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**JUDGMENT SHEET**

# LAHORE HIGH COURT, LAHORE

**JUDICIAL DEPARTMENT**

## Writ Petition No. 24153/2023

**Ch. Fawad Ahmad and others**

**Vs.**

**Government of the Punjab and others**

## JUDGMENT

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| **Date of hearing:** | **05.05.2023** |
| **For the Petitioners:** | Mr Sikandar Zulqarnain Saleem, Advocate, assisted by Mr Zafar Iqbal Mangan, Advocate. |
| **For Respondent Nos. 1-8 & 12:** | Mr Shan Gul, Advocate General, Ch. Khaleeq-uz-Zaman, Prosecutor General, Mr Ghulam Sarwar Nehang, Additional Advocate General and Mr Sittar Sahil, Assistant Advocate General, with Dr. Usman Anwar, Inspector General of Police, Punjab; Shakil Ahmad Mian/Additional Chief Secretary (Home), Muhammad Afzal Bashir/Deputy Secretary (Law), Home Department; Kamran Aadil/DIG (Legal) and Ghulam Hussain Chohan/SSP (Legal). |
| **For Respondent Nos. 9 & 11:** | Mr A.D. Naseem, Deputy Attorney General. |

**Tariq Saleem Sheikh, J. –** By this consolidated judgment, we shall decide Writ Petition No.24153/2023 and 22880/2023 as a common thread weaves through them.

***The factual background***

2. Pakistan has been in the grip of the most serious political crisis in its history for over a year. In a turn of events, *Pakistan Tehreek-e-Insaf* (PTI), which was in power in the Punjab and Khyber Pakhtun Khawa, dissolved the provincial assemblies. PTI says that the Caretaker Cabinets installed under Article 224(1A) of the Constitution of the Islamic Republic of Pakistan, 1973 (the "Constitution"), and the Federal Government run by Pakistan Democratic Movement (PDM), a coalition of 11 political parties, have joined hands to crush it. According to the Petitioners, the Caretakers and the Federal Government have filed a string of false cases against the

PTI's leadership across the country, most notably its Chairman, Imran Ahmad Khan Niazi. The party's top leadership, workers and activists are harassed, arrested and humiliated.

3. The general elections for the Punjab Assembly are scheduled for 14.5.2023. PTI planned to take out a rally on 8.3.2023 after following legal formalities but, according to it, the administration was bent upon interrupting it and imposed restrictions under section 144 Cr.P.C. PTI challenged that action of the administration in this Court through Writ Petition No. 16122/2023. During the proceedings, the Caretakers realized their mistake and withdrew their notification imposing section 144 Cr.P.C. in the city upon which the Court disposed of the said constitutional petition vide Order dated 9.3.2023.

4. The PTI workers were fully charged because of the above-mentioned and other events in the country over the last year, including an assassination attempt on Imran Khan on 3.11.2022. Meanwhile, the Additional Sessions Judge, Islamabad (West), issued non-bailable warrants of arrest against Imran Khan in a case he was hearing. On 18.3.2023, the police arrived at Imran Khan's residence in Zaman Park, Lahore, to execute the warrant. The PTI workers obstructed and battled with them. The city – and the world – saw ugly scenes for the next three days until this Court intervened in Writ Petition No. 17692/2023. Many people were injured, and many private and public properties were destroyed. At least one person, Zille Shah, was killed. There were allegations and counter-allegations. The police registered several FIRs regarding the occurences during the aforementioned period. PTI also filed applications under section 22-A(6) Cr.P.C. before the Ex-officio Justice of Peace for registration of FIRs/cross-versions against the members of the administration and the police top brass. There were loud demands for justice. In this background, on the request of the Inspector General of Police, Punjab, vide Order dated 22.3.2023, the Home Department constituted a Joint Investigation Team (JIT) to investigate ten FIRs. The said order is Appendix-I of this petition.

5. The Petitioners in the petitions before us are senior politicians holding high positions in PTI. They are either named in the FIRs mentioned in the Order dated 22.3.2023 or are apprehensive that they would be roped in during the investigation. The JIT has issued them notices

under section 160 Cr.P.C. By this petition under Article 199 of the Constitution, they have challenged the legality of the Order dated 22.3.2023 (the "Impugned Order"), and seek quashing of the JIT's proceedings.

***The submissions***

6. Advocate Sikandar Zulqarnain Saleem contends that, firstly, the concept of JIT violates both the rules of justice and the fundamental rights guaranteed by the Constitution. Secondly, the Provincial Government can form a JIT under section 19 of the Anti-Terrorism Act, 1997 (the "ATA") only to investigate the offences under that Act. Although the Government accuses the Petitioners and other members/workers of PTI of terrorism, the contents of the FIRs listed in the Impugned Order do not disclose such an offence under the criteria laid down by the Supreme Court of Pakistan in ***Ghulam Hussain and others v. The State and others*** (PLD 2020 SC 61). Hence, including section 7 of the ATA in the FIRs is illegal and *mala fide*. Thirdly, the Government did not follow the prescribed procedure while issuing the Impugned Order. The Additional Chief Secretary (Home) issued it without the approval of the Punjab Provincial Cabinet which was mandatory. Fourthly, the JIT cannot undertake an impartial and independent investigation because two of its members (Imran Kishwar/SSP and Aftab Phularwan/SP) are subordinates of the Inspector General of Police and the Capital City Police Officer, Lahore, whom the PTI blames for Zille Shah's murder. The party has initiated proceedings under section 22-A Cr.P.C. against them.

7. The Respondents have strongly opposed these petitions. They argue that JIT is a globally recognized concept which Pakistan adopted in section 19 of the ATA. It does not offend any constitutional provision or infringe any individual's fundamental rights. The Respondents claim that the violence starting 22.2.2023 caused a huge loss. It damaged public and private property worth crores of rupees, injured tens of police personnel, and killed at least one person. During the police's attempt to execute non-bailable warrants issued by the Islamabad Sessions Court against Imran Khan, the PTI workers threw petrol bombs at them, which under no circumstances can be justified. The Respondents contend that the Petitioners and those accused in the FIRs have an adequate and efficacious

remedy before the Anti-Terrorism Court (ATC) under section 23 of the ATA. Hence, these petitions are not maintainable. Even otherwise, they are premature because the probe is in its early stages. The evidence gathered during the investigation would determine whether the accused are liable to be prosecuted under section 7 of the ATA. The Respondents submit that there is no procedural irregularity in the constitution of the JIT, and the allegation that its members are not independent and impartial is false.

***Notice under Order XXVII-A CPC***

8. This Court admitted these petitions to regular hearing vide Order dated 12.4.2023 and framed four questions of law for determination. Since they required interpretation of the Constitution and the statutory laws, it issued a notice under Order XXVII-A CPC to the Attorney General for Pakistan and the Advocate General Punjab. It also sought assistance from the Prosecutor-General Punjab. For this purpose, it issued him a separate notice with a direction to present his viewpoint personally.

9. As adumbrated, four questions of law were framed originally, but during the hearings, a couple of additional/supplementary questions were deliberated. Therefore, we would also address them in this judgment.

10. Mr Shan Gul, Advocate General Punjab, questioned the maintainability of these petitions. He submitted that they were barred due to the principle of ripeness and because the Petitioners had an adequate alternative remedy before the ATC under section 23 of the ATA. The Advocate General contended that the Petitioners' objection to the formation of JIT was misconceived. It was legal under the Constitution and the statutory law (the ATA) and did not infringe on anybody's fundamental rights. It would rather help foster justice. Mr Gul further contended that under section 19 of the ATA, the Provincial Government has the authority to form a JIT for investigating an offence which is evident from the words "if the Government deems necessary". Since it is purely an administrative act, the Petitioners cannot challenge it, and it is not subject to judicial review. Furthermore, any intervention by this Court would amount to interference in the investigation, which the law strictly prohibits. Mr Gul stated that the Government meticulously followed the prescribed procedure while setting up the JIT for the ten cases registered between 22.2.2023 and 19.3.2023 against the PTI leadership and workers and emphasized that the

Impugned Order was unexceptionable. He also submitted documents to substantiate this plea. Mr Gul finally argued that the JIT consisted of honest, upright, competent senior officers. The criticism about including Imran Kishwar/SSP and Aftab Phularwan/SP in the JIT was unfounded. Their nomination could not be challenged just because they were subordinate to the Inspector General of Police, one of the accused in the PTI's estimation. There must be something more to block them.

