

IN THE SUPREME COURT OF PAKISTAN
(Original Jurisdiction)

PRESENT: Mr. Justice Mushir Alam
Mr. Justice Qazi Faez Isa

Suo Moto Case No. 7/2017

(Suo Moto action regarding Islamabad-Rawalpindi
Sit-in / *Dharna*)

In Attendance: Attorney Generals for Pakistan, Mr. Ashtar Ausaf Ali and Mr. Anwar Mansoor Khan.
Deputy Attorney General, Mr. Sohail Mehmood.

Advocate General, Islamabad, Mr. Abdul Rauf.
Additional Advocate Generals, Punjab, Mr. Razzaq A. Mirza and Barrister Qasim Chauhan.

Secretary, D.G. Law and A.D.G. Law of the Election Commission of Pakistan, Mr. Babar Yaqoob Fateh, Mr. M. Arshad and Malik Mujtaba respectively.

Chairman, Head Legal, D.G. (Operation and Broadcast Media) and D.G. (Operation Distribution) of PEMRA, Mr. Saleem Baig, Mr. Ali Zeeshan Gondal, Mr. Sohail Asif and Mr. Muhammad Farooq respectively.

Director and Joint Director of I.B., Mr. Malik Aziz-ur-Rehman and Mr. Anwar-ul-Haq Khawar respectively.

Director (Legal) and Deputy Director (Legal), Ministry of Defence, Brigadier Falak Naz and Lieutenant Commander Shafiq ur Rehman respectively.

Deputy Secretary Interior, Mr. Nasir Khan.
Assistant Director (Legal), Mr. Shafiq-ur-Rehman.

IGP and SP, Islamabad, Mr. Khalid Khattak and Mr. Liaqat Hayat Niazi respectively.

Dates of Hearing: 21st November, 2017, 23rd November, 2017, 30th November, 2017, 3rd January, 2018, 16th February, 2018, 19th March, 2018, 15th April, 2018, 11th October, 2018, 16th November, 2018 and 22nd November, 2018.

JUDGMENT

Qazi Faez Isa, J.

Background

1. Muslim candidates contesting elections have to submit a declaration in a prescribed written form affirming that Prophet Muhammad (peace and blessings be upon him) is the last prophet sent by Almighty Allah. This declaration used to state, "*I solemnly swear...*" but the words were substituted, in the Elections Act, 2017 with, "*I believe...*"¹. Due to the change in the wording of the declaration there were widespread protests. The Government decided to undo the change made to the wording of the declaration and revert the law to its original position.

2. The Minister of Law, Justice and Parliamentary Affairs on 5th October, 2017 introduced a bill to revert to the original text of the said declaration. The "*Statement of Objects and Reasons*" of the Bill² is reproduced hereunder:

Subsequent to the enactment of the Elections Act, 2017 (XXXIII of 2017), misgivings have been expressed in the National Assembly and also reported in the media regarding the wording of the "DECLARATIONS BY THE CANDIDATE" in the nomination form (FORM A) attached with the Act.

2. In order to avoid further controversy, there is consensus amongst the political parties in the National Assembly that the original text of "DECLARATION AND OATH BY THE PERSON NOMINATED", included in original Form-IA, should be restored in toto.

3. Misgivings have also been expressed regarding the omission of Articles 7B and 7C consequent upon the repeal of the Conduct of General Elections Order, 2002 (Chief Executive's Order No. 7 of 2002). Again to avoid further controversy, there is consensus amongst the political parties that the provisions of Article 7B and 7C ibid be retained through amendment in section 241 of the Elections Act, 2017. Hence this Bill.

¹ The Elections Act, 2017, The Gazette of Pakistan, Extraordinary, Part I, 2nd October, 2017.

² National Assembly of Pakistan, "A bill to Amend the Elections Act, 2017" 5th October, 2017.
<http://www.na.gov.pk/uploads/documents/1507210474_138.pdf> accessed 31st January, 2019.

Parliament accepted the aforesaid amendment and the Elections (Amendment) Act, 2017³ was enacted on 19th October, 2017 and the words "*solemnly swear*" found their way back into the law. The relevant part of the declaration as it stands since 19th October, 2017 is reproduced hereunder:

I, the above mentioned candidate, solemnly swear that:

- (i) I believe in the absolute and unqualified finality of the Prophethood of Muhammad (peace be upon him), the last of the prophets and that I am not the follower of any one who claims to be a Prophet in any sense of the word or of any description whatsoever after Prophet Muhammad (peace be upon him), and that I do not recognize such a claimant to be Prophet or a religious reformer, nor do I belong to the Qadiani group or the Lahori group or call myself an Ahmadi.
- (ii) I will be faithful to the declaration made by the Founder of Pakistan Quaid-e-Azam Muhammad Ali Jinnah, that Pakistan would be a democratic state based on Islamic principles of social justice. I will bear true faith and allegiance to Pakistan and uphold the sovereignty and integrity of Pakistan and that I will strive to preserve the Islamic Ideology which is the basis for the creation of Pakistan.

TLP's Dharna

3. Parliament had resolved the misgivings with regard to the language of the declaration (on 19th October, 2017), however, the Tehreek-e-Labaik Pakistan ("**TLP**"), a recently formed political party, continued to protest. On 5th November, 2017 the members of TLP and its supporters occupied a road junction (interchange) known as the 'Faizabad Interchange', which is one of the main entry-exit points to Pakistan's Capital, Islamabad, and its fourth largest city, Rawalpindi. Hundreds of thousands of vehicles traverse Faizabad Interchange daily. TLP demanded the removal of the Minister for Law, Justice and Parliamentary Affairs and, then, called for the resignation of the government itself. The sit-in, colloquially referred to as *dharna*, at the Faizabad Interchange

³ Act No. XXXV of 2017, The Gazette of Pakistan, Extraordinary, Part I, 19th October, 2017.

effectively paralyzed the cities of Islamabad and Rawalpindi. The working of the courts, including the Supreme Court of Pakistan, was disrupted. Many litigants and their counsel could not attend to their cases. The threats and abuse continued unabated and the situation exacerbated. On 21st November, 2017 a number of counsel could not attend Court because of the *dharna*. The Deputy Attorney General for Pakistan complained that he reached the Supreme Court with great difficulty, and only managed to do so by using an alternative route, which took three hours longer than his usual travelling time. The public's movement was restricted or altogether stopped. They could not commute, could not get to courts, schools, colleges, universities, their place of work, *et cetera*. Those needing medical treatment could not reach doctors or hospitals. Ambulances transporting the seriously ill could not get to Emergency.

4. The leaders of the *dharna* intimidated, hurled threats, abused, provoked and promoted hatred. The media provided unabated coverage to TLP. Anyone having a grouse against the government joined in. The report⁴ submitted by Inter Services Intelligence (“**ISI**”) under the title “Public Support” and subtitle “Political Parties/Personalities” listed the following: “1) Sheikh Rasheed Ahmed (Chairman AML), 2) Ejaz-ul-Haq (PML-Z), 3) PTI Ulema Wing Islamabad released audio message and 4) Sheikh Hameed (PPP)”. Inflammatory speeches were delivered by irresponsible politicians. Some unscrupulous talk-show hosts incited and provoked citizens. The free publicity made TLP, a little known political party, into a phenomenon. Basking in the

⁴ C. M. A. No. 1229/2018.

limelight, TLP's leadership became ever more intransigent, abusive and aggressive. With each passing day, as they grew in strength and number they became delusional and alleged that people would be rendered objects of Divine displeasure (which is a criminal offence⁵) unless they followed the chosen path of the TLP. Protests turned violent and spread to other cities.

5. It was in abovementioned background that on 21st November, 2017, this Court passed an order, the relevant part whereof is reproduced hereunder:

4. The prevailing situation demonstrates that the matter is one of public interest and a number of Fundamental Rights of citizens enshrined in the Constitution of the Islamic Republic of Pakistan, including, right to life (Article 9), freedom of movement (Article 15), right to education (Article 25A) are prima facie being infringed, which enables this Court to take notice under Article 184 (3) of the Constitution...

6. We would therefore issue notices to the Attorney General for Pakistan, Secretary Interior, Secretary Defence and Advocate General Punjab. The Learned Attorney General for Pakistan is also directed to file comments of the Ministry of Interior and Defence, the intelligence agencies under their respective ministries, including the Intelligence Bureau (IB) and Inter Services Intelligence (ISI) and to submit what, if any, measures have been taken to ensure that the Constitutional rights of citizens of Pakistan are protected and enforced in accordance with law.

Article 184 (3) of the Constitution and Supreme Court's Jurisdiction

6. This Court had invoked jurisdiction under Article 184 (3) of the Constitution of the Islamic Republic of Pakistan ("**the Constitution**"), which provision is reproduced hereunder:

Without prejudice to the provisions of Article 199, 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.

⁵ Section 508 of the Pakistan Penal Code, 1860 makes it a punishable offence to induce a person to believe that he will be rendered an object of Divine Displeasure, and illustration (a) thereunder is with regard to a person who "sits *dhurna*".

