

Present: Umar Ata Bandial, C.J., Ijaz ul Ahsan, Munib Akhtar, Syed Hasan Azhar Rizvi and Shahid Waheed, JJ

**ABID SHAHID ZUBERI, ADVOCATE SUPREME COURT OF PAKISTAN and 3 others--
-Petitioners**

Versus

**FEDERATION OF PAKISTAN through Secretary, Cabinet Division, Islamabad and 2
others---Respondents**

Constitution Petitions Nos. 14 to 17 of 2023, decided on 26th May, 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).

Pakistan Commissions of Inquiry Act (IX of 2017)---

----S. 3---Constitution of Pakistan, Art. 184(3)---Constitutional petitions challenging formation of an Inquiry Commission comprising of Senior Puisne Judge of the Supreme Court and two Chief Justices of the High Courts---Permission of the Chief Justice of the Supreme Court---Whenever a sitting Judge was intended to be made a member of a Commission, the permission of the Chief Justice (of the Supreme Court) first had to be sought---Since such 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---Said constitutional principle would apply even in regard to the Chief Justices of the High Courts being made members of a Commission---Prima facie, therefore, the very constitution of the Commission in the present case was cast in doubt.

The petitioner's challenge was to Notification No.SRO.596(I)/ 2023 dated 19.05.2023 (impugned notification) was 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 Senior Puisne Judge Supreme Court, and Chief Justices of High Court of Balochistan and Islamabad High Court. The terms of reference (TORs) of the Commission, inter alia, were 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, constituted material whereby public trust and confidence in the credibility, uprightness, impartiality and independence of the superior judiciary was eroded.

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 Chief Justice (of the Supreme Court) 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 the present matter, a constitutional principle of the highest importance had been, prima facie, breached.

In the present matter even though the other two members of the Commission were Chief Justices of respective High Courts, the subject matter of the reference transcended any particular High Court and involved 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 Chief Justice (of the Supreme Court) was required for their appointment. Prima facie, therefore, the very constitution of the Commission was cast in doubt.

Federation of Pakistan v. Muhammad Akram Sheikh PLD 1989 SC 689; Gen.(R) Parvez Musharraf v. Nadeem Ahmed (Advocate) and another PLD 2014 SC 585; The President v. Justice Shaukat Ali PLD 1971 SC 585 and Malik Asad Ali v. Federation of Pakistan PLD 1998 SC 161 ref.

Supreme Court directed that 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 was suspended as was the order dated 22-05-2023 made by the Commission and in consequence thereof proceedings of the Commission were stayed.

For the Petitioner(s)

M. Shoaib Shaheen, Haseeb Jamali, Umar Lakhani, Ayan Memon and Maqsood Buttar, Advocate Supreme Court (in Constitutional Petition No. 14 of 2023).

Malik Shakeel-ur-Rehman, Advocate Supreme Court and Muqtedir Akhtar Shabbir, Advocate Supreme Court (in Constitutional Petition No. 15 of 23).

Nemo (in Constitutional Petition No. 16 of 2023).

In-person (in Constitutional Petition No. 17 of 2023).

For the Federation

Mansoor Usman Awan, Attorney General for Pakistan assisted by Saad Javaid Satti, Advocate, Ms. Maryam Rasheed, Advocate and Ms. Maryam Ali Abbasi, Consultant.

Date of hearing: 26th May, 2023.

ORDER

UMAR ATA BANDIAL, C.J.---We have heard Shoaib Shaheen, Advocate Supreme Court 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.

2. The essence of the submissions made by Mr. Shoaib Shaheen, Advocate Supreme Court, 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*.
- 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.

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 v. 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 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 v. 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 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 v. Muhammad Akram Sheikh [PLD 1989 SC 689 @ para-28(ii) to (iv)]
- b) Gen.(R) Parvez Musharraf v. Nadeem Ahmed (Advocate) and another (PLD 2014 SC 585 @ para-26)
- c) The President v. Justice Shaukat Ali (PLD 1971 SC 585 @ page 605)
- d) Malik Asad Ali v. Federation of Pakistan (PLD 1998 SC 161 @ para 66)

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 XXVIA of the Civil Procedure Code.