11. Mr A.D. Naseem, Deputy Attorney General, adopted the Advocate General's arguments.

***The submissions of the Prosecutor General Punjab***

12. Ch. Khaliq-uz-Zaman, Prosecutor General Punjab, made oral and written submissions. He argued that the Provincial Government had the authority to form a JIT under section 19 of the ATA, but it could only be for the offences under that Act. The police had included section 7 of the ATA in the subject FIRs in derogation of the law enunciated by the Supreme Court in ***Ghulam Hussain and others v. The State and others*** (PLD 2020 SC 61). It was, therefore, liable to be deleted. Once that is done, the legal basis for forming the JIT fades away, and the Impugned Order falls to the ground. The Prosecutor General submitted that, in his opinion, the writ petitions at hand were maintainable and this Court could grant the Petitioners the relief they had prayed for.

13. Ch. Khaliq-uz-Zaman's response evoked a strong reaction from the Advocate General. He argued that he was appointed during the PTI regime and had a tilt towards it. His views conflicted with the Punjab Government's position and urged this Court to disregard them.

14. On 20.4.2023, in pursuance of the decision of the Provincial Caretaker Cabinet taken in its 14th Meeting held on 20.4.2023, the Punjab Government restrained Ch. Khaliq-uz-Zaman from appearing in any court on its behalf. Confronted with this situation, he filed C.M. No.4/2023 in W.P. No.24153/2023 claiming that he had a statutory right of audience under section 6(6) of the Punjab Criminal Prosecution Service (Constitution, Functions and Powers) Act, 2006 (the "PCPS Act"). Although he did not expressly request it, he wanted this Court to disregard the Cabinet's decision of 20.4.2023 and consider his submissions. This

Court issued notice to the Punjab Government on this application and directed it to submit a reply, which it did.

15. The Advocate General vehemently opposed the above-mentioned application contending that the Prosecution Service is an attached department of the Punjab Government and is under its control and administration under Serial No. 32 of the First Schedule of the Government of the Punjab Rules of Business, 2011. All members of the said Service, including the Prosecutor General, are obliged to conduct their public duties according to the Government's instructions. The Advocate General further contended that the Prosecutor General had no authority to add or delete any section from the FIR.

16. In view of the above, the issue regarding the nature and scope of the duties and powers of the Prosecutor General Punjab has also come into focus. Therefore, this judgment shall also decide it.

***Opinion***

17. The Respondents have objected to the maintainability of these petitions. We take up this issue first.

**Maintainability**

18. The Petitioners have challenged the formation of the JIT on both constitutional and statutory planes. In many ways, it is a case of first impression that requires a thorough examination of the law that is possible by a Constitutional Court. Therefore, we hold these petitions maintainable.

19. We must, nevertheless, make a point. Section 6 of the ATA, which defines "terrorism" has been amended from time to time. Hence, the criteria for classifying an act as terrorism has been changing. In ***Ghulam Hussain and others v. The State and others*** (PLD 2020 SC 61), a 7-member Bench of the Supreme Court of Pakistan observed that, at one stage, the legislation focused on the gravity of the crime, the deadly nature of the weapon used, the number of perpetrators, the number of victims, the impact created by the offence, and the fear and insecurity that it caused or was likely to generate in the community. The latest definition is consistent with the international perception. The previous emphasis on the act's speculative effect has given way to a clearly defined *mens rea* and *actus reus*. The amended section 6(1)(b) now specifies the "design", and section

6(1)(c) earmarks the "purpose," which should be the motivation for the act. The *actus reus* has been explicitly mentioned in section 6(2)(a) to (n). As a result, an action can only be characterized as "terrorism" when the *actus reus* specified in section 6(2) is accompanied by the *mens rea* required by section 6(1)(b) or 6(1)(c). The fear or insecurity actually created, intended to be created, or likely to be created no longer determines whether an action qualifies as terrorism. The determinative factor now is the intent and motivation behind the action, regardless of whether any fear and insecurity were actually caused. Following the most recent amendment to section 6, an action is reckoned as terrorism if it "is designed to coerce and intimidate or overawe the Government or the public or a section of the public or community or sect" or if such action is intended to "create a sense of fear or insecurity in society" or if it is taken to advance a religious, sectarian or ethnic cause. It is also not terrorism when fear or insecurity is just a byproduct, a spillover, or an unintended consequence of a private act. In paragraph-16 of the judgment, the Supreme Court concluded:

> "… [F]or an action or threat of action to be accepted as terrorism within the meanings of section 6 of the Anti-Terrorism Act, 1997 the action must fall in subsection (2) of section 6 of the said Act and the use or threat of such action must be designed to achieve any of the objectives specified in clause (b) of subsection (1) of section 6 of that Act or the use or threat of such action must be to achieve any of the purposes mentioned in clause (c) of subsection (1) of section 6 of that Act. It is clarified that any action constituting an offence, howsoever grave, shocking, brutal, gruesome or horrifying, does not qualify to be termed as terrorism if it is not committed with the design or purpose specified or mentioned in clauses (b) or (c) of subsection (1) of section 6 of the said Act. It is further clarified that the actions specified in subsection (2) of section 6 of that Act do not qualify to be labeled or characterized as terrorism if such actions are taken in furtherance of personal enmity or private vendetta."

20. The FIR is essentially an "incident report" which informs the police for the first time that an occurrence involving the commission of a cognizable offence has taken place.[1] Rule 25.3(3) of the Police Rules, 1934, states that the Investigating Officer must find out the truth of the matter under investigation, discover the actual facts, and arrest the real culprits. He cannot commit himself prematurely to any account of the incident, including the one set out in the FIR. Thus, the question whether the offence of terrorism has been committed in a particular case in terms of the law declared by the Supreme Court in *Ghulam Hussain* is determined

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[1] *Mst. Sughran Bibi v. The State* (PLD 2018 SC 595).

on the basis of the evidence gathered during the investigation. The Investigating Agency must have a free hand for this purpose. We agree with the Advocate General that a notice under section 160 Cr.P.C. cannot be challenged under Article 199 of the Constitution before the High Court unless it is patently illegal, *mala fide*, without jurisdiction or *coram non judice*. The doctrine of ripeness applies. In ***Sabira Khatoon v. Government of the Punjab and others*** [2021 PLC (C.S.) 1600], this Court explained:

> "Ripeness is a doctrine which courts use to enforce prudential limitations upon their jurisdiction'.[2] It is founded on the principle that judicial machinery should be conserved.[3] It 'reflects concerns that courts involve themselves only in problems that are real and present or imminent'[4] and should not exhaust themselves in deciding theoretical or abstract questions that have no impact on the parties at least for the time being.[5] This doctrine postulates that the 'lawsuit must be well developed and specific and appropriate for judicial resolution. Courts may not decide cases that involve uncertain and contingent future events that may not occur as anticipated, or indeed may not occur at all."[6]

21. Section 23 of the ATA empowers the ATC to transfer cases to regular courts where it is of the opinion that the offence is not a scheduled offence. For ease of reference, section 23 is reproduced below:

> **23. Powers to transfer cases to regular courts.–** Where, after taking cognizance of an offence, [an Anti-Terrorism Court] is of opinion that the offence is not a scheduled offence, it shall, notwithstanding that it has no jurisdiction to try such offence, transfer the case for trial of such offence to any court having jurisdiction under the Code, and the court to which the case is transferred may proceed with the trial of the offence as if it had taken cognizance of the offence.

22. The term "cognizance" in section 23 of the ATA is significant. In ***Wazir v. The State*** [PLD 1962 (W.P.) Lahore 405], a Full Bench of this Court ruled that the police report, when received by a Magistrate, does not constitute taking cognizance by itself. There should be something more to establish that the Magistrate intends to begin the proceedings. He may keep the case waiting until the sanction arrives, then pass some order indicating his intention to hold the trial. In ***Abdul Aziz v. Muhammad Ashraf and others*** (PLD 1973 Lahore 304), it was held that a court takes cognizance through a judicial action, which does not have to be formal. It occurs whenever the court applies its mind to the suspected commission of the

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[2] *Gillespie v. City of Indianapolis*, 13 F. Supp. 2d 811.

[3] Davis, Kenneth Culp. *"Ripeness of Governmental Action for Judicial Review"*. Harvard Law Review 68, No.7 (1955): 1122-153.doi: 10.2307/1337691.

[4] *Able v. U.S.*, 88 F. 3d 1280.

[5] *Rice v. Cayetano*, 941 F. Supp. 1529.