Chapter 1 of Part II referred to in Article 184 (3) of the Constitution is titled "*Fundamental Rights*" and Articles 9 through to 28 of the Constitution set out specific fundamental rights. These fundamental rights are categorized as human rights in many countries and in international treaties.

7. The jurisdiction invoked by this Court was neither questioned nor challenged. However, as the original jurisdiction of this Court was invoked we should ensure that it was done in accordance with the Constitution. Part VII of the Constitution is titled "*The Judicature*" and is divided into different chapters: Chapter 1 – The Court, Chapter 2 – The Supreme Court of Pakistan, Chapter 3 – The High Courts and Chapter 3A – Federal Shariat Courts. 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 confers a number of different jurisdictions on the Supreme Court. The most commonly used one is this Court's appellate jurisdiction⁷ whereunder appeals and petitions for leave to appeal are heard; these arise from cases already decided by a High Court or tribunal⁸. Under its transfer jurisdiction this Court may, "*transfer any case, appeal or other proceedings pending before any High Court to any other High Court*".⁹ The advisory jurisdiction of this Court may be availed of by the President to seek the *opinion* of this Court, "*on any question of law which he considers of public*

⁶ Article 175 (2) of the Constitution of the Islamic Republic of Pakistan.

⁷ Article 185 of the Constitution of the Islamic Republic of Pakistan.

⁸ Article 185 of the Constitution of the Islamic Republic of Pakistan.

⁹ Article 186A inserted by the Revival of the Constitution of 1973 Order (Presidential Order No. 14 of 1973) affirmed by the Constitution (Eighth Amendment Act, 1985 and incorporated as Article 270A in the Constitution of the Islamic Republic of Pakistan.

importance"¹⁰. The Supreme Court is also empowered to decide, "Any dispute between any two or more Governments"¹¹. In the exercise of its review jurisdiction this Court has the power to review its own judgments and orders¹². The Supreme Court also has an ancillary power, "for doing complete justice in any case or matter pending before it"¹³.

8. Jurisdiction under Article 184 (3) may be invoked by the Supreme Court if two preconditions are met. Firstly, the matter must be one of *public importance* and, secondly, it must pertain to *the enforcement of any of the Fundamental Rights*. The term *public importance* however is not defined in the Constitution. We may therefore, in accordance with settled principles of interpretation, consider whether the same phrase – *public importance* – is used elsewhere in the Constitution, and if so, by reference thereto the scope of these words can be better determined. Every citizen has the fundamental right to access "*information in all matters of public importance*"¹⁴. The President may "*obtain the opinion of the Supreme Court on any question of law which he considers of public importance*"¹⁵. Appeals from a judgment, decree, order or sentence of an Administrative Court or Tribunal lies to the Supreme Court if it, "*involves a substantial question of law of public importance*"¹⁶. These provisions like Article 184 (3) of the Constitution use the word "*public*" in conjunction with the word "*importance*" meaning thereby that the mere importance of a

¹⁰ Article 186 of the Constitution of the Islamic Republic of Pakistan.

¹¹ Article 184 (1) of the Constitution of the Islamic Republic of Pakistan.

¹² Article 188 of the Constitution of the Islamic Republic of Pakistan.

¹³ Article 187 (1) of the Constitution of the Islamic Republic of Pakistan.

¹⁴ Article 19A of the Constitution of the Islamic Republic of Pakistan. Emphasis added.

¹⁵ Article 186 (1) of the Constitution of the Islamic Republic of Pakistan. Emphasis added.

¹⁶ Article 212 (3) of the Constitution of the Islamic Republic of Pakistan. Emphasis added.

matter isn't, in itself, sufficient to invoke jurisdiction. The matter must be one of *public importance*, that is, it must involve the rights of the public too.

9. In the case of *Benazir Bhutto v Federation of Pakistan*¹⁷ this Court held that, "*It is only when the element of "public importance" is involved that the Supreme Court can exercise its power to issue the writ*"¹⁸. In the case of *Manzoor Elahi v Federation of Pakistan*¹⁹, this Court had deliberated on what is meant by *public importance*:

Now, what is meant by a question of public importance. The term "public" is invariably employed in contradistinction to the terms private or individual, and connotes, as an adjective, something pertaining to, or belonging to, the people; relating to a nation, state, or community. In other words, it refers to something which is to be shared or participated in or enjoyed by the public at large, and is not limited or restricted to any particular class of the community. As observed by the Judicial Committee of the Privy Council in *Hamabai Franjee Petit v. Secretary of State for India-in-Council* ILR 39 Bomb. 279, while construing the words public purpose such a phrase "whatever else it may mean must include a purpose, that is an object or aim, in which the general interest of the community, as opposed to the particular interest of individuals, is directly and vitally concerned". This definition appears to me to be equally applicable to the phrase "public importance".

The aforesaid definition of *public importance*, has been consistently followed by this Court. In *Suo Moto Case No. 13*²⁰ the definition as had been enunciated in the cases *Manzoor Elahi* and *Benazir Bhutto* (above) was reiterated:

The public importance of case is determined as observed by this Court in *Manzoor Elahi's case (supra)* on question affecting the legal rights and liberties of the people at large, even though the individual who may have brought the matter before the Court is of no significance. Similarly, it was observed in *Benazir Bhutto's case (supra)*, that public importance should be viewed with reference to freedom and liberties guaranteed under the Constitution, their protection and invasion of these rights in a manner, which raises a serious question regarding their enforcement, irrespective of the fact whether such infraction of right, freedom or liberty is alleged by an individual or a group of individuals.

¹⁷ *Benazir Bhutto v Federation of Pakistan* (PLD 1988 SC 416).

¹⁸ *Benazir Bhutto v Federation of Pakistan* (PLD 1988 SC 416). See also *Asad Ali v Federation of Pakistan* (PLD 1988 SC 161, 2092).

¹⁹ *Manzoor Elahi v Federation of Pakistan* (PLD 1975 SC 66, 144-145).

²⁰ *Suo Motu Case No. 13 of 2007* (PLD 2009 SC 217, 229).

In *Sohail Butt v Deputy Inspector General of Police*²¹ this

Court observed:

Public importance must include a purpose or aim in which general interest of the community as opposed to the particular interest of the individuals is directly and vitally concerned.

In *Watan Party v Federation of Pakistan*²² this Court said that the scope of *public importance* had been settled, and it related to the general interest of the community:

It is settled that public importance must include a purpose or aim in which the general interest of the community as opposed to the particular interest of the individuals is directly and vitally concerned.

Thus, a fortiori, this Court may invoke its power under Article 184 (3) of the Constitution provided the matter is one of *public importance* and pertains to the enforcement of any of the *Fundamental Rights*.

10. To ensure that in matters of public importance the citizens are not deprived of their fundamental rights is the underlying objective of Article 184 (3) of the Constitution. Before an order is made under Article 184 (3) of the Constitution it would be appropriate if this Court identifies the public importance of the matter and the fundamental right/s requiring enforcement. And every possible care should be taken before making an order under Article 184 (3) since there is no right to appeal such an order.

Applicability of Article 184 (3) of the Constitution to this Case

11. Protestors had converged on major roads and highways, they pelted stones, damaged and burnt vehicles and properties. Ambulances, doctors, paramedic staff and other organizations

²¹ *Sohail Butt v Deputy Inspector General of Police* (2011 SCMR 698, 704).

²² *Watan Party v Federation of Pakistan* (PLD 2012 SC 292, 324).

providing emergency services, including those of firefighters, Bomb Disposal and Rescue were prevented from rendering emergency assistance or would get unreasonably delayed searching for alternative routes to the emergency. Deprived of access to doctors and medical facilities countless people suffered. An eight-year-old boy lost his life because the *dharna* on the Faizabad Interchange prevented the ambulance, in which he was being taken, to reach the hospital²³. There may have been many more such similar cases which were not reported.

12. Preventing the sick from reaching doctors and hospitals infringes their right to life (guaranteed under Article 9 of the Constitution) which requires enforcement. Blocking roads for long durations prevents citizens from exercising their right to freedom of movement (guaranteed by Article 15 of the Constitution) and this right of theirs requires enforcement. When students cannot attend schools and educational institutions their right to education (guaranteed under Article 25A of the Constitution) requires enforcement. When litigants' access to courts is blocked their right to fair trial and due process (guaranteed by Article 10A of the Constitution) requires enforcement. Abusing, threatening and attacking people undermines their right to live a life of "dignity" (guaranteed under Article 14 (1) of the Constitution) which requires enforcement. When shops and businesses are forced to shut, when people cannot pursue their vocation, when poor daily workers are denied the possibility of earning a livelihood their right to work (guaranteed by Article 18 of the Constitution) requires

²³ 'Army called in to restore peace after cop martyred, over 200 hurt in Islamabad clashes' *The News International* (Islamabad, 25th November 2017) <<https://www.thenews.com.pk/amp/248716-faizabad-sit-in-operation-to-disburse-protesters-begins-as-deadline-ends>> accessed 1st February, 2019.

enforcement. When property is damaged or destroyed the right to hold and enjoy property (guaranteed under Article 23 of the Constitution) requires enforcement.

