

Athar Minallah, J.- I have had the privilege of carefully reading the order. With great respect, I have not been able to persuade myself to endorse paragraphs 1 to 12 at this stage. The question whether the Prime Minister can be called on the administrative or judicial side and whether in the facts and circumstances of the case before us, particularly the nature of the complaint, the constitution of the commission by the executive branch of the State in exercise of its powers conferred under the Pakistan Commissions of Inquiry Act, 2017 would have been in breach of the principle of independence of judiciary are yet to be considered by the full Court. Moreover, larger benches of this Court, while exercising the extraordinary jurisdiction under Article 184 (3) of the Constitution of the Islamic Republic of Pakistan (**'Constitution'**), have already exercised the power of constituting commissions and, therefore, this question is also open to be decided in this case on the judicial side by the full Court. All these questions are likely to be considered by the full Court in the present proceedings and, therefore, propriety requires that I restrain myself from commenting on these issues. It was for this reason that I could not persuade myself to endorse paragraphs 1 to 12 at this stage, while I concur with the remaining order. In order to appreciate the gravity and the extent of public importance involved in the matter brought before us I deem it appropriate to briefly record some preliminary observations.

2. Six judges of a constitutional court, the Islamabad High Court, have brought to the attention of the Supreme Court grave and serious interference in judicial proceedings and intimidation of judges by the executive branch of the State and its organs. They have recorded specific instances of such interference and intimidation. They have stated that they were compelled to seek guidance because

certain questions have been left open by this Court while deciding the case of Justice Shaukat Siddiqui¹. It is obvious from the letter that they had raised the issue before all the relevant forums but, despite the seriousness of matter, there was no institutional response. The matter was also promptly brought to the attention of the former Chief Justice of Pakistan, who at that time had the exclusive power to invoke suo moto proceedings under Article 184 (3) of the Constitution. The matter was serious and its implications in the context of the independence of judiciary were so grave that there could not have been any conceivable justification for the then pater familias of the institution to ignore it and, instead, choose to look the other way. The institutional insensitivity is manifest from the letter. It also reflects a culture of accepting the practice of manipulation of judicial proceedings by the executive branch of the State through interference and intimidation. The institutional response relating to the most serious and grave acts of interference in judicial proceedings and intimidation of judges could have been justifiably understood as an acceptance of practices, standards and norms which have profound consequences for the independence of the judiciary. The letter by the six judges, therefore, raises questions regarding the institutional commitment to uphold the Constitution and the independence of the judiciary. The interference and intimidation, as reported in the letter, is in relation to certain 'politically consequential matters' and, in support, instances have been described in the letter. The Attorney General has referred to the political engineering in 2018 by organs of the executive branch to manipulate and interfere with judicial proceedings in 'politically consequential matters' then. This Court was also perceived to be

¹ Shaukat Aziz Siddiqui v. Federation of Pakistan and others (Const.P.No.76 of 2018 decided on 22.3.2024)

complicit, rather seen as a willing partner. Though not every judge could be influenced or pressurised at that time and their judgments speak for themselves but the culture of deviancy was accepted as a norm because the institution was perceived to be complicit. The phenomenon of interference with and manipulation of 'politically consequential matters' has remained an acceptable norm which is manifested from the unflattering role of the judicial branch for the past seventy six years. This phenomenon has, prima facie, relegated the principle of independence of judiciary to a mere platitude. This is what has been highlighted by the six judges in their letter. The normalisation of the culture of deviancy profoundly erodes and undermines the independence of judiciary. The assiduous entrenchment of such normalisation has made unacceptable practices, standards and norms as acceptable within the institution. The six judges have drawn the attention of this Court to a matter which definitely is of paramount public importance, having profound consequences in the context of safeguarding the fundamental rights of the citizens.