[6] *Valeria G. v. Wilson*, 12 F. Supp. 2d 1007

offence, as disclosed in the police report or the private complaint, to proceed in a specific manner following the provisions of the Code of Criminal Procedure, 1898 (hereinafter referred to as the "Code or Cr.P.C.") for holding an enquiry or a trial, as the case may be. In ***Haq Nawaz and others v. The State and others*** (2000 SCMR 785), the Supreme Court of Pakistan held:

> "Taking cognizance of a case by the court is the first step, which may or may not culminate into the trial of the accused. The trial in a criminal case, therefore, does not commence with the taking of the cognizance of the case by the court. A careful examination of the above provisions in the Code makes it clear that until charge is framed and copies of the material (statement of witnesses recorded under sections 161 and 164 Cr.P.C., inspection note of the first visit to the place of occurrence and recoveries recorded by investigating officer, if the case is initiated on, police report, and copies of complaint, other documents filed with complaint and statements recorded under section 200 or 202 if it is a case upon complaint in writing) are supplied to accused free of charge and he is called upon to answer the charge."

23. In a nub, the court is said to have taken "cognizance of the case" when it applies a conscious mind and takes positive steps indicating that it will try the case after receiving the challan and the materials attached to it by the prosecution. Such steps may not be documented as judicial orders. What is important is that the orders so passed or actions taken signal that the court intends to proceed with the trial.[7]

24. In ***Ali Gohar and others v. Pervaiz Ahmed and others*** (PLD 2020 SC 427), the Supreme Court defined the scope of section 23 of the ATA as follows:

> i) Both, the Administrative Judge and any other ATC to whom the case is assigned by the Administrative Judge, after taking 'cognizance of the case', have the authority to transfer the case under section 23 to an ordinary criminal court for trial under Cr.P.C.
>
> ii) The authority of ATC to transfer the case under section 23 to an ordinary criminal court for trial under Cr.P.C. can take place after taking cognizance of the case, and this authority to transfer remains with the ATC during the proceedings of the trial till the judgment is announced.
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> iii) The condition precedent for ATC to exercise the authority to transfer the case under section 23 of the Act are: firstly when the ATC takes cognizance of the case; and secondly, if ATC is of the opinion that the offences referred to it for trial does not come within the scope of offences triable under the Act.
>
> iv) The words 'cognizance of the case' employed in section 23 of the Act simply means, when the ATC, on receipt of the challan, takes any step indicative of proceeding with the trial.

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[7] *Ali Gohar and others v. Pervaiz Ahmed and others* (PLD 2020 SC 427).

25. Generally speaking, the High Court should not, while exercising jurisdiction under Article 199 of the Constitution, intervene or otherwise comment on the applicability of section 7 of the ATA before the investigation is completed because it may amount to interference in the investigation process, which is not permissible. In ***Emperor v Khwaja Nazir Ahmed*** (AIR 1945 PC 18), their Lordships of the Privy Council held:

> "In their Lordships' opinion, however, the more serious aspect of the case is to be found in the resultant interference by the Court with the duties of the police. Just as it is essential that everyone accused of a crime should have free access to a Court of Justice so that he may be duly acquitted if found not guilty of the offence with which he is charged, so it is of the utmost importance that the judiciary should not interfere with the police in matters which are within their province and into which the law imposes upon them the duty of enquiry. In India, as has been shown, there is a statutory right on the part of the police to investigate the circumstances of an alleged cognizable crime without requiring any authority from the judicial authorities, and it would, as their Lordships think, be an unfortunate result if it should be held possible to interfere with those statutory rights by an exercise of the inherent jurisdiction of the Court."

The above view was approved by the Supreme Court of Pakistan in ***Shahnaz Begum v. The Hon'ble Judges of the High Court of Sind and Baluchistan and another*** (PLD 1971 SC 677) and in several subsequent cases, including ***Younas Abbas and others v. Additional Sessions Judge, Chakwal and others*** (PLD 2016 SC 581).

26. We agree with Mr Gul that, as a general principle of law, a litigant cannot seek judicial review if he has an alternative remedy. However, in order to be considered an "alternative", the remedy must be convenient and efficacious. In ***Mehboob Ali Malik v. The Province of West Pakistan, and another*** [PLD 1963 (W.P.) Lahore 575], this Court explained:

> "The word 'adequate' signifies a concept of a relative nature. It can be comprehended only as a state of correspondence between one thing and another. A thing can be 'adequate', or 'not adequate', to something else, as for example 'not adequate to the expectations, is language adequate to describe it'; or adequate to the disease'. When something is described as being adequate without indicating what it is adequate to, the context must supply that which has been left unstated. Therefore, the first question in construing the meaning of 'adequate remedy' is … 'to what has the remedy to be adequate'? In the context, we think, the answer must be that the remedy has to be adequate to the requisite relief, i.e., the removal, or lessening of the cause of distress or anxiety, the deliverance from that which was burdensome. It is evident that the trouble, expense and delay in getting what is wanted are all as much ingredients of the sum total of that which can be described as 'relief' as the substance of that which is wanted."

27. In ***Dr. Sher Afgan Khan Niazi v. Ali S. Habib and others*** (2011 SCMR 1813), the Supreme Court of Pakistan stated that the High Court should apply the following tests to determine the adequacy of an alternative remedy:

(i) If the relief available through the alternative remedy in its nature or extent is not what is necessary to give the requisite relief, the alternative remedy is not an 'other adequate remedy' within the meaning of Article 199.

(ii) If the relief available through the alternative remedy, in its nature and extent, is what is necessary to give the requisite relief, the 'adequacy' of the alternative remedy must further be judged, with reference to a comparison of the speed, expense or convenience of obtaining that relief through the alternative remedy, with the speed, expense or convenience of obtaining it under Article 199. But in making this comparison those factors must not be taken into account which would themselves alter if the remedy under Article 199 were used as a substitute for the other remedy.

(iii) In practice, the following steps may be taken:-

(a) Formulate the grievance in the given case, as a generalized category;

(b) Formulate the relief that is necessary to redress that category of grievance;

(c) See if the law has prescribed any remedy that can redress that category of grievance in that way and to the required extent;

(d) If such a remedy is prescribed, the law contemplates that resort must be had to that remedy;

(e) If it appears that the machinery established for the purposes of that remedy is not functioning properly, the correct step to take will be a step that is calculated to ensure, as far as lies in the power of the Court, that that machinery begins to function as it should. It would not be correct to take over the function of that machinery. If the function of another organ is taken over, that other organ will atrophy, and the organ that takes over will break down under strain;

(f) If there is no other remedy that can redress that category of grievance in that way and to the required extent, or if there is such a remedy but conditions are attached to it which for a particular category of cases would neutralise or defeat it so as to deprive it of its substance, the Court should give the requisite relief under Article 199;

(g) If there is such other remedy, but there is something so special in the circumstances of a given case that the other remedy which is generally adequate to the relief required for that category of grievance, is not adequate to the relief that is essential in the very special category to which that case belongs, the Court should give the required relief under Article 199.

28. The question as to whether the other remedy(ies) constitutes an alternative remedy that would limit the jurisdiction of the High Court under Article 199 of the Constitution is one of law. It must be determined

on an individual basis. Since the ATC decides about the applicability of section 7 of the ATA after taking cognizance, in certain instances, the remedy under section 23 of the ATA may not be adequate and efficacious, as explained above, to qualify as an alternative remedy. Therefore, we cannot lay down an inflexible rule that the High Court cannot consider whether section 7 of the ATA applies in a particular matter until the litigant has availed remedy under section 23 of the ATA. The High Court should decide each case after considering its peculiar facts and circumstances.

29. The Impugned Order lists ten FIRs in which the police have applied section 7 of the ATA. The Inspector General of Police has apprised us that police have collected forensic materials from the crime scenes and vital information from geo-fencing, call records of different people, and other sources which are being analysed. According to him, *prima facie*, an act of terrorism as defined by law has been committed. In the circumstances, it is necessary to wait until the relevant reports are received before determining whether the police correctly applied section 7 of the ATA in the aforementioned cases. It may come out that they did it rightly in some but not in others, necessitating individual review of each case. Any opinion by this Court at this stage may be detrimental to the interests of justice. If so advised, the Petitioner or any aggrieved person may file separate proceedings later.