13. Rawalpindi and Islamabad were brought to a grinding halt. Protests spread to other cities. The country effectively came under lockdown. The matter undisputedly was one of *public importance* and required the *enforcement of the fundamental rights* of nearly every citizen. This Court therefore invoked its jurisdiction under Article 184 (3) of the Constitution.

Reports and Proceedings

14. On 23rd November, 2017 the learned Attorney General for Pakistan ("**AGP**") submitted in Court the Intelligence Bureau ("**IB**") report²⁴ which stated that, "*To keep the participants of sit-in engaged and charged, the TLP leadership resorted to delivering provocative speeches*". The report further stated that, "*TLP is determined to exploit the situation and gain political mileage to gain support for next general elections*". As per the IB report the, "*normal life of the ordinary citizens of Rawalpindi and Islamabad, especially those visiting twin cities on daily basis for routine purposes stand paralyzed*". The report²⁵ submitted by the Ministry of Interior confirmed the contents of the IB report. It also disclosed that the requisite permission to take out a rally or to stage a sit-in (*dharna*) was not obtained by the TLP and that TLP's leadership repeatedly broke their promise to relocate to the designated protest areas, namely, the Democracy Park and the Speech Corner. The report²⁶

²⁴ Report dated 22nd November 2017 of the Deputy Director General, Intelligence Bureau, Islamabad.

²⁵ C. M. A. No. 8578/2017.

²⁶ C. M. A. No. 8733/2017.

of the Inspector General of Police, Islamabad ("IGP Islamabad") corresponds with the reports of IB and the Ministry of Interior and highlighted the illegal actions of the protestors, including causing the death of a seriously ill eight-year-old child. The ISI report²⁷ did not negate the reports submitted by IB, Ministry of interior and IGP Islamabad.

15. On 25th November, 2017 the law enforcement personnel used tear gas and water cannons to disperse the protestors, but failed, and gave up after a hundred and seventy-three of them suffered serious injury. The law enforcement personnel were not allowed to use firearms and were provided only with anti-riot equipment²⁸. *"The mob/protestors were so prepared that they even cut the wires of all relevant cameras installed within the jurisdiction of Islamabad and Rawalpindi... The level of preparedness of the protestors can be well imagined from the fact that they cut the cables of CCTV cameras installed around the sit-in places through which their activities were monitored."*²⁹ The Government then invoked Article 245 of the Constitution and sought the assistance of the Army. But, before the Army was deployed the matter was resolved between the Government and the protestors on the night of 26th November, 2017³⁰, and TLP and its supporters, who received payment from men in uniform³¹, dispersed.

16. We had sought additional information from PEMRA, the Ministry of Defence and the ISI on 19th March, 2018 and on 24th

²⁷ C. M. A. No. 1229/2018.

²⁸ C. M. A. No. 8733/2017.

²⁹ C. M. A. No. 8733/2017, page 7.

³⁰ C. M. A. No. 8733/2017, page 9.

³¹ 'Why was Pakistan general giving money to protestors' *BBC News* (Islamabad, 29th November, 2017) <<https://www.bbc.com/news/world-asia-42149535>> accessed 1st February, 2019.

April, 2018. Inexplicably, the case was not fixed again for over five months. On 11th October, 2018, we directed the Election Commission of Pakistan (“**the Election Commission**”) to submit a report regarding the registration of TLP as a political party and the provisions whereunder it was registered. Information as to whether TLP abides by the political parties’ code of conduct, whether it is foreign funded and whether it has foreign membership was also sought. The matter next came up for hearing on 16th November, 2018 when it was noted (in the following paragraphs) that some of the information had still not been provided:

2. On the last date of hearing the Inter Services Intelligence (“**ISI**”) submitted CMA No. 8712/2018 which was to be considered today. With the assistance of the learned DAG, we have examined the report which states that ISI can neither ascertain whether a person has a bank account nor if he is a tax payer, and such information can only be obtained from the State Bank of Pakistan (“**SBP**”) and Federal Board of Revenue (“**FBR**”) respectively. We enquired from Brigadier Falak Naz, Director (Legal) about the law/regulations/instructions which determine the mandate of ISI. He states that ISI is governed by the “laws of the country”, but without mentioning any law. We accordingly direct the Secretary, Ministry of Defence, which is stated to be the ministry under which ISI comes, and the learned AGP to submit the law/rules/instructions governing ISI and its mandate...

5. We expect the learned AGP to come prepared to attend to the matters noted herein as well as those in earlier orders. We also need to determine the parameters of protests and how these have to be handled by the State. In this regard whether there are parallels with earlier protests and how those were handled, including those of 12th May, 2007 in Karachi and the Pakistan Tehreek-e-Insaf (PTI) and Pakistan Awami Tehreek (PAT) *dharna* at D-Chowk, Islamabad.

6. To be continued to be treated as part heard. To come up on 22nd November, 2018.

17. All the hearings in this case were conducted in open court. We had permitted those aggrieved and those whose interest may be affected to come forward and had also permitted them to file documents and written submissions. Two applications were submitted. The first application³² was by Syed Iftikhar Hussain Gilani, a senior advocate of this Court, who stated that his normal

³² C. M. A. No. 8732/2017.

commute from his residence to the Supreme Court took about thirty-five minutes, which now, on account of the *dharna*, was taking three hours. He further complained that the administration had adopted a siege mentality by placing large shipping containers across roads to block the protestors from continuing their advance. He also pointed out that the protest had spread to other parts of Pakistan and was causing massive losses to the economy. The other application³³ was submitted by Mr. Siraj Ahmad, a local advocate of Islamabad. He drew attention to the State's inconsistent approach and different treatment of protestors. He cited the 2014 *dharna* by two political parties, the Pakistan Tehreek-e-Insaf ("**PTI**") and the Pakistan Awami Tehreek ("**PAT**"), when the State did not remove the protestors who gathered in front of the Presidency, Parliament, Supreme Court, Prime Minister's and Cabinet Secretariats, all of which fell within the designated 'Red Zone'. During the PTI-PAT *dharna* the protestors had camped on D-Chowk and on Constitution Avenue for over three months. He also wanted this Court to investigate those, "*responsible for tampering with divine law and abrogation of the provisions of the Constitution of Pakistan 1973*"³⁴.

18. The last hearing in this case took place on 22nd November, 2018 when we again heard the learned AGP and others. After hearing them we permitted an additional four weeks for the submission of documents, reports and written arguments. However, there was no filing and the four weeks ended on 22nd December, 2018.

³³ C. M. A. No. 8803/2017.

³⁴ C. M. A. No. 8803/2017, page 6.

19. When this case commenced, both in the Federation and the Province of Punjab, the governments were of the Pakistan Muslim League (Nawaz) (“**PML (N)**”) with Mr. Muhammad Nawaz Sharif as the Prime Minister and Mr. Ashtar Ausaf Ali as the AGP. After the general election of 25th July, 2018 both these governments were replaced by the PTI and Mr. Imran Khan became the Prime Minister and Mr. Anwar Mansoor Khan the AGP. Mr. Anwar Mansoor Khan, the law officers of Punjab and those of the Capital Territory, representing PTI’s governments, stood by the reports which had been submitted during the tenure of the PML (N) governments.

Previous Protests and TLP Dharna

20. Mr. Siraj Ahmed in his application³⁵ complained that the protestors of the 2014 *dharna* by PTI-PAT were not treated like those of the TLP. We also wanted to understand the difference in approach and had referred to the 12th May, 2007 Karachi massacre, the 2014 *dharna* by PTI-PAT in Islamabad (referred to by Mr. Siraj Ahmed) and the TLP Faizabad Interchange *dharna* by TLP³⁶. Were the earlier gatherings handled differently by the State?

21. **12th May, 2007 Karachi Massacre:** General Pervez Musharraf had removed Chief Justice Iftikhar Muhammad Chaudhry on 9th March, 2007. A peaceful movement, which came to be known as ‘The Lawyers Movement’, to restore him and the independence of the judiciary commenced. On 12th May, 2007 the Chief Justice was flying in to Karachi. Lawyers and people from all walks of life wanted to receive the Chief Justice at the airport to

³⁵ C. M. A. No. 8803/2017.

³⁶ Order of 16th November, 2018.

express their support for him and an independent judiciary. General Musharraf however did not want the Chief Justice to be welcomed. Massive shipping containers were brought from the port on trucks and by using mobile cranes were placed across all roads leading to the airport. But this did not deter the people, who abandoned their vehicles and peacefully proceeded on foot to the airport, and this is when they were targeted by gunmen. Fifty-five persons were mercilessly killed and hundreds suffered bullet injuries on 12th May, 2007. The Muttahida Qaumi Movement (“MQM”) and its leader, Mr. Altaf Hussain, supported General Musharraf. Incidentally, the shipping containers used to block roads were brought from ports, which were under the domain of the Federal Minister incharge of ports, a nominee of the MQM.

