding of General Elections to the Provincial Assemblies of Punjab and Khyber Pakhtunkhwa); (5) Const.P.5/2023 Muhammad Sibtain Khan v. Election Commission of Pakistan (Regarding change of polling date by the Election Commission of Pakistan); (6) Const.P.6/2023 Raja Amer Khan v. Federation of Pakistan (Challenging the Supreme Court (Practice and Procedure) Bill, 2023); (7) Const.P.9/2023 Sardar Kashif Khan v. Federation of Pakistan (Regarding holding of General Elections of National Assembly and Provincial Assemblies on same date); (8) Const.P.14/2023 Abid Shahid Zuberi v. Federation of Pakistan (Regarding constitution of an Inquiry Commission to probe into the veracity of alleged Audio Leaks); (9) Const.P.21/2023 Ghulam Mohiuddin v. Federation of Pakistan (Challenging the Supreme Court (Review of Judgments and Orders) Act 2023, etc.

[2] TYH

[3] Justice Athar Minallah and Justice Syed Hasan Azhar Rizvi are out of the country.

Kiernat Khan Zimri

Watermarkly

people of Pakistan, in particular their right to life, liberty, dignity, due process and fair trial.

Judge

Islamabad,
22nd June, 2023.
**Approved for reporting.**
Sadaqat

Kismat Khan Zimri

Watermarkly