**Constitutionality of the JITs**

30. In general, JITs are established under an agreement between the competent authorities of two or more States to conduct criminal investigations in one or more of the involved States for a limited time and a defined purpose.[8] "JITs have the following advantages over traditional forms of police and judicial cooperation: (a) JITs enable the direct collection and exchange of information and evidence without using conventional channels of mutual legal assistance (MLA). Information and evidence gathered in conformity with the legislation of the State in which the team operates can be shared solely on the basis of the JIT agreement, and (b) Seconded members of the team (i.e. those coming from a State other than the one in which the JIT operates) have the right to be present

[8] Marin Petkov et.al. *Concept of Joint Investigation Teams*, IJASOS, Vol. IV, Issue 11, Aug.2018. https://www.researchgate.net/publication/327308545_CONCEPT_OF_JOINT_INVESTIGATION_TEAMS)

and participate in investigative measures conducted outside their State of origin. For these reasons, JITs are a highly efficient and effective cooperation mechanism which facilitates the coordination of investigations and prosecutions conducted in parallel across several States."[9]

31. In EU policy-making, the concept of a JIT first appeared in 1994 when a German delegation submitted a discussion paper to the Customs Corporation Working Group during deliberations on revising and updating the 1967 Naples Convention on mutual assistance between customs authorities. Germany raised the idea again in the first draft of the Naples II Convention and then in a note on new methods of cross-border investigation during the preparation of the EU Mutual Legal Assistance Convention (the "EU MLA Convention"). In March 1999, the German Presidency advocated putting a concrete provision on joint investigation teams in the EU MLA Convention. JITs were debated not just in the technical working group dealing with the draft EU MLA Convention this time, but the concept was also incorporated in other important EU policy documents. JITs were first mentioned in the 1997 Action Plan to combat organized crime. The 1997 Amsterdam Treaty formally introduced in Article 30.2 a general provision that envisaged the involvement of Europol in (unspecified) "joint teams". In 1998, Article 43.1.b. of the Vienna Action Plan elaborated on this provision and, in 1999, the Presidency Conclusions of the European Council in Tampere called for "joint investigation teams as foreseen in the Treaty to be set up without delay."[10] According to Article 13 of the EU MLA Convention, a JIT is an "operational investigation team consisting of representatives of law enforcement and other authorities for different Member States and possibly from other organizations like Europol and Eurojust."

32. Article 13 of the 2000 EU MLA Convention and the 2002 Framework Decision on JITs provide the EU legal foundation for establishing JITs between Member States, but they can also be set up under

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[9] *ibid.*

[10] Ludo Block, *EU Joint Investigation Teams: Political Ambitions and Police Practices* (August 2012) DOI:10.4324/9780203813058, https://www.researchgate.net/publication/228124548_EU_Joint_Investigation_Teams_Political_Ambitions_and_Police_Practices

other international instruments.[11] Likewise, competent authorities from non-EU countries can organize JITs in accordance with the appropriate international agreements.

33. Sometimes, a JIT is used domestically for coordination between various law enforcement agencies for a single investigation in a criminal case within a given timeframe. Long before she launched her EU initiatives, Germany employed the notion of JITs (*Gemeinsame Ermittlungsgruppen*) as a strategy for collaboration between law enforcement agencies in and between different *Lander* (states) of the German Federal Republic. She established its first JIT in Hamburg between state police and federal customs.[12]

34. Pakistan adopted the concept of the JIT in section 19 of the ATA (see Appendix-II). Later, it was also incorporated in some other statutes, for instance, Article 18A of the Police Order, 2002,[13] section 30 of the Prevention of Electronic Crimes Act, 2016, and section 9 of the Anti-Rape (Investigation and Trial Act) 2021. The courts have also constituted JITs in certain matters.[14]

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[11] The following instruments include a legal basis for setting up JITs:

- Agreement between the European Union and the Republic of Iceland and the Kingdom of Norway on the application of certain provisions of the Convention of 29 May 2000 on Mutual Assistance in Criminal Matters between the Member States of the European Union and the 2001 Protocol thereto;
- Article 5 of the Agreement on Mutual Legal Assistance between the European Union and the United States of America;
- Article 27 of the Police Cooperation Convention for South-East Europe (PCC-SEE), applicable between several Member States (Austria, Bulgaria, Hungary, Romania, Slovenia) and countries of the Balkans (Albania, Bosnia and Herzegovina, FYROM, Moldova, Montenegro, Serbia);
- Article 20 of the Second Additional Protocol to the European Convention on Mutual legal Assistance;
- Article 9 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances;
- Article 19 of the United Nations Convention against Transnational Organised Crime (UNTOC);
- Article 49 of the United Nations Convention against Corruption (UNCAC);
- Bilateral agreements between the States involved.

(Source: Marin Petkov et.al. *Concept of Joint Investigation Teams*, IJASOS, Vol. IV, Issue 11, Aug.2018. https://www.researchgate.net/publication/ 327308545_CONCEPT_OF_JOINT_INVESTIGATION_TEAMS)

[12] Ludo Block, *EU Joint Investigation Teams: Political Ambitions and Police Practices* (August 2012) DOI:10.4324/9780203813058, https://www.researchgate.net/publication/228124548_EU_Joint_Investigation_Teams_Political_Ambitions_and_Police_Practices

[13] Punjab Amendment. Inserted by Punjab Police Order (Amendment) Act XXI of 2013.

[14] See for example, *Slackness in the Progress of Pending Enquiries Relating to Fake Bank Accounts etc.: In the matter of Human Rights Case No.39216-G of 2018* (2019 SCMR 332); *Syed Iqbal Kazmi and others v. Federation of Pakistan and others* (PLD 2019 Sindh 255).

35. Section 94 Cr.P.C. grants wide powers to the Investigating Officer to compel the production of any document or other thing necessary or desirable for any investigation. However, Parliament found this provision inadequate to deal with cases involving terrorism which constitute a special class. Investigation in such cases may need to be conducted across provinces or internationally. This may require special skills or knowledge that regular police personnel lack. Sometimes, they may also require assistance from other agencies within the country and overseas. Since a fair investigation is essential to the right to a fair trial, JITs help it. Consequently, subject to statutory safeguards, the concept does not offend the Constitution.

36. The Petitioners contend that section 19 of the ATA violates Article 10A of the Constitution (right to a fair trial) because it does not provide for a change of investigation from a JIT. We are afraid the contention is misconceived. We must first point out that nobody has a vested right to have the case investigated by a particular person or a body of persons. In ***Federation of Pakistan v. Shah Muhammad Khan and others*** (PLD 1960 SC 85), the Supreme Court of Pakistan held:

> "No law or regulation gives a complainant a vested right, which can be enforced by a writ to have his complaint investigated by a particular branch of the police, and the law gives powers to the Central Government by a general or special order to take away the jurisdiction and powers of investigation and arrest of the Special Police Establishment by the proviso to section 2 (2) of the Ordinance referred to above. The respondent No. 1, therefore, had no right to maintain a petition for writ, and the High Court was in error in issuing a direction on such a petition. The order of the High Court is, therefore, set aside, and this appeal is allowed."

37. In some early cases, the courts considered that transferring a case from one competent investigating agency to another amounted to "unwanted" interference with the investigation,[15] which the Judicial Committee of the Privy Council disapproved of in ***Khwaja Nazir Ahmad***.[16] That view subsequently changed, and the requests for change of investigation or re-investigation began to be considered on the administrative side under section 551 Cr.P.C. Now, Article 18A of the Police Order 2002 expressly deals with the subject. It provides a complete

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[15] *Shahnaz Begum v. The Hon'ble Judges of the High Court of Sind and Baluchistan and another* (PLD 1971 SC 677)

[16] *Emperor v Khwaja Nazir Ahmed* (AIR 1945 PC 18).

statutory mechanism for change of investigation. There is neither any rule of law nor administrative practice which gives any person a vested right to have the investigation of a case transferred.

38. It is incorrect that the ATA does not contain any provision for a change of investigation from a JIT. Sections 19(1A) and 28(3) of the Act give the authority to the Federal Government. If a person has a genuine grievance, he may also make a representation before it. The maxim "*everything which is not forbidden is allowed*" applies here. The Government is obligated to decide on such representation within a reasonable time.

**Constitution of JIT under the ATA**

39. Section 19(1) of the ATA provides that if the Government deems it necessary, it may constitute a JIT led by an officer not below the rank of Superintendent of Police (BS-18). The other officers of the JIT may be of equivalent rank from intelligence agencies, armed forces and civil armed forces. The JIT shall comprise five members, and the quorum shall consist of these members for a meeting. The JIT may co-opt any additional member from any Federal or Provincial institution or department deemed appropriate for investigation. Section 19(1A) of the ATA states that the Federal Government may, in respect of any case registered by or under investigation with the police, or any other investigation agency or authority, by written order, entrust inquiry or such investigation to such agency or authority as it may deem fit. Thereupon, the police or any other investigation agency or authority shall transfer the case record to it.

40. Section 2(i) of the ATA defines "Government" as follows:

> (i) "Government" means the Federal Government or, as the case may be, the Provincial Government.

41. Considering the above definition, Section 19(1) of the ATA grants the Federal and Provincial Governments concurrent powers to form a JIT. Under section 19(1A), the Federal Government may transfer an inquiry or investigation from one agency to another. This is an additional power.