22. **2014 *dharna* by PTI-PAT at Islamabad:** PTI, PAT and their supporters had alleged that the results of the general elections held on 11th May, 2013 were rigged. They protested and camped outside the National Assembly, played loud music till late at night and disrupted the peace and sleep of those living in the area. Litigants, and even judges, had to find alternative routes to reach the Supreme Court. The PTI-PAT *dharna* took place on Constitution Avenue, but it did not paralyze the Capital. The PML (N), as a consequence of the continuous pressure, agreed to the demand of PTI to promulgate a Presidential Ordinance to enable the setting up of a judicial commission to inquire into the conduct of the general elections of 2013. The *Statement of Objects and Reasons* of the Ordinance³⁷ explains the matter:

Pursuant to allegation of rigging in the General Elections
2013 in particular by Pakistan Tehreek-e-Insaf, a political

³⁷ The General Elections 2013 Inquiry Commission Ordinance, 2015, The Gazette of Pakistan, Extraordinary, Part-I, dated 4th April, 2015.

party and denied by Pakistan Muslim League (Nawaz), a political party and a party in power, an accord was arrived at between them to setup a Commission to inquire into the allegation of rigging in the General Elections 2013. The Commission to be known as the General Elections 2013 Inquiry Commission shall comprise three Judges of the Supreme Court of Pakistan to be constituted by the Chief Justice of Pakistan on the request of the Federal Government. The Commission shall inquire into and determine whether or not, the General Elections 2013 were organised and conducted impartially, honestly, fairly, justly and in accordance with law; the General Elections 2013 were manipulated or influenced pursuant to a systematic effort by design by anyone; and the results of the General Elections 2013, on an overall basis, are a true and fair reflection of the mandate given by the electorate.

The judicial commission which was constituted was headed by Mr. Nasirul Mulk, the then Chief Justice of Pakistan. He and two senior judges were the three-member Inquiry Commission, which examined the allegations leveled by the PTI. The Commission found that, "*the 2013 general elections were in large part organized and conducted fairly and in accordance with the law*"³⁸. The Commission's findings were not disputed by PTI.

23. We have considered three different protests and the State's handling of them. On 12th May, 2007 unarmed citizens wanted to go to the airport to receive the Chief Justice of Pakistan. The Constitution guarantees the freedom of movement, however, citizens were prevented from going to the airport. Large shipping containers were placed across roads by the State at public expense. The citizens were not deterred and proceeded on foot when they were fired upon and by day's end fifty-five lay dead and hundreds more were injured. Seven years later came the PTI-PAT *dharna*. The three-member Inquiry Commission, headed by the Chief Justice of Pakistan, unanimously concluded that the results of the general elections of 2013 reflected the mandate of the

³⁸ General Elections 2013 Inquiry Commission, *Final Report of the General Elections – 2013 Inquiry Commission 2015* (22nd July, 2015) page 236 [TOR 3a].

people. Then three years later the country was faced with the TLP *dharna*.

TLP's Methodology

24. The leadership of TLP must have noted that despite the daylight slaughter of innocents on the streets of Karachi on 12th May, 2007 its principal conspirators and beneficiaries were not punished. They must also have noted that when PTI-PAT had camped in the Red Zone for several months they had achieved the setting up of a judicial inquiry commission. Though the findings of the Inquiry Commission had rebutted PTI's allegations no adverse consequences followed. PTI's leadership did not even tender an apology, let alone clean up the area or pay to clean and restore it. Instead PTI received a lot of free publicity. TLP had demanded that the words *solemnly swear* in the declaration of Muslim candidates be restored. The government conceded and the law was amended. As per unanimous view of all the intelligence agencies TLP wanted to maximize political mileage for itself³⁹. The ambitious leadership of a fledgling political party projected itself as the defender of the Muslim faith. They provoked religious sentiment, stoked the flames of hatred, abused, resorted to violence and destroyed property worth 163,952,000 rupees⁴⁰. Nearly all economic activity in the country was brought to a virtual standstill by TLP. Pakistan's Gross Domestic Product for the year 2017 was 32,406,956,000,000 rupees⁴¹, therefore, each day's shutdown is

³⁹ The reports of IB, Ministry of Interior, IGP Islamabad and the ISI.

⁴⁰ C. M. A. 1427/2018, page 31.

⁴¹ Gross Domestic Product of Pakistan calculated by the Pakistan Bureau of Statistics, Government of Pakistan for the years 2017-2018

<<http://www.pbs.gov.pk/sites/default/files//tables/Table-4.pdf>> accessed 1st February, 2019.

calculated to be 88,786,180,821 rupees⁴². Intelligence agencies reported that politicians visited TLP's leadership camped on the Faizabad Interchange⁴³. TLP received prime-time free media coverage and publicity, transforming it overnight into a household name. Two of its candidates got elected as members of the Sindh Assembly and TLP got a sizeable number of votes in the 25th July general elections.

The Right to Protest

25. The Constitution does not specifically stipulate a right to protest. However, democracy recognizes such a right, and it was through democratic means that Pakistan was achieved. The people of the subcontinent acquired independence from British-colonial rule by the efforts of the All India Muslim League and the Indian National Congress; they peacefully protested, demonstrated, held meetings and expressed themselves through elections, as a consequence of which two independent countries, Pakistan and India, emerged. Our Constitution is moored in democracy. The people of Pakistan have declared, "*that Pakistan would be a democratic State*"⁴⁴ and that its citizens are, "*dedicated to the preservation of democracy*"⁴⁵. Citizens have the right to peacefully protest and hold demonstrations, and may do so against any action or decision of a government or authority. The right to protest is also implied in "*the right to assemble peacefully*"⁴⁶, in the "*right to form associations or unions*"⁴⁷, in the "*right to form or be a*

⁴² 32,406,956,000,000 divided by 365 is equal to approximately 88,786,180,821.

⁴³ C. M. A. No. 1229/2018.

⁴⁴ The Preamble of the Constitution of the Islamic Republic of Pakistan which is now, by virtue of Article 2A, a "*substantive part of the Constitution*".

⁴⁵ The Preamble of the Constitution of the Islamic Republic of Pakistan.

⁴⁶ Article 16 of the Constitution of the Islamic Republic of Pakistan.

⁴⁷ Article 17 (1) of the Constitution of the Islamic Republic of Pakistan.

member of a political party"⁴⁸ and in the "*in the right to freedom of speech and expression*"⁴⁹.

The Failure of the State

26. The TLP and its followers, from all accounts, were determined to disrupt civic life. But, to meet this challenge there was little preparation or preplanning by the government, the police and other law enforcement agencies. No plan was apparently prepared to attend to the different eventualities likely to emerge⁵⁰. The lack of preparedness to deal with similar events is most likely the situation even today. It is also not clear whether there was sufficient coordination between different authorities. A lack of vision, clarity and indecisiveness seemed to prevail. The District Magistrate of the Islamabad Capital Territory had written a letter⁵¹ to the TLP leadership stating that an order had been issued under section 144 of the Criminal Procedure Code, which prevented public gatherings and cautioned them to abide by it. He had also informed them that if they wanted to protest they should do so at the Democracy Park or the Speech Corner and if they wanted to take out a "Long March/Rally" they should obtain the requisite prior permission. TLP's leadership paid no heed to the District Magistrate's letter, yet no prosecution was launched against them in this regard. When those breaking the law know that there shall be no consequences it only emboldens others. The citizens of

⁴⁸ Article 17 (2) of the Constitution of the Islamic Republic of Pakistan.

⁴⁹ Article 19 of the Constitution of the Islamic Republic of Pakistan.

⁵⁰ In different reports and documents which have been submitted there is no plan attached nor is there any reference to one. Islamabad Senior Superintendent of Police's letters No. 25321-40/SEC dated 16th November, 2017, No. 25391-420/SEC dated 17th November, 2017, No. 25421-70/SEC dated 17th November, 2017 and No. 25581-610/SEC dated 19th November, 2017 filed in C. M. A. 8578/2017 can not be categorized as plans.

⁵¹ Letter No. 10(3)-HC(G)/2017 dated 5th November, 2017, page 14 of C. M. A. No. 8578/2017.

Pakistan have reposed their trust in the State to ensure that their fundamental rights are upheld. Citizens must be kept safe, their properties protected and they should be allowed to move freely. The State however let them down.

The Right to Assemble Peacefully

27. The "*right to assemble peacefully and without arms*"⁵² is "*subject to any reasonable restrictions imposed by law in the interest of public order*"⁵³. The right of assembly is recognized as a right to preserve the democratic order, but it cannot be used to overthrow a lawful government. Nor can the right of assembly be used to bring about a revolution or insurrection. These principles were enunciated in the case of *Islamic Republic of Pakistan v Abdul Wali Khan*⁵⁴:

It goes without saying that while the right of Assembly is a very important right for the preservation of a democratic political system yet it cannot be denied that no State can tolerate utterances or actions which threaten to overthrow the Government established by law in that State by unlawful or unconstitutional means. As observed by the American Supreme Court in the case of *American Communications v. Douds* [(1951) 340 US 268], 'Freedom of speech, press and Assembly are dependent upon the power of the constitutional Government to survive. If it is to survive, it must have the power to protect itself against unlawful conduct and, under some circumstance, against incitements to commit unlawful acts'.