8. C.M.A. 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.

MWA/A-18/SC

Order accordingly.

Syed Mansoor Ali Shah

IN THE SUPREME COURT OF PAKISTAN (Original Jurisdiction)

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

ABID SHAHID ZUBERI, ADVOCATE SUPREME COURT OF PAKISTAN---Petitioner

Versus

FEDERATION OF PAKISTAN through Secretary Cabinet, Islamabad and others---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 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, 2023¹ states that:

2. Constitution of Benches.-

(1) 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.

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 conduct² 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 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 5 Commissions of Inquiry Act, 2017³ (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 public 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

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 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 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.

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 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 Pakistan¹⁴ 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 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 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	Secretary
Dated: 31 May 2023	Inquiry Commission

In,

CONSTITUTION PETITIONS NOS. 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 Nos. 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 along with 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 Nos.26 and 28 of 2016 titled as Muhammad Tariq Asad v. Federation of Pakistan and Siraj-ul-Haq, Ameer Jamaat-e-Islami v. 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 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.

Sd/-

Sardar Tariq Masood, J

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 cases¹ 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 people of Pakistan, in particular their right to life, liberty, dignity, due process and fair trial.

Islamabad, 22nd June, 2023	Sd/- Syed Mansoor Ali Shah, J
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^{*} Published as received. Contains multiple orders and notes recorded by Members of the Bench on different dates of hearing of the present case.

^{*} Annexure

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.

⁵ Constitution of the Islamic Republic of Pakistan, Article 176.

⁶ Ibid., Article 175(2).

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).

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.

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.

²⁰ Presidential assent was given on 12 April 1973.

²¹ Four Members abstained.

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 Ala Maududi (1903-1979) in his *Tafhim Al-Qur'an* (vol. 4, pp. 508-510) and the great Qur'anic 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.

³⁴ Now High Court of Sindh.

³⁵ Now the Supreme Court of Pakistan.

* Annexure

* Annexure

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

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.

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

⁴ Constitution Petitions Nos. 14 and 15/2023.

⁵ https://www.youtube.com/watch?v=PE5mtZOBm5c&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=7uBdfRGq5c8&ab_channel=BOLNews (last accessed on 29 May 2023).

[8](https://www.youtube.com/watch?v=4iEpzLS6eQ&ab_channel=ARYNews) https://www.youtube.com/watch?v=4iEpzLS6eQ&ab_channel=ARYNews (last accessed on 29 May 2023).

[9](https://www.youtube.com/watch?v=IgtlGk4aLwo) <https://www.youtube.com/watch?v=IgtlGk4aLwo> (last accessed on 29 May 2023).

[10](https://www.youtube.com/watch?v=oFGzah-Oyrl&ab_channel=ARYNews) https://www.youtube.com/watch?v=oFGzah-Oyrl&ab_channel=ARYNews (last accessed on 29 May 2023).

[11](https://www.youtube.com/watch?v=rdjQjg2B0c&ab_channel=GNM%2B) https://www.youtube.com/watch?v=rdjQjg2B0c&ab_channel=GNM%2B (last accessed on 29 May 2023).

[12](https://www.youtube.com/watch?v=MNU1BM5D13E&ab_channel=ARYNews) https://www.youtube.com/watch?v=MNU1BM5D13E&ab_channel=ARYNews (last accessed on 29 May 2023).

[13](https://www.youtube.com/watch?v=hVOFJyUZ5EE&ab_channel=CapitalTV) https://www.youtube.com/watch?v=hVOFJyUZ5EE&ab_channel=CapitalTV (last accessed on 29 May 2023).

[14](#) PLD 1988 Supreme Court 388.

[15](#) PLD 2021 SC 1.

[16](#) Constitution of the Islamic Republic of Pakistan, Article 1(2)(a) and (b).

[17](#) Ibid, Article 203. 18

[18](#) Ibid, Article 202.

[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.