42. The phrase "if the Government deems necessary" in section 19(1) of the ATA is significant. "Deems it necessary" means to "consider someone or something essential, important or appropriate". The phrase is

sometimes used interchangeably with "deems it fit", but they are not synonymous. "Necessary" connotes more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity and consideration of alternative measures for a particular action.[17] On the other hand, "deems fit" implies that something may be done or not done as deemed fit at the person's discretion. The two phrases share one feature: the authority must act justly, fairly and in conformity with the law. In the context of section 19(1) of the ATA, the expression "deems necessary" should be construed to mean a decision that is desirable or appropriate to achieve the objective of the Act and to foster the ends of justice. Terrorism has plagued our country for more than three decades. Therefore, the Government should be given as much investigative leeway as possible. Intelligence agencies are critical in gathering information on organized criminals and assisting law enforcement officials in busting such gangs. These crimes may entail an investigation into conduct that extends beyond the local area, necessitating the use of special skills and equipment that local police may not have. Hence, the phrase "if the Government deems necessary" should be interpreted broadly to allow for setting up JITs. Even otherwise, since the formation of JIT is a question relating to the conduct of the investigation and a purely administrative act, it is not subject to judicial review. The courts should only intervene when it is found that the Government's action is *mala fide* or that there is a colourable exercise of authority.

43. The violence between 22.2.2023 and 19.3.2023 damaged public and private property worth crores of rupees, injured many police personnel and killed at least one person. Allegedly, the PTI workers threw petrol bombs at the police as they attempted to execute non-bailable warrants issued by the Islamabad Sessions Court against Imran Khan. A thorough probe into these incidents is essential to bring the miscreants to justice. The Caretaker Cabinet has rightly constituted the JIT to broaden the investigation's scope and make it transparent, fair, and credible. The Petitioners have failed to demonstrate that the Impugned Order is *mala fide*.

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[17] https://www.lawinsider.com.dictionary.deems

## The procedure of the JITs

44. The JITs constituted under section 19 of the ATA perform their functions in accordance with the ATA, the Code, the Police Rules, 1934, and the Investigation for Fair Trial Act, 2013. These, however, are inadequate to regulate them. Section 35 of the ATA empowers the Federal Government and Provincial Governments to make rules for carrying out the purposes of the Act. So far, none of them has framed any to regulate the JITs, which is regrettable. The Advocate General brought to our notice the SOPs issued by the Ministry of Interior, Government of Pakistan,[18] but they are too general to address the deficiencies.

45. Every JIT under the ATA serves a specific purpose and has an object. The Government may also include officers from intelligence agencies, armed forces and civil armed forces. A comprehensive legal framework is required to regulate their appointments and functioning. This is essential for promoting the rule of law and making the system more credible and efficient.

46. The Petitioners want us to suspend the formation of the JITs and their functioning until proper rules are framed. We are not inclined to do so. However, we direct the Federal Government to make them within two months from the date of the announcement of this judgment. The Registrar of this Court shall forthwith send its copy to the Secretary, Ministry of Interior, Government of Pakistan.

### *The other objections to the Impugned Order*

47. The Petitioners' next challenge to the Impugned Order is based on the case of ***M/s Mustafa Impex, Karachi, and others v. Government of Pakistan and others*** (PLD 2016 SC 808). They claim that it was issued without the Provincial Cabinet's approval. In *Mustafa Impex*, the Supreme Court held that the Constitution (Eighteenth Amendment) Act, 2010, has made fundamental changes in the Constitution which, *inter alia*, include channelling the Government's executive power. The Supreme Court ruled that insofar as the Federal Government is concerned, it consists of the Prime Minister and the Federal Ministers (i.e. the Cabinet) but does not include the President because he is the Head of the State. Neither a

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[18] Also available at: https://www.interior.gov.pk/index.php/downloads/category/1-forms?download=214:nacta-sop-on-jit

Secretary nor a Minister nor the Prime Minister constitutes the Federal Government and cannot perform functions on its behalf. The Supreme Court further held that the Rules of Business, 1973, are binding on the Federal Government and must be followed in letter and spirit in all circumstances. Rule 16 gives the Prime Minister discretionary power to bring matters before the Cabinet. However, the exercise of that discretion is subject to two conditions: first, he must consciously apply his mind to every case and justify through a reasoned and formal order where he believes that reference to the Cabinet is not necessary; and second, the matter should not be such regarding which Cabinet decision is mandatory under the Constitution. The same principles apply to the Provincial Government.

48. The Provincial Governments conduct business according to Rules framed under Article 139 (3) of the Constitution. Under Rule 25 of the Punjab Government Rules of Business 2011, the cases referred to the Cabinet shall be disposed of:

i) by discussion at a meeting of the Cabinet;
ii) by circulation amongst the Ministers; and
iii) by discussion at a meeting of a Committee of the Cabinet.

49. Respondents No.1, 3, and 12 have submitted documents that reflect that the Caretaker Cabinet, in its 3rd Meeting held on 16.2.2023, approved the TORs of the Standing Committee on Law & Order (the "Standing Committee"). It further decided that because the decisions of the Standing Committee do not involve any financial implications, they need not be ratified as per Rule 25(2) of the Rules of Business. One of the TORs of the Standing Committee is to approve JITs under the ATA. The Standing Committee was notified on 11.3.2023. The Inspector General of Police, vide Letter No. SO(JUDL-III)-11-JITs/2023 dated 22.3.2023, requested the Home Department to constitute JIT in ten cases registered against the PTI workers. His request was placed before the Standing Committee in its 2nd Meeting held on 22.3.2023 and was accepted, and then the Additional Chief Secretary (Home) issued the Impugned Order.

50. The Petitioners' counsel, Mr Saleem, alleged that the language of the Impugned Order shows that the Additional Chief Secretary (Home) issued it on his own intention without the approval of the Caretaker Cabinet

or the Standing Committee and that the documents referred by Respondents No.1, 3, and 12 are fabricated/ante-dated. He focused on the words "in the exercise of powers conferred" mentioned in the Impugned Order. Although official records are presumed to be correct, the Advocate General showed us the minutes of all pertinent sessions of the Caretaker Cabinet and the Standing Committee. We are satisfied that the Impugned Order conforms to the dictate of *Mustafa Impex*. Any errors or ambiguities in its language are inconsequential.

51. Finally, we come to the Petitioner's objection relating to the composition of the JIT. They are upset with the inclusion of SSP Imran Kishwar and SP Aftab Phularwan in it. They contend that the JIT cannot conduct an impartial and independent probe because these officers are subordinates of the Inspector General of Police and the City Capital Police Officer, Lahore, whom the PTI accuses of the murder of Zille Shah. Admittedly, there is not even the slightest evidence of bias against SSP Imran Kishwar and SP Aftab Phularwan. Their nomination cannot be objected on the basis of apprehensions.

**Powers and functions of the Prosecutor General Punjab**

52. The Advocate General is the principal law officer of the Provincial Government and has a constitutional status. In contrast, the Prosecutor General has a limited role defined by the PCPS Act. The two offices do not overlap. They rather complement each other.

53. The office of the Advocate General of a province is established by Article 140 of the Constitution. He is charged with the duty to advise the Provincial Government upon such legal matters and to perform such other duties of a legal character as may be referred or assigned to him. Besides, he performs various functions under different statutes.[19] The Advocate General owes an independent obligation towards the courts under Order XXVII-A CPC. In ***Federation of Pakistan and others v. Aftab Ahmed Khan Sherpao and others*** (PLD 1992 SC 723), the Supreme Court explained the nature and extent of the duty of the Attorney General and Advocate General under Order XXVII-A CPC as follows:

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[19] See, for example, Article 111 of the Constitution (Right to speak in Provincial Assembly), Legal Practitioners and Bar Council Act, 1973, Code of Civil Procedure, 1908, Punjab Mental Health Ordinance, 2001.

> "Besides, under Rule 1 of Order XXVII-A CPC, he has to appear and advise and assist the court so that it could have expert constitutional and legal advice. Therefore, it is made incumbent upon court to hear him in a case in which a substantial question of constitutional law is involved, before determining such question. But, in such a case, a notice to him is not notice to the Federation and *vice versa* unless it is so provided by law. He has two capacities: (1) Where the Federal Government directs him to appear in a case, and carry out instructions, whatever may be, and (2) as advisor, under the Constitution or law to advise as to the interpretation of Constitution or law. In performing such duty, he is not supposed to act on the advice of the Federation. He has to honestly guide the Federal Government and the Federal Legislature on the questions of law. Similarly, he has to advise courts as to the interpretation of constitutional law pursuant to a notice under Order XXVII-A, Rule 1 CPC. He cannot be said to have performed his duty honestly and duly if he does not give his frank opinion on such constitutional questions. Therefore, counsel representing parties may interpret a provision of Constitution or law in the best interest of their respective clients even if they are Federation of Pakistan or the Province, but as an Attorney-General or as an Advocate General, when he gives advice to the Federal Government or speaks in the Parliament or a court, on a question of law, he is not supposed to keep the interest of his client, but advise the Federal Government, or Parliament or a court of law, as the case may be, to the best of his ability, independently and in accordance with the Constitution."