The maintenance of public order is the paramount duty of the State. If anyone propagates, "*hatred or contempt, or excites or attempts to excite disaffection towards the Federal or Provincial Government*"⁵⁵ they commit the offence of sedition for which the punishment is imprisonment for life. TLP sowed discord and dissension, it resorted to mob-rule, rioting and the destruction of property.

⁵² Article 16 of the Constitution of the Islamic Republic of Pakistan.

⁵³ Article 16 of the Constitution of the Islamic Republic of Pakistan.

⁵⁴ *Islamic Republic of Pakistan v Abdul Wali Khan* (PLD 1976 SC 57, 104).

⁵⁵ Section 124-A of the Pakistan Penal Code, 1860.

28. The House of Lords of the United Kingdom has determined that, "*The right of assembly, of demonstration, is of great importance but in English law it is not an absolute right which requires all limitations on other rights to be set aside or ignored*"⁵⁶. With regard to assembly on a public highway or a public place it observed that if these:

... are reasonable, do not involve the commission of a public or private nuisance, and do not amount to an obstruction of the highway unreasonably impeding the primary right of the general public to pass and repass, they should not constitute a trespass. Subject to these qualifications, therefore, there would be a public right of peaceful assembly on the public highway.⁵⁷

29. The rights to free movement, peaceful assembly and freedom of speech and expression (respectively Articles 15, 16 and 19 of the Constitution) are provided in Article 19 of the Indian Constitution, but in India too such rights are not absolute. The Indian Supreme Court elaborated in the case of *Bimal Gurun v Union of India*⁵⁸, that:

Demonstrations whether political, religious or social or other demonstrations which create public disturbances or operate as nuisances, or create or manifestly threaten some tangible public or private mischief, are not covered by protection under Article 19(1). A demonstration might take the form of an assembly and even then the intention is to convey to the person or authority to whom the communication is intended the feelings of the group which assembles. From the very nature of things a demonstration may take various forms; 'it may be noisy and disorderly', for instance stone-throwing by a crowd may be cited as an example of a violent and disorderly demonstration and this would not obviously be within Article 19(1)(a) or (b)".⁵⁹

In *Re Ramlila Maidan Incident* case⁶⁰ the Supreme Court of India observed:

⁵⁶ *Director of Public Prosecutions v Jones (Margaret) and another* [1999] 2 AC 240, 263.

⁵⁷ *Director of Public Prosecutions v Jones (Margaret) and another* [1999] 2 AC 240, 254 (Lord Irvine of Lairg, L.C).

⁵⁸ *Bimal Gurun v Union of India* (2018) SCC Online SC 233.

⁵⁹ *Bimal Gurun v Union of India* (2018) SCC Online SC 233.

⁶⁰ *In re Ramlila Maidan Incident* (2012) 5 SCC 1.

To maintain and preserve public peace, and public order is unequivocal duty of the State and its organs... There can be no social order or proper State governance without the State performing this function and duty in all its spheres.⁶¹

The right of assembly, the freedom of association and the freedom of speech cannot be exercised by infringing the fundamental rights of others. Without obtaining permission public meetings cannot be held on roads. Nor can a road be used as a camping ground or to assemble on it indefinitely. Roads are for vehicular use and pavements are for the use of pedestrians to enable the travelling public to *move freely*, which is their fundamental right⁶².

TLP and the Election Commission

30. *"Every citizen not being in the service of Pakistan shall have the right to form or be a member of a political party"*⁶³, however, as this fundamental right itself stipulates, it is one which vests in *every citizen* of Pakistan. Political parties must not act in a manner, *"prejudicial to the sovereignty and integrity of Pakistan"*⁶⁴ and they *"shall account for the source of funds"*⁶⁵. TLP was registered as a political party on 25th May, 2017⁶⁶ under the Political Parties Order, 2002. The Political Parties Order, 2002 was subsequently substituted on 2nd October, 2017 by the Elections Act, 2017. The documents⁶⁷ filed with the Election Commission show that a resident of the United Arab Emirates, holding a

⁶¹ *In re Ramlila Maidan Incident* (2012) 5 SCC 1, 98.

⁶² Article 15 of the Constitution of the Islamic Republic of Pakistan.

⁶³ Article 17 of the Constitution of the Islamic Republic of Pakistan.

⁶⁴ Article 17 (2) of the Constitution of the Islamic Republic of Pakistan.

⁶⁵ Article 17 (3) of the Constitution of the Islamic Republic of Pakistan.

⁶⁶ Page 45 of C. M. A. 9273/2018 submitted by the Election Commission of Pakistan.

⁶⁷ C. M. A. No. 9273/2018.

National Identity Card for Overseas Pakistanis⁶⁸ (“**NICOP**”), who was “*entitled visa free entry to Pakistan*”, represented TLP before the Election Commission and attended to all its matters and secured TLP’s registration as a political party. Subsection (4) of section 3 of the Political Parties Order, 2002 (the old law) and subsection (4) of section 200 of the Elections Act, 2017 (the new law) prohibit political parties to:

- (a) propagate any opinion, or act in a manner prejudicial to the fundamental principles enshrined in the Constitution;
- (b) undermine the sovereignty or integrity of Pakistan, public order or public morality or indulge in terrorism;
- (c) promote sectarian, regional or provincial hatred or, animosity;
- (d) bear a name as a militant group or section or assign appointment titles to its leaders or office-bearers which connote leadership of armed groups;
- (e) impart any military or para-military training to its members or other persons; or
- (f) be formed, organized, set-up or convened as a foreign-aided political party.

The phrase “*foreign-aided political party*”, includes, receiving “*any portion of its funds from foreign nationals*”⁶⁹.

31. If a political party “*is a foreign aided political party or has been formed or is operating in a manner prejudicial to the sovereignty or integrity of Pakistan or is indulging in terrorism*” the Election Commission may submit a reference to the Federal Government under section 212 of the Elections Act, 2017. When such a reference is submitted the Federal Government may issue a notification⁷⁰ declaring that the political party is foreign aided, operating in a manner prejudicial to the sovereignty or integrity of

⁶⁸ Copy of the NICOP of the said person is at pages 11 and 12 of the C. M. A. No. 9273/2018 filed by the Election Commission.

⁶⁹ Explanation (c) of section 212 of the Elections Act, 2017.

⁷⁰ In the official gazette as per section 212 of the Elections Act, 2017.

Pakistan and/or indulging in terrorism. Within fifteen days of the declaration/notification the Government has to refer the matter to the Supreme Court for its consideration⁷¹ and if the Supreme Court *upholds the declaration* made by the Federal Government the political party stands dissolved⁷².

32. The Election Commission's report⁷³ states that TLP did not provide information about its funding despite repeatedly directing it to do so. Section 211 of the Elections Act, 2017 and rule 161 (2) of the Elections Rules, 2017, which were referred to by the Election Commission in its notices to TLP, require that political parties submit the following financial details:

Section 211 of the Elections Act, 2017

(1) A political party shall furnish to the Commission the list of contributors who have donated or contributed an amount equal to or more than one hundred thousand rupees to the political party for its election campaign expenses.

(2) A political party shall furnish to the Commission details of the election expenses incurred by it during a general election.

Rule 161 (2) of the Elections Rules, 2017

(2) The details of election expenses under this rule shall be submitted by the political party within sixty days of the publication of the names of returned candidates in the official gazette.

The Director General (Law) and the Secretary of the Election Commission confirmed that TLP did not provide the requisite financial information, however, stated that the law is (to use their words) *cosmetic in nature*⁷⁴ therefore the Election Commission could not take action against TLP.

⁷¹ Section 212 (2) of the Elections Act, 2017.

⁷² Section 212 (3) of the Elections Act, 2017.

⁷³ C. M. A. No. 9273/2018.

⁷⁴ Order dated 16th November, 2017.

33. The Election Commission is a constitutional body⁷⁵ and the Constitution stipulates that the Election Commission shall ensure that, *"the election is conducted honestly, justly, fairly and in accordance with law, and that corrupt practices are guarded against"*⁷⁶. The Election Commission is also required to undertake, *"such other functions as may be specified by an Act of Majlis-e-Shoora (Parliament)"*⁷⁷. Article 17 (3) of the Constitution requires political parties to account for the source of their funds and section 211 of the Elections Act, 2017 demands that details of election expenses be provided. The Election Commission confirmed that TLP did not account for its funds and election expenses, but, surprisingly, professes its helplessness because the law according to it is *cosmetic in nature*. The Election Commission should disabuse itself that constitutional and legal provisions are *cosmetic*. The responsibilities placed on the Election Commission by the Constitution and the law must be fulfilled, they are not optional. The Constitution also empowers the Election Commission to get requisite information from any executive authority - *"All executive authorities in the Federation and in the Provinces to assist the Commissioner and the Election Commission in the discharge of his or their functions"*⁷⁸.

Freedom of Speech, Expression, Press and PEMRA

34. The freedom of speech and expression and of the press are fundamental rights⁷⁹. However, these rights cannot be used to denigrate or undermine:

⁷⁵ Article 218 of the Constitution of the Islamic Republic of Pakistan.