3. The six judges of the Islamabad High Court have sworn oaths under the Constitution and, therefore, a presumption of credibility and truth is attached to what they have highlighted in the letter unless it is rebutted. They have done what every judge is bound by the oath to do; uphold the Constitution and the independence of the judiciary. There is no conceivable justification to doubt their intention in bringing on record a matter of the highest public importance. It is noted that the letter was in the nature of an internal institutional correspondence and it was not meant to be made public. The judges had reasonable grounds to seek guidance and that is what they had explicitly sought. They had blown a whistle internally

and as whistle blowers they were required to be dealt with carefully because the whistle blowing was in public interest. This Court in the present proceedings also has to consider evolving jurisprudence which does not deter internal whistle blowing because of the public importance associated with it. No one within the institution must fear that blowing whistle internally could lead to unimaginable consequences having the effect of being thrown to the wolves. Such an approach would profoundly undermine the internal independence of judiciary. It was, in my opinion, premature for the executive to constitute a commission and, *prima facie*, in breach of the independence of judiciary. The matter is now *subjudice* before the full Court. The full Court will consider whether an inquiry is required and, if so, the nature of the inquiry is also likely to be determined on the judicial side having regard to safeguarding the independence of judiciary. It is noted that in Air Marshal Asghar Khan's case² the factual aspects were determined by this Court on the basis of affidavits while in *Dharna* case³ credible print media reports and other material placed on record were relied upon. This crucial aspect has yet to be considered by the full Court in these proceedings. The judges are not complainants but they had solicited advice and guidance. Nonetheless, they have referred to instances of intimidation and interference. The onus is on the State and the executive to demonstrably satisfy the full Court that there has been no interference nor attempt to manipulate judicial proceedings in specific 'politically consequential matters'. What has been highlighted in the letter as a phenomena appears to be a continuation of the unacceptable practices and norms that have been made acceptable in the past seventy six years. The judges have highlighted the

² M. Asghar Khan v. Mirza Aslam Baig (PLD 2013 SC 1)

³ Suo Motu action regarding Islamabad-Rawalpindi Sit in/*Dharna* (PLD 2019 SC 318)

institutional insensitivity. The Attorney General has referred to political engineering in specific politically consequential matters in the past while it appears from the letter of the six judges that it continues unabated even today. The impunity against intimidation of the judges and interference in judicial proceedings in politically consequential matters cannot be denied, rather it has been affirmed by this Court repeatedly. The recent opinion by a larger Bench in Reference No.1, relating to the trial and appeal proceedings which had sent an illegally deposed Prime Minister, Zulfikar Ali Bhutto, to the gallows is an acknowledgment of the worst form of manipulation of judicial proceedings. It is a blemish on the institution which cannot be removed. Air Marshal Asghar Khan's case is enough to demonstrate the extent of interference. What could have been a more atrocious form of interference than the reference proceedings against the present Chief Justice of Pakistan which was declared as unconstitutional and based on *malafide* by a larger bench of this Court in Justice Qazi Faez Isa case. The recent judgment of this Court in the *Dharna* case has also unequivocally affirmed interference by the executive and its organs. This Court has observed as follows:-

“Pursuant to the judgment in *Air Marshal Asghar Khan's* case the involvement of ISI and of the member 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 uniform, 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*”. The Armed Forces, and all agencies manned by the 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 of civil power when called upon to do so"*. 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."

4. The letter of six judges confirms that the cases of Asghar Khan and the *Dharna* could not stop interference in judicial proceedings and that the judgments are being brazenly violated. The letter manifests the phenomena of normalisation of deviancy culture within the institution and outside which has profound consequences for the independence of the judiciary. No one has ever been held accountable, which has created impunity for the worst form of mutilation of independence of judiciary. The public trust in the judicial system is eroded when the courts are perceived to be compromised. The flagrant violations of fundamental rights of the citizens and perceived failure of the courts to safeguard individual freedoms and rights severely undermines public confidence in the institution. The citizens would, therefore, be justified in raising questions regarding the independence of judiciary. As judges of the highest constitutional court we cannot turn a blind eye and ignore the grave abuse of powers by the executive which have consequences for individual freedoms and rights. We all know the reality but pretend to be ignorant. The six judges have raised the crucial

question of 'whether there exists a continuing policy on part of the executive branch of the State, implemented by intelligence operatives who report to the executive branch, to intimidate judges, under threat of coercion or blackmail, to engineer judicial outcome in politically consequential matters'. The other crucial question that has arisen from the letter, as already discussed, is regarding normalisation of the culture of deviancy. Both these critical questions erode and undermine the independence of judiciary. The onus is on the Federal Government to establish before this Court that it is not so and to assist in resolving the questions raised in the order.

(Justice Athar Minallah)

APPROVED FOR REPORTING