54. In ***Haider Automobiles Ltd. v. Pakistan*** (PLD 1967 Lahore 882), this Court held:

> "Under rule 1, the Advocate General of the Province or the Attorney-General of Pakistan has a right to intervene without impleading the Provincial or the Central Government as a party. Thereby, the Government does not become a party to the case. It is only under rule 2 that the Government is to be added as a party, if necessary."

55. The Prosecutor General is the head of the Punjab Criminal Prosecution Service, which was established under the Punjab Criminal Prosecution Service (Constitution, Functions and Powers) Act, 2006 (the "PCPS Act"). He is appointed by the Punjab Government for three years (extendable for another two years)[20] on such terms and conditions as it may determine.[21] However, those terms shall not be varied during the initial or extended term of his office.[22] According to Section 6(6) of the PCPS Act, the Prosecutor General has the right to representation and audience in all courts, including the High Court, the Federal Shariat Court, and the Supreme Court, on behalf of the Punjab Government.

56. Chapter-III (sections 9 to 13) of the PCPS Act describes the powers and functions of the prosecutor. According to section 2(1)(l) of the

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[20] Section 6(2).

[21] Section 6(2).

[22] Proviso to section 6(1).

Act, prosecutor means "the Prosecutor General, Additional Prosecutor General, Deputy Prosecutor General, District Public Prosecutor, Deputy District Public Prosecutor, Assistant District Public Prosecutor, and a Public Prosecutor appointed under this Act and shall be deemed to be the public prosecutor under the Code." Section 5(1) of the PCPS Act states that the Punjab Government shall exercise superintendence over the Prosecution Service to achieve the Act's objectives, while section 5(2) states that the Service's administration shall, in the prescribed manner, vest in the Prosecutor General. It is pertinent to note that the PCPS Act distinguishes between "administration" and "superintendence". Section 2(2) of the Act of 2006 provides that the words and expressions used therein but not defined shall have the same meaning as are assigned to them in the Code or the Police Order 2002. Since the terms "administration" and "superintendence" are defined in Article 2(1) of the Police Order, we allude to them. The said Article says:

> (i) "Administration" includes management of administrative, operational and financial functions.
>
> (xxvi-a) "superintendence" means supervision of police by the appropriate Government through policy, oversight, and guidance, and in the case of a province, it shall be exercised by the Chief Minister through the Chief Secretary and the Provincial Home Department, while ensuring total autonomy of the Provincial Police Officer in operational, administrative and financial matter and, in case of Federal Capital, such supervision shall be exercised by Ministry of Interior, Government of Pakistan.

57. Applying the above definitions, the role of the Punjab Government under the PCPS Act of 2006 is of policy-making and monitoring the Prosecution Service, while the Prosecutor General is charged with managing and controlling its administrative, operational, and financial functions. Since it is the fundamental obligation of the State to establish the rule of law and ensure justice for everyone within its borders, the Government must take necessary steps to attain that purpose. All its policies must be tailored to that end. The objective of the Prosecution Service – and the Prosecutor General – is also the same.

58. There is no cavil that the Prosecution Service is an attached department of the Punjab Government and is under the administration and control of the Public Prosecution Department in terms of Serial No.32 of the First Schedule of the Rules of Business. However, it has a unique role. The Preamble of the PCPS Act states that its purpose was to establish an

independent, effective, and efficient Service for prosecuting criminal cases and to ensure prosecutorial independence for better coordination in the criminal justice system in the Punjab.

59. Mr Gul contends that the Prosecutor General must perform his functions according to the Government's instructions. He argues that the expression *"on behalf of Government"* used in sections 6(6) and 9(1) of the PCPS Act are indicative of this legislative will and has cited the following passages in support of his contention:

> ***The State v. Gangamma (A-4) and others*** (AIR 1965 Karnataka 235)
>
> "10. The words, 'on behalf of' have been construed in several judicial decisions. In *Bank of Bengal v. Fagan*, 7 Moo PC 61, the Privy Council observed as follows:
>
> > "… But it is said, that the power was given to do the acts in question on the donor's behalf. This is really only saying that what the agent is to do, he is to do as representing the principal; as doing it on behalf of, or in the place and in the right of, the principal …"
>
> "13. Thus the words, 'on behalf of' connote an agency; when one person acts on behalf of the other the former acts as an agent of the latter. No doubt ordinarily, an agency, that is, the relationship of principal and agent, is the result of a contract express or implied; but an agency may also be created by a statute."
>
> "16. As observed by Caspersz and Sharfuddin, JJ., in *Uttam Chand v. Emperor*, ILR 39 Cal 344, the expression 'on behalf of' connotes some benefit to the person on whose behalf another person may act. It cannot be said that after the death of the aggrieved wife, the filing of the complaint against her husband for the act of bigamy would be to her benefit. The prosecution of the guilty husband will not confer any benefit even to her estate. Hence the complaint filed by a relative of the wife after the death, cannot be said to be on her behalf."
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> ***Navaikulam Cashew Workers Industrial Cooperative Society Ltd. v. Enforcement Officer*** [2009 (83) AIC 515].
>
> "8. The expression 'on behalf of' connotes some benefit to the person on whose behalf another person may act (See *Uttam Chanel v. Emperor*, 15 IC 1007). In *State v. Gangamma*, MANU/KA/0069/1965 : AIR 1965 Mys. 235, the expression 'on behalf of' was interpreted and it was held, thus the words, 'on behalf of' connote an agency; when one person act on behalf of the other, the former acts as the agent of the latter. No doubt, originally, an agency, i.e., the relationship of principal and agency is the result of a contract express or implied; but an agency may also be created by a statute."

60. There cannot be two opinions that the Prosecutor General must perform his functions according to the Government's instructions. What we disagree with Mr Gul is that he must follow the Government's wishes in prosecuting criminal cases. In our opinion, he must act independently in the interest of justice. We have reviewed the above judgments and noted that the courts' interpreted the expression *"on behalf*

*of Government"* in the peculiar circumstances of the cases they were deciding. This interpretation cannot be applied to the PCPS Act because it contradicts its objective.

61. Section 11(2) of the PCPS Act stipulates that the Prosecutor General shall liaison with the office of the Attorney General and the Advocate General on matters pending in the superior courts. According to Oxford Advanced Learner's Dictionary of Current English, "liaison" means "a relationship between two organizations, involving the exchange of information or ideas."[23] Hence, section 11(2) cannot be read to imply that the Prosecutor General reports to the Advocate General. Both are separate offices with distinct functions. However, as adumbrated, the Advocate General holds a constitutional position with broader responsibilities.

62. Section 17 of the PCPS Act states that the Prosecutor General shall issue a code of conduct for the prosecutors (the "Code of Conduct") with the prior approval of the Punjab Government. We have been apprised that the First Edition of the Code of Conduct was issued in 2012, and the Second in October 2016. Both were approved by the Ministry's Secretary rather than the Provincial Cabinet. The legality of the Second Edition may be questioned on the basis of the *Mustafa Impex* case, but the First Edition still holds the field. In ***Pakistan Medical and Dental Council v. Muhammad Fahad Malik and others*** (2018 SCMR 1956), the Supreme Court of Pakistan stated that the judgment in *Mustafa Impex* would apply prospectively.

63. The Code of Conduct generally refers to prosecutors but applies equally to the Prosecutor General. Paragraph 3 sets out the General Principles of Prosecution. The following three are relevant to the present discourse:

> 3.1 The decision to prosecute is a serious step that affects suspects, victims, witnesses and the public at large and must be taken with the utmost care and caution.
>
> 3.2 Prosecutors must always act in the interests of justice and not solely for the purpose of obtaining a conviction. Acting in the interest of justice means that Prosecutors must acquaint themselves with the facts and circumstances of the case and work to ensure that the right person is prosecuted for the right offence and no one else.

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[23] Tenth Edition, p.903

> 3.3 Prosecutors must also ensure that the law is properly applied; the relevant evidence is put before the court; and that obligations of disclosure are met. Prosecutors must also consider whether trial is the best solution.

64. In our opinion, the Government cannot also deviate from the above principles, and they must be hardwired into all its policies.