⁷⁶ Articles 218 (3) of the Constitution of the Islamic Republic of Pakistan.

⁷⁷ Article 219 (e) of the Constitution of the Islamic Republic of Pakistan.

⁷⁸ Article 220 of the Constitution of the Islamic Republic of Pakistan.

⁷⁹ Article 19 of the Constitution of the Islamic Republic of Pakistan.

... the glory of Islam or the integrity, security or defence of Pakistan or any part thereof, friendly relations with foreign States, public order, decency or morality or in relation to contempt of court, or commission of or incitement to an offence.⁸⁰

The Pakistan Electronic Media Regulatory Authority Ordinance, 2002 (the "**PEMRA Ordinance**") mirrors the aforesaid restrictions as set out in the aforementioned Article 19 of the Constitution and further prohibits broadcasts which are, "*likely to create hatred among the people or is prejudicial to the maintenance of law and order or is likely to disturb public peace and tranquility*"⁸¹. The licences which PEMRA issues further stipulate that broadcasts cannot be made which, "*encourage violence, terrorism, racial, ethnic or religious discrimination, sectarianism, extremism, militancy, hatred*"⁸².

35. TLP's leadership created hatred amongst the people, they abused, threatened and advocated violence; and this was broadcasted by some private television channels. ISI's report⁸³ identified "Channel 92" as a television channel supporting TLP and stated that its owners had supplied food to the protestors occupying the Faizabad Interchange. PEMRA, however, did not take action under the PEMRA Ordinance against any of its licencees for violating the terms of their licences. PEMRA abdicated its statutory duty, a duty which it was legally obliged to fulfil.

36. PEMRA also failed to protect the legitimate rights of its licensed broadcasters. Broadcasts by "DAWN" and "Geo" television channels were stopped/interrupted; complaints stating this were

⁸⁰ Article 19 of the Constitution of the Islamic Republic of Pakistan.

⁸¹ Section 27 (a) of the PEMRA Ordinance, 2002.

⁸² Section 20 (c) of the PEMRA Ordinance, 2002.

⁸³ C. M. A. No. 8712/2018.

acknowledged by PEMRA⁸⁴. "DAWN" and "Geo" were particularly targeted in the cantonment and defence housing authority areas of the country, which too was confirmed by PEMRA. But, sadly, PEMRA looked the other way. It did nothing to protect the interests of its licencees nor took action against those cable operators who were responsible. On 19th March, 2018 and on 24th April, 2018, information was sought from PEMRA as to who was responsible, but PEMRA professed ignorance.

37. In compliance with our order⁸⁵ the Pakistan Telecommunication Authority through the Deputy Attorney General for Pakistan submitted a report⁸⁶ which pointed out that under the Prevention of Electronic Crimes Act, 2016⁸⁷ the preparation and dissemination of hate speech and terrorism through electronic means is a serious offence. Section 11 and 12 of this Act respectively state:

11. Hate speech

Whoever prepares or disseminates information, through any information system or device, that advances or is likely to advance interfaith, sectarian or racial hatred, shall be punished with imprisonment for a term which may extend to seven years or with fine or with both.

12. Recruitment, funding and planning of terrorism

Whoever prepares or disseminates information, through any information system or device, that invites or motivates to fund, or recruit people for terrorism or plans for terrorism shall be punished with imprisonment for a term which may extend to seven years or with fine or with both.

The hate which was spread and the violence which was incited through electronic means appears not to have been investigated, let alone the violators prosecuted and punished. If serious violations of the law are ignored then the law loses respect and efficacy.

⁸⁴ Order dated 25th April, 2018.

⁸⁵ Order dated 3rd January, 2018.

⁸⁶ C. M. A. No. 2379/2018.

⁸⁷ The Prevention of Electronic Crimes Act, 2016, The Gazette of Pakistan, Extraordinary, Part I, 22nd August, 2016.

Censorship

38. Television channels and newspapers had complained about interference in their broadcasts and the delivery of their publications. We, therefore, tried to determine whether there was substance in their complaints. The organisation of journalists⁸⁸, editors⁸⁹, broadcasters⁹⁰ and newspapers⁹¹ complained that media is being suppressed and at times even silenced. The resolution⁹² of the Federal Executive Council of Pakistan Federal Union of Journalists ("**PFUJ**") makes troubling allegations:

The Press Freedom in Pakistan is under great threat as there is an unannounced censorship imposed by the State institutions across in Pakistan... through coercion, control on advertisement, harassment and even carrying attacks on the journalists... Journalists in particular and society as a whole is scared of from those elements who are either guns, or claiming to be the religious god-fathers.

The Council of Pakistan Newspaper Editors ("**CPNE**") has alleged⁹³ "*media repression*", "*that editors and journalists are forced to self-censor their work amid pressure from certain quarters*" and it "*appealed to all state and non-state actors to refrain from such unconstitutional practices*". It seems that "DAWN", the oldest English language newspaper of the country, which was founded by Quaid-e-Azam Muhammad Ali Jinnah, was targeted the most.

39. Overt and covert censorship is unconstitutional and illegal. Nebulous tactics, such as issuing advice to self-censor, to suppress independent viewpoints, to project prescribed ones, to direct who

⁸⁸ Pakistan Federal Union of Journalists.

⁸⁹ Council of Pakistan Newspaper Editors.

⁹⁰ Pakistan Broadcasters Association.

⁹¹ All Pakistan Newspapers Society.

⁹² Federal Executive Council of Pakistan Federal Union of Journalists' resolution dated 2nd October, 2018.

⁹³ 'CPNE passes resolution against media repression' *Pakistan Today* (Islamabad, 27th June, 2018)

<<https://www.pakistantoday.com.pk/2018/06/27/cpne-passes-resolution-against-media-oppression/>> accessed 1st February, 2019.

should be hired or fired by media organisations is also illegal. This Court has castigated those who had resorted to such tactics in the past. It had directed that there should be "*no hindrance or obstruction*"⁹⁴ of television broadcasts and the Provincial Police Officers were directed to take action against the perpetrators. No one, including any government, department or intelligence agency can curtail the fundamental right of freedom of speech, expression and press beyond the parameters mentioned in Article 19 of the Constitution. Those who resort to such tactics under the mistaken belief that they serve some higher goal delude themselves. Pakistan is governed by the Constitution and, "*Obedience to the Constitution and the law is the inviolable obligation of every citizen wherever he may be and of every other person for the time being in Pakistan*"⁹⁵.

40. A half century ago Justice Brandeis⁹⁶ of the Supreme Court of the United States of America articulated why the American Constitution had guaranteed free speech and assembly:

Those who won our independence believed that the final end of the state was to make men free to develop their faculties, and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government. They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lied in

⁹⁴ *Dr. Shahid Masood v Federation of Pakistan* (2010 SCMR 1849 at pages 1860-1861).

⁹⁵ Article 5 of the Constitution of the Islamic Republic of Pakistan, inserted by the Eighteenth Amendment to the Constitution by the Constitution (Eighteenth Amendment) Act, 2010.

⁹⁶ *Whitney v People of State of California* (1964) 274 U.S. 357, 375.

the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones... Men feared witches and burnt women. It is the function of speech to free men from the bondage of irrational fears⁹⁷.

41. Freedom of speech, expression and the press are guaranteed as fundamental rights in the Constitution. Therefore, the quintessential words of Justice Brandeis are equally applicable to the rights conferred by the Constitution upon the citizens of this great country. Quaid-e-Azam Muhammad Ali Jinnah wanted journalists to be responsible, independent and fearless and welcomed criticism. He said:

The power of the press is great, but you must remember that this power which you are wielding is a trust. Look upon it as a great trust, and remember that you are guiding honestly and sincerely the progress and welfare of your nation. At the same time, I expect you to be completely fearless... If I go wrong, or if the League goes wrong in any direction of its policy or programme, I want you to criticise it honestly.⁹⁸

Intelligence Agencies

42. The report submitted by ISI did not disclose the "*source of livelihood, place of work, address, funding of their organisations, et cetera*"⁹⁹ of the TLP leadership. Subsequently, we had inquired whether they paid income tax or had bank accounts. ISI responded by stating that it did not have the mandate to gather such information and therefore was unable to provide answers to our queries¹⁰⁰. The learned AGP was thus asked¹⁰¹ to inform us about the law/rules/regulations governing ISI and its mandate. The learned AGP tendered a document (in a sealed envelope) which spelled out ISI's mandate, but requested that the mandate of ISI should not be disclosed. He did not give any reason for such

⁹⁷ *Whitney v People of State of California* (1964) 274 U.S. 357, 375.

⁹⁸ *Quaid-i-Azam Muhammad Ali Jinnah (Speeches, Statements, Writings, Letters, etc.)*, Muhammad Haneef Shahid (1st edn, Sang-e-Meel 1976) 51.

⁹⁹ Order dated 23rd November, 2017.

¹⁰⁰ C. M. A. No. 1229/2018 and 8712/2018.