65. Paragraph 2.2 of the Code of Conduct stipulates that the prosecutors cannot direct the police or other investigators except as provided by paragraph 4. According to paragraph 4.1, a decision to prosecute is taken when a prosecutor determines that the case is fit for trial against one or more suspects. A decision to start a prosecution is the same as a decision to prosecute. Paragraph 4.2 states that a decision not to prosecute is made when a prosecutor determines that a case is unfit for trial against one or more suspects. A decision to decline a prosecution is equivalent to the decision not to prosecute. Paragraph 4.8 says that a decision on whether or not to prosecute must be taken when a review of the police case has been finalized. Paragraph 4.12 provides that prosecutors may make a decision only if they are satisfied that the broad extent of the criminality has been determined and they can make a fully informed evaluation. If the prosecutors do not have enough information to take such a decision, the investigation must be continued, and a decision should be made later in accordance with the Full Code Test described in paragraph 5. It comprises two tests, the Evidential Test and the Public Interest Test, which are applied sequentially. These tests are explained in paragraphs 5A and 5B of the Code of Conduct.

66. A prosecutor may apply the Threshold Test[24] where all the evidence is unavailable, and a decision must be made regarding the detention or start of a prosecution. It is, however, pertinent to point out that this test is directory and not mandatory, which is indicated by the word "may" in paragraph 6.1 of the Code of Conduct. Further, it is contingent on the availability of some, if not all, of the evidence. The evidential consideration of the Threshold Test has two parts: the first is that the prosecutor must be satisfied that there are at least reasonable grounds to believe that the person to be charged committed the offence. This satisfaction occurs only after evaluating the evidence and ensuring it is

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[24] See paragraph 6 of the Code of Conduct

relevant and admissible. This exercise is dependent on the elements listed in the second part. The prosecutor must be convinced that there are reasonable grounds to believe that the ongoing investigation will yield more evidence within a reasonable time so that all the evidence combined can establish a realistic prospect of conviction under the Full Code Test. The additional evidence must be identifiable and not speculative. Paragraph 6.4 of the Code of Conduct states that the Threshold Test should not be employed when the evidence on which the criminality of the suspect hinges is in the process of forensic analysis.

67. Terrorism cases are extremely complicated. When police produce the accused before the court for the first time after his arrest (which is within 24 hours), very little evidence is available. At that point, using the Threshold Test is difficult, if not impossible. Hence, it is desirable to apply it at a later stage, such as when filing an interim report under section 173 Cr.P.C. However, this observation should not be construed as limiting the court's powers to grant or refuse a remand or bail to an accused or to discharge him.

68. Paragraph 7 of the Code of Conduct gives certain guidelines to the prosecutors for the selection of charges.[25] However, the trial court is neither bound by the opinion of the police nor the prosecutor regarding the applicability of a penal provision. In ***Munir Aftab v. The State and others*** (2021 PCr.LJ 293), this Court held:

> "12. A criminal case that commences with the registration of FIR under section 154, Cr.P.C. has a long journey before it is decided and the accused is/are acquitted or convicted. FIR sets the law in motion. The police investigate the allegations of the complainant party, collect evidence, identify the offences committed by the accused and determine what penal provisions are attracted. After that, they draw a report under section 173 Cr.P.C. which is submitted to the court through the office of the District Public Prosecutor. Section 9(5) of the Punjab Criminal Prosecution Service (Constitution, Functions and Powers) Act, 2006 (III of 2006) obligates the public prosecutor to scrutinize the said report and submit it to the court if it is in order. However, if it is defective, he shall return the same to the officer-in-charge of the police station or the investigating officer (as the case

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[25] Paragraph 7.1 of the Code of Conduct reads as follows:

> 7.1 Prosecutors should select the charges which:
>
> a) reflect the seriousness and extent of the offending supported by the evidence;
>
> b) give the court adequate powers to sentence and impose appropriate post-conviction orders;
>
> c) enable the case to be presented in a clear and simple way. This means that prosecutors may not always choose or continue with the most serious charge.

> may be) for correction. The term "scrutinize" has a wide connotation and includes the power to add or delete a section. Reliance is placed on *Rasoolan Bibi v. Additional Sessions Judge and others* (PLD 2009 Lahore 135) and *Nadeem alias Deema v. District Public Prosecutor, Sialkot and 7 others* (2012 PCr.LJ 1823).
>
> "13. The trial court is neither bound by the opinion of the police nor the prosecutor regarding the applicability of a penal provision. At the time of indicting the accused, it is bound to go through the entire record, apply its own judicial mind and frame charge against him for all those offences which appear to be made out from the evidence collected by the police. Section 9(7) requires the prosecutor to assist the court in this matter. However, under section 227 Cr.P.C. the court is competent to amend the charge at any time before judgment is pronounced.
>
> "14. It may not be out of place to mention that the High Court does not entertain constitutional petitions challenging the insertion or deletion of a section by the Investigating Officer. Similarly, it does not allow requests for judicial review of the opinion/direction of the public prosecutor given to the police for such an amendment on the ground that the error, if any, does not prejudice either party and it can be rectified by the trial court at the time of framing of charge."

69. We have considered ***Fayyaz Ahmed and another v. The State and others*** (2008 PCr.LJ 805), a case decided by a Division Bench of this Court, which holds that a prosecutor has no authority to delete (or add) an offence in the report under section 173 Cr.P.C. prepared by the police. We respectfully disagree with this but clarify that his opinion does not bind the court and that it is the final arbiter whether a particular provision applies.

70. Admittedly, the investigation in the cases mentioned in the Impugned Order is at the initial stage or is yet to begin. It is still to be determined whether there was any "design" or "purpose" behind the incidents that occurred between 22.2.2023 and 19.3.2023, which may constitute terrorism under section 6 of the ATA. The Threshold Test is subject to certain conditions explained above. The Code of Conduct expressly prohibits the prosecutor from applying it in cases where criminality depends on forensic analysis of evidence. As adumbrated, such a process is currently underway in the subject cases. As a result, Ch. Khaliq-uz-Zaman's opinion regarding the non-applicability of section 7 ATA to them is premature.

71. We cannot comment on the Cabinet's decision dated 20.4.2023 and the Punjab Government's subsequent restraint order against Ch. Khaliq-uz-Zaman because it is not under challenge in the present proceedings.

***Conclusion***

72. The Impugned Order is unexceptionable. The Government is competent to form the JIT in the cases mentioned therein. These petitions are **dismissed.**

**(Tariq Saleem Sheikh)**
Judge

**(Muhammad Amjad Rafiq)**
Judge

**(Farooq Haider)**
Judge

**Appendix I & II**

Announced in open Court on _____

Approved for reporting

Judge

**Appendix I**

**GOVERNMENT OF THE PUNJAB**
**HOME DEPARTMENT**

**Dated: March 22nd, 2023**

## ORDER

**No.SO(JUDL-III)11-JITs/2023.** In pursuance of the request made by Inspector General of Police, Punjab, vide letter No.4912/Legal-09-JIT/2023 dated 21.03.2023 and in exercise of powers conferred under section 19(1) of Anti-Terrorism Act, 1997, a Joint Investigation Team is hereby constituted to conduct and finalize investigation in case FIRs No. and dated as under:

| Sr.No. | Police Station | FIR No. & Date | Sections of PPC/ATA, 1997 |
|---|---|---|---|
| 1 | PS Civil Lines, Lahore | 239/23 dated 22.2.23 | 506, 290, 291, 188, 427, 186, 353, 147, 149 PPC, 7-ATA 1997 |
| 2 | PS Race Course, Lahore | 388/23 dated 8.3.23 | 302, 324, 147, 149, 353, 186, 188, 427, 290, 291, 109 PPC,7-ATA |
| 3 | PS Race Course, Lahore | 410/23 dated 14.3.23 | 109, 120B, 353, 186, 324, 147, 148, 149, 290, 291, 212, 172, 174, 436, 173, 440, 427, 506-II PPC, 7-ATA |
| 4 | PS Race Course, Lahore | 412/23 dated 15.3.23 | 186, 148, 149,440, 457, 427, 324, 436, PPC, 7-ATA 1997 |
| 5 | PS Race Course, Lahore | 413/23 dated 15.3.23 | 379, 109, 353, 186, 427, 147, 148, 149 PPC, 7-ATA 1997 |
| 6 | PS Race Course, Lahore | 414/23 dated 15.3.23 | 147, 148, 149, 427, 436, 440 PPC, 7-ATA 1997 |
| 7 | PS Shadman, Lahore | 445/23 dated 16.3.23 | 148, 149, 186, 353, 336, 427, PPC, 7-ATA 1997 |
| 8 | PS Race Course, Lahore | 436/23 dated 18.3.23 | 109, 120B, 147, 148, 149, 172, 173, 174, 186, 212, 290, 291, 324, 353, 427, 436, 440, 506-II PPC, 7-ATA |
| 9 | PS Race Course, Lahore | 437/23 dated 19.3.23 | 109, 120B, 147, 148, 149, 324, 341, 506-II PPC, 7-ATA 1997 |
| 10 | PS Race Course, Lahore | 438/23 dated 19.3.23 | 109, 120B, 147, 148, 149, 290, 291, 341, 353, 186, 395, 427, 440 PPC, 7-ATA 1997 |

2. Joint Investigation Team comprises of the following:

| | | |
|---|---|---|
| I | Mr. Imran Kishwar, SSP | Convener |
| II | Mr. Aftab Phularwan, SP | Member |
| III | Representative of IB | Member |
| IV | Representative of ISI | Member |
| V | Representative of MI | Member |
| VI | Any Co-Opted Member by JIT | Member |

3. The Convener of the Joint Investigation Team shall depute one of its members for the purpose of submission of report u/s 173 of the Criminal Procedure Code, 1898, as required under Section 19(1) of Anti-Terrorism Act, 1997.

**(SHAKEEL AHMED)**
ADDITIONAL CHIEF SECRETARY (HOME)

## No. & Date Even

A copy is forwarded for information and necessary action to:

1. The Provincial Police Officer/IGP, Punjab, Lahore w/r to his letter referred above.
2. Sector Commander, IS1, Punjab, Lahore, with the request to depute a representative of equivalent rank as required u/s 19(1) of ATA 1997.
3. Sector Commander, MI, Punjab, Lahore, with the request to depute a representative of equivalent rank as required u/s 19(1) of ATA, 1997.
4. Joint Director General, IB, Punjab, Lahore, with the request to depute a representative of equivalent rank as required u/s 19(1) of ATA, 1997.
5. The Additional IG of Police CTD, Punjab, Lahore.
6. All Members of JIT.
7. PSO to Chief Secretary Punjab.
8. PSO to Additional Chief Secretary (Home), Punjab.
9. PA to Special Secretary, Home Department, Punjab.
10. PA to Additional Secretary (Judicial), Home Department. Punjab.
11. PA to Deputy Secretary (Judicial), Home Department, Punjab.

**(MAZHAR HUSSAIN)**
SECTION OFFICER (JUDICIAL-III)

## Appendix II

**19. Procedure and Powers of Anti-Terrorism Court.–** (1) An investigating officer under this Act shall be an officer or Police Officer not below the rank of Inspector or equivalent or, if the Government deems necessary Joint Investigation Team to be constituted by the Government shall be headed by an investigation officer of police not below the rank of Superintendent of Police (BS-18) and other officers of JIT may include equivalent rank from Intelligence Agencies, Armed Forces and Civil Armed Forces. The JIT shall comprise five members and for the meeting purposes the quorum shall consists of three members.

The investigating officer to the JIT, as the case may be, shall complete the investigation in respect of cases triable by the court within thirty working days. The report under section 173 of the Code shall be signed and forwarded by the investigating officer of police directly to the Court:

Provided that where the provisions of sections 4 and 5 have been invoked, the investigation shall be conducted by the JIT comprising members of armed forces or civil armed forces, as the case may be, intelligence agencies and other law enforcement agencies including an investigating officer of police not below the rank of Inspector who shall sign the report under section 173 of the Code and forward it to the Court:

Provided further that, where investigation is not completed within a period of thirty days from the date of recording of the first information report under section 154 of the code, the investigating officer or the JIT shall, within three days after expiration of such period, forward to the court through the Public Prosecutor, an interim report under section 173 of the Code, stating therein the result of investigation made until then and the court shall commence the trial on the basis of such interim report, unless, for reasons to be recorded, the court decides that the trial may not so commence. The interim report shall be signed by the investigating officer of police;

(1A) Notwithstanding anything contained in any other law for the time being in force, the Federal Government may, in respect of any case registered by or under investigation with, the police or any other investigation agency or authority, by order in writing, entrust inquiry or such investigation to such agency or authority as it may deem fit and thereupon the police, or any other investigation agency or the authority shall transfer the record of the case to such agency or authority.

(1B) Where any person has been arrested by the armed forces or civil armed forces under section 5, he shall be handed over to the investigating officer of the police station designated for the purpose by the Provincial Government in each District.

(2) Any default on the part of an officer-in-charge of a police-station, an investigating officer or any other person required by law to perform any functions in connection with the investigation, that results in, or has the effect of, delaying investigation or submission of the report under sub-section (1), shall be deemed to be a willful disobedience of the orders of the Anti-Terrorism Court and the person committing the default shall be liable to be punished for contempt of Court.

(3) The Anti-terrorism Court may directly take cognizance of a case triable by such Court without the case being sent to it under section 190 of the Code.

(4) ***

(5) Where, in a case triable by an Anti-Terrorism Court, an accused has been released from police custody or custody of any other investigating agency joined in an investigation, under section 169 of the Code, or has been remanded to judicial custody, the Anti-Terrorism Court may, on good grounds being shown by a Public Prosecutor or a Law Officer of the Government, for reasons to be recorded in writing, make an order for placing him in police custody or custody of any other Investigating Agency joined in investigation for the purpose of further investigation in the case.

(6) An Anti-Terrorism Court shall be deemed to be a Magistrate for purpose of sub-section (5).

(7) The court shall, on taking cognizance of a case, proceed with the trial from day-to-day and shall decide the case within seven days, failing which the matter shall be

brought to the notice of the Chief Justice of the High Court concerned for appropriate directions, keeping in view the facts and circumstances of the case.

(8) An Anti-Terrorism Court shall not give more than two adjournments during the trial of the case and that also imposition of exemplary costs. If the defense counsel does not appear after two consecutive adjournments, the court may appoint a State Counsel with at least seven years standing in criminal matters for the defense of the accused from the panel of advocates maintained by the court for the purpose in consultation with the Government and shall proceed with the trial of the case.

(8a) Non-compliance with the provisions of sub-section (7) or (8) may render the presiding officer of the court liable to disciplinary action by the concerned High Court.

(8b) Notwithstanding anything contained in section 7 of the Explosive Substances Act. 1908 (VI of 1908), or any other law for the time being in force, if the consent or sanction of the appropriate authority, where required, is not received within thirty days of the submission of challan in the court, the same shall be deemed to have been given or accorded and the court shall proceed with the trial of the case.

(9) An Anti-Terrorism Court shall not, merely by reason of a change in its composition or transfer of a case under sub-section (3) of section 12, be bound to recall and re-hear any witness who has given evidence and may act on the evidence already recorded.

(10) Any accused person may be tried in his absence if the Anti-Terrorism Court, after such inquiry as it deems fit, is satisfied that such absence is deliberate and brought about with a view to impeding the course of justice:

Provided that the accused person shall not be tried under this sub-section unless a proclamation has been published in respect of him in at least in one daily newspaper including Sindhi language requiring him to appear at a specified place within seven days failing which action may also be taken against him under section 88 of the Code:

Provided further that the Court shall proceed with the trial after taking the necessary steps to appoint an Advocate at the expense of the State to defend the accused person who is not before the court.

Explanation. An accused who is tried in his absence under this sub-section shall be deemed not to have admitted the commission of any offence for which he has been charged.

(11) The Advocate appointed under the second proviso to sub-section (10) shall be a person selected by the Anti-Terrorism Court for the purpose and he shall be engaged at the expense of the Government.

(11A) Noting contained in sub-section (10) or sub-section (11) shall be construed to deny the accused the right to consult or be defended by a legal practitioner of his own choice.

(12) If, within sixty days from the date of his conviction, any person tried under sub-section (10) appears voluntarily, or is apprehended and brought before the Anti-Terrorism Court, and proves to its satisfaction that he did not abscond or conceal himself for the purpose of avoiding the proceeding against him, the Anti-Terrorism Court, shall set aside his conviction and proceed to try him in accordance with law for the offence with which he is charged:

Provided that the Anti-Terrorism Court may exercise its powers under this sub-section in a case in which a person as aforesaid appears before it after the expiration of the said period and satisfies it that he could not appear within the said period by reason of circumstances beyond his control.

(13) ***

(14) Subject to the other provisions of this Act, an Anti-Terrorism Court shall, for the purpose of trial of any offence have all the powers of a Court of Sessions and shall try such offence as if it were a Court of Sessions as far as may be in accordance with the procedure prescribed in the Code for trial before a Court of Sessions.