¹⁰¹ As noted in our order dated 16th November, 2018.

secrecy except that this was also the practice in other countries but did not cite the example of a single one. We, therefore ascertained whether other countries maintained secrecy about the mandate of their intelligence agencies.

43. The United Kingdom, the United States of America, New Zealand, Australia, Canada and Norway have laws governing their intelligence agencies and all these laws also disclose their respective mandates:

Country and their Intelligence Agencies	Laws Governing Intelligence Agencies
United Kingdom: Secret Intelligence Service (MI6), Security Service (MI5) and Government Communications Headquarters (GCHQ)	The Security Service Act, 1989, Intelligence Services Act, 1994, Regulation of Investigatory Powers Act, 2000, Justice and Security Act, 2013 and The Investigatory Powers Act, 2016.
United States of America: Central Intelligence Authority (CIA) and Federal Bureau of Investigation (FBI)	The National Security Act of 1947, Central Intelligence Agency Act of 1949 and The Intelligence Reform and Terrorism Prevention Act of 2004.
New Zealand: New Zealand Security Intelligence Service (NZSIS)	Intelligence and Security Act, 2017.
Australia: Australian Security Intelligence Organisation (ASIO) and Australian Secret Intelligence Service (ASIS)	Australian Security Intelligence Organisation Act, 1979 and Intelligence Services Act, 2001.
Canada: Canadian Security Intelligence Service (CSIS)	The Canadian Security Intelligence Service Act, 1984.
Norway: Norwegian Intelligence Service (NIS), National Security Authority (NSM) and Norwegian Defence Security Agency (FSA)	The Oversight of Intelligence, Surveillance and Security Services Act of 1995.

We are disappointed in the manner in which the Government handled this aspect of the case; by ignoring an issue it does not go away. The perception that ISI may be involved in or interferes with matters with which an intelligence agency should not be concerned with, including politics, therefore was not put to rest.

44. The late Air Marshal Asghar Khan, the youngest officer who headed Pakistan's Air Force, was concerned that ISI and some Armed Forces personnel pursued a political agenda. He expressed these concerns to the Supreme Court and this Court took cognizance of the matter under Article 184 (3) of the Constitution, as it was a matter of public importance regarding the enforcement of fundamental rights. The decision¹⁰² of this Court referred to the oath, "*Every member of the Armed Forces shall make*"¹⁰³ swearing "*allegiance to Pakistan and [to] uphold the Constitution*" and "*not engage myself in any political activities whatsoever*"¹⁰⁴. The decision in the case of *Air Marshal Asghar Khan* declared, that:

Involvement of the officers/members of secret agencies i.e. ISI, MI, IB, etc. in unlawful activities, individually or collectively calls for strict action being, violative of oath of their offices, and if involved, they are liable to be dealt with under the Constitution and the Law.¹⁰⁵

45. Pursuant to the judgment in *Air Marshal Asghar Khan's* case the involvement of ISI and of the members of the Armed Forces in politics, media and other "unlawful activities" should have stopped. Instead when TLP's *dharna* participants received cash handouts from men in uniform¹⁰⁶ the perception of their involvement gained traction. The Director General of the Inter-Services Public Relations ("**ISPR**") has also taken to commenting on political matters: "*history will prove the 2018 general elections were transparent*"¹⁰⁷. The Armed Forces, and all agencies manned by the

¹⁰² *Air Marshal (Retd.) Muhammad Asghar Khan v General (Retd.) Mirza Aslam Baig, Former Chief of Army Staff* (PLD 2013 SC 1).

¹⁰³ Article 244 of the Constitution of the Islamic Republic of Pakistan.

¹⁰⁴ Oath of the 'Members of the Armed Forces', Third Schedule to the Constitution of the Islamic Republic of Pakistan.

¹⁰⁵ *Air Marshal (Retd.) Muhammad Asghar Khan v General (Retd.) Mirza Aslam Baig, Former Chief of Army Staff* (PLD 2013 SC 1, 119) [102 (11)].

¹⁰⁶ 'Why was Pakistan general giving money to protestors' *BBC News* (Islamabad, 29 November, 2017) <<https://www.bbc.com/news/world-asia-42149535>> accessed 1st February, 2019.

¹⁰⁷ 'History will prove 2018 elections were transparent: DG ISPR' *DAWN* (London, 13 October, 2018) <<https://www.dawn.com/news/1438764>> accessed 1st February, 2019.

personnel of the Armed Forces, including ISI, Military Intelligence ("MI") and ISPR serve Pakistan, and thus all its citizens. They must never be perceived to support a particular political party, faction or politician. If any personnel of the Armed Forces indulges in any form of politicking or tries to manipulate the media he undermines the integrity and professionalism of the Armed Forces. The duties of the Armed Forces are clearly spelt out in the Constitution, they, "*shall under the direction of the Federal Government defend Pakistan against external aggression or threat of war, and, subject to law, act in aid civil power when called upon to do so*"¹⁰⁸. We must not allow the honour and esteem due to those who lay down their lives for others to be undermined by the illegal actions of a few.

46. ISI states that it cannot monitor the financials of those advocating violence and carrying out violent acts. However, in the context of terrorism, the Anti-Terrorism Act, 1997 does envisage a role for "*Intelligence Agencies, Armed Forces and Civil Armed Forces*"¹⁰⁹. Intelligence agencies should not ignore those who promote violence and hate. If the proponents of violent ideology and action are not monitored and checked they often mutate against the State and terrorize the people. Those who resort to abuse, hate and violence should never be pampered, instead they should fear the State, its police and intelligence agencies.

47. The Directorate of the Inter Service Intelligence was established during the Premiership of Mr. Liaquat Ali Khan. The Directorate's first head, designated as the Director of Intelligence,

¹⁰⁸ Article 245 of the Constitution of the Islamic Republic of Pakistan.

¹⁰⁹ Section 19 of the Anti-Terrorism Act, 1997.

was Brigadier S. Shahid Hamid¹¹⁰. With very limited resources the Directorate had managed to fulfill its assigned responsibilities and it did so professionally and by strictly adhering to its prescribed mandate (as disclosed to us), which did not include either politics or the media. The newly founded State of Pakistan, which included the then East Pakistan, quickly rose in stature and gained a place of respect in the comity of nations. When institutions stay within their designated constitutional boundaries and there is an effective system of check and balance, citizens stay safe and the State prospers. The trouble starts with self-proclaimed-saviours, who must be reminded that sovereignty, *"belongs to Almighty Allah alone, and the authority to be exercised... is a sacred trust"*¹¹¹. Quaid-e-Azam Muhammad Ali Jinnah visualized Pakistan to be, *"based on the fundamental principles of democracy, not bureaucracy or autocracy or dictatorship"*¹¹². We must hold steadfast to the Constitution and the ideals of our leader.

Freedom Movement and Pakistan

48. Pakistan was achieved through democratic and constitutional means. The All India Muslim League and its President, Mr. Jinnah, articulated their demands and peacefully strove to achieve them. They did not exhort their followers to violence. They did not abuse or threaten the British rulers, from whom they wanted freedom, nor their political opponents, the Indian National Congress, or any religious community. The leadership of the League was guided by the great example of

¹¹⁰ Brigadier S. Shahid Hamid, who retired from Pakistan Army as a Major General, was the elder brother of Qazi Faez Isa, J's mother.

¹¹¹ The opening words of the Preamble to the Constitution of the Islamic Republic of Pakistan.

¹¹² *Air Marshal (Retd.) Muhammad Asghar Khan v General (Retd.) Mirza Aslam Baig, Former Chief of Army Staff* (PLD 2013 SC 1, 101) [84], quoting Quaid-e-Azam Muhammad Ali Jinnah.

Prophet Muhammad (peace and blessings be upon him), the founder of the great Islamic tradition of *akhlaq* (ethics and morals) and *aadab* (decency and etiquette), who never uttered an abuse nor a word which could be construed as abusive. Men and women of integrity, sincerity and good manners achieved Pakistan.

Islam

49. Prophet Muhammad (peace and blessings be upon him) is designated as *Rehmatul lil Aalameen* (Mercy of the Worlds). Divine revelation states that his was a "great moral character"¹¹³ (*khuluqin azimin*). The Prophet (peace and blessings be upon him) said, "I am sent only to perfect the noble qualities of character"¹¹⁴; to bring about a moral-ethical transformation. He was the epitome of virtue, ethics, morality and self-abnegation. Threatening another, violating the law, occupying public roads, destroying property, injuring or causing death does not emulate the example of the Prophet (peace and blessings be upon him), his *akhlaq* and *aadab*. Those who employ such tactics cannot be the standard bearers of the Muslim faith. Prophet Muhammad (peace and blessings be upon him) taught his followers to live in peace and taught them to greet by saying – "*assalam-u-aleykum*" (peace be upon you) and to respond to the greeting by saying - "*walaykum assalam*" (and upon you too) or with a still better response – "*waleykum assalam wa rahmatullahe barakatuhu*" (and upon you too and upon you be the Blessings and the Mercy of Allah). Muslims must remain vigilant against the self-righteous and arrogant. "*The servants of (Allah) Most Gracious are those who walk on the earth in humility, and when the ignorant address them, they say, 'Peace' "*. The Almighty

¹¹³ Al-Quran, *Surah Al-Qalam* (68) verse 4.

¹¹⁴ Reported in *Tirmidhi*.

dislikes pride and conceit – *“Allah likes not the proud and boastful”*. Those hurling abuses wantonly need to study the Holy Quran which denigrates even the raising of one’s voice – *“The harshest of sounds without doubt is the braying of the ass”*¹¹⁵.

50. The first words inscribed in the Constitution are – *“In the name of Allah, the most Beneficent, the most Merciful”*¹¹⁶. Its preamble then unequivocally affirms that sovereignty belongs to Allah Almighty alone and that the authority is to be exercised by the people *“within the limits prescribed by Him”*¹¹⁷. The Constitution does not permit *“the glory of Islam”*¹¹⁸ to be denigrated. When a mob abuses, threatens and resorts to violence ostensibly in the name of Islam it does exactly this. True believers abhor such conduct. Slowly, and over a period of time, the real face of Islam is being effaced and the voices of believers, who practice *akhlaq* and *aadab*, have been muffled. Ironically, the most offensive speech and violent behavior purports to represent Islam and Muslims; this is against Islam and the *sunnah* of Prophet Muhammad (peace and blessings be upon him). The Constitution holds out the promise that Muslims will be enabled to live *“in accordance with the fundamental principles and basic concepts of Islam”*¹¹⁹, and the State shall endeavour, *“to promote unity and observance of the Islamic moral standard”*¹²⁰. Abuse, threats and violence are the antithesis of the Islamic moral standard.

¹¹⁵ Al Quran, *Surah Luqman* (31) verse 19.

¹¹⁶ The first line which precedes even the title, ‘The Constitution of the Islamic Republic of Pakistan’.

¹¹⁷ The opening words of the Preamble to the Constitution.

¹¹⁸ Article 19 of the Constitution of the Islamic Republic of Pakistan.

¹¹⁹ Article 31 (1) of the Constitution of the Islamic Republic of Pakistan.

¹²⁰ Article 31 (1) of the Constitution of the Islamic Republic of Pakistan.

51. This case brought to the fore a number of important matters. We examined the Constitution, determined what constitutes public importance, interpreted fundamental rights, considered the consequences of institutional overreach, the tactics used to achieve political agendas, how the State protects citizens and their fundamental rights, the security mechanisms in place, the mandate and role of the intelligence agencies, the independence and obligations of the media, the responsibilities of PEMRA, the role of the Election Commission and what Islam teaches.

52. We are aware that some of the matters considered by us are moral, political and religious. For instance, those in government on 12th May, 2007 (when unarmed citizens were massacred) or those who extended support to the Faizabad Interchange mob (who disrupted civic life and destroyed property) are today in coveted positions at the highest levels of government. While the general moral decline and the loss of political and religious values can only be commented upon we however have not lost sight of the parameters of the jurisdiction of this Court under Article 184 (3) of the Constitution.

Conclusion

53. For the reasons mentioned above this case is disposed of with the following declarations and directions:

- (1) Subject to reasonable restrictions imposed by law, citizens have the right to form and to be members of political parties.

- (2) Every citizen and political party has the right to assemble and protest provided such assembly and protest is peaceful and complies with the law imposing reasonable restrictions in the interest of public order. The right to assemble and protest is circumscribed only to the extent that it infringes on the fundamental rights of others, including their right to free movement and to hold and enjoy property.
- (3) Protestors who obstruct people's right to use roads and damage or destroy property must be proceeded against in accordance with the law and held accountable.
- (4) The Constitution earmarks the responsibilities of the Election Commission which it must fulfill. If a political party does not comply with the law governing political parties then the Election Commission must proceed against it in accordance with the law. The law is most certainly not *cosmetic* as contended on behalf of the Election Commission.
- (5) All political parties have to account for the source of their funds in accordance with the law.
- (6) The State must always act impartially and fairly. The law is applicable to all, including those who are in government and institutions must act independently of those in government.
- (7) When the State failed to prosecute those at the highest echelons of government who were responsible for the murder and attempted murder of peaceful citizens on the streets of

Karachi on 12th May, 2007 it set a bad precedent and encouraged others to resort to violence to achieve their agendas.

- (8) A person issuing an edict or *fatwa*, which harms another or puts another in harm's way, must be criminally prosecuted under the Pakistan Penal Code, the Anti-Terrorism Act, 1997 and/or the Prevention of Electronic Crimes Act, 2016.
- (9) Broadcasters who broadcast messages advocating or inciting the commission of an offence violate the PEMRA Ordinance and the terms of their licences and must be proceeded against by PEMRA in accordance with the law.
- (10) Cable operators who stopped or interrupted the broadcast of licenced broadcasters must be proceeded against by PEMRA in accordance with the PEMRA Ordinance, and if this was done on the behest of others then PEMRA should report those so directing the cable operators to the concerned authorities.
- (11) Those spreading messages through electronic means which advocate or incite the commission of an offence are liable to be prosecuted under the Prevention of Electronic Crimes Act, 2016.
- (12) All intelligence agencies (including ISI, IB and MI) and the ISPR must not exceed their respective mandates. They cannot curtail the freedom of speech and expression and do

not have the authority to interfere with broadcasts and publications, in the management of broadcasters/publishers and in the distribution of newspapers.

- (13) Intelligence agencies should monitor activities of all those who threaten the territorial integrity of the country and all those who undermine the security of the people and the State by resorting to or inciting violence.
- (14) To best ensure transparency and the rule of law it would be appropriate to enact laws which clearly stipulate the respective mandates of the intelligence agencies.
- (15) The Constitution emphatically prohibits members of the Armed Forces from engaging in any kind of political activity, which includes supporting a political party, faction or individual. The Government of Pakistan through the Ministry of Defence and the respective Chiefs of the Army, the Navy and the Air Force are directed to initiate action against the personnel under their command who are found to have violated their oath.
- (16) The police and other law enforcement agencies are directed to develop standard plans and procedure with regard to how best to handle rallies, protests and *dharnas*, and ensure that such plans/procedures are flexible enough to attend to different situations. It is clarified that though the making of such plans/procedures is not within the jurisdiction of this Court however we expect that in the maintenance of law and

order every effort will be taken to avoid causing injury and loss of life.

- (17) We direct the Federal and provincial governments to monitor those advocating hate, extremism and terrorism and prosecute the perpetrators in accordance with the law.

54. It would be apt to conclude this judgment by quoting Quaid-e-Azam Muhammad Ali Jinnah:

I consider it my duty to call upon the Muslims to temper their resentment with reason and to beware of the dangers which may well overwhelm their own State. Should they allow their feelings of the moment to gain mastery over their actions.¹²¹

It is of utmost importance that Pakistan should be kept free from disorder, because the outbreak of lawlessness... is bound to shake... its foundation and cause irreparable damage to its future.¹²²

I pray to God that He who has bestowed on us this great boon of a sovereign State, may now give our people courage to... preserve intact the peace of Pakistan for the sake of Pakistan.¹²³

55. The office is directed to send copies of this judgment for information and compliance to the Government of Pakistan, through the Cabinet Secretary, Secretary Defence, Secretary Interior, Secretary Human Rights, Secretary Religious Affairs and Interfaith Harmony, Secretary Information, the Chief Secretaries of the provinces, the Election Commission of Pakistan, the Pakistan Electronic Media Regulatory Authority, the Pakistan Telecommunication Authority and the Chief Commissioner of Islamabad. The Secretary Defence is directed to forward the judgment to the heads of the Armed Forces, the Director General

¹²¹ *Quaid-i-Azam Muhammad Ali Jinnah (Speeches, Statements, Writings, Letters, etc.)*, Muhammad Haneef Shahid (1st edn, Sang-e-Meel 1976) 96.

¹²² *Quaid-i-Azam Muhammad Ali Jinnah (Speeches, Statements, Writings, Letters, etc.)*, Muhammad Haneef Shahid (1st edn, Sang-e-Meel 1976) 97.

¹²³ *Quaid-i-Azam Muhammad Ali Jinnah (Speeches, Statements, Writings, Letters, etc.)*, Muhammad Haneef Shahid (1st edn, Sang-e-Meel 1976) 98.

Inter Services Intelligence, the Director General Inter Services Public Relations and the head of the Military Intelligence. Secretary Interior is directed to forward the judgment to the Director General Intelligence Bureau, Director General Federal Investigation Agency, Inspector Generals of Police of the provinces and the Islamabad Capital Territory. Secretary Information is directed to forward the judgment to the directors of all press and information departments, who in turn are directed to forward it to all newspapers published in their territories. Pakistan Electronic Media Regulatory Authority is directed to forward this judgment to all television channels and all its licenced broadcasters and operators.

56. This case and all pending applications are disposed of in the aforesaid terms.

Judge

Judge

Bench-III
ISLAMABAD
(Rana Ali Wajahat Khan)
6.2.2019

Announced in open Court at Islamabad on 6th February, 2019

Judge

Approved for Reporting